IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

Not Restricted

S CI 2010 5318

ERIN DOWNIE — Plaintiff

v

SPIRAL FOODS PTY LTD (ACN 006 292 780) — First Defendant

and

MUSO CO. LTD — Second Defendant

and

MARUSAN-AI CO. LTD — Third Defendant

JUDGE:	J Forrest J
WHERE HELD:	Melbourne
DATE OF HEARING:	25 February 2015 22 April 2015 (Case management conference)
DATE OF JUDGMENT:	7 May 2015
CASE MAY BE CITED AS:	Downie v Spiral Foods Pty Ltd & Ors
MEDIUM NEUTRAL CITATION:	[2015] VSC 190

PRACTICE AND PROCEDURE – Group proceeding – Application for approval of settlement of group proceeding – Whether Court should approve settlement of group proceeding – Relevant considerations – Directions as to assessment of costs of the trial and administration costs – *Supreme Court Act 1986* (Vic), Part 4A.

APPEARANCES:	Counsel	Solicitors
For the Plaintiff	Mr D Curtain QC with Ms L Nichols and Ms K Burke	Maurice Blackburn
For the First Defendant	No appearance	Hunt & Hunt
For the Second Defendant	No appearance	Corrs Chambers Westgarth
For the Third Defendant	No appearance	Wotton & Kearney

HIS HONOUR:

Introduction and background to the claim

1 This is an application for the approval of the settlement of a class action[1] under s 33V of the *Supreme Court Act 1986* (Vic).

2 Ms Erin Downie consumed Bonsoy Soy Milk (**Bonsoy**) between 2003 and 2009 which she alleges resulted in her developing a thyroid condition. This, it was said, was because of the unsafe levels of iodine in Bonsoy, following a reformulation in 2003.

3 In late 2009, another Bonsoy consumer, Kate Grono, gave birth to a daughter who was diagnosed with congenital hypothyroidism. The condition was reported to New South Wales health authorities, which tested the iodine levels in Bonsoy. On Christmas Eve 2009, the Victorian Chief Health Officer requested a recall of Bonsoy on the basis that it posed a danger to public health due to its high levels of iodine. The product was voluntarily recalled throughout Australia.

4 Ms Downie, represented by Maurice Blackburn, is the lead plaintiff on behalf of 496 others who also allege injury and loss as a result of consuming Bonsoy.[2] Ms Downie seeks damages for pain and suffering and economic loss arising out of consuming Bonsoy between 1 July 2004 and 24 December 2009. Her claims are founded in negligence and under ss 74B, 74D and 75AD of the *Trade Practices Act 1974* (Cth) (**TPA**),[3] which respectively concern fitness for purpose, merchantable quality and defective goods.

5 Ms Downie sued:

(a) the first defendant, Spiral Foods Pty Ltd (**Spiral**), on the basis that it owned the Bonsoy brand and distributed it in this country;

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1 A class action brought under Part 4A of the *Supreme Court Act 1986* (Vic).

2 I have referred throughout these reasons to 'group members' meaning those who have registered as part of the group pursuant to the class closure orders of Cavanough J dated 12 May 2014.

3 The TPA has been repealed, and replaced with Schedule 2 (the Australian Consumer Law) of the *Competition and Consumer Act 2010* (Cth). However, as Ms Downie's claim arose prior to the *Competition and Consumer Act* coming into force, her claim relates to breaches of the TPA, and I refer to those provisions in the course of these reasons.

(b) the second defendant, Muso Co Ltd (**Muso**), on the basis that it packaged and exported Bonsoy from Japan to Spiral; and

(c) the third defendant, Marusan-Ai Co Ltd (**Marusan**), on the basis that it manufactured Bonsoy.

6 Although the claims against each defendant are distinct (and I will set them out in more detail in a moment), in broad terms Ms Downie alleges that each defendant knew how much iodine was in Bonsoy, and failed to take reasonable steps to ensure that the product was fit for human consumption.

7 The claim against all defendants has now been settled for $25 million, inclusive of costs of the proceeding and the administration of the settlement. This will leave about $16.5 million[4] to be distributed amongst the group members if the settlement submitted by Maurice Blackburn is approved.

8 The question for the Court is whether the settlement, as provided for under the settlement deed and settlement scheme, is fair and reasonable.

9 I have decided that the resolution of the proceeding as proposed in the settlement deed and settlement scheme is in the interests of the group members as a whole and should be approved. My reasons now follow.

The relationship between Bonsoy and the thyroid dysfunction of group members

10 Ms Downie began consuming Bonsoy in or about June 2007. From around April 2008 until about December 2009, she drank approximately three to four glasses of Bonsoy per day. Since July 2008, Ms Downie has suffered from significant thyroid dysfunction, which she alleges is the result of Bonsoy consumption.

11 The claims of the group members as to Bonsoy consumption and the alleged effects upon them are broad and disparate and relate to different iodine-related thyroid

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4 I have in the course of these reasons set out as best I can the estimates of the deductions from the settlement sum. The administration expenses have been estimated at $1.6 to $1.8 million (which takes into account an offset against interest). I have chosen the lower of these figures in trying to estimate the pool available to the group members.

conditions, falling into three categories:

(a) **Thyroid conditions caused by excess iodine only:** specifically iodine-induced hyperthyroidism, iodine-induced hypothyroidism, and iodine goitre. These conditions will commonly, although not always, spontaneously resolve upon cessation of excess iodine intake.

(b) **Thyroid conditions that can have multiple causes:** these are conditions that are known to be precipitated or exacerbated by iodine, but can have other causes. Persons suffering from these conditions have an underlying thyroid weakness or predisposition to thyroid illness. These relevantly include Graves' disease, Hashimoto's illness, toxic nodules with resulting hyperthyroidism, and painless thyroiditis.

(c) **Chronic iodine toxicity/iodism**: large doses of iodine can cause a chronic toxicity or sensitivity reaction which may result in inflammation of salivary glands and mucous membranes, skin eruptions and other consequences.

12 I should add that there are some thyroid conditions that are either known not to be caused by excess iodine, or in relation to which there is a lack of sufficient information to support a finding of causation, for example:

(a) Development of multinodular goitre;

(b) Thyroid cancer; and

(c) Genuine subacute thyroiditis.

13 Although excess iodine is not known to cause any other illness, thyroid illness caused by iodine can cause or exacerbate secondary illnesses, including, but not limited to, heart and psychiatric conditions.

14 There is also wide variability within the group in respect of the severity and nature of the conditions suffered, and the compensable loss said to have been sustained. It is estimated that:

(a) A majority of group members (50 to 60 per cent) suffered from illness consistent with iodine-induced hyperthyroidism, the severity of which ranged from unpleasant symptoms for a few weeks to many months of symptomatic, and sometimes incapacitating, illness. Almost all of these recovered fully following medical treatment and/or discontinuation of Bonsoy consumption.

(b) In a very small number of group members, existing heart conditions or psychiatric disturbances were exacerbated by the thyroid dysfunction.

(c) A significant minority (around 30 per cent) suffered from permanent or ongoing illness. These fell into the following categories:

(i) Permanent hypothyroidism due to Hashimoto's thyroiditis or failure to regain normal thyroid function after iodine-induced hypothyroidism;

(ii) Permanent hypothyroidism following removal or destruction of thyroid to control Graves' disease or toxic nodules;

(iii) Graves' disease that remains active or has a significant chance of recurrence; and

(iv) Eye impairment due to Graves' disease.

In the majority of group members who sustained permanent hypothyroidism, the condition is managed with medication that they will need to take for the rest of their lives.

Some of those with Graves' disease will continue to be significantly affected by the condition.

15 The case against each of the defendants in relation to the group members and associated thyroid conditions is discussed in more detail at [11] and following.

Procedural background

16 The proceeding was issued on 30 September 2010 against Spiral alone.[5] At a directions hearing on 26 October 2012, Ms Downie sought, and was granted, leave to join Muso and Marusan as defendants.

17 On 12 and 19 May 2014, the Court made orders closing the class. Group members were required to return a registration form by 11 July 2014, failing which they would remain a group member for all purposes of the proceeding but not be entitled to receive a distribution pursuant to any settlement, subject to further order. There were 487 group members who registered. Others subsequently attempted to, or expressed interest in, registering after the deadline. This is discussed below.

18 On 8 March 2013, the Court ordered that the proceeding be fixed for trial on 12 November 2013. The trial date was subsequently vacated and re-fixed on two occasions before it was ultimately fixed on 27 October 2014 before Cavanough J.

19 On 16 October 2014 the Court was advised that the parties were close to agreement on settlement.

20 Following further negotiation, the settlement deed was executed on 17 November 2014.

21 Trial preparation was substantially advanced when the proceeding resolved. I do not propose to delve into, or make findings concerning, the detail of materials filed with the Court; nor would it be appropriate for me to do so in the present application. However, I note that pleadings had closed, court books had been prepared, and the materials filed included nine reports by endocrinology experts.

22 On 24 November 2014, the Court listed the hearing of the present application for approval of settlement and made related orders, including the procedure for group members to object to the proposed settlement.

23 The settlement scheme was first circulated on 1 December 2014. An amended

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5 'Open affidavit' of Irina Lubomirska sworn 19 February 2015 (**Open Affidavit of Irina Lubomirska**), [5].

version was circulated on 16 February 2015 and considered at the approval hearing on 25 February 2015.

24 One group member, William Minson, filed a notice of objection which was subsequently withdrawn at the approval hearing.[6] There was therefore no contradictor opposing the approval of the settlement scheme.

25 Subsequently, there have been several revisions of the settlement scheme as a result of discussion between my chambers and counsel and solicitors for Ms Downie.

26 On 22 April a case management conference (**CMC**) was held to discuss amendments and revision of the settlement scheme. The final version is annexed as an annexure to these reasons.

Material provided by Maurice Blackburn on the application

27 On 24 November 2014, Cavanough J granted Maurice Blackburn leave to file material supporting the approval of the settlement. His Honour granted leave for the filing of a confidential affidavit in this matter, as follows:[7]

> The plaintiff has leave to file any confidential affidavit in support of the Settlement Application by delivering it to the Court in a sealed envelope marked 'Confidential Affidavit – Not to be Opened Except by Direction of a Judge of the Court', and should any application be made to release the documents, notice of such application be first given to the plaintiff's solicitors.

28 The material provided to the Court by Ms Downie on this application included:

(a) an 'open affidavit' of Irina Lubomirska of 19 February 2015; and

(b) a 'confidential affidavit' of Ms Lubomirska of 19 February 2015, filed pursuant to the aforementioned order of Cavanough J.

29 These exhibited key documents including:

(a) the settlement deed;

(b) the settlement scheme;

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6 Confirmed in writing by his solicitor at the approval hearing.
7 Orders of Cavanough J made 24 November 2014, [5].

(c) a confidential advice of counsel of 19 February 2015; and

(d) an expert report of Ms Catherine Dealehr as to legal costs and disbursements incurred by Ms Downie in bringing the claim.

30 The open affidavit dealt with such matters as the history of the proceeding and the major features of the settlement scheme.

31 The 'confidential affidavit' included the following matters (expressed in the broad):

(a) Details of the composition of the group and the conditions caused by consumption of Bonsoy;

(b) The estimate of group loss, with details as to the information-gathering process undertaken by Maurice Blackburn, as well as the methodology of the modelling process of the likely total sum to be distributed to group members in the settlement. The procedures applied to late registrants are also set out;

(c) The progress of settlement negotiations, obstacles, impetus and alternatives to settlement, and the risks of recovery;

(d) An estimate of Maurice Blackburn's costs, including the aforementioned costs report of Ms Dealehr;

(e) An estimate of the lead plaintiff's reimbursement claim; and

(f) The opinion of counsel as to the adequacy of the settlement of the claim.

What parts of the 'confidential affidavit' should be kept confidential?

32 In the course of the approval hearing I expressed some disquiet at the breadth of the material which was sought to be kept confidential. The question of what parts should remain confidential was the subject of correspondence between my chambers and Maurice Blackburn and further discussion at the CMC.

33 My concerns as to the entire contents of the confidential affidavit remaining sealed are as follows.

34 First, that the group members are entitled to know as much as is practicable as to why the settlement has been approved.

35 Second, there is no basis upon which issues such as the costs of Maurice Blackburn in mounting the case or the potential administration costs should remain confidential. To the contrary, there should be full disclosure of the quantum of such costs and the manner in which they have been calculated. This is consistent with the usual practice of the filing of a bill of costs (which would be placed on the court file and available for inspection) and the open hearing of any taxation of costs. Indeed, it is especially important in a case (such as this one) involving the approval of a class action where the quantum of costs will eat into the settlement figure.

36 Third, once the material is filed with the court for the purpose of approving a compromise there is an implied waiver of any claim for privilege – at least in terms of disclosure to the court. The usual practice in the approval of a compromise under Order 15 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic) (**Rules**) is for the materials relevant to the settlement to be retained on the file but to be the subject of a confidentiality order. The purpose behind this, as I have understood it, is that there is no true public interest in why a compromise has been effected. Absent the need for approval, the basis upon which a party decides to settle a case is a matter solely for that party and his or her legal adviser.

37 Having said that, the settlement of a class action raises different issues. I accept, on the one hand, that there is no need for the general public, or the defendants and their lawyers, to know why the claim was settled. On the other hand, the group members are entitled to know exactly why the case has been resolved and, if so minded, the basis for the approval; and it is necessary to enter into this material to some extent in setting out adequate reasons for approval (or refusal) of the compromise.

38 Often (and this is so in this case) the judgment dealing with approval of a settlement will indicate to the group members, at least in outline, the matters that persuaded the judge to approve the settlement. But it will not tell the whole story.

39 In my view, taking into account the matters I have just mentioned, the confidential affidavit should not be sealed and should be available for inspection on the court file subject to the following redactions:

(a) those parts of the affidavit (and the exhibits, including that of counsel's opinion) that relate to the merits and value of the claim and the reasons for acceptance of the offer made by the defendants;

(b) those parts of the affidavit that contain confidential information relating to Ms Downie or any other group member;

(c) those parts of the affidavit that relate to matters which have been agreed with the defendants to be kept confidential.

40 Consistent with the orders of Cavanough J, and as a result of discussions with Maurice Blackburn a redacted version of the confidential affidavit was prepared, which will be placed on the court file. Those parts which have been omitted are described above.

41 If a group member was sufficiently interested and wished to obtain access to that material, I would entertain such an application, but only on the basis of the provision of an undertaking as to confidentiality.

Principles applicable to the approval of a group settlement

42 Section 33V of the *Supreme Court Act* relevantly provides that a group proceeding 'may not be settled or discontinued without the approval of the Court'.[8] Where the Court approves a settlement, it may make 'such orders as it thinks fit with respect to the distribution of any money, including interest, paid under a settlement or paid into court'.[9] An application for approval under s 33V must not be determined unless notice has been given to group members, except where the Court is satisfied that is it just not to.[10]

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8 *Supreme Court Act 1986* (Vic) s 33V(1).
9 *Supreme Court Act 1986* (Vic) s 33V(2).
10 *Supreme Court Act 1986* (Vic) s 33X(4).

43 Section 33V does not provide guidance as to the approach the Court is to take in exercising its power to approve settlements. However the principles (which might be said to be based on those of the Court's protective jurisdiction)[11] relevant to such an application have been discussed in a series of decisions in this Court and the Federal Court.[12]

44 The Court's task is especially onerous where the application is not opposed;[13] it must be satisfied of the fairness of the proposed settlement independent of the prima facie reasonableness of the opinions expressed on behalf of the plaintiff's legal advisors;[14] and the absence of objections to the proposed settlement will not relieve the court of its obligations to satisfy itself of the fairness and reasonableness of the settlement.[15]

45 In a settlement application under s 33V, the court approaches its task by asking two 'critical questions':[16]

(a) whether the proposed settlement is fair and reasonable as between the parties having regard to the claims of the group members; and

(b) whether the proposed settlement is in the interests of group members as a whole and not just in the interests of the plaintiff and the defendants.

46 The first issue, consideration of whether the settlement of the plaintiff and the group members' claims is fair and reasonable, is akin to the exercise carried out by a court in determining, under O 15 of the Rules whether the settlement of a claim brought by a person under a disability should be approved.

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11 *Tasfast Air Freight v Mobil Oil Australia Ltd* [2002] VSC 457, [4]; *Australian and Securities and Investments Commission v Richards* [2013] FCAFC 89 (***Richards***), [8].

12 See for example: *Matthews v AusNet Electricity Services Pty Ltd* [2014] VSC 663 (***Matthews***), [33]–[45]. The approach of this Court closely tracks that of the Federal Court in respect of s 33V of the *Federal Court of Australia Act 1976* (Cth) as to which see *Richards* [6]–[8].

13 *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104, [16] cited with approval in this jurisdiction in *Clarke (as trustee of the Clarke Family Trust) v Great Southern Finance Pty Ltd (Receivers and Managers appointed) (in liquidation)* [2014] VSC 516 (***Clarke***), [38].

14 *Matthews* [2014] VSC 663, [37].

15 Ibid [38] and the authorities cited therein.

16 *Matthews* [2014] VSC 663, [34] (citation omitted). See also *A v Schulberg (No 2)* [2014] VSC 258, [12]; *Thomas v Powercor Australia Ltd* [2011] VSC 614; *Perry v Powercor Australia Ltd* [2012] VSC 113, *Mercieca v SPI Electricity Pty Ltd* [2012] VSC 204 [2012] VSC 204 (***Mercieca***).

47 The underlying rationale for this protective role is reflected in part by the following observation of Osborn JA in *Matthews*:[17]

> As Gordon J recognised in *Modtech*, the group members who are to share the liability for the fees and disbursements are limited in their capacity to act as contradictors to the claim for costs because the information available to them is limited. While the opt out notices distributed to the group members in 2011 specifically notified them of [some details]… [t]hey do not know how the sum was quantified and have not had access to the confidential affidavits of the costs consultants retained by Maurice Blackburn in support of this application. The process of analysis undertaken in the evidence before the Court is therefore integral to ensuring the costs sought are fair and reasonable.

48 These observations are apt in this case in which the group members received little information in the notice of the proposed settlement about the amount of administration and legal costs payable to Maurice Blackburn and how it will affect their entitlement.

49 In determining whether the proposed settlement of a class action falls within a range of fair and reasonable outcomes a court will consider the following matters:[18]

(a) the complexity and duration of the litigation (both to date and into the future - particularly if the case is not settled and proceeds to verdict);

(b) the attitude of the group members to the settlement;

(c) the stage of the proceeding at which settlement is proposed;

(d) the relative risks of establishing liability;

(e) the relative risks of establishing loss and damage for both the plaintiff and the group members;

(f) whether the claim would be able to continue to judgment as a class action;

(g) the ability of the defendant(s) to withstand (i.e. to pay) a judgment that is greater than the settlement amount;

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17 *Matthews* [349] (citations omitted).

18 See *Williams v FAI Home Security Pty Ltd* (2000) 180 ALR 459, 465 [19] (***Williams***).

(h) the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.[19]

50 Of course, as Osborn JA remarked in *Matthews* in relation to the considerations arising on an application of this nature: 'it is also well accepted that there is no checklist [of considerations] which necessarily identifies the indicia of fairness or its absence in a particular case'.[20]

51 In determining the second issue – fairness of the settlement as between all group members – the Court is required to examine the internal workings of the settlement and consider where there is any differentiation between the treatment of the individual group members and, in particular, their entitlement to an award.

52 In some cases, a settlement scheme will simply provide for a particular amount or percentage of an assessed amount to be paid to group members without any differentiation between those members.[21] Provided the settlement as a whole is fair and reasonable (the first question) then these cases present no difficulty.

53 However, where there is an internal differentiation in the settlement scheme (which may relate to many disparate factors – the strength of the case of some group member, issues of causation, the effect of legislation on the claim of the independent group member and the nature of the damage sustained by the group member) then it will be necessary to determine whether that differentiation is fair and reasonable.

54 In *Australian Securities and Investments Commission v Richards*,[22] for example, a settlement scheme was disallowed in its entirety because it was found, on appeal, that the primary judge had erred in finding that the distribution of the settlement sum was fair and reasonable as between all group members. The Court held that the distribution unfairly benefited group members who had paid to be legally

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19 *Matthews* [43].

20 Ibid [42], citing *Darwalla Milling Co Pty Ltd v F Hoffman La Roche Limited (No 2)* (2006) 236 ALR 322, 335 (***Darwalla***); *Wheelahan v City of Casey* [2011] VSC 215, [62] (***Wheelahan***), which in turn were cited with approval in *Matthews v SPI Electricity; SPI Electricity Pty Ltd v Utility Services Corporation Ltd (Ruling No 16)* [2013] VSC 74, [36]; *Thomas v Powercor Australia Limited* [2012] VSC 113, [12]; *Clarke* [41]-[42].

21 See eg *Mercieca*; *Thomas v Powercor Australia Ltd* [2011] VSC 614.

22 [2013] FCAFC 89.

represented, and were parties to agreements under which they would be reimbursed their legal costs. Under the scheme this class would receive a larger percentage of the quantum of their claims, at the expense of unrepresented group members, who were to recover a smaller percentage of their claims to lost equity. The difference in quantum of recovery between the two groups was referable to the existence of a 'funders' premium', paid to the funded group members, but unavailable to those who were unrepresented. The existence of that premium had not been declared at the outset of the litigation, and was found by the Court to be excessive.

The proposed settlement

55 The settlement deed provides for a settlement sum of $25 million. This sum is all-inclusive, and the following costs and expenses will be deducted from it:

(a) Ms Downie's legal costs;

(b) the costs of reimbursing Ms Downie for her time and expenses; and

(c) the costs of administering the settlement scheme.

56 The remainder will be available for distribution among group members.

57 The amount available to group members is expected to be in the region of $16.5 million.

Who will be entitled to payment under the settlement scheme?

58 Entitlement of the group members is not assumed. Rather, the settlement scheme provides for the following matters to be considered in assessing whether a group member is entitled to an amount under the scheme:[23]

(a) whether the group member fits the pleaded group definition;[24]

(b) whether the injuries claimed were caused by consuming Bonsoy (with general

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23 Settlement scheme, cl 8.4.

24 That is, those who had consumed Bonsoy during the period from 1 July 2004 to 25 December 2009, and had suffered thyroid dysfunction, exacerbation of a pre-existing thyroid condition, or iodism as a result – including infants who suffered thyroid dysfunction as a result of maternal consumption.

propositions as to the role of iodine being taken as established);[25]

(c) whether the group member satisfies statutory thresholds for, and quantum of, general damages under the *Wrongs Act 1958* and *Competition and Consumer Act 2010* (Cth) (**CCA**);[26] and

(d) whether the group members' entitlement to and quantum of damages and for 'special damages' are limited by the *Wrongs Act*.

59 Therefore, a group member will not receive a distribution unless Maurice Blackburn concludes that he or she would have succeeded in establishing a causal link between the consumption of Bonsoy and thyroid dysfunction. If such a link is established, then his or her damages will be assessed by application of the provisions of the *Wrongs Act* and CCA.

60 I should say something briefly about the limitations imposed by the *Wrongs Act* and the CCA. Under the *Wrongs Act*, a person can only recover damages for non-economic loss (general damages) if they have suffered a significant (permanent) injury.[27] A significant injury, other than psychiatric injury, is one that involves an impairment of more than five per cent as confirmed by the AMA Guides.[28] A significant injury in respect of psychiatric injury is one that involves an impairment of more than ten per cent under the AMA Guides.[29]

61 Under the CCA, a person can only recover damages for non-economic loss if their loss is more than 15 per cent of a most extreme case.[30]

62 The entitlement of group members to a distribution will depend upon their ability to satisfy these requirements.

63 The reference in the settlement scheme to 'special damages' is misleading. 'Special

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25 Transcript of Proceedings, *Downie v Spiral Foods Pty Ltd* (Supreme Court of Victoria, S CI 2010 5318, J Forrest J, 25 February 2015) (**Transcript**) 16.
26 *Competition and Consumer Act 2010* (Cth), Pt VIB, Div 3.
27 *Wrongs Act 1958* ss 28LB, 28LE, 28F.
28 *Wrongs Act 1958* s 28LF.
29 *Wrongs Act 1958* s 28LF.
30 *Competition and Consumer Act 2010* (Cth) s 87S.

damages', as commonly understood, refers to an ascertainable claim for medical and like expenses. Claims for loss of earnings and loss of earning capacity are not special damages. However, as I apprehend the position, the reference to special damages here and, in particular, the expression 'relevant limitations', refers to limitations on claims for loss of earnings and loss of earning capacity as well as any claims under the principles of *Griffiths v Kerkemeyer*.[31] I have proceeded on that basis.

64 There is provision for interim distributions of no more than 60 per cent of the assessed value, once at least 30 per cent of the total number of group members have received final assessments.[32]

65 Where a case is borderline as to whether the balance of probabilities is satisfied, there is scope for a reduced payout proportionate to the uncertainty.[33] Where a claim is less than borderline, it would be refused.

What amount will eligible group members receive?

66 The likely amounts payable to claimants under the scheme has been estimated through modelling exercises undertaken by Maurice Blackburn. Two initial assessments were discarded due to concerns about the reliability of the underlying data. Ultimately, the modelling that was relied upon included an assessment of three sample groups.

67 In one group (**the central sample group**), a random sample of group members was selected by Maurice Blackburn and assessed on the basis of self-reported information and medical, tax and business records (the records providing a degree of verification of the self-reported information). Assessments were conducted or supervised by Ms Lubomirska, an experienced solicitor in this area of law; in accordance with the principles which would govern entitlement under the settlement scheme. Thus, the modelling process considered causation and the calculation of relevant heads of

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31 (1977) 139 CLR 161.

32 Settlement scheme, cl 12.

33 Transcript 24-5.

damages.[34]

68 According to Maurice Blackburn, the methodology used to assess individual claims was deliberately generous, to avoid underestimation. The estimated damages of the central sample group were then scaled to the number of registrants to produce an estimate for the total group. Outlier claims were individually identified and allowances made for them, to ensure that the extrapolated figure was representative.

69 Based on the Maurice Blackburn modelling, the range of damages recoverable by group members is between (roughly) $22 million and $26 million.

70 Given that this process was carried out by an experienced solicitor, familiar with statutory thresholds, principles of causation and assessment of damages, it is fair to assume that there is a reasonable correlation with the potential damages recoverable by the group members.

71 As I mentioned earlier, a combination of legal fees and administration costs will reduce the pool available to group members to about $16.5 million clear. Inevitably, this will mean that group members will not receive the full assessment of their claim. I return to this matter when I consider the fairness of the settlement.

How will the proposed settlement operate?

72 Under the settlement scheme, each group members' claim would be assessed against the criteria for entitlement (**Assessment**).[35] The Assessment is to be carried out by Maurice Blackburn as Administrator,[36] unless in its discretion it chooses to refer the Assessment to a barrister.[37]

73 If Maurice Blackburn requires a registrant to undergo a medico-legal review, it may require the group member to pay the medico-legal costs.[38] It must first give the group member an opportunity to plead inability to pay, and must fairly consider any

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34 Past and future medical expenses, loss of earning capacity (including past loss of earnings), *Griffiths v Kerkemeyer* damages and general damages.

35 Settlement scheme, cl 8.

36 Settlement scheme, cl 4.1.

37 Settlement scheme, cl 8.11.

38 Settlement scheme, cl 8.12.

such material.

74 Group members must provide information, documents and authorities, and attend meetings, amongst other requirements, upon Maurice Blackburn's request.[39] Maurice Blackburn can discount the group member's claim for non-compliance, even reducing it to zero.[40]

75 Group members can seek review of the Assessment by a barrister with at least eight years of post-admission experience, with no prior association with the case (**Independent Review**).[41] The request for a review must be made within 21 days, without fail, using a prescribed form.[42] Group members must pay a bond of up to $1,000 within 14 days if requested to do so by Maurice Blackburn. This amount will be refunded if the Independent Review produces an assessment value that is more than 110 per cent of that under the Assessment.[43] Otherwise, the group member must pay the further costs of the Independent Review up to a ceiling of $2,000, bringing it to a total of $3,000 forfeited; that is unless Maurice Blackburn exercises its discretion to waive the costs, which it may or may not do on compassionate grounds.[44] As with the Assessment stage, under the Independent Review, group members may be required to undergo a medico-legal review which they are liable to pay for, in the same circumstances.[45]

76 If a group member seeks an Independent Review, Maurice Blackburn would first have the opportunity to accept that the grounds for review are made out.[46] The rationale is that this would provide scope to correct any slips or errors in the initial Assessment without necessitating an Independent Review.[47] Any remaining disputed grounds would then be referred for Independent Review.

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39 Settlement scheme, cl 5.1.
40 Settlement scheme, cl 5.2.
41 Settlement scheme, cl 9.
42 Settlement scheme, cl 9.1.
43 Settlement scheme, cl 10.1.
44 Settlement scheme, cl 10.2.
45 Settlement scheme, cll 9.6(c), 9.7.
46 Settlement scheme, cl 9.3(a).
47 MB's email of 10 April 2015 to the Court.

How will the assessment and review procedure for persons under disabilities operate?

77 The settlement scheme is to operate differently in respect of registrants who are under a disability within the meaning of O 15 of the Rules (**O 15 registrants**).[48] There are eight O 15 registrants, and one late group member who would be an O 15 Registrant if allowed to participate.[49]

78 Maurice Blackburn, as Administrator, is to appoint a personal representative for each O 15 registrant, who will represent them in the settlement process.[50]

79 Under the settlement scheme, Maurice Blackburn will conduct an initial assessment of whether an O 15 registrant is a group member as per the pleaded group definition, just as it would do in the assessment of any group member. However, unlike standard assessments, if Maurice Blackburn were to determine that an O 15 registrants is a group member, then the remainder of the assessment is to be conducted by independent counsel.[51]

80 An O 15 registrant can seek review by another independent member of counsel, in the same way that Independent Review is available for a standard registrant. However, the O 15 registrant must obtain leave from Maurice Blackburn before doing so, having already had his or her initial assessment conducted by independent counsel.[52] The leave requirement is not onerous: Maurice Blackburn need only be of the opinion that it is 'on the cards' that the other independent review might produce a higher assessment value.[53]

81 Where an O 15 registrant is found not to be a group member, that O 15 registrant is able to seek a review of Maurice Blackburn's decision by independent counsel,[54] for which leave is not required.[55] No further review would be available to that O 15

48 Settlement scheme, cl 11.
49 Open Affidavit of Irina Lubomirska, [14].
50 Settlement scheme, cl 11.1(a).
51 Settlement scheme, cl 11.5(c).
52 Settlement scheme, cl 11.5(f).
53 Settlement scheme, cl 11.5(g).
54 Settlement scheme, cl 11.5(d).
55 Settlement scheme, cl 11.5(f).

group member if independent counsel finds them not to be a group member.[56]

82 The time limits for O 15 group members are 42 days for each stage; longer than those for standard registrants.

83 No bond is required to be paid for O 15 registrants in respect of the review process.[57]

84 For O 15 registrants, assessments are subject to approval by the Senior Master of the Court, who would have the benefit of any statement of reasons given in the assessment process and could require Maurice Blackburn to provide a report.[58]

How will the claims of late registrants be treated?

85 As mentioned earlier, the class was closed pursuant to orders of 12 May 2014, which provided that group members who failed to register with Maurice Blackburn by 11 July 2014 would not be entitled to participate in any settlement.[59] Registration forms were submitted by 487 people within the specified timeframe.[60]

86 Nine people submitted registration forms after the deadline, but prior to the parties reaching agreement to settle, such that their claims were known to Maurice Blackburn in negotiating the settlement.[61] Maurice Blackburn proposes to permit these nine individuals to register.

87 Eighty-two people sought to register following announcement of the settlement on 17 November 2014.[62]

88 Under the settlement scheme, Maurice Blackburn has the power to decide whether to allow these late registrants to participate in the settlement.[63]

89 In deciding so, Maurice Blackburn must have regard to circumstances including the length and reasons for delay, any likely prejudice to other group members, and the

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56 Settlement scheme, cl 11.5(e).
57 Settlement scheme, cl 11.5(h).
58 Settlement scheme, cl 11.6.
59 Open Affidavit of Irina Lubomirska, [6.1].
60 Open Affidavit of Irina Lubomirska, [6.12].
61 Open Affidavit of Irina Lubomirska, [15.1].
62 Open Affidavit of Irina Lubomirska, [15.2]-[15.3].
63 Settlement scheme, cl 7.

extent to which the late registrant acted promptly upon coming to know of his or her possible entitlement under the settlement, amongst other factors.

90 In the event that Maurice Blackburn refuses to permit a late registrant to join the class, it must give reasons as to why that decision was just and reasonable.

91 Upon refusal, a late registrant is able to seek review within 14 days, using a prescribed form and upon paying a $400 'bond'.[64] Once the 'bond' is paid, Maurice Blackburn (rather than the late registrant) is required to bring the review application before the Court, which would then conduct the review of Maurice Blackburn's decision. Maurice Blackburn is not obliged to refund the bond unless the late registrant succeeds in the Court review.[65] There is otherwise no scope for Court supervision.

Reimbursement of the lead plaintiff's expenses?

92 The proposed settlement provides for Ms Downie to be paid $13,470.46 for part of her participation and expenditure in relation to the proceeding.[66] Under the settlement scheme, this amount is described as 'the Plaintiff's reasonable claims, subject to approval of the Court, for compensation for the time or expenses incurred in the interests of prosecuting the Proceeding on behalf of Group Members as a whole'.[67]

93 The figure is calculated by reference to the multiple conferences between Maurice Blackburn and Ms Downie (by telephone and in person) and medico-legal appointments. Ms Downie is to be reimbursed at a commercial rate commensurate with her previous employment as a music teacher. An additional allowance is also made for travel expenses.

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64 Settlement scheme, cl 7.6.
65 Settlement scheme, cll 7.10, 7.11.
66 Open Affidavit of Irina Lubomirska, [16].
67 Settlement scheme, cl 2.1 (definition of 'Plaintiff's Reimbursement Claim'). See also the obligation to pay these: cll 1.3(f), 13.1(b).

Is the settlement of the claim against the Defendants fair and reasonable?

The settlement sum and deductions

94 The total settlement sum is $25 million but, as discussed, this amount is to be subject to three reductions. Given that costs are assessed at approximately $7 million up to December 2014 (as discussed below), then the maximum sum available is approximately $18 million. From that figure, an estimate of just over $1.5 million in administration expenses is to be deducted[68] – leaving about $16.5 million for distribution among the group members.

Amounts payable to individual group members

95 Because of the nature and diversity of the thyroid dysfunction, it is not possible to simply divide the net settlement sum (approximately $16.5 million) by the number of group members. As I mentioned earlier, some group members will not be entitled to a distribution as they do not fit the group description or cannot establish causation. Further, there are the statutory constraints of the *Wrongs Act* and the CCA upon general damages which I have set out. A more reliable, but necessarily imprecise, indicator is that produced by the sampling or modelling of claims, which I have described at [66] and following.

96 Based on the Maurice Blackburn modelling (discussed above), the amount of damages recoverable by group members at trial would have been in the region of $22 million and $27.5 million.

97 The estimate is admittedly uncertain because of limitations regarding the underlying data, the risks inherent in extrapolation and the deliberately generous methodology adopted. However, to paraphrase Osborn JA[69] and Emerton J[70] in other settlement approval applications, I am satisfied that Maurice Blackburn has made a serious and conscientious effort to accurately estimate the total damages and that it is not unreasonable to proceed to settlement on the basis of the estimate. Further, to the

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68 As calculated after taking into account the interest earned and offset on the amounts paid by the defendants, as noted below.

69 *Matthews* [54].

70 *Mercieca* [36].

extent that the modelling errs on the side of generosity, that inaccuracy enhances rather than detracts from fairness and reasonableness to the group members.

98 The end result is that on Maurice Blackburn's best estimate the group members who establish causation and satisfy the statutory thresholds have a reasonable prospect of recovering roughly 60 to 70 per cent of their assessed claim value, free of any liability for trial costs and the costs of the administration of the assessment process.

Risks on liability

99 In *Matthews*, Osborn JA said as follows:[71]

> In particular, the relative prospects of success can only be broadly gauged. In *A v Schulberg*, Beach JA described the role of the Court in determining whether or not to approve the settlement of group proceedings as follows:
>
> > The job of this Court is to determine whether or not the settlement is fair between the parties and between the plaintiff and group members. While, in making that assessment, it is necessary to form a view as to the correlation between the amount individual group members will recover under the settlement distribution scheme and the amount they might recover after a trial, necessarily any such comparison can only be performed in a broad manner.

100 These observations are all the more compelling where the evidence has not been heard and tested – as was the case in *Matthews*. The assessment of the prospects of success of a case by a judge hearing an application for approval of a compromise prior to the trial of the proceeding necessarily requires an element of guesswork and judicial intuition. The material upon which the judge relies is provided by the applicant's lawyers, and the various defences proffered by the defendants have not been tested.

101 These observations should be borne in mind when considering the following analysis.

Background

102 Based on the material provided by Ms Downie for the purpose of this application, the following factual matters appeared to be either undisputed or likely to have

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71 *Matthews* [40] (citations omitted).

withstood any putative challenge by the defendants:

(a) Marusan manufactured Bonsoy in Japan. Muso was responsible for its distribution from Japan to Australia. Spiral imported and distributed Bonsoy in Australia.

(b) In 2003, Bonsoy was reformulated to include a product known as kombu extract instead of kombu powder. This, in all likelihood, increased the iodine content of Bonsoy.

(c) Each of Marusan, Muso and Spiral were involved in discussions concerning the reformulation.

(d) As a result of the reformulation, from 2003 to December 2009 (when Bonsoy was recalled), the new recipe for Bonsoy replaced 0.54 kilograms of kombu powder and 1.5 kilograms of wet salt with 7 kilograms of kombu extract per 1,000 litres of product.

(e) In 2006 a Bonsoy consumer (on the advice of her doctor), contacted Spiral inquiring as to the iodine content in the reformulated Bonsoy. This inquiry (which was communicated to Muso and Marusan) resulted in the testing of the Bonsoy to determine its iodine content, which was measured at approximately 30,000ug of iodine per litre of Bonsoy. This is a high level of iodine intake (in Japan, the upper daily limit is 3,000ug per day, with a recommended daily intake of 150ug per day). Marusan, Muso and Spiral were all aware of the results of the testing.

(f) Testing carried out on behalf of the Victorian Department of Health on Bonsoy in December 2009 demonstrated an iodine content of between 27,580ug and 31,000ug per litre pack.

The claim against Spiral

103 The claim against Spiral alleged breach of its common law duty of care to Ms Downie and the group members and contravention of ss 74B, 74D and 75AD of the

TPA.

104 Ms Downie argued that Spiral, as the distributor of the product, owed a duty of care to Ms Downie and the group members who consumed the product. That allegation was denied by Spiral.

105 On the material provided, I am satisfied that it is likely that Ms Downie and the group members would have established that Spiral owed a duty of care to consumers of Bonsoy between 2003 and 2009. Its knowledge of the reformulation, the likely presence of excessive amounts of iodine in the product and its relationship with its consumers underpins such a duty. Although not analogous, it is, in many respects, a case descendant of *Donoghue v Stevenson*.[72]

106 Any breach of that duty is to be determined by the application of Part X of the *Wrongs Act*.

107 It was necessary for Ms Downie and the group members to establish breach of duty as required by ss 48 and 49 of the *Wrongs Act*.

108 The relevant risk of harm to Ms Downie and the group members was that of an over-consumption of iodine by reason of the high levels of iodine contained in the reformulated Bonsoy. Such a level of iodine was a potential cause of thyroid disorders. I also think it likely that it would have been established that this risk of harm was reasonably foreseeable by Spiral, given the facts I have adverted to, and particularly after 2006 when the testing was carried out.

109 For the case in breach to be made out, it is necessary to establish that the defendant has failed to take reasonable precautions as stipulated by s 48(1)(c), having regard to the matters contained in ss 48(2) and 49 (which are not exclusionary).

110 The precautions which, it is said, Spiral should have undertaken and which would have averted or minimised the risk of high iodine levels and consequential thyroid dysfunction, were as follows:

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72 (1932) AC 562.

(a) undertaking appropriate testing when reformulating the product in 2003;

(b) alternatively, in 2006, when it became aware after testing of the level of iodine within Bonsoy, to have asked Marusan and Muso reformulate the product.

(c) undertaking a proper analysis of food safety legislation and food standards, both federally and at a State level, which would have demonstrated to Spiral that Bonsoy had the potential to produce unsafe levels of iodine with consequential risks to health.

111 I am satisfied that Ms Downie and the group members had reasonably good prospects of success in the common law claim against Spiral.

112 The claim against Spiral was also brought under three separate provisions of the TPA, namely:

(a) Bonsoy was not fit for the purpose for which it was produced, namely, drinking or other human consumption, in contravention of s 74B;

(b) Bonsoy was not of merchantable quality, in contravention of s 74D; and

(c) Bonsoy was defective, in contravention of s 75AD.

113 Spiral admitted that:

(a) it was a deemed manufacturer under the TPA;

(b) its conduct was in trade or commerce, and that it supplied Bonsoy for resupply to consumers.

It also admitted that consumers who purchased Bonsoy did so for the purpose of drinking or consuming it. It is clear that these provisions applied to Bonsoy.

114 Counsel for Ms Downie summarised the case under each of the provisions as having the same thread: 'Bonsoy was not fit for its purpose, nor of merchantable quality, and was defective because it contained excessive amounts of iodine, such that

consuming just a very small amount put consumers at material risk of harm which was realised in the case of group members'.

115 Based on the material provided, I am satisfied that Ms Downie had a relatively sound case for breach of each of the provisions of the TPA. Consumption of relatively modest amounts of Bonsoy could lead to an amount in excess of the recommended daily intake of iodine consumption and, indeed, to an amount in excess of the maximum recommended daily iodine consumption. In those circumstances, there was a reasonable case that the product was not fit for human consumption, not of merchantable quality and defective.

116 All in all, I am satisfied that Ms Downie and the group members possessed a reasonably good cause of action against Spiral and would have probably established liability under both common law and statute.

The claims against Muso and Marusan

117 Both Muso and Marusan were incorporated in Japan and carried on business in that country. Marusan manufactured the product and Muso purchased and distributed it to Spiral in Australia. Both the companies were involved in its reformulation in 2003 and testing in 2006.

118 The claims against the two companies are to be determined pursuant to Japanese choice of law principles.[73] The Japanese legal experts agreed that Japanese choice of law rules identified Australian law as the law governing the claim: it was also agreed that the law of the place where the victim received the product applied to any claim arising out of injuries sustained after 1 January 2007. Before that point in time the position was not as clear, but the prevailing view was that the same position applied prior to that date.

119 It can be safely assumed, for the purposes of this determination, that Australian law applies and the principles relevant to determining whether Spiral owed a duty of

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[73] See *Regie Nationale des Usines Renault SA v Zhang* (2002) 210 CLR 491, *Neilsen v Overseas Project Corporations of Victoria Ltd* (2005) 223 CLR 331.

care to Ms Downie and the group members hold good to the claims against Muso and Marusan.

120 Marusan was the manufacturer of Bonsoy. It is settled law that a manufacturer owes a duty of care to a consumer:

> A duty of care owed by a manufacturer or produced to a consumer is a duty to take reasonable care toward injury to the consumer.[74]

121 As far as I am aware, that duty is not limited by any territorial boundaries and it follows that Marusan owed a duty of care to Ms Downie and the group members.

122 Apparently Marusan intended to contend at trial in relation to its contribution claim against Muso that, given the role played by Muso in the reformulation, it had no responsibility or control over the reformulation of the product.

123 This, in my view, could not have negated an established category of duty of care into which Marusan fitted. Rather, if its contentions as to the reformulation and its distribution were accepted, it would have been relevant to questions of scope and breach of duty.

124 In any event, whatever the role of Muso (or for that matter Spiral), Marusan – at least on the material provided to the Court – was involved in the reformulation of the Bonsoy, the testing of the new product and the printing of the new packaging of the product. Added to that is Marusan's apparent knowledge from July 2006 of the excessive levels of iodine contained in the Bonsoy.

125 I reach a similar conclusion in relation to Muso, albeit that it was not the manufacturer. It can be accepted that Muso does not fall into an established category for the purpose of a duty of care. It can also be accepted that a 'middle man' who has no opportunity to inspect the product and is simply involved in passing the product from manufacturer to supplier may not owe a duty of care to the ultimate user of the product. However, as the New South Wales Court of Appeal

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74 *Graham Barclay Oysters Pty Ltd v Ryan* (2002) 211 CLR 540, 585 [106].

explained in *McPherson's Ltd v Eaton,*[75] *J & V Pesl v Ray Smith Tractors Pty Ltd*[76] and *Baden Cranes Pty Ltd v Smith,*[77] there may be circumstances where the involvement of the 'middle man' is such that it owes a duty of care to the end user. In *Baden Crane,* the Court of Appeal held that a distributor's conduct in the supply of a crane (not manufactured by it) and its knowledge of the way in which the crane would be used was sufficient for it to owe a duty of care to the end user.

126 I think it likely that, given Muso's apparent involvement with the other two companies that it would have been found to have taken an active role in the reformulation and testing of the product.

127 Whilst not free from doubt, and by no means as strong as the case on duty against Spiral and Marusan, there was, I think, a reasonable prospect of establishing the existence of a duty of care.

128 As Victorian law applies, the provisions of the *Wrongs Act* are applicable to the claims against each of the Japanese companies.

129 For the reasons set out in relation to Spiral, I think it likely that it would be established that there was a foreseeable risk of injury which was not insignificant. The remaining question then is what precautions, if any, should Marusan and Muso have taken.

130 Subject to one matter, it is distinctly arguable that their reaction should have been no different to that of Spiral – ensuring that there was not excessive iodine in the product, testing the product in relation to levels of iodine and reformulating the product once it was determined that there were excessive levels.

131 The exception I just mentioned is that contained in Marusan's defence to the claim that recommended iodine daily intakes in Japan are far higher than Australia: in Japan the upper safe daily limit is 3000ug per day, as against the recommended daily

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75 (2005) 65 NSWLR 187.
76 [2007] NSWCA 74.
77 [2013] NSWCA 136.

intake in Australia of 150ug per day. At least at first glance, it may be thought that this defence misses the point. This product was being shipped to Australia for consumption by Australian consumers and it is reasonable to expect the manufacturer and distributor of a product with considerable sales in this country to be aware of food standards and, in particular, the safe levels of the components of the product.

132 I am satisfied that Ms Downie and the group members had reasonable prospects of success in the case against Marusan and Muso.

Enforcement and recovery risks on any award of damages

133 It would serve no useful purpose (and would be contrary to the spirit in which negotiations were entered into) to set out in any detail the financial position of Spiral and its entitlement (if any) to indemnities under a policy or policies of insurance. It suffices to say that there was, in the view of Maurice Blackburn and counsel retained by it, a real risk that Spiral would not be able to meet a judgment of the magnitude for which the case has been settled. The extent of its insurance cover was unclear and it is a company of limited assets.

134 Muso and Marusan are both incorporated in Japan. If enforcement of a judgment sum against Spiral produced recovery of less than that amount then the only recourse to make up the deficiency would have been by taking enforcement proceedings in Japan.

135 In addition to practical issues such as the need for translation of documents, this would have required the group members to confront both the general question of enforcing an Australian judgment in Japan, and also the question of whether an Australian judgment obtained in a group proceeding could be enforced in Japan at all and, if so, whether enforcement could be sought by the group or would instead need to be sought through individual proceedings.

136 It is not necessary to refer in detail to the expert opinion obtained by Maurice Blackburn in relation to enforcement of a class action judgment in Japan. It suffices

to say that Japanese law would enable the enforcement of individual awards of damages – but that would have meant that each group member required a judgment in this Court which would have to be the subject of a discrete application in a Japanese court. One might add that the enforcement of foreign judgments by a local court, at least in this country, gives rise to a myriad of issues.[78]

137 If there was any realistic prospect that Spiral would fall short in terms of payment of a judgment then this settlement is highly beneficial.

Risks on causation and assessment of damages

138 As with liability, the question of causation is governed by Part X of the *Wrongs Act*. Damages recoverable by individual group members are governed by Part VB.

139 In *Wallace v Kam,*[79] the High Court said of the factual causation test in respect of analogous New South Wales legislation:

> The determination of factual causation in accordance with s 5D(1)(a) involves nothing more or less than the application of a 'but for' test of causation. That is to say, a determination in accordance with s 5D(1)(a) that negligence was a necessary condition of the occurrence of harm is nothing more or less than a determination on the balance of probabilities that the harm that in fact occurred would not have occurred absent the negligence.[80]

140 The Court also said of the distinction between questions of factual causation and scope of liability:

> The distinction now drawn by s 5D(1) between factual causation and scope of liability should not be obscured by judicial glosses. A determination in accordance with s 5D(1)(a) that negligence was a necessary condition of the occurrence of harm is entirely factual, turning on proof by the plaintiff of relevant facts on the balance of probabilities in accordance with s 5E. A determination in accordance with s 5D(1)(b) that it is appropriate for the scope of the negligent person's liability to extend to the harm so caused is entirely normative, turning in accordance with s 5D(4) on consideration by a court of (among other relevant things) whether or not, and if so why, responsibility for the harm should be imposed on the negligent party.[81]

141 Here, the risks on causation and limitations on damages are, in practice, excluded

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78 See, for example, my recent ruling of *Doe v Howard* [2015] VSC 75.

79 *Wallace v Kam* (2013) 250 CLR 375 (***Wallace***).

80 ***Wallace***, 387 [16]. See also *Strong v Woolworths Ltd* (2012) 246 CLR 182 (***Strong***), 190 [17]; *Adeels Palace Pty Ltd v Moubarak* (2009) 239 CLR 420 (***Adeels Palace***), 639 [45].

81 *Wallace* 386—387 [14]. See also *Adeels Palace,* 440 [42]; *Strong*, 191 [19].

from consideration of the appropriateness of the settlement sum. This is because the settlement scheme provides for those group members who fail either the causation test or the threshold on damages to be excluded from or limited in participation in a distribution.

142 I will consider this issue in more detail in a moment.

Advantages of assessment process over trial

143 The advantage of the non-adversarial approach to assessment taken under the settlement scheme is also significant and bears emphasis here because it is one of the main advantages of this settlement. The non-adversarial approach provided under the settlement scheme provides a simpler, faster, more cost-effective approach. To proceed to judgment in the group proceeding, and further, determination of individual claims, would have involved years of litigation, potential appeals and complex questions of law, including the application of Japanese law to the claims of the group members. This is true for both those who would have succeeded in claims under the settlement scheme and those who would have failed. As counsel for Ms Downie submitted, those who would fail to establish claims under the settlement scheme would also have failed at the trial, and the settlement scheme provides a better path to arriving at this outcome.

Costs

144 The trial, although said by the lawyers to be a four week trial, would have proceeded for at least six weeks. Experience dictates that such estimates are normally under rather than an overestimate. Indeed, the case may have gone for eight weeks with judgment reserved for a number of months, bearing in mind the number of issues to be considered by the trial judge.

145 Patently, the costs involved in the prosecution of the case over a lengthy period of time would have increased substantially. Even allowing that a proportion of those costs would have been recoverable, in the event of a favourable judgment, the indisputable fact is that the solicitor-client portion of the costs would have grown exponentially with the length of the trial. To put it another way, to pursue the trial

to verdict would necessarily have depleted significantly any potential judgment and the moneys available for distribution.

146 Then there is another issue. It was inevitable in this case that the trial judge would have ordered separate assessments of each group member's claim. Those assessments would have examined questions of causation and damage, presumably in a curial setting, i.e. determined by a judge or an Associate Justice of this Court. This in turn would have produced significant costs for each group member eating into the judgment sum. This is avoided by the simple assessment process provided by the scheme.

No opposition by group members

147 It is significant in a class of this size (over 490 persons) that no group member opposed the approval of the settlement.

Negotiations

148 On the basis of counsel's advice at the CMC I am satisfied that it is highly likely that no greater offer could have been extracted from the defendants prior to the trial commencing.

149 It suffices to say, given the protracted course of negotiations, this was an appropriate time for the offer to be accepted subject to the approval of the Court.

Advice of counsel

150 An opinion of counsel (senior and two junior counsel) running to 66 pages was annexed to Ms Lubomirska's confidential affidavit. Counsel, having taken into account the matters to which I have adverted in these reasons, concluded that the settlement was fair and reasonable. It is to be remembered that in reaching this opinion, counsel owed a duty not only to the plaintiff but also to the group members as well as the Court. I am therefore fortified in my conclusion that the settlement is fair and reasonable by the opinion of counsel experienced in this area and very familiar with the issues in the case.

Certainty

151 In my opinion, one of the matters that counts powerfully towards the settlement is the certainty that it provides participating group members in relation to their claims.

152 By approval of the settlement scheme, any doubt as to the ultimate success of the proceeding is removed, as is the prospect of any appeal. This advantage should not be discounted notwithstanding my views as to the viability of the claim. Class actions are fraught with procedural issues and the application of Part VB of the *Wrongs Act* and of the CCA could have led to considerable legal jousting on questions of liability. In addition, the claims of individual group members would, in all likelihood, have been assessed separately subsequent to any findings on duty, and breach (common law and statutory). This would have required separate hearings of each group member's claim (thus requiring the attendance of medical practitioners, lay witnesses and perhaps expert witnesses). The whole process may have taken years and could only have been commenced after judgment in the primary proceeding. I think this scenario was close to inevitable, absent settlement.

153 The course which is now adopted means that the resolution of these issues is far less cumbersome and will be expeditious.

154 Second, any anxiety or worry concerning the outcome of the trial is now assuaged. There is no need for Ms Downie or any other group member to give evidence and be cross-examined. Settlement entails a reduction in stress and anxiety for group members and witnesses, and payment to group members at a much earlier stage than if the matter had proceeded to judgment.

Synthesis of these considerations

155 Whilst it is clear the group members will not receive the full amount of the assessment of their individual claims, this does not mean that the settlement is not fair and reasonable. Although I have concluded that Ms Downie and the group members had reasonable grounds to expect to succeed in the claim, that is not the only consideration. The prospect of endeavouring to recover some (or perhaps a large part) of the judgment by taking action in Japan would have been costly and

time-consuming – assuming it was even practicable. It was also inevitable that group members would be liable for a significant deduction by way of payment of costs out of the judgment amount – even allowing for a favourable order from the court. Unfortunately an inevitable consequence of civil litigation in this day and age is that 'solicitor-client' costs eat up a sizeable portion of the fruits of any judgment – particularly if the case proceeds to judgment. The costs are contained by the assessment and review process. The certainty of a settlement at a fixed sum, even if not the perfect result, is a powerful factor in the resolution of any proceeding. Notwithstanding that the group members did not have the detail of the deductions and the likely distribution figures, I am comfortably persuaded that the settlement is in the best interests of Ms Downie and the group members. I am reinforced in reaching this conclusion by the opinion of counsel.

Is the settlement fair and reasonable amongst group members?

Fairness of the settlement scheme

156 The settlement scheme and its method of operation is set out at [58] and following. It is noteworthy that in this proceeding, the entitlement of group members is not assumed. As set out at [58], the general principles as to the role iodine plays in thyroid conditions are assumed. Beyond that, questions of causation and the satisfaction of statutory thresholds (under the *Wrongs Act* and CCA) must be assessed for each group member. Thus, this proposed settlement differs from others, such as that in *Matthews*, where settlement had the added advantage to group members of avoiding the risk of some failing on causation.[82]

157 The fact that some group members will not qualify for a payment under the scheme is not inequitable provided the scheme works as it is intended.[83] As senior counsel for Ms Downie pointed out, such a group member is not losing anything as, inevitably, that person would have failed at trial either on the question of causation or on the failure to meet the statutory threshold. In other words, at some point of time, if the matter had proceeded to judgment and then analysis of questions of

82 *Matthews* [294].
83 See *Darwalla* [94].

causation and the assessment of damages, that group member would have been required to prove his or her case at that time. In fact, given the manner in which the scheme is to be administered, the group member has a greater prospect of success under this scheme than a judicial assessment of the issues. The settlement scheme provides for a degree of elasticity and discretion on the part of Maurice Blackburn, and in particular Ms Lubomirska, who will carry out this process.

158 Similar schemes have been approved in other class actions. In *Matthews*, Osborn JA approved a settlement scheme under which the initial assessment of group members' claims was conducted by the former solicitor for the lead plaintiff. Likewise, in *Pathway Investments Pty Ltd v National Australia Bank Ltd (No 3)*,[84] Pagone J approved a settlement under which the scheme administrator assessed participants' claims.

159 The review process (to which I will return in a moment) will accommodate any mistakes that may be made by Maurice Blackburn in the assessment process. Overall, I am satisfied that the manner in which the scheme operates (and particularly the scope for review), protects the interests of the group members. It allows the group members to have individual assessments of their claims and those who do not receive an entitlement are no worse off than they would have been had their cases proceeded to judgment.

Review mechanisms

160 After discussion with counsel at the approval hearing and the CMC, the in-house 'Re-Assessment' stage was dispensed with. If a group member is dissatisfied with an assessment he or she will go directly to Independent Review, as described at [75] to [76].

161 The Scheme now contemplates a single review stage, being Independent Review, but provides an opportunity for Maurice Blackburn to concede a ground or grounds of review beforehand. I am satisfied that this strikes a balance that is fair and

84 [2012] VSC 625. See [7.1] of the settlement scheme annexed to these reasons for judgment.

reasonable in the interest of group members between enabling Maurice Blackburn to correct errors or otherwise uncontroversial review grounds in a cost-effective manner on the one hand, and promoting confidence in access to independent review on the other.

162 The scheme in *Matthews* provided for a first review by the scheme administrator, and a second independent review stage with a $3,000 'bond' imposed on personal injury group members[85] – a broadly similar process to this scheme.

163 I accept senior counsel's argument that it is desirable to impose a bond to discourage hopeless Independent Reviews. These would incur administration costs and reduce the pool, against the interest of group members as a whole. There was considerable discussion in the course of the hearing and the CMC about the level of the bond that should be provided by a group member seeking review of the initial decision. Ultimately I was persuaded that the amount prescribed by the scheme ($1,000 with a subsequent additional payment of up to $2,000) was appropriate. In the circumstances of this proposed settlement, I am persuaded that it is fair and reasonable in the interests of group members to require these to forfeit up to $3,000 in seeking review, as it was in *Matthews*. I have concluded that the bond and fee proposed in this case strike an appropriate balance between the interest of the group as a whole in not having the fund depleted, and the need to spread the administrative costs of the assessment process fairly between the group members.

Persons under disabilities

164 As detailed above at [77] to [84], the present version of the settlement scheme would provide for assessment of O 15 registrants' claims to be conducted independently of Maurice Blackburn, other than in assessing group membership, which is a fairly black and white question, and independent review is available for both group membership determinations and Assessments.

165 I am satisfied that the Scheme contains sufficient measures to address the

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85 Exhibit 'ED-2' on the application for approval of settlement, 'Kilmore case settlement distribution scheme'.

vulnerabilities that O 15 registrants may have, such as the more extensive use of independent barristers, longer timeframes and the scheme for provision of materials to the Senior Master. I am also satisfied that these measures are not excessive as against the interests of other registrants: they are balanced, for instance, by the requirement that O 15 registrants must obtain Maurice Blackburn's leave to obtain Independent Review, albeit at an appropriately low bar.

Late registrants

166 I have set out the scheme for late registrants at [85] to [91]. I am satisfied that the Scheme appropriately balances the potential desirability of permitting group members who failed to register by the deadline to participate in the settlement on the one hand, as against the interest of group members who registered in a timely fashion in not having the amount available to them reduced without proper reason. It might be said that the $400 'bond', along with the fact that reviews of denials of participation are to be brought before the Court by Maurice Blackburn, rather than the late registrant, present hurdles for late registrants. However, in my view the provisions for late registration strike a balance that is appropriate between late registrants and other group members, and are fair and reasonable in the interests of group members as a whole.

Reimbursement of Ms Downie

167 As noted above, the proposed settlement provides for Ms Downie to be paid $13,470.46. The plaintiff describes this amount as 'incurred in a representative capacity in bringing the proceedings in the interests of group members'.[86]

168 The notice to group members of proposed settlement stated that there would be a payment of this nature:

> The proposed Settlement Scheme provides for the distribution of the monies in the Settlement Distribution Fund to the Claimants. It also provides for payment of the plaintiff's costs and disbursements and *re-imbursement of the Plaintiff's reasonable time and expenses incurred in the litigation*.[87]

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86 Open Affidavit of Irina Lubomirska, [16].

87 Orders of Cavanough J made 24 November 2014, Annexure A, 'Notice of Proposed Settlement'.

169 Schemes involving payments of this nature have been approved in a number of cases.[88] That is not to say that such payments are routine, nor that they will routinely be approved. In *Darwalla*, Jessup J said:

> There are … reasons why the court should pause before approving payments of this kind. First, although the claimants are not fiduciaries apropos the generality of group members, they have chosen to remunerate themselves, albeit modestly, ahead of the distribution to group members of a sum which has been calculated by reference to the estimated loss and damage suffered by the latter. The sensitivity of the position in which the claimants find themselves in these circumstances is obvious. Secondly, although courts have long-established procedures, and scales, by reference to which to assess the propriety and quantification of parties' claims to be compensated for the legal costs and expenses made necessary by successful litigation, the same cannot be said of the payments with which I am presently concerned. I am denied the advantage of court scales and taxation procedures. I have only the claimants' own evidence on the matter of the reasonableness of the payments, and of the necessity for the work and outlays to which they relate. Thirdly, the court is denied the benefit of the contribution of a contradictor in relation to these payments. Although the same may be said of the settlement distribution scheme as a whole, the problem is particularly acute where the court has only the say-so of those who claim these benefits with respect, for example, to the time occupied on the work to which their claims relate and the hourly rates by reference to which particular categories of personnel should be compensated.[89]

170 That is so even where the amounts involved are relatively small in the context of the settlement as a whole.[90]

171 In *Darwalla*, Jessup J approached the task by considering whether it would be 'fair and reasonable in the interests of group members as a whole for [the lead plaintiffs] to be so compensated.'[91] In other words, it requires asking 'whether it would be fair and reasonable for one of the "passive" group members in the present case to deny the claimants an appropriately but conservatively measured degree of compensation for the time input'.[92] The compensation is for time actually input; it is not an 'incentive payment' for taking on the role of lead plaintiff as has been adopted in the

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88 See for example *Darwalla*; *Jarra Creek Central Packaging Shed Pty Ltd v Amcor* [2011] FCA 671 (***Jarra Creek***); *Modtech (No 2)* [2013] FCA 1163; *Matthews*.

89 *Darwalla*, 346–7 [75] cited with approval in *Modtech Engineering Pty Ltd v GPT Management Holdings Ltd* [2013] FCA 626, [69] (***Modtech (No 1)***).

90 See for example *Darwalla* 346 [75].

91 *Darwalla* 351 [85].

92 Ibid [88].

US class actions system.[93]

172 A primary consideration in assessing the fairness and reasonableness of compensating the lead plaintiff from the settlement sum is what the sum claimed relates to. In *Darwalla*, Jessup J only allowed the lead plaintiffs amounts for time and expenditure spent 'in a truly representative capacity' – but not for that spent pursuing individual aspects of their claims.[94] This required looking not just to the purpose for which particular work was done but also whether the result of the work done was in fact representative.[95]

173 The role of the lead plaintiff should not be underestimated. Having seen at first hand, both as counsel and trial judge, the work put in by a lead plaintiff and the stress and anxiety occasioned by the fulfilment of their role in court, it is only fair and reasonable that he or she be compensated for their time and effort.

174 However, that said, there must be a reasonable attempt to endeavour to quantify the expenses incurred by the lead plaintiff.[96]

175 Whilst there are some failings in the methodology employed by Maurice Blackburn in calculating the figure of $13,470.46, on balance I am satisfied that the amount is appropriate. Looking at the sum itself, the figure appears plausible and unlikely to be an overstatement considering the scale, complexity and history of this proceeding. It should be allowed in full.

Conclusion

176 In my opinion, the settlement scheme operates fairly as between group members.

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93 Ibid 347 [76]. See also 351–2 [86].
94 Ibid 348 [81].
95 Ibid 351 [85].
96 Further, the amounts claimed should not be reconstructed after the event but should be contemporaneously recorded: *Modtech (No 2)* [2013] FCA 1163, [10].

Court review of costs and administration expenses

Costs of the proceeding

177 The proceeding has been settled on an 'all in' or 'inclusive' of costs basis. Given that the group members as a whole benefit from the legal costs incurred, Ms Downie's solicitor, Maurice Blackburn, is entitled to its costs out of the settlement amount.[97] However the Court, in the exercise of its protective role under s 33V of the *Supreme Court Act* will scrutinise, at times closely, the quantum of those costs and any other deductions from the amount available to group members.

178 This is important for two reasons. First, as the costs are deducted from the settlement sum, it has the potential to affect the reasonableness of the settlement.[98] Secondly, the group members lack detailed information about the legal costs incurred so as to be able to challenge the plaintiff's solicitor's claimed costs.[99]

179 In determining whether to approve the deduction of costs from the settlement sum, courts must be satisfied that the costs claimed are 'reasonable in the circumstances'.[100] This does not necessarily require a taxation of the costs claimed (although it may),[101] but rather the tendering of 'sufficient' evidence so as to enable the court to make an assessment as to whether the costs were reasonably incurred.[102] In group proceedings, usually this evidence will come from an independent solicitor or costs consultant.[103]

180 As noted by Gordon J in *Modtech (No 1)*,[104] and Osborn JA in *Matthews*,[105] it is the Court, and not the independent costs expert who must determine whether fees and disbursements are reasonable. In this application, it is particularly important to be

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97 *Modtech (No 1)* [24].
98 *Matthews* [347].
99 *Matthews* [349]; *Modtech (No 1)* [27].
100 *Matthews* [348]; *Modtech (No 1)* [32].
101 *Modtech (No 1)* [32], cf *A v Schulberg (No 2)* [2014] VSC 258, [17] where Beach JA, having formed a 'general view as to reasonableness' based on expert costs evidence, stated that he would entertain an application for a taxation.
102 *Modtech (No 1)* [34]–[35], citing *Re Medforce Healthcare Services Ltd (in liq)* [2001] 3 NZLR 145, 155.
103 *Matthews* [350].
104 *Modtech (No 1)* [35].
105 *Matthews* [355].

satisfied that the costs are reasonable because, as in *Matthews*,[106] the net amount available for distribution to group members will be affected by the amount deducted to pay Maurice Blackburn.

181 The factors to be taken into consideration in determining whether the costs claimed are reasonable will vary from case to case. Amongst other factors, it may be necessary to consider:

(a) whether the work in a particular area, or in relation to a particular issue, was undertaken efficiently and appropriately;

(b) whether the work was undertaken by a person of appropriate level of seniority;

(c) whether the charge out rate was appropriate having regard to the level of seniority of that practitioner and the nature of the work undertaken;

(d) whether the task (and associated charge) was appropriate, having regard to the nature of the work and the time taken to complete the task; and

(e) whether the ratio of work and interrelation of work undertaken by the solicitors and the counsel retained was reasonable.[107]

182 Under the proposed settlement, Maurice Blackburn will receive approximately $6.9 million for its costs and disbursements, assessed on a solicitor-client basis by a costs consultant and calculated in accordance with Ms Downie's retainer agreement with Maurice Blackburn. This calculation includes an uplift fee of 25 per cent payable pursuant to that agreement.[108] As noted above, this amount will be deducted from the settlement sum prior to distributions being made, leaving a net amount available for group members.

183 The notice to group members of proposed settlement adverted to the proposed

106 *Ibid* [346]-[348].

107 *Modtech (No 1)* [37]. Approved of in *Matthews* [352].

108 Exhibit 'IL-1' to the 'confidential affidavit' of Irina Lubomirska sworn 19 February 2015 (**Confidential Affidavit of Irina Lubomirska**), 'Counsel's Confidential Opinion', [206]. See also [7].

deduction in passing, although not specifying that Maurice Blackburn's costs would be deducted prior to distributions being made and not giving an indication of the likely amount of the costs.[109]

184 Ms Dealehr is a partner at a costing group and has some 26 years' experience as a costs lawyer.[110] She has provided costs opinions in a number of class actions, including the recent application for the approval of settlement in *Matthews*.

185 Her opinion, contained in a lengthy report, covers the costs incurred up to 10 December 2014, which I will summarise.[111]

186 In determining the quantum of costs Ms Dealehr did not prepare a detailed bill of costs but provided an opinion which:

(a) applied the applicable rates and uplift fee under the retainer and disclosure notice;

(b) excised time on non-recoverable or inappropriate matters, including administrative work such as preparation of time entries, preparing and executing costs agreements, and entries that she considered could not be proved on taxation due to lack of information;[112]

(c) applied a discount to time logged as bulk entries, to account for the difficulty of translating such entries into a form acceptable for taxation, at a rate of 15 per cent, which she calculated based on sampling of such entries;[113] and

(d) applied discounts with regard to who performed the work and in what manner, with regard to what level of seniority and expertise would be

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109 Orders of Cavanough J made 24 November 2014, Annexure A, 'Notice of Proposed Settlement'. In *Matthews*, the notice to group members noted that Maurice Blackburn's fees would be deducted from the settlement sum, although with greater detail.

110 Exhibit 'IL-11' to the Confidential Affidavit of Irina Lubomirska, 'Affidavit and Report of Catherine Mary Dealehr' (**Costs Report of Catherine Dealehr**), [47].

111 Costs Report of Catherine Dealehr.

112112 Costs Report of Catherine Dealehr, [50].

113 Costs Report of Catherine Dealehr, [80].

appropriate.[114]

187 In assessing the nature of the work performed by Maurice Blackburn partners and staff Ms Dealehr examined random samples of time entries in twelve categories:

(a) attendances and dealings with counsel;

(b) dealing with group members

(c) file management;

(d) generating and using databases and spreadsheets regarding group member information;

(e) internal meetings;

(f) lawyers' attendance at Court, and preparation of court books;

(g) mediation;

(h) obtaining and reviewing information from medical practitioners and other agencies;

(i) sampling and modelling of the claim group;

(j) time associated with experts retained by the plaintiff;

(k) time recorded as a 'bulk entry'; and

(l) work on Ms Downie's individual claim.

188 In each category, Ms Dealehr looked at a sample of individual time entries, and considered the appropriateness of both the seniority of the person who conducted the work and the length of time it took, based on the description of the work in the time entry. She also analysed a number of issues, including:

(a) complexity of issues, including with Japanese law and translation of

114 Costs Report of Catherine Dealehr, [41].

discovered Japanese documents, and in analysing data about the group;

(b) the total and core lawyers and non-lawyers who worked on the matter;

(c) who conducted work, including considering seniority and whether the person was a member of the core team or not;[115]

(d) the number of staff attending conferences, meetings or Court;

(e) any duplication of work; and

(f) any inefficiencies in the discovery process.

189 Ms Dealehr concluded that the following disbursements were generally, reasonable:

(a) media;

(b) document and court management expenses;

(c) medico-legal reports;

(d) information gathering;

(e) court-related expenses;

(f) claimable travel expenses;

(g) process service fees; and

(h) couriers.

190 In relation to counsel's fees, Ms Dealehr found that these did not need adjustment, except in respect of fees charged by two members of counsel – not because of recoverability issues but rather the potential difficulty of proving some of the fees.[116]

191 Similarly, the fees of six experts retained by Maurice Blackburn were found by Ms Dealehr to be reasonable, save that she adjusted the fees of one expert by $1,400 due

115 Costs Report of Catherine Dealehr, [91].
116 Costs Report of Catherine Dealehr, [140].

to a lack of detail as to one item claimed in a particular invoice. Ms Dealehr's rationale being that this would occur on taxation.[117]

192 I have no reason to doubt that Ms Dealehr has done her best to ensure that the estimate of costs is reasonable. I am also satisfied that Ms Dealehr has significant expertise in the costing of cases such as this.

193 In *Matthews* Osborn JA ultimately concluded that the provision of two independent opinions as to costs was sufficient and no further inquiry was warranted. His Honour examined in detail the reports, and was satisfied that the costs sought were fair and reasonable.[118]

194 However each case must be considered on its own facts and there are two important reasons why Ms Dealehr's calculations should be the subject of independent scrutiny.

195 First, notwithstanding Ms Dealehr's qualifications, the Court needs to be satisfied that there is an independent source of verification of Ms Dealehr's figures. This is especially so when, if the case had been settled on a 'plus costs' basis, the defendants would have been in a position to contradict a bill of costs and, if resolved, a determination as to the reasonableness of the amount charged would have been made by a court officer.

196 Second, as the amount allowed for costs will directly affect the distribution to group members, they are entitled to know not only what amount of costs is to be deducted from the settlement sum, but also:

(a) whether the Court regards that sum as being reasonable; but also

(b) that an appropriate auditing process has been undertaken to verify that the amount is reasonable.

197 The Court's protective role must extend to the appointment of an independent costs

117 Costs Report of Catherine Dealehr, [149].
118 See *Matthews* [379]-[386].

review. The trick, so to speak, is to devise a method by which such an assessment can be carried out without that assessment itself significantly diminishing the corpus of the settlement funds.

198 In this case, the sum sought represents more than 20 per cent of the settlement sum and it seems appropriate that there be a second opinion in the form ordered by Sackville J in *Courtney v MedTel Pty Ltd (No 5)*.[119] In that case, his Honour did not require an exhaustive review of the solicitors' files but an overview of the following matters:

(a) the reasonableness of the terms of the fee and retainer agreements (including the provisions for ancillary services, interest and an uplift factor);

(b) whether the fees and disbursements actually charged by the solicitors have been calculated in accordance with the fee and retainer agreement; and

(c) confirming that so far as the solicitor or costs consultant can determine, no significant portion of the fees and disbursements charged by the solicitors have been inappropriately or unnecessarily incurred in conducting the proceedings on behalf of the plaintiff and the representative group.[120]

199 In this settlement, where the corpus is finite, I think it appropriate that there be an independent review, at a general level (and along the lines suggested by Sackville J), of Ms Dealehr's estimate. It is not enough, in the distribution of a settlement sum of such magnitude to such a large number of claimants, and in the absence of a contradictor regarding taxation, for a bill of costs of nearly $7 million simply to be presented to the Court and then approved.

200 Bearing these factors in mind, I propose in the first instance to appoint, pursuant to s 33ZF of the *Supreme Court Act*, a Costs Registrar or a Judicial Registrar experienced in costs matters to examine Ms Dealehr's calculations and report to myself or my delegate as to whether it is reasonable. If that report determines that the amount

119 [2004] FCA 1406.
120 Ibid [61].

claimed is reasonable then it will be paid to Maurice Blackburn.

201 If, on the other hand, it is considered that there are aspects of the estimate that need to be examined further, I will ask Ms Dealehr and the Registrar to meet and endeavour to resolve any issues. If such issues cannot be resolved, I propose to refer any outstanding issues to the Costs Court for determination.

Administration costs

202 Under the settlement scheme, the costs of administering the settlement scheme will be deducted ahead of distributions to group members.[121]

203 The settlement scheme defines, 'administration costs' as:[122]

> the costs and disbursements incurred by Maurice Blackburn and approved by the Court in connection with the identification of Registrants, obtaining Settlement Approval and administering the settlement scheme, including without limitation, counsels' and experts' fees.

204 I was originally disturbed by the fact that, unlike other cases requiring approval of a class action settlement, there was no estimate in the material filed as to the likely costs of administration save that I was told that it would not be covered by the interest produced on the settlement.

205 After discussions at both the approval hearing and the CMC, Maurice Blackburn helpfully provided a series of calculations which are set out in a memorandum of 1 May 2015. I accept that this was a difficult exercise, particularly in this case where it is not known with any precision how many group members will seek review under the scheme. However, it was necessary in the circumstances.

206 Maurice Blackburn have produced two figures ranging between approximately $1.6 million and $1.8 million, after taking into account the interest earned and offset on the amounts paid by the defendants. Further, Maurice Blackburn has identified the composition of the team which will conduct the assessments and have outlined the anticipated breakdown of work within the team and applicable hourly rates.

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121 Settlement scheme, cl 1.3(e), 13.1(d).

122 Settlement scheme, cl 2.1 (definition of 'Administration Costs'). See also cl 4.6.

207 Whether the ongoing administration costs are ultimately justified is another issue. For present purposes, I propose to act on the basis that the estimates are relatively accurate, acknowledging that there is, of course, a degree of guesswork involved in the calculations.

208 As with the costs of the proceeding (and for the same reasons), the administration costs should be subject to review. That review would involve an assessment of the costs overall, including those charged by a particular employee or partner of Maurice Blackburn engaged in the exercise as well as the costs of counsel engaged in the review process.

209 I will direct that the same process be adopted – namely, that a Judicial Registrar or a Costs Registrar review any claims for administration expenses and that, in the event of a difference of opinion, there be a conference between the representatives of Maurice Blackburn and the Registrar. If that cannot resolve the issue then the Registrar will be authorised to refer it to the Costs Court or, if appropriate, to an associate judge of the Court.

Conclusion

210 The settlement is fair and reasonable and in the best interests of group members.

211 Subject to the qualifications set out in these reasons, the settlement deed and the settlement scheme should be approved.

CERTIFICATE

I certify that this and the 47 preceding pages are true copies of the reasons for Judgment of J Forrest J of the Supreme Court of Victoria delivered on 7 May 2015.

DATED 7 May 2015.

Associate

ANNEXURE A

Erin Downie v Spiral Foods Pty Ltd and Others

Supreme Court of Victoria proceeding S CI 2010 05318

(Bonsoy Class Action)

SETTLEMENT SCHEME

1. Background

1.1 This Settlement Scheme establishes a procedure for verifying and distributing to Group Members the sum to be paid by the Defendants pursuant to a settlement of the Bonsoy Class Action approved by the Supreme Court of Victoria.

1.2 This Settlement Scheme will not become operative unless and until the Court has granted approval for the settlement of the class action upon the terms set out in the Settlement Deed and in this Settlement Scheme.

1.3 This Settlement Scheme provides for the following major steps:

(a) Maurice Blackburn will be appointed as Administrator of this Settlement Scheme (clause 4);

(b) Late Registrants must deliver to the Administrator a statutory declaration explaining the reason for their late registration. A process is established for determination of those registrations (clause 7);

(c) Each Registrant will have their claim assessed according to an assessment procedure, and the Administrator will notify the Registrant of the outcome of the Assessment (clause 8);

(d) Each Registrant may seek a review of their Claim by Independent Counsel. Depending upon the outcome of the review they may be required to pay the costs of the review, in a fixed amount and may be required to lodge a bond for the costs of the review (clause 9);

(e) The Administrator will deduct from the Settlement Distribution Fund the Plaintiff's Costs and Disbursements, the Plaintiff's Reimbursement Payment, and any Administration Costs outstanding and then from the balance shall distribute the Settlement Distribution Fund between Registrants (clause 13).

1.4 The operative provisions of this Settlement Scheme are set out below.

2. Definitions

2.1 In this Settlement Scheme, the following terms have the meanings defined below (clause references are references to the clauses of this document unless otherwise specified):

Act means the *Supreme Court Act 1986* (Vic).

Administrator means Maurice Blackburn Pty Ltd acting as the Court appointed administrator of the Settlement Scheme.

Administration Costs means the costs and disbursements incurred by Maurice Blackburn and approved by the Court in connection with the identification of Registrants, obtaining Settlement Approval and administering the Settlement Scheme, including without limitation, counsels' and experts' fees.

Assessment means a determination of a Registrant's Claim in accordance with clause 8 of the Settlement Scheme.

Assessment Value means the total quantum of general and special damages for a Registrant assessed by the Administrator in accordance with clause 8.4 of the Settlement Scheme, and includes any Assessment Value in a Notice of Review.

Claims means any and all claims (present and future and including any claim for costs) of the Plaintiff or any Group Member arising out of, or in connection with the Proceeding or the subject matter of the Proceeding.

Court means the Supreme Court of Victoria.

Defendants means collectively, the defendants in the proceeding: Spiral Foods Pty Ltd, Muso Co Ltd and Marusan-Ai Co Ltd.

Distribution means an amount of money distributed to a Registrant from the Settlement Distribution Fund in accordance with clause 14.2 of the Settlement Scheme.

Final Assessment means:

(i) where a Registrant has not made a request for Independent Review pursuant to clause 9, the Assessment Value; or

(ii) where a Registrant has made a request for Independent Review by Independent Counsel, the Assessment Value contained in the Notice of Review under clause 9 of this Settlement Scheme.

Group Member means a group member within the meaning of paragraph 2 of the Amended Statement of Claim.

Independent Counsel means a nominee of the Administrator who shall be an Australian barrister admitted to practice for at least 8 years with no previous involvement in the Proceeding.

Independent Review means the procedure provided in clause 9 of the Settlement Scheme for Independent Counsel to finally determine any objection to a Notice of Assessment.

Interest means interest accrued on the Settlement Reserve Fund and the Settlement Distribution Fund.

Late Registrant means a person who delivered a Registration Form to Maurice Blackburn after 4.00 pm on 11 July 2014 and before 26 February 2015.

Maurice Blackburn means Maurice Blackburn Pty Ltd (ABN 21 105 657 949).

Notice of Assessment means a notice provided by the Administrator to a Registrant in accordance with clause 8.9.

Notice of Review means a notice provided by Independent Counsel to the Administrator, and by the Administrator to the Registrant, in accordance with clause 9.9.

Order 15 Registrant means a Registrant who is also defined as a person under disability pursuant to Order 15 of the *Supreme Court (General Civil Procedure) Rules 2005* (Vic).

Plaintiff means Ms Erin Downie.

Plaintiff's Costs and Disbursements means the Plaintiff's legal costs and disbursements on a solicitor and own client basis (calculated in accordance with the Plaintiff's retainer of Maurice Blackburn), subject to the approval of the Court, incurred on her own behalf and on behalf of all Group Members in the Proceeding.

Plaintiff's Reimbursement Claim means the Plaintiff's reasonable claims, subject to approval of the Court, for compensation for the time or expenses incurred in the interests of prosecuting the Proceeding on behalf of Group Members as a whole.

Proceeding means *Downie v Spiral Foods and Others*, Supreme Court of Victoria proceeding number S CI 2010 05318.

Registrant means a Group Member who returned a Registration Form to Maurice Blackburn by 4.00pm on 11 July 2014.

Registration Form means a Registration Form within the meaning of paragraph 3 of the orders of the Court dated 19 May 2014.

Relevant Period means the period from 1 July 2004 to 24 December 2009 inclusive.

Residual Settlement Amount means the amount of the Settlement Amount after deduction of the Plaintiff's Costs and Disbursements, the Plaintiff's Reimbursement Costs and Administration Costs.

Settlement Amount means the amount of $25,000,000.

Settlement Approval means the approval of the terms of settlement of the Proceeding and the Settlement Scheme by the Court pursuant to section 33V of the Act.

Settlement Approval Date means the date on which orders are made in the Proceeding granting Settlement Approval.

Settlement Deed means the deed of settlement executed on 17 November 2014 between the Plaintiff, Maurice Blackburn, Spiral Foods Pty Ltd, Muso Co Ltd and Marusan-Ai Co Ltd.

Settlement Distribution Fund has the meaning defined in clause 1.2 of the Settlement Deed.

Settlement Scheme means the terms of this Settlement Scheme as approved by the Court, including any annexures.

Settlement Reserve Fund has the meaning defined in clause 1.2 of the Settlement Deed.

3. Interpretation

3.1 Headings are for convenience only and do not affect interpretation.

3.2 The following rules apply unless the context requires otherwise:

(a) the singular includes the plural, and the converse also applies;

(b) a gender includes all genders;

(c) if a word or phrase is defined, its other grammatical forms have a corresponding meaning;

(d) a reference to a person includes a corporation, trust, partnership, unincorporated body or other entity, whether or not it comprises a separate legal entity;

(e) a reference to dollars and $ is to Australian currency;

(f) a reference to any thing done by any person includes a reference to the thing as done by a director, officer, servant, agent, personal representative or legal representative if permitted to be so done by law or by any provision of the Settlement Deed or this Settlement Scheme.

4. Settlement Scheme Administrator

4.1 The Settlement Scheme shall be administered and applied by Maurice Blackburn as Administrator.

4.2 In acting as Administrator (including any incidental functions), the Administrator:

(a) will administer this Settlement Scheme fairly and reasonably according to its terms, with its duty owed to the Court to take priority over any obligation to any individual Registrant;

(b) subject to any orders of the Court, must not act as the solicitor for the Plaintiff or any Group Member;

(c) shall have the same immunities from suit as attach to the office of a judge of the Supreme Court of Victoria.

4.3 On appointment as Administrator, where Maurice Blackburn was retained as the solicitor for a Registrant or Late Registrant prior to Settlement Approval it will:

(a) cease to act for any Registrant, Late Registrant, or Group Member who had retained Maurice Blackburn as their solicitor prior to Settlement Approval; and

(b) notify the Registrant or Late Registrant of the effect of clauses 4.2, 4.3(a), and 4.4.

4.4 Nothing in this Settlement Scheme prevents any Registrant, Late Registrant or Group Member from retaining legal representation, at their own cost, provided that no legal costs or like expenses may be claimed from the Administrator or the Settlement Distribution Fund.

4.5 Following Settlement Approval and payment of the Settlement Sum into the Settlement Distribution Fund, the Administrator shall hold the monies standing from time to time in the Settlement Distribution Fund on trust for Registrants subject to and in accordance with the terms of this Settlement Scheme.

4.6 In consideration of the provisions made by the Settlement Deed and this Settlement Scheme regarding the payment of Administration Costs, Maurice Blackburn undertakes not to seek to recover from the Settlement Sum, the Settlement Distribution Fund or from any individual Group Member any costs incurred in connection with the Claims of the individual Group Member, except as otherwise provided in this Settlement Scheme. All such costs whether incurred prior to Settlement Approval or after Settlement Approval shall form part of the Administration Costs.

4.7 Notwithstanding anything elsewhere contained in this Settlement Scheme, the Administrator may at any time correct any error, slip or omission occurring in the course of its administration of the Settlement Scheme.

5. Registrants' Obligations

5.1 Each Registrant shall do all things stipulated in this Settlement Scheme or as requested or directed by the Administrator, including without limitation:

(a) providing instructions, information or documents;

(b) providing authorities or permissions;

(c) attending and participating in conferences or meetings with:

(i) the Administrator;

(ii) any other person as required under this Settlement Scheme;

and shall do so:

(iii) complying to the best of the Registrant's ability with the substance and not merely the form of the direction or request; and

(iv) by any date stipulated in the request or direction.

(d) Each Registrant shall act honestly, and do all things necessary to ensure that any agent or representative of the Registrant acts honestly, in any thing done in or for the purposes of participating in this Settlement Scheme and any person discharging any function or office created by this Settlement Scheme shall be entitled to rely upon the honesty of the thing done.

5.2 Where a Registrant fails to:

(a) fulfil any obligation as set out in clause 5.1; or

(b) follow any direction or request made by the Administrator in connection with this Settlement Scheme;

the Administrator may, in its absolute discretion, apply a discount to the Registrant's Assessment conducted under clauses 8 or 9 (including reducing the Registrant's claim to an Assessment of zero).

6. Registrants indemnity of Administrator

6.1 Payment of any Distribution under this Settlement Scheme is or may be subject to:

(a) the *Social Security Act 1947* and/or the *Social Security Act 1991*;

(b) the *Health and Other Services (Compensation) Act 1995*; or

(c) other statutes or regulations;

and each Registrant indemnifies the Administrator in respect of all Social Security, Medicare or other statutory benefits paid to or for the benefit of the Registrant between 1 July 2004 and the date of final Distribution to the Registrant under this Settlement Scheme.

6.2 If a Registrant, by reason of receiving a Distribution pursuant to this Settlement Scheme, has a legal obligation, whether by reason of statute, contract or otherwise, to an agency, compensation payer or insurer to pay or re-pay a sum from the Distribution, the Registrant shall, as a condition of his or her entitlement to receive a Distribution under this Settlement Scheme, be deemed to indemnify the Administrator in respect of any and all such obligations.

6.3 Without limiting any other obligation or discretion of the Administrator under this Settlement Scheme, for the avoidance of doubt the Administrator may:

(a) make such adjustments or withholdings from any Distribution otherwise due to a Registrant pursuant to this Settlement Scheme as may be necessary to:

(i) comply with any statutory or regulatory obligation to pay or refund any amount to a statutory agency; or

(ii) effect any indemnity given by a Registrant under this Settlement Scheme.

(b) enter into bulk payment agreements on behalf of all Registrants:

(i) pursuant to the *Health and Other Services (Compensation) Act 1995;* or

(ii) as permitted by law in any other act or regulation, in relation to Claims in the Proceeding.

(c) where it is necessary to comply with any statutory or regulatory obligation owed by a Registrant in relation to Claims in the Proceeding, release a Registrant's name, address and any Notice of Assessment in respect of that Registrant to the following bodies:

(i) Centrelink;

(ii) the Australian Taxation Office;

(iii) the Department of Human Services.

6.4 Where an agency or government department administering any State or Federal scheme (including without limitation Centrelink and the Department of Human Services) notifies the Administrator in writing that any amount is payable to the agency or department from any Distribution payable to a Registrant pursuant to this Settlement Scheme, the Administrator:

(a) shall pay the said amount to the agency or department prior to any Distribution made to the Registrant pursuant to this Settlement Scheme;

(b) shall notify the Registrant of the payment to the agency or department; and

(c) without affecting any other privilege or immunity under this Settlement Scheme, shall have no further obligation to the Registrant in respect of the said amount;

but nothing in this clause shall affect any right the Registrant or the agency might have against each other in respect of the said amount.

7. Late Registrants

7.1 Any Late Registrant who delivered a Registration Form to Maurice Blackburn after 4.00pm on 11 July and before 17 November 2014 will hereafter be taken to be a Registrant for all the purposes of this Settlement Scheme.

7.2 As a soon as practicable after the Settlement Approval Date, the Administrator shall issue a Notice to Late Registrants to each Late Registrant.

7.3 Each Late Registrant wishing to receive a Distribution must, within 14 days of the Notice to Late Registrants, deliver to the Administrator a Statutory Declaration stating the reasons why the Late Registrant did not submit a Registration Form by 4.00pm on 11 July 2014.

7.4 Upon receipt of a Statutory Declaration from a Late Registrant referred to in clause 7.3, the Administrator must review the Statutory Declaration and if the Administrator decides that it would not be just and reasonable to allow the Late Registrant to be eligible to receive a Distribution, must notify the Late Registrant of that decision, the reasons for that decision and of the process for determination of the question by the Court provided by clause 7.6.

7.5 In deciding whether to allow a Late Registrant to be eligible to receive a Distribution, the Administrator shall have regard to circumstances including:

(a) the length of and reasons for the delay on the part of the Late Registrant;

(b) the extent to which, having regard to the delay, there is or is likely to be prejudice to any other Group Member;

(c) the duration of any disability or legal incapacity of the Late Registrant;

(d) the extent to which the Late Registrant acted promptly and reasonably once the Late Registrant knew of his or her possible entitlement under the Settlement Scheme; and

(e) the steps, if any, taken by the Late Registrant to obtain medical, legal or other expert advice and the nature of the advice he or she may have received.

7.6 A Late Registrant who wishes to have the issue of his or her eligibility to receive a Distribution determined by the Court must within 14 days of the date of notification provided by the Administrator in clause 7.4:

(a) deliver a Request for Late Registrant Review, in the form prescribed by the Administrator, to the Administrator;

(b) pay to the Administrator a bond fixed in the sum of $400.

7.7 If a Late Registrant fulfils the requirements of clause 7.6, the Administrator must:

(a) apply to the Court for a determination as to whether the Late Registrant is entitled to receive a Distribution;

(b) file an affidavit exhibiting the Statutory Declaration received from that Late Registrant (in addition to any other material the Administrator considers necessary to include in such affidavit);

(c) provide a copy to the Late Registrant of any material it files in support of the application; and

(d) if the Court determines to conduct a hearing on the application, within one business day of being informed of date, time and place of the hearing, notify the Late Registrant of that date, time and place.

7.8 For the avoidance of doubt, for the purposes of the process provided by clause 7.7, the Administrator may apply for orders and file material relating to more than one Late Registrant at a time.

7.9 Any of the Administrator's costs in relation to the process provided by clause 7.6, including preparation for and attendance at any hearing or appeal, shall be Administration Costs.

7.10 If, in relation to a Late Registrant:

(a) the Administrator decides, in its absolute discretion, upon review of a Statutory Declaration referred to in clause 7.3 that it is just and reasonable to allow the Late Registrant to be eligible to receive a Distribution; or

(b) the Court determines that the Late Registrant is eligible to receive a Distribution;

that Late Registrant shall be taken thereafter to be a Registrant for all the purposes of this Settlement Scheme.

7.11 If, in relation to a Late Registrant the Court determines that the Late Registrant is not eligible to receive a Distribution, the bond paid by that Late Registrant pursuant to clause 7.6(b) may be applied as Administration Costs.

7.12 If the Court determines that the Late Registrant is eligible to receive a Distribution:

(a) the bond paid pursuant to clause 7.6(b) shall be refunded to the Registrant;

(b) any costs incurred by the Registrant in relation to the determination of their status under this clause may not be claimed against the Administrator or the Settlement Distribution Fund.

7.13 If, in relation to a Late Registrant:

(a) the Late Registrant does not provide a Statutory Declaration within 14 days of the Notice to Late Registrants;

(b) the Late Registrant does not deliver a Request for Late Registrant Review within 14 days of the date of notification provided by the Administrator in clause 7.4;

(c) the Late Registrant does not pay to the Administrator a bond fixed in the sum of $400 within 14 days of the date of notification provided by the Administrator in clause 7.4; or

(d) the Court orders that the Late Registrant not receive a Distribution;

the Late Registrant shall not be entitled to receive a Distribution and shall not be required to receive any further notices under this Settlement Scheme.

8. Assessment of Claims

8.1 In the conducting an Assessment under this Settlement Scheme, the Administrator may request the following documents from Registrants:

(a) Health records, including but not limited to reports from treating or consulting doctors and specialists;

(b) Tax records, including but not limited to Notices of Assessment issued by the Australian Taxation Office;

(c) Any documents that are evidence of loss of income;

(d) Records kept or maintained by Centrelink;

(e) Any documents that are evidence of medical expenses, including but not limited to receipts and invoices relating to health services or treatment;

(f) Any authority (written or otherwise) to obtain records or information that, in the opinion of the Administrator, is necessary for an Assessment;

(g) Any other document that the Administrator may, in its absolute discretion, require to conduct an Assessment under this Settlement Scheme.

8.2 In the conducting an Assessment under this Settlement Scheme, the Administrator may rely upon any or all of the following:

(a) information contained in a Registration Form submitted by a Registrant;

(b) information contained in any document produced to the Administrator pursuant to a request under clause 8.1;

(c) documents provided by a Registrant to the Administrator;

(d) information provided by a Registrant whether in person, by telephone or in writing;

(e) information or records obtained pursuant to an authority provided by the Registrant;

(f) expert opinion or reports obtained by the Administrator;

(g) advice of lawyers whether or not they are employed by the Administrator.

8.3 The Administrator will conduct an Assessment for each Registrant, applying the law operating in the State of Victoria at the time the Registrant claims to have suffered an injury.

8.4 In conducting an Assessment, the Administrator must do the following:

(a) **Group membership:** Determine whether the Registrant is a Group Member;

(b) If the Registrant is determined to be a Group Member:

(i) **Causation:** Determine whether, on balance of probabilities, consumption of Bonsoy within the Relevant Period caused the injuries claimed.

(ii) **Special damages:** Assess the Registrant's entitlement to and quantum of special damages, applying relevant limitations in the *Wrongs Act 1958* (Vic).

(iii) **General damages (threshold):** Determine whether the threshold for general damages is satisfied under the:

A. *Wrongs Act 1958* (Vic); or

B. *Trade Practices Act 1974* (Cth) (as it then was).

(iv) **General damages (quantum):** If a threshold for general damages is satisfied, undertake an assessment of the quantum of general damages under:

A. *Wrongs Act 1958 (Vic)*; and

and apply the greater of the assessments.

8.5 In conducting any Assessment or in determining processes for Assessment, the Administrator may consult and take advice from any relevant expert.

8.6 Where, in the Administrator's opinion, the claim is borderline in relation to:

(a) causation of claimed injury;

(b) entitlement to special damages claimed; or

(c) entitlement to general damages;

the Administrator may determine that an Assessment Value be provided to the Registrant, but that the quantum of the Assessment Value be reduced to take into account the relevant uncertainty.

8.7 Where, in the Administrator's opinion, the costs of conducting a full Assessment of the quantum of special damages for any particular Registrant could exceed the likely quantum of special damages recoverable by that Registrant, the Administrator may estimate those damages.

8.8 Where, in the Administrator's opinion, the costs of conducting a full Assessment of the quantum of a head of special damages for each Registrant could exceed the likely quantum of special damages recoverable by the Registrants under that head of damage, the Administrator may apply an estimate of that head of damages for all or for some Registrants.

8.9 After conducting the Assessment pursuant to clause 8.3, the Administrator shall issue to the Registrant a Notice of Assessment.

8.10 The Notice of Assessment must contain the following information:

(a) the Assessment Value;

(b) disclosure of the information and documents relied on by the Administrator in the Assessment;

(c) a brief statement of reasons disclosing:

(i) any material assumptions made by the Administrator in the Assessment;

(ii) the determinations made under clauses 8.3 and 8.4 and the grounds for those determinations;

(iii) if applicable, any reduction in damages made pursuant to clause 8.6;

(d) the availability and terms of Independent Review pursuant to clause 9;

(e) a notice explaining any statutory compensation scheme, Centrelink and insurance issues which might arise as a consequence of payment to the Registrant;

(f) a brief statement explaining that the Assessment Value may not be the total amount payable to the Registrant under the Scheme in light of the operation of clause 13.2.

8.11 The Administrator may, in its absolute discretion, refer or direct:

(a) that an Assessment, in part or in whole, be conducted by a member of the Victorian Bar;

(b) that a Registrant attend a medico-legal assessment.

8.12 If a Registrant is referred by the Administrator to a medico-legal assessment pursuant to clause 8.11(b), the Administrator may, in its discretion:

(a) pay the costs of the medico-legal assessment (**medico-legal costs**), which shall in that case be deemed as Administration Costs; or

(b) require the Registrant to pay the medico-legal costs, subject only to the following requirements:

(i) it must inform the Registrant that it intends to require the Registrant to pay the medico-legal costs and that the Registrant may seek a waiver of the requirement to pay those costs by providing evidence of the Registrant's inability to pay those costs, in the form of a statutory declaration and any relevant supporting documents;

(ii) it must fairly consider any material provided pursuant to (i) but need not inform the Registrant of the reasons for its decision whether or not to require the Registrant to pay the medico-legal costs.

8.13 Where a medico-legal determination is made pursuant to clause 8.11(b), that determination is final and binding on the Registrant for the purposes of Assessment and may not be subject to Independent Review.

9. Independent Review

9.1 A Registrant who wishes to obtain a review of any part of a Notice of Assessment may request the review by delivering a Request for Review, in the form prescribed by the Administrator, to the Administrator within 21 days of the date of the Notice of Assessment, failing which:

(a) the Registrant shall be deemed to have accepted the Notice of Assessment; and

(b) the Assessment Value in the Notice of Assessment shall stand as the Final Assessment for the Registrant.

9.2 A Registrant must in any Request for Review state with precision the grounds for seeking the review.

9.3 The Administrator may, in its absolute discretion:

(a) accept that the grounds for review are made out and issue the Registrant with a revised Notice of Assessment or accept that part of the grounds for review are made out and refer the balance of the Request for Review to Independent Counsel; or

(b) require any Registrant seeking a review to pay to the Administrator, within 14 days, a bond not exceeding $1000 for the cost of the Independent Review; and

(c) treat as void and of no effect any Request for Review where the required bond has not been paid within 14 days.

9.4 Where a Registrant makes a Request for Review in respect of a part of a Notice of Assessment, the Administrator shall after receipt of the Request for Review:

(a) refer the Request for Review to Independent Counsel; and

(b) give written notice to the Registrant seeking the review that:

(i) the Request for Review has been referred to Independent Counsel; and

(ii) the provisions set out in clauses 9.6 to 9.11 below will apply to the Registrant in respect of the review.

9.5 After completion of the steps set out in clause 9.4, the Administrator will deliver to the Independent Counsel:

(a) the Registrant's claim file;

(b) the Notice of Assessment; and

(c) the Registrant's Request for Review.

9.6 The Independent Counsel:

(a) may, via the Administrator, require the production of additional documents by the Registrant;

(b) may, after receipt of the papers referred to in clause 9.5 and clause 9.6(a), confer with the Registrant (together with any representative of the Registrant);

(c) may require the Registrant to attend a medico-legal assessment;

(d) shall conduct the Independent Review:

(i) by reference to the papers provided pursuant to clause 9.5 and clause 9.6(a); and

(ii) as at the date of the original Assessment;

(e) may stipulate a deadline for compliance with any direction given by the Independent Counsel and failing compliance with the deadline shall proceed to make a determination on the basis of evidence and submissions already received.

9.7 If a Registrant is referred by Independent Counsel to a medico-legal assessment pursuant to clause 9.6(c), the Administrator may, in its absolute discretion:

(a) pay the costs of the medico-legal assessment (**medico-legal costs**), which shall in that case be deemed as Administration Costs; or

(b) require the Registrant to pay the medico-legal costs, subject only to the following requirements:

(i) it must inform the Registrant that it intends to require the Registrant to pay the medico-legal costs and that the Registrant may seek a waiver of the requirement to pay those costs by providing evidence of the Registrant's inability to pay those costs, in the form of a statutory declaration with any relevant supporting documents;

(ii) it must fairly consider any material provided pursuant to (i) but need not inform the Registrant of the reasons for its decision whether or not to require the Registrant to pay the medico-legal costs.

9.8 Where a medico-legal determination is made pursuant to clause 9.6(c), that determination is final and binding on the Registrant for the purposes of the Independent Review.

9.9 After completing the Independent Review, the Independent Counsel shall deliver to the Administrator a Notice of Review including a statement of reasons disclosing the bases (including any calculations) for the conclusions reached by Independent Counsel, and the Administrator shall deliver the Notice of Review and statement of reasons to the Registrant.

9.10 The decision of Independent Counsel shall be final and binding upon the Administrator and the Registrant in respect of the matters the subject of the Notice of Review, and no appeal shall lie to any court or tribunal in respect of any error or alleged error of jurisdiction, fact or law attaching to Independent Counsel's decision.

9.11 Where an Independent Review has been made, the Assessment Value reported in the Notice of Review shall stand as the Final Assessment (net of interest) of the claims of the Registrant.

10. Costs of an Independent Review

10.1 Where an Independent Review has been undertaken pursuant to clause 9 and the Assessment Value reported in the Notice of Review is less than or equal to 110% of the Assessment Value reported in the Notice of Assessment, the Registrant shall pay the Administrator's costs of engaging the Independent Review of up to $3000 in respect of each Independent Review.

10.2 The Administrator may in its absolute discretion waive the costs referred to in clause 10.1 where the Administrator considers that the circumstances of the Registrant disclose special compassionate grounds for the waiver.

10.3 Any costs payable to the Administrator pursuant to clause 10.1 shall be deducted from any bond paid pursuant to clause 9.3(a) and thereafter from any amount otherwise payable to the Registrant pursuant to this Settlement Scheme.

10.4 Where an Independent Review has been undertaken and the Assessment Value reported in the Notice of Review is greater than 110% of the Assessment Value reported in the Notice of Assessment, any bond paid pursuant to clause 10.1 shall be refunded to the Registrant.

11. Persons under disability

Personal Representative

11.1 Where a Registrant is an Order 15 Registrant the operation of this Settlement Scheme shall be modified as follows:

(a) each Registrant under a disability will have a personal representative appointed in relation to the operation of the Settlement Scheme;

(b) except where otherwise provided by this Settlement Scheme or by the Administrator anything that is required by the Settlement Scheme or the Administrator to be done by a Registrant, shall if the Registrant is under a disability, be done by his or her personal representative;

(c) any notices, correspondence or information required by this Settlement Scheme to be given to a Registrant shall in the case of an Order 15 Registrant be given to the personal representative of the Registrant; and

(d) any request for review of an assessment which may be given by a Registrant pursuant to this Settlement Scheme will in the case of an Order 15 Registrant be given by the personal representative of the Registrant.

11.2 A person may be appointed by the Administrator as personal representative of an Order 15 Registrant if that person is not a person under disability. The Administrator shall inform the person in writing of their appointment as a personal representative of the Registrant under this clause.

11.3 Where the interests of an Order 15 Registrant so require, the Court, may:

(a) appoint or remove a personal representative of that Registrant; or

(b) substitute another person as personal representative of that Registrant.

Senior Master's Office

11.4 Where the Administrator believes that a Registrant is an Order 15 Registrant the Administrator shall:

(a) identify the Registrant in a notice filed with the Senior Master's Office;

(b) identify the personal representative of the Registrant in a notice filed with the Senior Master's Office; and

(c) send to the registered address of the Registrant a notice informing the Registrant that, pursuant to this Settlement Scheme and pending further order from the Senior Master, the Senior Master's Office will supervise any final application of this Settlement Scheme to the Registrant's claims.

11.5 Where a Registrant is an Order 15 Registrant the operation of this Settlement Scheme shall be modified as follows:

(a) the deadlines set by this Settlement Scheme in clauses 7.3, 7.5, 7.12, 9.1 and 9.3 are extended to 42 days in respect of the claims of that Registrant, but no deadline set by this Settlement Scheme shall apply to or confine any direction or enquiry made by the Senior Master;

(b) any interim or final Distributions paid in respect of that Registrant will be paid in accordance with directions given by the Senior Master;

(c) if an Order 15 Registrant is determined to be a Group Member pursuant to clause 8.4(a), the Administrator will refer the remainder of the Assessment of the Order 15 Registrant to be conducted by Independent Counsel;

(d) if pursuant to clause 8.4(a) an Order 15 Registrant is determined not to be a Group Member, the Order 15 Registrant may request a review of that decision by Independent Counsel, using the form prescribed by the Administrator, within 42 days of the date of notice of the decision, failing which the Order 15 Registrant shall be deemed to have accepted the decision under clause 8.4(a) that he or she is not a Group Member;

(e) a decision upon review under clause 11.5(d) as to whether an Order 15 Registrant is a Group Member shall be final and binding on the Order 15 Registrant;

(f) an Order 15 Registrant must obtain leave from the Administrator to seek Independent Review of an Assessment determined under clause 11.5(c) (not being a review of whether the Order 15 Registrant is a Group Member, pursuant to clause 11.5(d)), using the form prescribed by the Administrator, within 42 days of the Notice of Assessment;

(g) the Administrator shall grant leave pursuant to clause 11.5(f) if, in the Administrator's opinion, it is 'on the cards' that Independent Review might produce a higher Assessment Value than under the Assessment; and

(h) clauses 9.3(b) and 9.3(c) and clause 10 do not apply to Independent Review, or to a review pursuant to clause 11.5(d), in respect of any Order 15 Registrant.

Procedure facilitating Order 15 approval

11.6 Where a Registrant is an Order 15 Registrant, the Administrator upon receipt or completion of all Assessments required for the Registrant's claims shall deliver to the Senior Master's Office:

(a) the Assessments including any applicable statements of reasons;

(b) a report by the Administrator detailing such background or other matters as the Senior Master may require;

(c) confirmation that:

(i) the personal representative of the Order 15 Registrant has been given notice of the assessments and any review rights in respect of the assessments in accordance with this Settlement Scheme;

(ii) the time for making any request for review has expired; and

(iii) any review of an assessment requested by the personal representative of the Order 15 Registrant has been completed in accordance with this Settlement Scheme;

(d) a proposed form of order, if applicable, including orders to the effect that:

(i) pursuant to Order 15 of the Rules, approval be granted for a compromise of the Registrant's claims by the Final Assessment of the claims being included for pro rata Distributions pursuant to this Settlement Scheme; and

(ii) any Distribution in respect of the Registrant pursuant to this Settlement Scheme be paid into Court.

(e) Upon the making by the Senior Master of orders to the effect of clause 11.6(d) above, the claim values approved by the Senior Master shall be pro-rated against the Final Assessments of all Registrants in accordance with clause 13.1.

12. Interim Distribution

12.1 Upon resolution of the Final Assessments of at least 30% (by number) of Registrants, the Administrator may at its absolute discretion make interim Distributions from the Settlement Distribution Fund to those Registrants with completed Assessments**.**

12.2 The Administrator:

(a) may make interim Distributions progressively as claims are resolved, or in tranches; and

(b) may vary the proportions at which interim Distributions are paid, for all Registrants or for particular groups of Registrants;

as the Administrator deems appropriate.

12.3 The proportion at which interim Distributions may be paid pursuant to clause 12.1:

(a) shall be determined by the Administrator having regard to the imperative to retain sufficient funds to pay pending Assessments, Administration Costs and indemnities; and

(b) shall, for any Registrant, not exceed 60% of the Registrant's Assessment Value.

13. Final Distribution

13.1 Prior to any final Distribution from the Settlement Distribution Fund to Registrants, the following payments shall be made from the Settlement Distribution Fund:

(a) an amount to the Plaintiff for the Plaintiff's Costs and Disbursements;

(b) an amount to the Plaintiff for the Plaintiff's Reimbursement Payment;

(c) any amount payable to any agency or government department pursuant to clause 6.4 of the Settlement Scheme;

(d) an amount to the Administrator for Administration Costs incurred by the Administrator and approved by the Court.

13.2 Once the payments referred to in clause 13.1 are made, the amount in the Settlement Distribution Fund, referred to as the Residual Settlement Amount, shall then be distributed to Registrants as follows:

(a) the Residual Settlement Amount shall be allocated between Registrants in the proportion which the Final Assessment of each Registrant bears to the aggregate of the Final Assessment for all Registrants;

(b) each Registrant's allocation will be distributed to each Registrant.

13.3 If, 180 days after the distribution of the Residual Settlement Amount to Registrants, any amount remains or is held in the Settlement Distribution Fund, including:

(a) interest accrued prior to the final Distribution but received after the final Distribution, or

(b) an amount representing moneys distributed to Registrants by cheques that have not been presented within 180 days of the final Distribution, the amount shall be distributed *pro rata* amongst the Registrants, subject to clause 13.4.

13.4 At the Administrator's discretion, the following amounts required to be distributed under clause 13.3 may instead be paid to the Australian Thyroid Foundation:

(a) if the total amount is less than $20,000, the total amount; or

(b) if the amount to be distributed to any individual Registrant is less than $100, that amount.

14. Immunity From Claims

14.1 The completion of Distributions made pursuant to clause 13 (including Distributions made by cheques that remain unrepresented for 180 days) shall satisfy any and all rights, claims or entitlements of all Group Members in or arising out of the Proceeding.

14.2 Upon the release of the Settlement Amount and Interest from the Settlement Reserve Fund into the Settlement Distribution Fund, the Defendants will be immune from all the Claims by all Group Members. The Defendants may plead this Settlement Scheme and the Settlement Deed to bar any claim or action (including a claim for costs) brought by any Group Member relating to the Claims.

15. Supervision By The Court

15.1 The Administrator may refer any issues arising in relation to the Settlement Scheme or the administration of the Settlement Scheme to the Court for determination.

15.2 Any costs incurred by the Administrator in any reference to the Court made pursuant to clause 15.1 shall be deemed to be Administration Costs.

16. Notice

16.1 Any notice to be given pursuant to the Settlement Scheme shall be deemed given and received for all purposes associated with this Settlement Scheme if it is:

(a) addressed to the person to whom it is to be given; and

(b) either:

(i) delivered, or sent by pre-paid mail, to that person's postal address (being, in respect of any Group Member, the current postal address recorded in the Administrator's Group Member records, as obtained from the Group Member's Registration Form, Group Member's retainer or funding agreement or directly from the Group Member);

(ii) sent by fax to that person's fax number (being, in respect of any Group Member, the current fax number recorded in the Administrator's Group Member records, as obtained from the Group Member's Registration Form, the Group Member's retainer or funding agreement or directly from the Group member) and the machine from which it is sent produces a report that states that it was sent in full; or

(iii) sent by email to that person's email address (being, in respect of any Group Member, the current email address recorded in the Administrator's Group Member records, as obtained from the Group Member's Registration Form, the Group Member's retainer or funding agreement or directly from the Group Member) and a server through which it is transmitted produces a report that states that the email has been delivered to the inbox of that person.

16.2 A notice that complies with this clause 16 will be deemed to have been given and received:

(a) if it was sent by mail to an addressee in Australia, two clear business days after being sent;

(b) if it is sent by mail to an addressee overseas, five clear business days after being sent;

(c) if it is delivered or sent by fax, at the time stated on the report that is produced by the machine from which it is sent; and

(d) if it is sent by email, at the time it is sent.

16.3 Where a Group Member is not a natural person and where one person has been nominated as the contact in respect of several Group Members, it is sufficient for the purpose of giving notice that any of the provisions of clause 16.2 are complied with in relation to that nominated person.

16.4 The Administrator's address, fax number and email address shall be as set out below unless and until the Administrator notifies the sender otherwise:

Bonsoy Class Action
Maurice Blackburn Pty Ltd
PO Box 13094
Law Courts VIC 8010
Email bonsoyclassaction@mauriceblackburn.com.au

17. Time

17.1 The time for doing any act or thing under the Settlement Scheme may be extended by the Administrator in its absolute discretion.

17.2 The time for doing any act or thing under the Settlement Scheme may be extended by order of the Court.