

IN THE SUPREME COURT OF VICTORIA
AT MELBOURNE
COMMON LAW DIVISION

S CI 2010 05318

B E T W E E N :

ERIN DOWNIE

Plaintiff

- and -

SPIRAL FOODS PTY LTD (ACN 006 292 780)

First Defendant

- and -

MUSO CO. LTD

Second Defendant

- and -

MARUSAN-AI CO. LTD

Third Defendant

SPECIAL REFEREE'S REPORT
JOHN DAVID WHITE
10 NOVEMBER 2016

Date of document	: 10 November 2016	
Filed	: Pursuant to an appointment in Orders made 27 July 2016	
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SPECIAL REFEREE'S REPORT

APPOINTMENT

1. By Orders of His Honour Justice J Forrest made 27 July 2016 I was appointed as a special referee pursuant to Rule 50.01 of the Supreme Court (General Civil Procedure) Rules 2015.
2. The appointment requires me to report in writing to the Court on each occasion the Scheme Administrator seeks approval from the Court for payment of the costs of administering the Settlement Distribution Scheme ("the Scheme"). Specifically, my written report is to respond to the two questions set out in Annexure A to the Orders made 27 July 2016 and is to state my opinion with reasons. The two questions set out in Annexure A are as follows :
 - (a) Are the costs sought in relation to the administration of the settlement distribution scheme reasonable ?
 - (b) If not, in what amount should the costs be disallowed ?

MY EXPERIENCE

3. I was admitted to practice on 1 November 1979. After working as a litigation lawyer for some years in 1983 I took a position with the then Department of Professional Conduct and Practice of the Law Institute of Victoria. Subsequently from 1984 to 1987 I was Manager of the Law Institute's then Costs Advisory Service of Victoria. During that period I was Secretary to a number of Costs Committees of the Law Institute and was also Secretary to the Costs (Federal) Committee of the Law Council of Australia. I was one of the Law Institute's representatives on the Attorney-General's 1986 Committee to review the Rules of the Supreme Court relating to costs and the Supreme Court scale of costs.
4. Since leaving the Law Institute in 1987 I have practised exclusively as a costs lawyer and from 1989 I have been engaged in practice on my own behalf.
5. My practice involves tendering advice on the Law of Costs, the preparation of assessments of costs on a solicitor-own-client and an inter partes basis, the preparation of itemized bills of costs in taxable form on both a solicitor-own-client and an inter partes basis, the preparation of Notices of Objections to itemized bills of costs and appearances in all Victorian and Federal jurisdictions on taxations of costs and reviews of costs both on a solicitor-own-client and an inter partes basis.

6. I have also been engaged as a costs expert to prepare reports in respect of security for costs applications and have been instructed to prepare advices in respect of costs disputes, costs agreements, gross sum cost applications and the like.
7. I have been appointed by the Supreme Court as a Special Referee in costs matters on a number of occasions which the most recent being in respect of costs of the settlement distribution schemes in both the Kilmore East Kinglake Black Saturday Bushfire Class Action ("the Kilmore matter" or "Kilmore") and the Murrindindi Black Saturday Bushfire Class Action ("the Murrindindi matter" or "Murrindindi").
8. I was a member of the panel established in the 1980's by the Master T Bruce, the then Taxing Master of the Supreme Court of Victoria, to represent the interests of Creditors and Contributories in taxations of costs in respect of liquidations.
9. I have been accredited as a costs law specialist by the Law Institute since 2010. I was a member of the Law Institute of Victoria Review of Scale of Costs Committee and am one of three costs lawyers who co-drafted the new Supreme Court scale of costs which came into operation on 1 April 2013. I was a member of the Law Institute's Costs Lawyers Group and until recently a member of the Law Institute's Costs Law Specialisation Committee. I am currently a member of the Law Institute's Costs Law Section Executive.
10. Since 1984 I have conducted numerous seminars on the law of costs and for more than 20 years until 2010 I delivered the annual introductory lecture on the law of cost to students at the Leo Cussen Institute for Continuing Legal Education.

MATERIALS PROVIDED

11. Following my appointment the Scheme Administrator on 15 August 2016 provided me with three folders of relevant documents which comprised the following :

1.	Memorandum	
1.1	Memorandum to Special Referee	
1.2	Filesite Folder Structure	
2.	Settlement Distribution Scheme	
2.2	Settlement Distribution Scheme	7 May 2015
3.	Settlement approval materials	
3.1	Confidential Affidavit of Irina Lubomirska and the exhibits thereto	19 Feb 2015

3.2	Open Affidavit of Irina Lubomirska and the exhibits thereto	19 Feb 2015
3.3	Transcript of Settlement Approval application hearing	25 Feb 2015
3.4	Confidential transcript of Settlement Approval CMC	22 Apr 2015
3.5	Costs Memorandum and attachment	1 May 2015
3.6	Transcript of Settlement Approval judgment	7 May 2015
3.7	Settlement Approval Judgment	7 May 2015
3.8	Settlement approval orders	8 May 2015
3.9	Costs approval orders	25 Sep 2015
4. Settlement Administration Brochures		
4.1	Information Booklet & Covering Correspondence	10 Jun 2015
5. Court Documents – June 2015 Interim Costs Application		
5.1	Affidavit of Irina Lubomirska	17 Jun 2015
5.2	Court Orders – Interim Payment	19 Jun 2015
6. Court Documents – Order 15 Registrants Settlements		
6.1	Confidential Affidavit of Irina Lubomirska and the exhibits thereto	16 Jun 2016
6.2	Correspondence with Senior Master's Office and proposed orders	20 Jun 2015
6.3	Orders of Associate Justice Daly	5 Aug 2015
7. Court Documents – June 2016 Application		
7.1	Affidavit of Irina Lubomirska and the exhibits thereto	20 Jun 2016
7.3	Transcript of Hearing	22 Jun 2016
7.4	Orders of Justice J Forrest and Associate Justice Daly	22 Jun 2016
7.5	Ruling of Justice J Forrest	21 Jul 2016
7.6	Orders of Justice J Forrest	27 Jul 2016
8. Court Approved Settlement Administration Itemised Invoices		
8.1	Bills index	
8.2	June Proforma Invoice	
8.3	July Proforma Invoice	

12. I have been given full access to the Maurice Blackburn electronic databases for the Bonsoy class action which are accessed through "Citrix".
13. Since receiving the three folders of relevant documents I have on occasions requested that Maurice Blackburn provide me with additional materials and each of those requests has been promptly and comprehensively complied with. The Scheme Administrator's staff have also provided me from time to time with additional material they consider may be relevant to my task.

14. By e-mail letter on 8 September 2016 Ms Lubomirska, on behalf of the Scheme Administrator (Maurice Blackburn), provided me with a copy of the finalised Invoice for the month of August 2016. The Scheme Administrator also advised that as at 8 September 2016 all of the assessments in the action had been finalised, that there were presently 3 review applications outstanding with Counsel and that no further reviews were expected.
15. By e-mail letter on 6 October 2016 Ms Lubomirska provided me with a copy of the finalised Invoice for the month of September 2016. By e-mail letter on 7 October 2016 Ms Lubomirska advised that an error had been identified in the August 2016 Invoice and provided me with a copy of the amended finalised Invoice for the month of August 2016. In the amended August 2016 Invoice an entry for 0.1 hours on 4 August 2016 had been removed as it should have been billed to the Kilmore matter rather than the Bonsoy matter.
16. Following a discussion between Ms Lubomirska and myself on 14 October 2016, by e-mail letter on 17 October 2016 Ms Lubomirska provided me with copies of documents relevant to the allegations made by Mr Singer on behalf of his wife (who was a group member) which ultimately became the subject of an article in the "Australian" newspaper on 15 August 2016 (see paragraphs 26.1 to 26.11 of Ms Lubomirska's Affidavit affirmed 2 November 2016).
17. By e-mail letter on 24 October 2016 Ms Lubomirska provided me with an EXCEL Workbook which detailed all fees and disbursements in the Bonsoy Scheme administration to 30 September 2016 including billed, unbilled and "unbillable" fees. I am advised that the "unbillable" fees are those Maurice Blackburn agreed to not charge to the matter. As a result of a query raised by me, by e-mail letter on 31 October 2016 Ms Lubomirska provided me with an updated EXCEL Proforma Invoice Index spreadsheet.
18. At my request Ms Lubomirska also provided me with further copies of Invoices for the period 6 February 2015 to 30 June 2015, 1 February 2016 to 29 February 2016 and 1 July 2016 to 30 September 2016.
19. By e-mail transmissions on 3 November 2016 Ms Lubomirska provided me with a copy of her Affidavit affirmed 2 November 2016 and the exhibits to that Affidavit.
20. On 3 November 2016 I was also alerted by Ms Lubomirska to a request lodged by a Registrant with the Court seeking to make a Submission to me as to concerns the Registrant had with the manner in which claims were assessed by the Scheme Administrator and as to the assessment review process. Ms Lubomirska provided me with copies of e-mail correspondence passing between the Registrant and the Scheme Administrator's staff over

the period 31 October 2016 to 2 November 2016. As a result of subsequent correspondence passing between the Court, the Scheme Administrator's staff, the Registrant and myself the Registrant has made a Submission to me which I onforwarded to the Court for directions. The Court responded to the Registrant's Submission by letter dated 8 November 2016.

21. At my request Ms Lubomirska also provided me with further copies of Invoices for the period 6 February 2015 to 30 June 2015, 1 February 2016 to 29 February 2016 and 1 July 2016 to 30 September 2016.
22. Accordingly, at the time of finalising this report I have been provided with copies of the following Invoices in respect of the Bonsoy Scheme administration :

	<i>Matter – Date of Invoice –Dates of work</i>	<i>Amount</i>
(a)	Bonsoy Settlement Administration – 29 Jun 2015 11 December 2014 to 24 December 2014	95,210.04
(b)	Bonsoy Settlement Administration – 25 Jun 2015 5 January 2015 to 5 February 2015	237,399.97
(c)	Bonsoy Settlement Administration – 20 Jun 2016 6 February 2015 to 27 February 2015	178,974.79
(d)	Bonsoy Settlement Administration – 28 Jun 2016 2 March 2015 to 31 March 2015	211,198.77
(e)	Bonsoy Settlement Administration – 28 Jun 2016 1 April 2015 to part 9 April 2015	34,789.44
(f)	Bonsoy Settlement Administration – 5 Aug 2016 part 9 April 2015 to 30 April 2015	128,779.88
(g)	Bonsoy Settlement Administration – 20 Jun 2016 1 May 2015 to 29 May 2015	208,326.40
(h)	Bonsoy Settlement Administration – 5 Aug 2016 1 June 2015 to 30 June 2015	178,376.32
(i)	Bonsoy Settlement Administration – 20 Jun 2016 1 July 2015 to 31 July 2015	288,070.40
(j)	Bonsoy Settlement Administration – 20 Jun 2016 1 August 2015 to 31 August 2015	216,991.80
(k)	Bonsoy Settlement Administration – 20 Jun 2016 1 September 2015 to 30 September 2015	180,928.43
(l)	Bonsoy Settlement Administration – 20 Jun 2016 3 October 2015 to 31 October 2015	221,691.30
(m)	Bonsoy Settlement Administration – 20 Jun 2016 2 November 2015 to 30 November 2015	174,432.27
	<i>Carried forward :</i>	2,355,169.81

	<i>Matter – Date of Invoice –Dates of work</i>	<i>Amount</i>
	<i>Brought forward :</i>	2,355,169.81
(n)	Bonsoy Settlement Administration – 20 Jun 2016 2 December 2015 to 29 December 2015	104,284.27
(o)	Bonsoy Settlement Administration – 20 Jun 2016 4 January 2016 to 29 January 2016	131,278.76
(p)	Bonsoy Settlement Administration – 20 Jun 2016 1 February 2016 to 29 February 2016	226,475.14
(q)	Bonsoy Settlement Administration – 20 Jun 2016 1 March 2016 to 31 March 2016	183,961.54
(r)	Bonsoy Settlement Administration – 20 Jun 2016 1 April 2016 to 29 April 2016	145,235.38
(s)	Bonsoy Settlement Administration – 20 Jun 2016 2 May 2016 to 31 May 2016	147,703.18
(t)	Bonsoy Settlement Administration – 5 Aug 2016 1 June 2016 to 30 June 2016	231,074.01
(u)	Bonsoy Settlement Administration – 10 Aug 2016 1 July 2016 to 29 July 2016	158,587.32
(v)	Bonsoy Settlement Administration – 18 Oct 2016 1 August 2016 to 31 August 2016	42,327.23
(w)	Bonsoy Settlement Administration – 6 Oct 2016 1 September 2016 to 30 September 2016	32,334.50
		\$3,758,431.14

23. I have conducted a detailed examination of all of the materials provided to me by the Scheme Administrator's staff.
24. During the course of my appointments as a Special Referee in both the Kilmore settlement scheme administration (Supreme Court Proceeding No S CI 2009 04788) and the Murrindindi settlement scheme administration (Supreme Court Proceeding No S CI 2012 04538) I met with the Scheme Administrator's staff for both of those matters at the offices of Maurice Blackburn on 20 November 2015 and again on 31 May 2016.
25. At those meetings I was given a detailed review of the assessment processes and a most comprehensive overview of the work done by the Scheme Administrator's staff in establishing and refining the procedure for processing claims and the electronic systems necessary for the efficient handling of that procedure, work done and continuing to be done in refining the electronic systems and the process generally, and work being done by the Scheme Administrator's staff in actually processing claims. I was also shown in soft copy and examined the electronic "FileSite" and "Matter Centre" records.

26. In addition at the latter of the two meetings I also examined and audited a number of hardcopy files in respect of late registrants and the like.
27. These two meetings were invaluable in giving me an understanding of the complex processes involved in establishing and administering a settlement scheme and also provided me with a good general insight into the manner in which Maurice Blackburn manages class action settlement administration schemes. In addition, the matters considered and the tasks involved in preparing my reports as special referee in both the Kilmore and Murrindindi special references have been of great assistance to me in considering the unique features of the administration of the Bonsoy settlement scheme and in preparing this report.

ESTABLISHMENT OF THE SETTLEMENT SCHEME

28. The Bonsoy Class Action ("the Class Action") was commenced on 30 September 2010 against the First Defendant (Spiral Foods Pty Ltd) alone. On 26 October 2012 Muso Co. Ltd and Marusan-Ai Co. Ltd were joined as the Second and Third Defendants respectively.
29. The trial of the proceeding was ultimately fixed for hearing on 27 October 2014 with an estimate of 4 weeks although it seemed more likely that the trial would proceed for at least 6 weeks and possibly longer. However, following a third mediation and in the weeks prior to the trial commencing the parties continued settlement negotiations and the Court was advised on 16 October 2014 that the parties were close to agreement on settlement.
30. On 17 November 2014 a settlement deed was executed under which the Class Action was settled for the sum of \$25,000,000.00 inclusive of costs of the proceeding and the administration of the settlement.
31. Settlement of the Class Action proceeding required that each individual claim be assessed and at the time of settlement there were approximately 496 Registrants. There were also 82 Late Registrants and under the Settlement Distribution Scheme these Late Registrants were required to provide statutory declarations setting out the reasons for their failure to register within the stipulated time.
32. The Settlement Deed was approved by J Forrest J on 8 May 2015 and on that date the Court also considered and approved the Scheme.
33. Broadly, the Scheme establishes a comprehensive framework for distributing the settlement sum among the Plaintiff and the Class Action group members including (a) the actual

procedures to be utilized in assessing the individual claims of Registrants against the criteria for entitlement, (b) the procedure to be adopted where a claimant is dissatisfied with the initial assessment (c) the manner in which the assessment and any subsequent review of claims by minors or persons under a disability are to be dealt with and (d) the manner in which the claims of Late Registrants are to be dealt with.

34. The Scheme also provides that the Scheme Administrator's costs of and incidental to the implementation of the scheme be paid out of the settlement sum.

COSTS FOR WHICH APPROVAL IS SOUGHT BY THE SCHEME ADMINISTRATOR

35. This report deals with costs of administering the Settlement Scheme over the period 11 December 2014 to 30 September 2016.
36. The Scheme Administrator has applied for approval of costs on two occasions. The first was at the Case Management Conference on 19 June 2015 when approval was sought for an interim payment of costs of administering the Settlement Scheme over the period 11 December 2014 to 1 June 2015. An interim payment of up to \$322,610.00 was sought which was equivalent to the interest that would accrue on the Settlement Sum in that financial year. On 19 June 2015 Associate Justice Daly made Orders approving an interim payment from the Settlement Sum of up to \$332,610.00. Clearly the amount of \$322,610.00 was *on account of* administration costs (including disbursements) for the period 11 December 2014 to 1 June 2015.
37. The second occasion on which the Scheme Administrator applied for approval of costs resulted in the Orders of His Honour Justice J Forrest and Associate Justice Daly made 21 June 2016 in which approval was given for a further interim payment from the Settlement Sum of \$424,963.00. Clearly the amount of \$424,963.00 was *on account of* administration costs (including disbursements) for the period 2 June 2016 to 1 June 2016.
38. The costs for which approval is sought covered by this report are all costs incurred over the period 11 December 2014 to 30 September 2016.

THE LAW RELEVANT TO MY TASK AND THE METHODOLOGY TO BE ADOPTED

39. The task for which I was appointed is to assist the Court in making a determination as to whether the costs claimed by the Scheme Administrator have been reasonably incurred and are reasonable in amount.

40. There is well-established case law in respect of the methodology to be adopted when assessing a claim for gross sum costs on an inter partes basis in Class Actions – indeed, in his Judgment delivered on 23 December 2014 in *Matthews v Ausnet Electricity Services Pty Ltd & Ors* [2014] VSC 663 (“the *Kilmore proceeding*”), Osborn J considered the law in relation to the approval of inter partes as costs at considerable length, including the decisions of Sackville J in *Courtney v Medtel Pty Limited* [2013] FCA 636 and Gordon J in *Modtech Engineering Pty Limited v GPT Management Holdings Ltd* [2013] FCA 626 (“*Modtech*”).
41. At paragraph 37 of her Judgment in *Modtech* Gordon J considered the requirement that sufficient information be provided to the Court by the solicitors seeking approval of their professional fees should not be unduly onerous.
42. Her Honour further considered that the information useful to the Court in assessing the reasonableness of the fees and disbursements claimed as a gross sum involved a review and consideration of :
 - (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 Counsel retained was reasonable.
43. At paragraph 353 of his Judgment in the *Kilmore proceeding*, Osborn J set out the principles underlying the methodology ultimately accepted by Gordon J in *Modtech Engineering Pty Limited v GPT Management Holdings Limited (No 3)* [2014] FCA 680 as follows :
 - (a) there was a need for an appropriate balance in relation to the level of information available to the court and the costs associated with the provision of that information: *Re Medforce Healthcare Services Ltd (in liq)* [2001] 3 NZLR 145;
 - (b) the principles applicable to the assessment of costs on a gross sum basis provided some guidance. When assessing costs in that way the methodology adopted and information provided must enable the Court to be confident that the approach taken is logical, fair and reasonable: *Beach Petroleum NL v Johnson (No 2)* (1995) 57 FCR 119; *Seven Network Ltd v News Ltd* (2007) FCA 2059 and *Leary v Leary* [1987] 1 WLR 72;

- (c) at a minimum, a statement of the work undertaken together with a sufficiently itemised account to enable the charges made to be related to the work done was required: *Re Medforce*;
- (d) the matters to be taken into account in a review of legal costs under s 3.4.44(1) of the *Legal Profession Act 2004* (Vic) ("the LPA"), which include whether or not it was reasonable to carry out the work to which the legal costs relate, whether or not the work was carried out in a reasonable manner and the fairness and reasonableness of the amount of legal costs in relation to that work, as well as the matters that may be taken into account in considering what costs are fair and reasonable under s 3.4.44(2) of the LPA; and
- (e) The considerations enunciated in *Modtech* and *Modtech Engineering Pty Ltd v GPT Management Holdings (No 2)* [2013] FCA 1163.

44. On the basis that it reflected the methodological principles approved by Gordon J in *Modtech* and was very comprehensive Osborn J accepted, at paragraph 381 of his Judgment in the *Kilmore proceeding*, the following as an appropriate methodology to be utilized in determining whether gross sum costs claimed on an inter partes basis are reasonable :

- (i) calculate the time spent on the proceeding by each of the lawyers and non-lawyers;
- (ii) apply the Supreme Court scale rates and charges to work done by lawyers and non-lawyers;
- (iii) identify and excise the number of hours relating to non-recoverable matters by reference to costs that are not claimable under the Supreme Court scales;
- (iv) apply any discounts after considering the nature of the work claimed or the manner in which the work was done;
- (v) apply the factor for loading for skill, care and attention as claimable under each of the old or new Supreme Court scales;
- (vi) apply the complexity loading factor as provided for under the Maurice Blackburn conditional costs agreements; and
- (vii) apply the factor of the 25 per cent uplift fee to professional fees on obtaining a successful outcome as claimable under the Legal Profession Act 2004 and provided for under the Maurice Blackburn conditional costs agreements.

45. My task here is however again slightly different. I am asked to advise whether the costs incurred in administering the Scheme are reasonable. The nature of work done in administering the Scheme in this matter is inherently different to the nature of work done in prosecuting a claim through the Court – to paraphrase Osborn J at paragraph 400 of his

Judgment in the *Kilmore proceeding*, although Maurice Blackburn is acting as Scheme Administrator, its role is almost entirely administrative and supervisory.

46. In addition, the Scheme explicitly provides that the Scheme Administrator is not to act as a lawyer representing individual group members. This is so, I assume, given that the Administrator's staff are, *inter alia*, to adopt a quasi-judicial role in that the appointed staff member or staff members is/are required to conduct an Assessment of each claim in accordance with the procedure established by the Scheme and to then issue a Notice of Assessment in respect of that claim.
47. Accordingly, bearing in mind the information that Gordon J at paragraph 37 in *Modtech* considered would be useful to the Court in assessing the reasonableness of costs and having regard to the roles of the Scheme Administrator's staff as well as the scope of the work done by them to date and the likely scope of work still to be done by them, I propose to adopt the following methodology :
 - (a) step 1 – establish the basis on which the Administrator's costs are to be calculated;
 - (b) step 2 – identify the scope of work done;
 - (c) step 3 – identify the nature of the costs incurred over particular periods of time;
 - (d) step 4 – examine the copy Invoices and calculate the time spent on the proceeding by each of the lawyers and non-lawyers;
 - (e) step 5 – examine the copy Invoices and take and examine :
 - (i) samples of charges claimed for work done by reference to selected operators and selected dates, and
 - (ii) samples of disbursements claimed by reference to selected service providers and selected dates;
 - (f) step 6 – apply the established basis for costing to the work reasonably done by the Administrator's staff;
 - (g) step 7 – identify the number of hours relating to non-recoverable work by reason of that work not being reasonably incurred or reasonable in amount and, if any, excise that work; and
 - (h) step 8 – identify and, if any, reduce or deduct disbursements which appear unreasonably incurred or unreasonable in amount.

STEP 1 – ESTABLISH THE BASIS ON WHICH THE ADMINISTRATOR'S COSTS ARE TO BE CALCULATED

48. Unlike the Settlement Distribution Schemes in the *Kilmore* matter and the *Murrindindi* matter, which stipulate that the costs incurred by the Scheme Administrator and his staff are to be

calculated pursuant to the hourly rates specified in the Schedules to those Settlement Distribution Schemes, the Scheme in the Bonsoy matter is silent as to the method of charging. Nevertheless, the quantum of the Administration Costs must be reasonable and it follows that the method of quantifying those costs must also be reasonable.

49. It is clear from the Invoices provided to me that in calculating costs for work done the Scheme Administrator's staff have charged on a time basis utilizing differing hourly rates depending upon the qualifications, expertise and level of experience of the various file operators and that those hourly rates have been applied in units of 6 minutes or part thereof.
50. I have had the benefit of reading Ms Dealehr's Expert Report dated 15 February 2015 in respect of solicitor own client costs of the Bonsoy Class Action proceeding together with the Memorandum of Judicial Registrar Gourlay dated 17 August 2015 in respect of that expert report and note that in the Bonsoy Class Action proceeding Maurice Blackburn had entered into a Conditional Costs Agreement with the Plaintiff under which charges would be calculated on the hourly professional rates set out in the Costs Agreement. Maurice Blackburn utilized the "Elite" system (an automated time and billing system in which time is recorded in units of 6 minutes or part thereof) to record the time expended by file operators in the Bonsoy Class Action proceeding. Ms Dealehr was of the view that the hourly rates claimed for work done in the Bonsoy Class Action proceeding reflected the expertise and experience acquired by Maurice Blackburn in the specialised field of class actions and were reasonable. Judicial Registrar Gourlay agreed.
51. It would seem that on establishment of the Scheme Maurice Blackburn continued to utilize the same time billing system which was no doubt expedient having regard to the facts that (a) its existing "Elite" system had been utilized in the Bonsoy Class Action proceeding, (b) the "Elite" system was an eminently suitable method of keeping track of time spent by the Administrator's staff in conducting the administration and (c) the Administrator's staff were well familiar with the "Elite" system. Additionally, the use of time based billing is now commonplace amongst lawyers and in fact I observe that in my experience it is now probably the most common method of charging utilised by lawyers in Victoria.
52. It must also be recognized that in implementing and administering the Scheme Maurice Blackburn was not doing legal work as such and accordingly the statutory scales are neither applicable nor quite probably appropriate having regard to the nature of work done.
53. Further, there is recognition in the case law that the use of appropriate hourly rates is appropriate when the work performed is not strictly legal work – see for example the decision

in *Deposit Investment and Investment Co Ltd (recs apptd) -v- Peat Marwick and Co* (1996) 39 NSWLR 267 at 291. Accordingly in my view it is reasonable for Maurice Blackburn to have applied a time based system of charging to work done in administering the Scheme.

54. From my examination of the Invoices it appears that the hourly rates applied in respect of the Bonsoy Settlement Scheme are more or less the same as those in the Conditional Costs Agreement referred to in paragraph 50 above. They are also the same hourly rates as those detailed in the Schedules to both the Kilmore and Murrindindi Settlement Distribution Schemes. Those two Settlement Distribution Schemes and their Schedules were approved by the Court and the hourly rates in those Schedules were applied to work done in administering the Settlement Distribution Schemes in both of those matters.
55. Accordingly, insofar as the hourly rates applied are concerned I am satisfied that the hourly rates applied in administering the Bonsoy Settlement Scheme are reasonable given that they do reflect the expertise and experience acquired by the Administrator's staff in this specialised field.

STEP 2 – THE SCOPE OF WORK DONE

56. The second step in determining whether the costs claimed are reasonable is to identify the nature and scope of work done.
57. It should be noted at this point that the process of assessment in the Bonsoy Settlement Scheme differs in some respects from that in the Kilmore and Murrindindi Settlement Distribution Schemes. In the Kilmore and Murrindindi administrations the assessment of claims was not done in the first instance by the Administrator or his staff but rather was performed, depending on whether the claim was for personal injury and dependency on the one hand or economic loss and property damage on the other, by a team of independent Counsel or a team of independent Assessors respectively.
58. In the Bonsoy administration pursuant to the Scheme the assessment of claims in the first instance is done by a member of the Administrator's staff – around half by Ms Lubomirska with the remaining half by Ms Lyng subject to review by Ms Lubomirska – save for complex matters which may be referred to Counsel in the first instance. I note that the assessment process in the then proposed Bonsoy Settlement Scheme was well scrutinized by His Honour Justice J Forrest J at the hearing on 25 February 2015 – see particularly page 42 line 6 through to page 63 line 18 of the transcript of that hearing.

59. As a result of the matters canvassed on 25 February 2015 some amendments were made to the proposed Scheme which were the subject of discussion at the hearing on 22 April 2015 – see particularly the transcript of that hearing from commencement through to page 9 line 24. I note that in respect of the Scheme as then settled His Honour stated in his Judgment of 7 May 2015 at paragraph 159 that he was “...satisfied that the manner in which the scheme operates (and particularly the scope for review), protects the group members. It allows the group members to have individual assessment of their claims and those who do not receive an entitlement are no worse off than they would have been had their case proceeded to Judgment.”
60. In any event, identifying the nature and scope of work done is to some extent evident from the copy Invoices provided to me however the logistics of implementing the Scheme and the nature of work done is best explained in the Affidavits of Ms Lubomirska affirmed 17 June 2015, 20 June 2016 and 2 November 2016 filed in this proceeding following establishment of the Scheme.
61. Those Affidavits comprehensively detail the scope of work done in particular categories over particular periods of time during the course of the administration of the Scheme to 2 November 2016. For the purposes of this report it is therefore appropriate to briefly summarize those parts of the relevant Affidavit material which detail the scope of work done.
62. Ms Lubomirska’s Affidavit affirmed 17 June 2015 at paragraph 11.1 provides the following overview of the primary categories of work done over the period 11 December 2014 to 17 June 2015 :
- (a) obtaining settlement approval,
 - (b) management of group member records and communications,
 - (c) establishment of systems and precedents for settlement administration,
 - (d) negotiating agreements and arrangements with third parties,
 - (e) obtaining records and information necessary for the assessment of claims,
 - (f) undertaking the late registrant process in accordance with the Scheme,
 - (g) compliance with procedures concerning persons under disability, and
 - (h) assessment of claims.

63. A further analysis of the work covered by the above eight categories is deposed to at paragraphs 11.3 to 11.28 of Ms Lubomirska's Affidavit affirmed 17 June 2015. The actual work done over the period 11 December 2014 to 17 June 2015 included :

(a) Settlement approval

the preparation and filing of extensive Affidavit material, obtaining and perusing a detailed opinion on settlement from Counsel, preparing submissions, obtaining and reviewing an expert report of a costs consultant as to solicitor own client costs of the Bonsoy Class Action proceeding, preparing a memorandum regarding estimated costs of the administration process and instructing at the hearing of the application which was heard over the course of one day.

(b) Management of group member records and communications

- (i) dealing with a large number of telephone calls and emails from existing registrants and members of the public following announcement of the settlement agreement which resulted in significant work being undertaken to manage those communications and to disseminate appropriate information and update records,
- (ii) dealing with a large number of queries regarding registering for the class action. On the basis of information provided by Ms Lyng of the Administrator's staff Ms Lubomirska understood that approximately 132 persons requested and were sent registration materials after the Court-ordered class closure date and of those 84 persons returned registration forms and became Late Registrants in the Class Action,
- (iii) dealing with continuing regular queries and communications from registrants and late registrants as they arose,
- (iv) providing registrants and late registrants with 6 separate updates in respect of the process of settlement approval, modifications made to the draft Settlement Scheme and the effect of the approved settlement administration process.

(c) establishment of systems and precedents for settlement administration,

- (i) designing and implementing an integrated system for tracking and managing claims and the recording of assessments made together with the reasons for those assessments,
- (ii) preparing precedents for various stages of the settlement administration process, including precedents for the Notice of Assessment, the Statement of Reasons and requests for information and authorities,
- (iii) preparing a 27 page Information Booklet entitled "*Personal Injury Compensation in the Bonsoy Class Action*" which set out the applicable law, evidentiary principles, details of

the settlement administration process, obligations of registrants and potential third party repayment obligations. This Information Booklet was forwarded to all claimants and was also published on the Bonsoy Class Action webpage.

(d) *negotiating agreements and arrangements with third parties*

- (i) negotiating a bulk payment arrangement with Medicare including the establishment of a bulk payment amount with Medicare,
- (ii) entering into discussions with the Department of Human Services to reach an agreement concerning social security implications for group members of assessments under the Settlement Scheme,
- (iii) entering into discussions with a major private health insurer regarding arrangements for ascertaining potential repayment obligations of group members,
- (iv) appointing Independent Counsel under the Settlement Scheme and briefing them with required materials and information.

(e) *obtaining records and information necessary for the assessment of claims*

- (i) sending authorities to some approximately 230 registrants whose medical and financial records had not been provided at the time the Deed of Settlement in order to obtain those medical and financial records,
- (ii) requesting medical records and Australian Taxation Office records for registrants who returned signed authorities, which resulted in approximately 125 medical records and 81 Australian Taxation Office records having been received by 17 June 2015. The process of obtaining authorities and medical materials involved responding to numerous queries from registrants and medical centres, ascertaining that the authorities and records received related to the correct period of time and the correct medical practitioners and processing and managing the records received,
- (iii) paying the fees charged by Medical centres for provision of medical records,
- (iv) identifying registrants who did not disclose a compensable injury on their registration forms and sending requests for further information to those registrants to clarify whether they had a compensable condition.

(f) *undertaking the late registrant process in accordance with the Scheme*

- (i) issuing a notice to each late registrant in accordance with the requirements of paragraphs 7.2 and 7.3 of the Scheme requiring completion of a Statutory Declaration setting out the reasons for late registration,
- (ii) reviewing 71 Statutory Declarations subsequently received and admitting as registrants persons who provided reasons falling into certain categories in the class action,

- (iii) for the purposes of making a determination pursuant to clauses 7.4 and 7.5 of the Scheme, examining the Statutory Declarations of persons whose reasons for failing to register did not fall into the certain categories referred to above and making further enquiries in respect of some of those late registrants.

(g) *compliance with procedures concerning persons under disability*

- (i) identifying registrants under a legal disability ("Order 15 Registrants"),
- (ii) appointing personal representatives for the Order 15 Registrants in accordance with clause 11.2 of the Scheme,
- (iii) forwarding the information required by clause 11.4(c) of the Scheme to the personal representatives together with information regarding modifications of the Scheme as it applies to Order 15 Registrants,
- (iv) preparing and filing with the Senior Master's Office the Notice required by clause 11.4 of the Scheme.

(h) *assessment of claims*

commencing the process of assessing claims and drafting reasons as required by the Scheme.

64. Ms Lubomirska's Affidavit affirmed 20 June 2016 provides most comprehensive details of the nature of work done since approval of settlement to 20 June 2016 including :

- (a) Part B which is an overview of outcomes of the administration process comprising an analysis of the claims made and assessed; reviews; Administration Costs; the recovery rate and the settlement administration process generally;
- (b) Part C which contains information regarding the Settlement Scheme comprising settlement and approval; settlement monies and accounts; the interim Administration Costs application; withdrawals from the Settlement Distribution Fund and interest earned on the Settlement Distribution Fund;
- (c) Part D which details the settlement administration team and their hourly rates; changes to the team; work allocation and roles and the appointment of Senior and Junior Counsel;
- (d) Part E which details the systems and structures set up for settlement distribution including design and implementation of the computer systems for claims and tracking; electronic document management; preparation of precedents for various stages of the

- settlement administration process; preparation and dissemination of the Information Booklet; the standardising of assessments of general damages; the obtaining of an expert report in respect of causation of thyroid cancer; the setting up of an online survey to obtain information regarding private health insurance and Centrelink benefits; negotiations with Medicare in respect of the proposed establishment and ultimate approval of a bulk payment agreement; discussions with Centrelink in respect of the establishment of an agreement concerning the social security implications of assessments under the Scheme; discussions with Medibank in an attempt to establish a centralized process for determining payback obligations; arrangements to establish an electronic system to facilitate the efficient distribution of settlement monies and requests for an interim distribution;
- (e) Part F which details the implementation and outcomes of the late registration process including post-settlement enquiries and late registration; the Late Registrant process itself; the number of late registrations submitted and the number of late registrations admitted on the one hand and not admitted on the other;
 - (f) Part G which details the procedures applied to Order 15 Registrants and outcomes including compliance with the procedures under the Scheme for dealing with persons under disability and the outcomes of claims made on behalf of Order 15 Registrants;
 - (g) Part H which details the processes for the obtaining of necessary records and information including the obtaining of medical and financial records where none had been provided earlier; the obtaining of updated medical records for some Registrants; the obtaining of Notices of Benefits from private health insurers; the obtaining of employment records, business profit and loss statements or Centrelink record on a case by case basis; Registrant interviews in order to ensure the reliability of assessments; issues encountered in obtaining medical records from treating doctors and in obtaining medico-legal reports, the provision of reports commissioned by Registrants themselves and issues in respect of fees claimed for accessing medical records; issues encountered in obtaining information from Registrants and in dealing with non-compliant Registrants;
 - (h) Part I which details the assessment process implemented in administering the settlement including the general process adopted; the position in respect of Registrants who withdrew their claims; the assessment of causation and dealing with those registration forms which did not disclose a compensable injury; issues arising in the assessment of causation; matters involving misdiagnosis and/or incorrect treatment;

the process of assessing damages in the categories set out in the Scheme and in accordance with the legal principles; determination of private health insurance obligations and claims referred to Counsel apart from Order 15 Registrant assessments;

- (i) Part J which details the review process, review applications and outcomes including an overview of the independent review process; outcomes as at 20 June 2016 of the independent reviews conducted and the costs of unsuccessful reviews;
- (j) Part K which details the anticipated recovery rates and provides a comparison with prior modelling including details of the likely final recovery rate; the reasons for the difference between the likely final recovery rate and the earlier pre-approved modelling including claims failing on causation, the position re past medical expenses, future medical expenses and economic loss;
- (k) Part L which details Administration Costs to 20 June 2016 and the variance from prior estimates including the quantum of fees and disbursements as at 31 May 2016; the recording of time; the manner in which Invoices are generated; the work to which the Administration Costs relate; a comparison with the estimate of Administration Costs made on 1 May 2015 and an analysis of the quantum of future costs per claim; and
- (l) Part M which details the application for interim approval of Administration Costs in the sum of interest expected to accrue on the Settlement year for the then current financial year.

65. Ms Lubomirska's Affidavit affirmed 2 November 2016 provides most comprehensive details of the nature of work done from 20 June 2016 to 2 November 2016 including :

- (a) Part B which is a summary of outcomes of the Settlement Administration noting that four claims were referred to Independent Counsel; further noting that informal advice in respect of several claims was obtained from Independent Counsel from time to time; confirming that the claims of all 569 Registrants had been completed by 15 August 2016 and that 377 of those claims had been found to have an entitlement to compensation; noting the number of review applications and the outcomes thereof; as to Administration costs, interim payments made and total interest earned on the Settlement sum to 30 September 2016 and in respect of the likely recovery rate for eligible group members;

- (b) Part C which details the monies contained in the Settlement Distribution Fund and transactions that occurred since the Affidavit affirmed 20 June 2016; the Bonds paid and held in trust in relation to requests for review; the proposed transfer of the funds held in trust to the Settlement Fund; a broad overview of the position in respect of interim payments; a full explanation for the inadvertent breach of the Scheme in respect of one Registrant's request for an interim payment and the Scheme Administrator's proposal to remedy the consequences of that error;
- (c) Part D which details the assessment and review processes and outcomes including a more detailed analysis of the process of assessment of claims and the outcomes thereof since 20 June 2016; a very comprehensive analysis of the review process of assessment of claims and the outcomes thereof since 20 June 2016; confirming that the last review had been completed by 14 October 2016; detailing the position re Bonds paid on the reviews and the residual costs of the reviews; noting the necessity to obtain two medicolegal reports in the course of the assessment and review process and as to the position re Registrants who withdrew their claims;
- (d) Part E which details the steps taken and arrangements made to prepare for settlement distribution including the setting up of a system for electronic transfer of payments to eligible group members; the survey conducted of eligible group members to ascertain relevant bank account details; the outcome of that survey and the proposal to make the payment by cheque where the Registrants either (i) failed to provide bank details, (ii) do not have bank accounts in their name, (iii) are deceased (in which case payment is to be made to their Estate) or (iv) are Order 15 Registrants (in which case payment is to be made into Court); the discussions and correspondence with the Senior Master's Office of the Supreme Court in respect of the two eligible Order 15 Registrants; the arrangements made with the executors of the Estate of the two deceased eligible group members for payment of entitlements; the discussions and correspondence with Medicare in respect of implementation of the bulk payment agreement; the discussions and correspondence with Department of Human Services in respect of reaching and implementing an agreement for Centrelink repayments; the contact with the Department of Veteran's Affairs ("DVA") as to the process adopted for identifying and determining the amount of repayment due to the DVA by two of the Registrants and the proposed arrangements for payment of those obligations; the obtaining of Notices of Benefits for 120 Registrants as to claims made on private health insurance funds in respect of the compensable injury; the identification of what services in the Notices of Benefits related to the compensable injury; communications with the private insurers in respect of the 21 Registrants found to have an obligation to repay their private health

insurer; agreements reached in respect of the bulk payment option and arrangements for direct repayment by the Scheme Administrator of amounts due by particular Registrants to their private insurer; the creation of the Master Workbook in ECXCEL; the audit conducted of the assessment figures in the Master Workbook and the rectification of errors identified in a small number of claims and the creation of a formula to calculate the recovery rate;

- (e) Part F which canvasses matters in respect of Administration Costs including details of Administration Costs as recorded to 30 September 2016; clarification of a discrepancy identified by me between the proforma Invoices referred to above and the totals in some of the proforma Invoices exhibited as "IL-8" to Ms Lubomirska's Affidavit affirmed 20 June 2016; an indication of Administration Costs recorded for the month of October 2016; a detailed report as to an article which appeared in The Australian newspaper on 15 August 2016 reporting various complaints from Mr Singer, who is the husband of a group member; a complaint from a Registrant received by the Court on 2 November 2016 together with details of earlier correspondence dating from 17 October 2016 between that Registrant and the Scheme Administrator's staff and discussions and correspondence with me in respect of the special reference;
- (f) Part G which details the rate of recovery for eligible group members and the methodology for calculation of the rate of recovery including an explanation of the formulae within the Master Workbook used to calculate the rate of recovery and a comparison of the most recent calculation of the rate of recovery with the matters canvassed in this respect in the Affidavit of 20 June 2016;
- (g) Part H which details the taxation issues that impact on the Settlement Distribution Fund and the arrangements for distribution of settlement including advice as to the tax status of interest earned on the Settlement Fund and the necessity to await a ruling or advice from the Australian Taxation Office;
- (h) Part I which details the proposed arrangements for distribution of the settlement fund and the orders required to effect same including the options available for distribution being (i) distribution now on the basis that there will be no tax liability, (ii) delaying distribution until the taxation issues are resolved or (iii) quarantining an appropriate amount in respect of a potential tax liability and distributing the remainder on a pro-rata basis; advising reasons for preferring the third option and with a suggested mechanism for the "dual distribution" option.

66. I observe from the above that as with the Kilmore and Murrindindi settlement distribution administrations the scope of work expanded over time as problems arose which could not have been foreseen until the Scheme was actually implemented and operating. However it is also clear to me that there has been a continual concerted effort on the part of the Scheme team to ensure that all claims are dealt with as cost effectively and expeditiously as possible.
67. I have no reason to consider that the descriptions of the scope of work done over particular periods of time as broadly deposed to in the Affidavits of Ms Lubomirska are anything other than accurate and my view in this respect has also been confirmed as a result of having undertaken the sampling process referred to as step 5(i) in paragraph 47 above and having regard to my examination of the other relevant hard copy and electronic material made available to me.

STEP 3 – THE NATURE OF COSTS INCURRED OVER PARTICULAR PERIODS OF TIME

68. The third step in determining whether the costs claimed are reasonable is to identify the nature of the costs incurred over particular periods of time.
69. On the Invoices, Administration Costs are separated into two sections being (i) professional charges and (ii) disbursements.
70. Identification of the nature of the costs incurred over particular periods of time is to a very large extent evident from a close examination of the copy Invoices provided to me. The Invoices prepared by the Scheme Administrator, copies of which have been exhibited to the various Affidavits affirmed by Ms Lubomirska since approval of the Scheme, are very comprehensive and by far the greater number of the entries contain a detailed narrative of the work done.
71. Save for the missing element of the statutory requirements for an itemized bill under Order 63.42(2)(a) of the Supreme Court (General Civil Procedure) Rules 2015 that the items be individually numbered, those Invoices are largely in itemized form and consequently are reflective of the actual work done.
72. The nature of costs incurred for work done over particular periods of time during the course of the administration of the Scheme is also explained in quite some detail in the Affidavit material filed in this proceeding following establishment of the Scheme. Having regard to the matters canvassed in paragraphs 58 to 65 above I do not consider it necessary for me to

once again summarize in this report those parts of the relevant Affidavit material which detail both the scope and the nature of costs incurred over the relevant periods.

73. It is also clear from an examination of (a) the Invoices and (b) those parts of the relevant Affidavit material which detail the scope and nature of costs incurred over the relevant periods that as the settlement distribution process was increasingly implemented and as more claims were progressively dealt with, administrative and/or logistic issues arose or otherwise became evident and were likewise progressively dealt with.
74. Accordingly, I have no reason to consider that the descriptions of the nature of the costs incurred over particular periods of time as broadly deposed to in the Affidavits of Ms Lubomirska referred to above are anything other than accurate and once again my view in this respect has been confirmed as a result of having undertaken the sampling process referred to as step 5(i) in paragraph 47 above and having regard to my examination of the other relevant hard copy and electronic material available to me.

STEP 4 – CALCULATE THE TIME SPENT BY LAWYERS AND NON-LAWYERS

75. The Scheme Administrator's staff at my request provided me with a Memorandum dated 2 November 2016 in respect of this administration which includes a table detailing (i) the name of the file operator, (ii) the position held by the file operator, (iii) the file operator's (GST exclusive) hourly rate, (iv) the total of hours worked by the file operator and (v) the total quantum of charges recorded by that file operator and which also describes in detail the nature of the work carried out by each of the named file operators over the period 11 December 2014 to 2 November 2016. The Memorandum is **Attachment 1** to this report.
76. It is apparent from the Memorandum and the Invoices over the period 11 December 2014 to 30 September 2016 that one Senior Associate (Ms Irina Lubomirska) was appointed as Special Counsel as from 1 July 2015. It is apparent from the Memorandum that one Paralegal (Ms Samantha Camilleri) was admitted to practice as a solicitor from 1 December 2015.
77. It is further apparent from the Memorandum and the Invoices over the period 11 December 2014 to 30 September 2016 that :
 - (a) Ms Lubomirska's hourly rate increased from \$610.00 (exclusive of GST) to \$720.00 (exclusive of GST) as from 1 July 2015 as a result of her appointment as Special Counsel, and

- (b) Ms Camilleri's hourly rate remained throughout that period at the Paralegal rate of \$320.00 (exclusive of GST) notwithstanding that she had been admitted to practice in mid-2015 and employed by Maurice Blackburn as a solicitor from 1 December 2015.

78. In order to verify the time spent by lawyers and non-lawyers on the work claimed in the Invoices I instructed my assistant, Mrs Nadine Straney, to review all the Invoices and prepare a table in respect of the settlement administration which detailed (i) the name of each of the file operators, (ii) the hourly rate of each of the file operators, (iii) the number of 6 minute units of time worked by each file operator over each bill period in respect of the Invoices detailed on pages 6 and 7 of this report, (iv) the total amount claimed for each file operator over each bill period and (v) the total amount claimed for each file operator from 11 December 2014 to 30 September 2016. This table is **Attachment 2** to this report.
79. I have cross-referenced the attached table with the table in the Memorandum dated 2 November 2016 (which is **Attachment 1** referred to above) and am satisfied that the charges claimed in the Invoices prepared for the period 11 December 2014 to 30 September 2016 have been calculated by applying appropriate hourly rates to the items of work done by the respective file operators.

STEP 5 – SAMPLE THE INVOICES

Charges

80. The Invoices prepared for the period 11 December 2014 to 30 September 2016 comprise 536 pages including formal parts and pages detailing summaries, disbursement accounts and the like. In order to conduct the sampling process referred to as step 5(i) in paragraph 47 above, I therefore determined to :
 - (a) examine in detail the work done by all file operators on a particular date on approximately every 10th page of the Invoices, and
 - (b) examine in detail a sample of the claims for work done by a particular file operator on approximately every alternate 10th page of the Invoices.

In other words on approximately every 5th page of the Invoices I examined in detail either the work done on a particular date or the work done by a particular file operator.

Where the work done on a particular date extended beyond the randomly selected page I also examined in detail all other work done on that date as noted in the surrounding pages.

Likewise if the work done by a particular file operator on a particular date extended beyond the randomly selected page I also examined in detail all other work done by that particular file operator on that particular date as noted in the surrounding pages.

81. My detailed examination of the randomly selected claims involved considering (a) the nature of work done, (b) whether the work was reasonably done at the time, (c) whether the work was done by the appropriate level of file operator given the nature of the task, (d) whether the time claimed for the work was reasonable and (e) whether the correct hourly rate had been applied given the level of file operator doing the work. Where a claim referred to an attendance (such as a delegation and/or reporting conference) on another file operator in addition to considering (a) to (e) above I cross-referenced the claims of both file operators to confirm that the time claimed was accurate and reasonable.
82. As part of my detailed examination of the randomly selected work I also compared the work noted in the Invoices with other relevant material provided to me, particularly the documents referred in paragraphs 11 to 22 above. I have not compared the work noted in the Invoices with the electronic files maintained by the Scheme Administrator as my experience in respect of the Kilmore and Murrindindi special references lead me to conclude that a random comparison with the electronic files, which are compiled over a period of time, was not particularly helpful in confirming that particular items of work were done by particular file operators on particular dates. However there is no doubt that the electronic files themselves are solid evidence of the substantial amount of work actually done by the respective file operators in relation to particular claims.
83. My detailed examination revealed that some of the work was in respect of tasks which would normally not be allowed on a taxation of costs as between solicitor and own client (such as claims for electronic and hard copy filing, printing and collating correspondence, updating and reviewing spreadsheets, etc) but in my view those claims should be allowed in the context of the Scheme since the work was done either as a result of particular requirements under the Scheme or simply to ensure the integrity and efficiency of the settlement distribution process. It should also be recalled that the nature of the Scheme means that by far the greater bulk of work done is almost entirely in respect of an administrative process rather than a legal process.
84. I am therefore satisfied that the randomly sampled work I examined was in all instances reasonably done at the time by the appropriate level of file operator, that the time claimed for the randomly sampled work was reasonable and that the correct hourly rate had been applied given the level of file operator doing the work.

85. This task was particularly involved and time consuming however I am satisfied that the cross-referenced sample was sufficiently large and provided a sufficiently accurate series of "snapshots" of the work done for me to extrapolate the results across the total of the charges claimed by file operators in all of the Invoices covering the period 11 December 2014 to 30 September 2016 and to state that in my view the work claimed in those Invoices was reasonably done at the time by the appropriate level of file operator, that the time claimed for the randomly sampled work was reasonable and that the correct hourly rate had been applied given the level of file operator doing the work.
86. In order to give a visual representation of the time spent by lawyers and non-lawyers in administering the Scheme to date I requested that the Scheme Administrator provide me with a "stack graph" which break downs the total time spent by each type of file operator for work done in respect of administration of the Scheme. This stack graph is **Attachment 3** to this report.
87. Examination of the attached stack graph reveals that in all aspects of the Scheme by far the greater bulk of work has been allocated to and done by Paralegals and Solicitors at appropriately lower hourly rates than had that work been done by Principals, Special Counsel, Senior Associates or Associates.
88. Having regard to the scope of work done from 11 December 2014 to 30 September 2016 and given the nature of costs incurred over particular periods of time from 11 December 2014 to 30 September 2016, both of which are detailed above, it is in my view appropriate that in respect of the administration of this Scheme far less time was spent by Principals, Special Counsel, Senior Associates and Associates than by Solicitors, Paralegals and Litigation Technology Support staff.
89. In my opinion the division of time amongst file operators apparent from the attached stack graph also reflects an appropriate and reasonable allocation of work across all file operators and particularly as between lawyers and non-lawyers.

Disbursements – Counsel and providers of medicolegal reports

90. Administration Costs are defined as follows :

(a) in clause 1.2 of the Deed of Settlement as :

*"any costs and **disbursements** incurred in connection with the administration of the Settlement Distribution Scheme and in connection with obtaining the First Orders and the Approval Order, insofar as such costs are not included in the Plaintiff's Costs and Disbursements, subject to approval of such costs by the Court".*

(b) in clause 2.1 of the Settlement Scheme as :

*"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, Counsel's and experts' fees".*

91. It is clear therefore that Administration costs include disbursements incurred by the Administrator during the course of the administration and accordingly all reasonable disbursements should be allowed.
92. From my examination of the Invoices it is apparent that the disbursements incurred in administration of the Scheme fall, broadly, into the following categories :
 - (a) The fees of Senior and Junior Counsel for work done in respect of the application for approval of the Scheme;
 - (b) The fees of Senior and Junior Counsel for work done in respect of reviews of the assessments;
 - (c) The fees of the Australian Legal Costing Group for preparation of expert reports in respect of costs of the Bonsoy class action proceeding;
 - (d) The fees of medical service providers for provision of medical reports and clinical notes (some of these fees did not include a GST component) and to medical specialists for expert reports;
 - (e) Court fees (which do not include a GST component) and transcript fees; and
 - (f) Miscellaneous fees including photocopy charges, Fol fees, courier fees, LitSupport Pty Ltd and the like.
93. In respect of disbursements incurred I requested that the Scheme Administrator provide me with a random sample of the disbursement accounts received in this matter together with copies of Counsels' feeslips for fees claim in all of the Invoices covering the period 11 December 2014 to 30 September 2016.

94. I have examined in detail the copy disbursement accounts provided to me and have generally reviewed the claims for disbursements as made out in the bills of costs/tax invoices. I make the following observations :

Counsel

95. The rates marked by Senior and Junior Counsel, including Junior Counsel appointed to independently review the Scheme Administrator's assessments, are as follows :

Counsel	Hourly rate	Daily rate	Hourly rate	Daily rate
	exclusive of GST		inclusive of GST	
Mr D Curtain QC	800.00	8,000.00	880.00	8,800.00
Mr A Keogh SC	780.00	7,800.00	858.00	8,580.00
Ms K Burke	\$209.09	2,090.90	230.00	2,300.00
Ms L Nichols	360.00 to 400.00	3,600.00 to 4,000.00	396.00 to 440.00	3,960.00 to 4,400.00

96. In my experience the rates marked by Senior and Junior Counsel are all well within the range of hourly and daily rates one would expect and in my view they are reasonable. In this respect I make the following observations :
- The hourly and daily rates marked by Mr D Curtain QC are at the highest end of the GST exclusive maximum hourly rate allowable to Junior Counsel on an *inter partes* basis under item of the Supreme Court scale. Having regard to his seniority and particularly to the nature of work Mr Curtain was briefed to perform I consider that as between solicitor and client the work claimed as done by him was reasonable and that the amounts marked by him for that work are likewise reasonable.
 - The hourly and daily rates apparently marked by Mr A Keogh SC (as he then was) are also the highest end of the GST exclusive maximum hourly rate allowable to Junior Counsel on an *inter partes* basis under item of the Supreme Court scale. Having regard to his seniority and also to the nature of work Mr Keogh was briefed to perform I consider that as between solicitor and client the work claimed as done by him was reasonable and that the amounts marked by him for that work are likewise reasonable.
 - Ms Burke had a conditional costs agreement with the Scheme Administrator in respect of her fees which allowed for a 25% uplift. The hourly and daily rates marked by Ms Burke is less than half of the GST exclusive maximum hourly rate allowable to Junior Counsel on an *inter partes* basis under item of the Supreme Court scale. Further Ms

Burke has also reduced her fees prior to any uplift being applied. As between solicitor and client I consider the work claimed as done by Ms Burke was reasonable and that the amounts marked by her for that work are likewise reasonable.

- (d) The hourly and daily rates apparently marked by Ms L Nichols are in the upper middle of the range of the GST exclusive maximum hourly rate allowable to Junior Counsel on an *inter partes* basis under item of the Supreme Court scale. Having regard to her experience in class actions and the nature of work Ms Nichols was briefed to perform I consider that as between solicitor and client the work claimed as done by her was reasonable and that the amounts marked by her for that work are likewise reasonable.
- (e) Ms Ryan was appointed pursuant to the Scheme as Independent Counsel to review assessments made by the Scheme Administrator's staff where the Registrant sought such a review. It is apparent from the feeslips that Ms Ryan marked separate fees for each of the reviews she conducted. I am advised by her clerk that Ms Ryan's usual hourly and daily rates are \$330.00 and \$3,300.00 respectively which I assume are GST inclusive. Each of the feeslips in respect of the reviews claims an amount which is a multiple of \$330.00 and in those circumstances it is reasonable to assume that the amount on each of the feeslips varied according to the time actually spent by Ms Ryan on each particular review. Insofar as the hourly and daily rates marked by Ms Ryan, I observe they are well under the GST exclusive maximum rates allowable to Junior Counsel on an *inter partes* basis under item of the Supreme Court scale and in the circumstances I consider that Ms Ryan's fees are reasonable.
- (f) I have not noted the hourly and daily rates for Mr M Wilson QC in the table above as only two "flat" fees, each of \$3,300.00, have been marked by Mr Wilson for the reviews referred to in paragraph 14.2 of Ms Lubomirska's Affidavit affirmed 2 November 2016. Having regard to his seniority I consider that as between solicitor and client Mr Wilson's fees are reasonable.

Medical providers

- 97. In my view the amounts paid to specialist medical providers for expert reports appear to be well within the range of rates one would expect and again in my view they are reasonable. Further, a relatively modest amount has been invoiced for obtaining medical reports and clinical notes and in my experience the amounts paid to the providers of those medical reports and clinical notes are well within the range one would expect and are therefore reasonable.

Court and transcript fees

98. As Court fees are fixed there is no dispute that they are reasonable. It appears from my examination of the Invoices for the period 11 December 2014 to 30 September 2016 that only one Court fee has been invoiced, that being the issuing fee of \$361.50 on the application for approval. There are modest fees invoiced for transcripts and in my view the fees for transcripts have in each case been reasonably incurred and are reasonable in amount.

Miscellaneous disbursements including photocopies, Fol fees and other service providers

99. I understand that the fees claimed by the Australian Legal Costing Group have been the subject of separate scrutiny by Judicial Registrar Gourlay of the Costs Court and in those circumstances the amounts now claimed are reasonable.
100. I am advised that photocopies have been invoiced at the rate of \$0.20 per page exclusive of GST. This is in fact less than the per page rate allowed for photocopies in the Supreme Court over the period 11 December 2014 to 30 September 2016. The total quantum claimed for photocopies is modest in the context of this matter and I consider it to be reasonable in amount.
101. Fol fees are generally fixed and accordingly there can really be no dispute that the (again modest in quantum) invoiced Fol fees have been reasonably incurred and are reasonable in amount.
102. It would in my view be difficult to argue in the context of this matter that the very small amount claimed for courier fees and for Cabcharge (a total of \$243.23 inclusive of GST) over the period 11 December 2014 to 30 September 2016 is unreasonable and I consider those claims should therefore be allowed.
103. There is a single fee charged by LitSupport Pty Ltd for electronic data processing. Having regard to the nature of that work and as a result of having some familiarity with the manner in which LitSupport charges for its services I consider this fee to be reasonable.

STEP 6 – APPLY THE ESTABLISHED BASIS FOR COSTING

Administration Costs

104. As mentioned above Administration Costs are defined as follows :

(c) in clause 1.2 of the Deed of Settlement as :

*"any **costs** and disbursements incurred in connection with the administration of the Settlement Distribution Scheme and in connection with obtaining the First Orders and the Approval Order, insofar as such costs are not included in the Plaintiff's Costs and Disbursements, subject to approval of such costs by the Court".*

(d) in clause 2.1 of the Settlement Scheme as :

*"**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, Counsel's and experts' fees".*

105. Clause 13.1 of the Settlement Scheme provides inter alia that :

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

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

Time recording

106. I am advised that the Scheme Administrator utilises the "Elite" automated time and billing system for time recording and that the Scheme Administrator and all administration staff are required to enter their time on the "Elite" system at the time or shortly after specific tasks are completed. As mentioned in paragraph 50 above the "Elite" system records time in units of 6 minutes or part thereof.

107. I am aware that all fee earners at Maurice Blackburn are provided with a document entitled "Time Recording Protocols". I have sighted that document which provides a comprehensive list of "DOs" and "DON'Ts" for data entry to the "Elite" system and also canvasses the importance of using the "non-billable codes" where appropriate.

108. My examination of the Invoices, both in a broad sense as referred to in paragraph 23 above and in a detailed sense as part of the sampling process referred to as step 5(i) in paragraph

47 above, suggests that these time recording protocols have been conscientiously followed and applied.

Application of the established basis for costing to the recorded time

109. Utilising the Memorandum and tables in Attachment 1 and the tables in Attachment 2 to this report I have reviewed the hourly rates applied as detailed in all of the Invoices covering the period 11 December 2014 to 30 September 2016 for each member of the Scheme Administrator's administration staff in light of the "qualification" of each file operator.
110. Having done that exercise and as a result of the sampling process referred to as step 5(i) in paragraph 47 above, I am satisfied that in all instances the appropriately qualified operator has done the work at the appropriate hourly rate commensurate with that operator's expertise and experience.

STEP 7 – EXCISE WORK UNREASONABLY DONE or UNREASONABLE IN AMOUNT

111. In light of my review of the materials provided to me, having regard to the outcome of the sampling process referred to as step 5(i) in paragraph 47 above and reiterating the matters generally canvassed, I do not consider it could reasonably be said that any of the work claimed in the Invoices was unreasonably done or is unreasonable in amount.

STEP 8 – DISBURSEMENTS UNREASONABLY INCURRED or UNREASONABLE IN AMOUNT

112. In light of my review of the materials provided to me and reiterating the matters generally canvassed above, I do not consider that any of the disbursements claimed in the Invoices were unreasonably incurred and or are unreasonable in amount.

OTHER MATTERS – THE AUSTRALIAN NEWSPAPER REPORT

113. I consider I should comment on the additional costs which the Scheme Administrator incurred as a result of the complaint by Mr Singer which eventually lead to the article in the "Australian" newspaper on 15 August 2016 (see paragraph 16 above).
114. The Scheme Administrator is of course to respond to queries and complaints arising out of the administration which are raised by group members or their representatives. As mentioned in paragraph 16 above by e-mail letter on 17 October 2016 Ms Lubomirska

provided me with copies of documents relevant to the allegations made by Mr Singer. I have carefully examined that material.

115. It is evident from the material that Mr Singer engaged in prolonged correspondence with the Scheme Administrator's staff both before and subsequent to the Review. It is also evident that the actual cost of the Review by Mrs Singer of her initial assessment, calculated by applying the hourly rates discussed in paragraphs 48 to 55 above and including the fee of Independent Counsel, was itemized by the Scheme Administrator at \$4,310.00 although it is equally evident that the itemization does not appear to include costs for some work which clearly must have been done. In any event, pursuant to clause 10.1 of the Scheme Mrs Singer's costs of the Review were capped at \$3,000.00 and the sum of \$2,000 (i.e. \$3,000.00 less the security bond of \$1,000.00 paid by Mrs Singer on lodging her Notice of Review) will be deducted from the amount payable to Mrs Singer under the Scheme. All of this has been well detailed in correspondence to both Mr and Mrs Singer.
116. Putting to one side the fact that costs of the Review are capped under the Scheme at \$3,000.00, in my view a charge of \$3,000.00 which includes the fee of Independent Counsel is most reasonable on any analysis.
117. Whilst the costs incurred as a result of Mrs Singer's Review (save for \$3,000.00) and the further costs incurred in dealing with Mr Singer's correspondence both before and subsequent to the Review are unavoidable (and in the circumstances it is difficult to conclude that they were unreasonable), they are borne by the Settlement Fund and therefore reduce the amount ultimately recovered by eligible group members. In other words all eligible group members have subsidized not only Mrs Singer's Review but also the further costs incurred in dealing with Mr Singer's correspondence both before and subsequent to the Review.

CONCLUSION

118. In my view the administration of the Bonsoy Scheme has been conducted in as lean and efficient a manner as possible by a most dedicated team who were and are clearly committed to obtaining the best possible result for eligible group members. Ultimately, this would appear to be borne out by the fact that eligible group members are likely to obtain a recovery of in excess of 100% of their assessed entitlements.
119. Accordingly, having regard to the matters canvassed in this report and the reasons expressed in paragraphs 48 to 89 and 104 to 111 above of this report the quantum of charges

claimed in the Invoices covering the period 11 December 2014 to 30 September 2016 is reasonable.

120. Having regard to the matters canvassed in this report and the reasons expressed in paragraphs 48 to 74, 90 to 103 and 112 above of this report the quantum of disbursements claimed in the Invoices covering the period 11 December 2014 to 30 September 2016 is reasonable.

121. Should however the Court require any further information or analysis I would of course be most pleased to oblige.

DATED : 10 November 2016

A handwritten signature in blue ink, appearing to read 'John D White', with a long horizontal flourish extending to the right.

JOHN D WHITE