

**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);

Settlement Scheme as approved by the Supreme Court of Victoria on 7 May 2015

- (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.

Settlement Scheme as approved by the Supreme Court of Victoria on 7 May 2015

**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 Scheme as approved by the Supreme Court of Victoria on 7 May 2015

**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

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

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](mailto: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.