

**MAURICE BLACKBURN LAWYERS**

# **Personal injury compensation in the Bonsoy Class Action**

Understanding the settlement process,  
your rights and responsibilities

The purpose of this booklet is to provide you with information about the applicable law and the process for assessing and settling the claims of group members in the Bonsoy Class Action.

The booklet contains important information about the assessment process, and it details the actions you are obliged to take in order to participate in the Settlement Scheme. A copy of the Settlement Scheme can be downloaded from <http://www.mauriceblackburn.com.au/media/2722/approved-bonsoy-settlement-scheme.pdf>

### **Assessing your claim**

The process of assessing all group members is estimated to take around 6 to 12 months because of the large number of people affected by Bonsoy.

The assessment process has been designed to efficiently and consistently assess the losses of the entire group in a manner that is responsive to the circumstances and needs of individual group members and recognises the need to minimise legal costs.

All facts and records necessary for assessment of an individual claim must first be obtained before any assessment of that claim can be conducted. This means that it will not be possible to provide individual advice before the information collection steps have been completed.

It is critical that you co-operate fully with meeting deadlines and providing full and complete information where requested.

We appreciate that many group members will be anxious to discuss matters specific to the assessment of their claim, however we ask that you help us to avoid delays and significant assessment expenses, by exercising patience in waiting until your claim is ready to be assessed.

Please take the time to read this booklet carefully to be sure that you understand your rights as well as your obligations under the assessment process.

If, having read this booklet, you have any questions about the assessment process please contact Maurice Blackburn on 1800 633 187.

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## SECTION A - OVERVIEW

### A.1 The Class Action and settlement

In this Class Action, the Lead Plaintiff, Erin Downie, brought a claim for compensation on behalf of herself and hundreds of group members, who have suffered thyroid dysfunction, exacerbation of thyroid dysfunction or iodism, as a result of their consumption of Bonsoy Soy Milk.

The Defendants in this action were the Australian brand owner of Bonsoy, Spiral Foods Pty Ltd, the Japanese manufacturer of Bonsoy, Marusan-Ai Ltd and the Japanese exporter of Bonsoy, Muso Co Ltd.

The trial of this class action was postponed twice to allow for settlement discussions. Settlement discussions were successful and on 24 November 2014 the parties announced that the plaintiff and defendants agreed to settle the Class Action for an amount of \$25 million, inclusive of costs, subject to Court approval.

The settlement was approved by the Supreme Court on 7 May 2015. The judgment of Justice J Forrest can be found at <http://www.austlii.edu.au/au/cases/vic/VSC/2015/190.html>

Each individual claim now needs to be assessed in order to allow compensation to be paid to all group members who are eligible for compensation.

There are more than 550 claims that need to be assessed. It will only be possible to calculate each group member's entitlements once the claims of all group members are properly assessed. This is expected to occur in the next 6 to 12 months.

### A.2 Who can participate in the settlement of this Class Action?

To participate in the settlement of this Class Action, you must have registered by 4.00pm on 11 July 2014, or have been allowed by the Administrator to join the class as a late registrant.

Only people who have registered are able to obtain compensation under the Settlement Scheme. These registered personal injury claimants are known as **registrants**.

### A.3 Why did the Class Action settle for a fixed sum?

While the Plaintiff was likely to succeed at the liability trial and show that the defendants had been negligent, for any group member to recover damages, they would need to show that Bonsoy caused their injuries and to prove their losses.

The defendants could contest the individual claims and it could be a very lengthy and stressful process for group members. In approving the settlement, Justice J Forrest stated that proceeding to judgment in the litigation and then determining individual group member claims would have involved years of litigation, potential appeals and complex questions of law. His Honour found that the settlement provides a better path for determining group members' entitlement to compensation.

Significant legal costs would be incurred in conduct of the trial and in litigating individual claims, which could reduce the money available to compensate group members. Also, group

members would be at risk of having to pay legal costs if their contested claims failed at hearing.

Settling the Class Action for a fixed sum allows compensation to be delivered to group members much more quickly, with fewer risks and stresses and with less money being spent on legal costs.

In approving the settlement, the Court found that the non-adversarial approach provided under the Settlement Scheme is one of the main advantages of the settlement as it will allow for a simpler, faster and more cost-effective approach to compensating group members.

#### **A.4 How was the claim settled for a fixed sum when the individual losses are yet to be assessed?**

Since the commencement of this Class Action, several desktop assessments have been undertaken to estimate the total group member losses.

Although this work did not ultimately produce a figure that was agreed on by all parties, there was sufficient confidence in the assessment of total group member losses for Maurice Blackburn to be able to recommend to the Court that the proposed settlement amount be approved.

In approving the settlement Justice J Forrest found that Maurice Blackburn has made a serious and conscientious effort to accurately estimate the total damages and utilised the estimates of loss to determine that the settlement is fair and reasonable.

The total losses having been estimated, a discount for the cost, delay and risk involved in group members of proving their individual claims was uniformly applied across the group, to arrive at the final settlement sum.

#### **A.5 What percentage of assessed losses are group members expected to recover under this settlement?**

The total losses will only be known once all claims have been assessed. Likewise, the legal costs incurred in administering the settlement will not be known until the end of the process. This means that, until the completion of the assessment process, we will not know the recovery rate.

At this stage, the best estimate, on the basis of the sample assessments of group losses, is that group members will recover approximately 60 to 70% of their assessed losses.

We emphasise that all these figures are necessarily both averages and estimates, and that the assessment of what each individual will receive will take time. **The final percentage recovery of assessed losses will only be definitively known at the end of the assessment process.**

#### **A.6 What factors impact the rate of recovery?**

The recovery rate is affected by the total assessed losses of group members, the costs of the administration and assessment process and the interest earned on the settlement sum during settlement administration.

## A.7 What happens to legal costs?

The legal costs of running the action to settlement are deducted from the overall settlement sum. The costs have been independently scrutinised and will need to be approved by the Court before they are deducted. Registrants are not asked to pay anything towards those costs.

The costs incurred in the administration process can be deducted from the remaining overall settlement sum and interest earned on that sum. These costs have to be approved by the Court.

Registrants do not have to pay anything to have their claims assessed. However, because costs of administration are deducted from the settlement amount, they reduce the money available for compensation.

Maurice Blackburn is very keen to **keep the administration costs as low as possible** in order to maximise the return to group members. The assessment process has been designed to be as efficient and cost-effective as possible, while remaining fair.

Please **help us to minimise the costs** of the assessment process and **maximise the return to group members** by:

1. Reading and familiarising yourself with the content of this booklet;
2. Before calling with a query, checking whether the answer is found in this booklet or in correspondence we sent to you;
3. Limiting queries to essential matters; and
4. Following the processes of the Settlement Scheme and complying with Administrator requests.

## SECTION B –LOSSES RECOVERABLE UNDER THE SETTLEMENT SCHEME

### Eligibility for Compensation

#### B.1 Persons who are eligible for compensation

The Bonsoy class action was brought by the plaintiff on behalf of **group members**. Only registrants who satisfy the definition of group member are eligible to receive compensation.

Paragraph 2 of the Amended Statement of Claim, which is available for download at <http://www.mauriceblackburn.com.au/media/2194/amended-statement-of-claim.pdf>, defines a **group member** as person who, during the period 1 July 2004 and 24 December 2009:

1. Consumed Bonsoy soy milk; and
2. As a result of consuming of Bonsoy, suffered:
  - (a) thyroid dysfunction;
  - (b) exacerbation of pre-existing thyroid conditions; or
  - (c) iodism

The reason that the Amended Statement of Claim defines group members in this way is that expert evidence and advice obtained by the plaintiff demonstrates that these are **the only conditions** that can be caused by excess iodine, such as was found in Bonsoy.

Therefore, as a first step in assessing claims, we will be looking at the medical materials and other evidence for each registrant and determining whether it is more likely than not that the registrant suffered one of these conditions.

Registrants who did not suffer one of these conditions are not group members and will not be eligible for compensation.

#### B.2 Conditions that can be compensated

In the conduct of the Class Action on behalf of the plaintiff, we obtained reports and also advice from the leading experts in this field of medicine. The defendants also obtained expert reports that were sometimes less favourable than the plaintiff's.

In assessing claims we will be applying the principles in the reports of the plaintiff's experts. This means that the question of whether any registrant's injury is related to Bonsoy will be assessed using the most favourable evidence in the Class Action.

**Excess iodine**, as was present in Bonsoy, **can cause many thyroid illnesses** and, more rarely, a sensitivity syndrome, sometimes called "iodism", which has particular symptoms associated with it.

Excess iodine **does not cause any other illnesses**. Therefore, other conditions are not compensable, unless they can be shown to arise as a direct consequence of thyroid illness.

There are some illnesses, such as particular heart conditions, that can be caused by thyroid illness. Where medical evidence establishes that a group member's condition arose from the thyroid illness, compensation may be payable for that condition.

However there are **a number of thyroid illnesses that are not caused by excess iodine**. Thyroid cancer, the development of multinodular goitre and virally induced thyroiditis are not caused by excess iodine. This is the view of experts in thyroid disease.

**Is it necessary for my doctor to have said that my condition was caused by Bonsoy?**

No. Prior to recall of Bonsoy in late 2009 medical professionals were not aware that Bonsoy contained excessive levels of iodine. As a result, prior to Bonsoy recall very few people were diagnosed as having suffered an injury due to excess iodine.

Also, not all medical professionals have the same level of expertise in thyroid conditions that can be caused by excess iodine as the experts who provided reports in the Class Action.

Therefore, the determination of whether a registrant has a compensable illness will be made by looking at the medical records for evidence of what conditions were suffered and then applying the principles in the reports of the plaintiff's experts to decide whether it is probable that the condition was caused by Bonsoy.

## **Assessment of Damages**

### **B.3 Recoverable Losses**

#### ***Losses must be linked to a condition caused by Bonsoy***

The law requires that, for a loss to be compensated, it has to arise directly from a condition that was caused by Bonsoy. Losses that are due to other causes are not compensable, even if they occur at the same time as an illness that was due to Bonsoy.

#### **EXAMPLE 1: Recoverable and non-recoverable losses**

John suffers from back pain and requires physical therapy treatment for that condition. At the same time, due to drinking Bonsoy, John develops hypothyroidism, for which he needs to take medication.

- The cost of medication for hypothyroidism **is a recoverable** loss.
- The cost of physical therapy sessions for back pain **is not recoverable**, because it is due to an illness that is not caused by Bonsoy.

#### **EXAMPLE 2: Recoverable and non-recoverable losses**

Jane develops hyperthyroidism due to drinking Bonsoy and has to stop work until she gets better. Unfortunately, a month later Jane is severely disabled by an unrelated illness and cannot return to work.

- The wage loss that Jane sustained when she was off work due to hyperthyroidism, prior to the unrelated illness, **is a recoverable loss**.
- The wage loss that Jane sustained after the unrelated illness is **not recoverable** in the Class Action, as it is no longer due to her hyperthyroidism, but is due to the unrelated illness.

It is part of the job of the Administrator and of Independent Counsel conducting reviews to determine which losses are due to a Bonsoy related illness and which losses are due to other causes.

***How will the Administrator determine if loss is related to Bonsoy?***

Assessing whether an injury is caused by Bonsoy and whether the loss claimed relates to that injury involves looking at evidence, including medical records, financial records and other information and deciding whether it is more likely than not that a particular loss relates to Bonsoy.

The Administrator and Independent Counsel can request reports from doctors and other experts if necessary.

**EXAMPLE 3: Determining losses that are due to Bonsoy**

Two years ago John suffered a back injury at work, which left him incapacitated for work. He has been receiving workers compensation payments on the basis that he cannot work because of his back injury and depression that he developed as a result of that injury.

John suffers hyperthyroidism as a result of Bonsoy. He says it made his depression worse and he was unable to work as a result. He is claiming for loss of earnings/earning capacity.

- The Administrator will review evidence relating to John's health and ability to work, including medical records and workers compensation materials, to determine whether, on balance of probabilities, John's incapacity for work relates to his pre-existing back injury or to consequences of hyperthyroidism.
- The fact that John is receiving workers compensation payments on the basis that his incapacity relates to his back injury will weigh significantly against finding that John suffered a loss of earning capacity due to Bonsoy.
- The Administrator can request reports from John's treating doctors or refer John for expert assessment if necessary.

***Losses must not be too remote***

Not every loss or detriment suffered by a group member entitles that group member to compensation – even if the loss is connected in some way to their consumption of Bonsoy.

The law imposes limits. Some losses do not satisfy the legal tests for compensation because they are too remote, indirect or of a nature which is not compensable.

#### **EXAMPLE 4: Losses that are not compensable**

John suffers severe hyperthyroidism due to drinking Bonsoy, which causes John to have a heart attack. John has to go to hospital and can't work for three months because of his heart attack. While he is in hospital he misses his daughter's 21<sup>st</sup> birthday, which really upsets him and he wants to take his daughter on a holiday to make up for it.

- If medical evidence shows that John's heart attack was contributed to by hyperthyroidism, John **can recover** the wage loss suffered due to his heart attack. This is because heart conditions are a **foreseeable consequence** of hyperthyroidism.
- John **cannot recover** damages for missing his daughter's birthday or get money for a holiday with his daughter, because this sort of loss **is not recognised by the law**.

It is part of the job of the Administrator and of Independent Counsel conducting reviews to determine the extent to which each group member's particular loss can be legally compensated.

#### **B.4 Categories of loss that may be recoverable**

Group member's claims will be assessed according to Victorian law for entitlement and amount of damage in the following categories:

- 1) Medical and Treatment expenses, past and future;
- 2) Loss of earnings or income, past and future;
- 3) Domestic and care assistance, past and future; and
- 4) Pain and suffering ('general') damages;

#### **B.5 Statutory Damages Thresholds**

The specific laws that apply to the assessments in this Class Action are *The Wrongs Act 1958* (Vic) and the *Competition and Consumer Act 2010* (Cth) (previously known as the *Trade Practices Act 1974* (Cth)).

These laws impose certain **thresholds or barriers** with respect to injuries and impairment, which have to be reached by an individual claimant before certain types of compensation can be claimed. The **most significant barriers are in respect of availability of pain and suffering damages**.

We understand that these thresholds may appear unfair to group members. However, they result from laws made by the State and Commonwealth governments and those laws would be applied to all claims if they were determined by the Court.

The details of most important thresholds are set out under heading **B.9** below.

## B.6 Medical and Treatment Expenses

Group members may make a claim for past and future medical, treatment and rehabilitation expenses.

The expenses, however, must relate **directly** to the injury caused by consumption of Bonsoy and must be **medically reasonable**.

### EXAMPLE 5: Medical and treatment expenses

Jane is diagnosed with iodine-induced hyperthyroidism due to Bonsoy. Her doctor tells her that, because she stopped drinking Bonsoy, her condition is likely to resolve itself, without medication, but she can take some beta-blockers to help her symptoms.

Jane decides that, instead, she will treat herself with a multivitamin complex. Jane's hyperthyroidism resolves, but she continues to take the multivitamins, because she believes they helped her get better.

- Jane is **able to recover** damages for the cost of appointment with her doctor, because it was required for diagnosis and treatment of her thyroid condition. She would also be able to recover damages for the cost of beta-blockers prescribed to her.
- Jane is **not able to recover** damages for the cost of multivitamins, because they were not a medically reasonable treatment for her thyroid condition.

## B.7 Loss of Earnings

A claim for past and future lost earnings, including superannuation, can be made where the loss is the result of a personal injury caused by the consumption of Bonsoy.

Loss of earnings is not recoverable where no loss was actually suffered, such as where absence from work was covered by paid sick leave. Loss of earnings is also not recoverable if it is due to an injury or circumstance other than injury caused by Bonsoy. Please refer to **Example 2** above.

Predictions based on the probable course of events often have to be made about future loss of income, but loss that is too speculative is not recoverable.

### **Evidence of loss**

Most loss of earnings claims will need to be substantiated by payment records or tax returns, especially where group members were self-employed. The Administrator will obtain these records where necessary.

Persons who have understated their earnings in the tax returns are unlikely to be able to recover lost earnings beyond those evidenced by tax returns. That is because tax returns are a statutory declaration and the courts take a dim view of reliability of claims made by persons

who have supplied incorrect information on a statutory declaration. The tax office can also impose penalties for provision of incorrect information on tax returns.

#### **EXAMPLE 6: Losses that are too speculative**

John is running his own business. In its first year the business made \$30,000. In the second year John suffered from hyperthyroidism due to Bonsoy and had to work less for a period of four months. His business suffered as a result and only made \$25,000 in that year. John recovered and returned to normal work. In the third year his business again made \$30,000 and the same in the fourth year.

John says that he was going to do a marketing course which he didn't do because he got sick. He claims that if he did the course he would market his business better and would be making \$60,000, not \$30,000 per year.

- The loss of income in the second year of business **is recoverable** as damages and amounts to approximately \$5,000.
- In absence of evidence, the claim that John would be making \$60,000 per year if he did a marketing course is **too speculative** and is not recoverable as damages.

The law also imposes additional limitations on recovery of loss of earnings by persons who were earning more than three times the average earnings. Group members who are affected by these limitations will be advised of them in the Notice of Assessment and Statement of Reasons.

### **B.8 Domestic and Care Assistance**

A group member might be so disabled by his or her injuries as to require the assistance of other people to perform domestic tasks or other care assistance. This can include things such as help with cleaning, shopping, showering, dressing, driving to medical appointments or other domestic or nursing help.

In some cases the value of such domestic or care services is claimable as part of the group member's assessment. This includes a situation where the domestic or care services have been provided freely by a relative or family member.

Gratuitous care services can only be compensated if:

- 1) The need for those services arose solely because of injury caused by Bonsoy; and
- 2) The services would not have been provided but for this injury

### EXAMPLE 7: Domestic and Care Assistance

Jane does the cooking at home and her partner Joe does the shopping and cleaning the house. Jane develops hyperthyroidism due to Bonsoy and is too unwell to do the cooking. Joe spends an hour a day doing the cooking that Jane previously did. He continues doing the shopping and house cleaning.

- Jane **can recover** compensation for one hour a day of domestic assistance for Joe doing the cooking, even though she is not paying Joe to do it.
- Jane **cannot recover** compensation for the shopping and house cleaning provided by Joe because Joe always did those tasks.

There are statutory limitations on damages that are available, including the hourly rate being fixed at the average wage and compensation being capped at a maximum of 40 hours per week.

#### ***Can my partner recover lost wages for time taken off work to look after me?***

No. Wages lost by a person looking after a group member during their illness are not recoverable as damages. However, damages may be available for domestic care and services provided, at the average wage, for a maximum of 40 hours per week.

In some cases those damages may be greater than the wages actually lost by the person providing care.

### **Pain and Suffering compensation**

#### **B.9 Pain and Suffering (General Damages)**

Damages for pain and suffering may be awarded under two legislative regimes: the *Wrongs Act 1958* (Vic) and *Competition and Consumer Act 2010* (Cth) (previously known as the *Trade Practices Act 1974* (Cth))

Under each of those regimes the law imposes **significant thresholds or barriers** with respect to severity of injury required before damages for pain and suffering can be claimed and also imposes **limitations on the amount** of damages available.

Pursuant to clause 8.4(b)(iv) of the Settlement Scheme, the Administrator must apply the greater of the assessments under the *Wrongs Act* or the *Competition and Consumer Act*.

Because of severe restrictions on the amount of damages available under the *Competition and Consumer Act*, if an entitlement to damages for pain and suffering can be established under the *Wrongs Act*, the damages for pain and suffering will only be assessed under that legislation because they will always be greater than the damages available under the *Competition and Consumer Act*.

#### ***Wrongs Act 1958* (Vic)**

Under the *Wrongs Act* a group member must be assessed as suffering a **significant injury** in order to be entitled to compensation for pain and suffering.

A significant injury is a **permanent injury** which currently results in a whole person impairment of **above 5% for physical injuries or above 10% for psychiatric injuries as**

assessed in accordance with the *American Medical Association Guides to the Evaluation of Permanent Impairment*.

If the threshold is met, the amount of damages depends on a range of factors, including severity of ongoing symptoms, treatment required and impact of Bonsoy-related illness on the group member's recreational, social, domestic and work activities and on close relationships.

Because of the requirement for a **permanent injury**, group members who suffered from transient illness and then recovered will not be entitled to pain and suffering damages under the *Wrongs Act*, even if they had severe symptoms.

However these group members may be able to receive compensation for pain and suffering under the *Competition and Consumer Act 2010* (Cth).

### ***Competition and Consumer Act 2010* (Cth) ('CCA')**

Pain and suffering damages are available under the *CCA* where the injury is assessed as equal to or exceeding 15% "of a most extreme case". The percentage used in the *CCA* is assessed differently to the percentage of whole person impairment in the *Wrongs Act*.

The advantage of the *CCA* is that the injury does **not** need to be permanent to qualify for general damages. The disadvantage of the *CCA* is that it sets very strict limits on the damages that can be awarded, especially at the lower end of the "most extreme case" scale.

The *CCA* sets out a sliding scale which correlates the assessed percentage of a most extreme case with general damages that are available. This scale is set out on the next page.

Previous court decisions indicate that an injury which is not permanent is unlikely to be assessed at more than 20%, even when the illness was prolonged, and illness that was of a short duration is unlikely to meet the 15% threshold.

The percentage of "a most extreme case" will be determined by the Administrator or Independent Counsel in accordance with the principles in previous court decisions.

#### **EXAMPLE 8: Pain and suffering damages under the CCA**

Jane is assessed as 16% of a most extreme case. Jane's damages are calculated by finding 16% in the left hand column and the corresponding percentage in the middle column (1.5%) and then working out 1.5% of \$327,260 (the maximum amount). Jane's pain and suffering damages are \$4,910.

## Competition and Consumer Act Pain and Suffering Damages Scale

Maximum amount		\$327,260.00
% of a most extreme case	% of the maximum amount	Calculated damages
Less than 15%	0	\$0.00
15%	1%	\$3,270.00
16%	1.50%	\$4,910.00
17%	2%	\$6,550.00
18%	2.50%	\$8,180.00
19%	3%	\$9,820.00
20%	3.50%	\$11,450.00
21%	4%	\$13,090.00
22%	4.50%	\$14,730.00
23%	5%	\$16,360.00
24%	5.50%	\$18,000.00
25%	6.50%	\$21,270.00
26%	8%	\$26,180.00
27%	10%	\$32,730.00
28%	14%	\$45,820.00
29%	18%	\$58,910.00
30%	23%	\$75,270.00
31%	26%	\$85,090.00
32%	30%	\$98,180.00
Greater or equal to 33%	Equals to % of a most extreme case	multiply % of a most extreme case by maximum amount

## Duty to Mitigate

### B.10 Duty to act reasonably to mitigate loss

Group members who have been injured have to do what is reasonable to mitigate their losses. Where a group member failed to reasonably mitigate their losses, damages may be reduced to take this into account.

#### Mitigating losses – Example 9

John develops hypothyroidism due to Bonsoy. He is feeling tired and cannot work full time as a result. His doctor prescribes thyroxine tablets to treat his hypothyroidism, but John refuses to take them because he doesn't like taking pills.

John suffers severe symptoms and has to stop working. John's doctor tells him again to take the tablets and John finally does so. He gets better and can return work.

- John's damages, including for loss of earnings, may be reduced to take into account his failure to mitigate his loss by taking appropriate treatment when it was prescribed by his doctor.

## SECTION C – SETTLEMENT SCHEME AND ASSESSMENT PROCESS

### The Settlement Scheme

#### C.1 The Settlement Scheme approval

On 7 May 2015, Justice J Forrest of the Victorian Supreme Court approved the settlement of the Bonsoy Class Action for the sum of \$25,000,000.

As part of the settlement approval, the Court also specifically considered and approved the Settlement Scheme. The Settlement Scheme establishes the Assessment Process by which all registrant claims will be individually assessed and can be downloaded from the Maurice Blackburn webpage at <http://www.mauriceblackburn.com.au/media/2722/approved-bonsoy-settlement-scheme.pdf>

The settlement sum will be invested for the duration of the assessment process, with the interest earned being used to offset some of the assessment costs. It is anticipated that, with the presently low interest rates, the interest **will not cover all of the assessment costs**.

We ask all registrants to **help us minimise the assessment costs** by following the procedures in the Settlement Scheme and limiting queries to essential matters concerning their claims. This will help us maximise the amount of compensation to group members.

Following the completion of the assessments, the settlement fund will be divided amongst the group members, by reference to the assessed value of each individual group member claim and the final rate of recovery.

Now that the settlement sum and the Settlement Scheme have been approved by the Court, the Defendants will play no further role in the assessment or distribution process.

#### C.2 How long before group members get any money from the settlement?

Now that the settlement has been approved by the Court, more than 550 claims need to be individually assessed. This will take time to do properly and fairly.

Our current estimate is that it will take about 6 to 12 months to assess all claims and distribute the settlement money. Undertaking the individual assessment of each claim within that time will be a significant challenge, and relies on the cooperation of all registrants.

#### C.3 What type of personal injury loss can I be compensated for?

The types of personal injury losses that a group member can be compensated for and the amount of compensation assessed for such loss will vary depending upon individual circumstances.

Once eligibility has been established, the main types of personal injury losses that may be compensable under the settlement scheme are:

- 1) Medical expenses, past and future;
- 2) Loss of earnings, past and future;
- 3) Domestic and care assistance, past and future;
- 4) Pain and suffering (general) damages; and
- 5) Other damages.

The entitlement to personal injury compensation is not automatic and it is important to understand that not every registered group member will be able to establish an entitlement to receive settlement money.

To have an entitlement a group member must have suffered injury, loss and damage which is sufficiently directly caused by the consumption of Bonsoy. There are some additional legal restrictions on the right to recovery that are discussed in **Section B** above.

#### **C.4 Does every group member get the same amount of compensation?**

The assessment principles will be applied consistently to all group members. However the final assessment of compensation will be based on the personal injury, loss and damage suffered by each individual group member. Every case is different and this means that compensation paid to different group members may vary considerably.

Once assessments are finalised, the percentage of recovery for all group members can be determined. That percentage will be applied consistently to all group members.

Group members may have deductions and repayment obligations, set out in **Section D** below, and these will also vary from person to person.

### **Assessment Process**

#### **C.5 Overview**

There are approximately 550 personal injury claims to be individually assessed as part of the process approved by the Court.

An important consideration in resolving the Class Action, was the wish to avoid each personal injury claim needing to be individually litigated before the Courts. A process like that would take years to complete, and the Defendants would be able to contest each assessment, further delaying the payment of compensation. The settlement allows for group member claims to be assessed in a non-adversarial way.

In order to avoid unnecessary delays and significant assessment expenses, Maurice Blackburn worked to develop a more efficient and cost effective assessment process which has been approved by the Court.

#### **C.6 Maurice Blackburn's role in the assessment process**

Maurice Blackburn has been appointed as the Administrator of the Settlement Scheme by the Supreme Court.

Maurice Blackburn now has a duty to the Court to distribute the settlement according to the approved terms of the Settlement Scheme, and the Court will continue to supervise and monitor the progress of the assessment process. Our obligation means our first duty is to the Court. We cannot prioritise any individual group member's claim and we are obliged to administer the settlement fairly and impartially as between all group members.

This means that, as Administrator of the Settlement Scheme **we cannot act as solicitors for any group member** and are required to terminate any retainers that were executed during the Class Action. We therefore terminate all retainers.

### C.7 Do I need my own lawyer?

The assessment process, which has been carefully considered and approved by the Court, is designed to be fair, impartial and cost effective, so that in our view, the overwhelming majority of group members will not need to engage their own lawyers. However this is ultimately a matter for each group member to consider in light of their own circumstances.

The settlement administration team is only able to offer assistance explaining how the scheme works and gathering claim information. If you wish to engage other lawyers to assist you to prepare your claim, you are entitled to do so, but the costs incurred in doing so will be your responsibility and will not be paid from the settlement sums.

### C.8 Process going forward

Maurice Blackburn will now direct our efforts to assessing each individual claim in a fair, cost efficient and timely manner so that the funds can be distributed to the group members who are found to have suffered a compensable injury as quickly as possible. This will include obtaining what further information, material and instructions we require to assess group members' claims and undertaking the assessments.

The process of assessing all group members is estimated to take around 6 to 12 months because of the large number of registrants. The actual time required may turn out to be shorter or longer, depending on the complexity of the claims.

Maurice Blackburn is committed to distributing the settlement sums as soon as possible and we will do everything we can to assess claims expeditiously and fairly.

The large number of claims means that it is possible your claim may not be assessed for some time. Please be assured that you will not be disadvantaged by having your claim assessed earlier or later than others. This is because the settlement sums will not be distributed until all claims have been assessed.

### C.9 Registrants who are under legal disability

The operation of the Settlement Scheme is modified in respect of persons who are under a legal disability (for example under the age of 18).

The assessment processes are modified and longer time limitations apply. The determination of claims of persons under a disability is subject to the supervision of the Senior Master's Office. The different procedures are outlined in clause 11 of the Settlement Scheme.

Personal representatives have been appointed for persons under a disability and they will be **provided with separate advice** regarding the operation of the Settlement Scheme and the role of the Senior Master's office and should **refer to that advice** in relation to differences in the assessment process.

### C.10 Overview of the Assessment process

The stages of the assessment process are described in detail in the Settlement Scheme, which can be downloaded from <http://www.mauriceblackburn.com.au/media/2722/approved-bonsoy-settlement-scheme.pdf> and are summarised on the following page.

### Step 1

Medical records, reports, tax records and any other information and documentation relevant to the assessment of a claim are collected.

### Step 2

The Administrator conducts an assessment for each registrant applying the law in the State of Victoria. The Administrator can request additional information as necessary.

### Step 3

A Notice of Assessment detailing the assessment value, information relied on by the administrator and a brief statement of reasons is provided to the registrant.

### Step 4

Any registrant dissatisfied with the Assessment can seek an Independent Review of the Assessment. Administrator may request a bond for costs of Review.

### Step 5

A review must be sought within 21 days of the date of the Notice of Assessment. The review decision of Independent Counsel is **final and binding** upon the Administrator and the registrant.

### Step 6

If a review is not requested within 21 days, the registrant **is deemed to have accepted the Assessment** of their claim.  
No further review can be sought after that time.

### Step 7

Once all the assessments have been completed, the settlement sum can be distributed.

## **C.11 Your Obligations under the Settlement Scheme**

The Settlement Scheme as approved by the Court now has the effect of Court Orders.

Registrants who wish to participate in the Settlement Scheme are required to comply with a number of obligations, which are set out in clause 5 of the Settlement Scheme. The Scheme is available at <http://www.mauriceblackburn.com.au/media/2722/approved-bonsoy-settlement-scheme.pdf>.

Please **read these carefully** to ensure you understand what is required of you.

In very broad terms: registrants are required to act honestly, respond to requests promptly, and to do anything else required for the timely administration of the Settlement Scheme; this includes attending and participating in conferences if asked to do so, and providing authorities, instructions or documentation.

Given both the size of this assessment process and the requirement to assess each claim before the settlement sums can be finally distributed, it is **critically important that registrants co-operate fully** with meeting deadlines, attending appointments and providing full and complete information where requested.

Maurice Blackburn, as the Administrator will ensure that the assessment of claims of the group as a whole and the distribution of the settlement sums are not delayed as a result of unwillingness to co-operate by individual registrants.

Where a registrant fails to fulfil obligations under the Settlement Scheme or follow any direction or request made by the Administrator, the Administrator is empowered to apply a discount to the registrant's Assessment, including reducing the registrant's claim to an Assessment of zero.

## **C.12 Stages of the assessment process**

### ***Authorities and information***

To help us obtain necessary materials to assess your claim, we previously sent you authorities for completion. These are used to obtain any medical treatment records and reports, tax returns and any other documents relevant to the assessment of your claim.

All records obtained will be treated confidentially and will only be used for the purpose of assessing your claim.

If you believe that specific or additional material or records should be obtained and considered as part of your assessment, you should raise that with Maurice Blackburn as soon as possible.

The Administrator will make all decisions as to whether additional material, including treating reports is required and if so, how the information is obtained.

Failure to comply with requests for information or to provide authorities is likely to result in the assessment of claim on the basis of what information is to hand, even where that is likely to result in a zero Assessment.

## ***Assessment and Notice of Assessment***

Following the collation of all the information required, the Administrator will conduct an assessment for each registrant applying the law operating in Victoria, which has been summarised in Section B above.

In conducting the Assessment the Administrator may obtain additional information and rely upon any or all of the information, documents or advice specified in clause 8.2 of the Settlement Scheme.

After conducting the Assessment, the Administrator will issue to the registrant a Notice of Assessment setting out the information required by clause 8.10 of the Settlement Scheme.

Once you receive your Notice of Assessment, you need to **carefully read** the document.

If you are satisfied with the Assessment, you do not need to take any further action. You will be automatically **deemed to have accepted the assessment** after 21 days of the date of the Notice of Assessment.

Once the Notice of Assessment is deemed to be accepted, no review can then be sought.

## ***Rights of Review***

If a registrant is dissatisfied with the Assessment as detailed in the Notice of Assessment, they can seek an Independent Review of the Assessment. The review **must be sought within 21 days** of the date on the Notice of Assessment, otherwise the Assessment is deemed to be accepted.

A Request for Review form will be sent with the Notice of Assessment. The registrant must state with precision the grounds for seeking the review.

The Administrator may request a registrant to pay a bond for the review, up to \$1,000.00 and this bond must be received within 14 days of lodging the Request for Review with Maurice Blackburn. If the bond is not paid within 14 days the Administrator may treat a Request for Review as void.

If the requirements are met the review will be referred for Independent Counsel and the registrant will be notified. Independent Counsel can seek further information regarding the claim, conduct interviews with the registrant and take what steps they consider necessary to conduct the review.

Registrants considering lodging a Request for Review should note that the **outcome of the review may be a decrease in the Assessment Value.**

The result of the Independent Review is binding on the registrant, even if it is lower than the original assessment.

**The outcome of Independent Review will be final and binding** on the registrant and the Administrator. It cannot be appealed to a tribunal or Court.

### ***How much will the review cost?***

Given the significant time and cost involved in assessing all claims before being able to distribute the settlement sums, the Court agreed that it was important to discourage speculative and time-wasting reviews and to minimise depletion of the settlement fund, by imposing **a cost for unsuccessful reviews**.

### ***Bond***

Registrants who seek a review of their Notice of Assessment may be required to pay a bond not exceeding \$1,000 within 14 days of lodging the Request for Review. If the bond is not paid within this time period, the request for a review is invalid and the original assessment deemed as final.

### ***Successful Review***

A successful review is where Independent Counsel assesses the losses as greater than 110% of the Assessment Value in the original assessment. In that case, any **bond paid will be refunded** to the registrant. The individual registrant is not liable for costs of the review. Those costs are paid out of the settlement fund.

### ***Unsuccessful Review***

An unsuccessful review is where Independent Counsel assesses the losses as less than or equal to 110% of the Assessment Value in the original assessment. In that case the registrant may be required to pay the Administrator's costs of engaging the Independent Review of up to the sum of \$3,000.

This means in the case of unsuccessful review, the bond is retained by Maurice Blackburn to offset the costs of the review, which would otherwise come out of the group settlement monies. Additionally, the group member is liable for the balance of the review costs, up to a total of \$3,000. The remaining balance can be deducted from any settlement sums otherwise payable to that group member.

The Administrator has discretion to waive the requirement for a bond, or to waive the costs of an unsuccessful review, where exceptional circumstances justify doing so.

## **C.13 Distribution of the Settlement Fund and Interim Distribution**

Compensation will not be paid to group members until all individual personal injury claims have been assessed.

At the time of the approval of the settlement, our estimate was that this process would take approximately 6 to 12 months. If our estimate of the duration of the assessment process changes, we will communicate that to you.

The Administrator retains the discretion to make an interim payment of a portion of assessed losses, after finalising assessments of at least 30% of registrants. Interim payments can only be made to those registrants with completed assessments and cannot exceed 60% of the registrant's Assessment Value.

This discretion will only be exercised in exceptional circumstances when compared to the circumstances of other group members.

#### **C.14 What if a group member no longer wishes to participate in the assessment process?**

As the case has now resolved, it is no longer possible for individual group members to opt out of the proceedings, but if they no longer wish to have those claims assessed they do not have to do so.

If any group member no longer wishes to have their claim assessed, they do not have to do so. They should inform Maurice Blackburn of the decision to not be involved in the assessment process. The group member will have his or her entitlement assessed at zero, and will then be unable to recover compensation, from the settlement funds or independently from the Defendants, for any injuries caused by their consumption of Bonsoy.

#### **C.15 Costs**

The cost of the assessment process will be met from the settlement sum and interest generated on the settlement fund up to the time it is distributed.

Therefore it **will not cost a group member to participate in the process** of having their individual claim assessed, even if they are assessed as having a zero or a very modest entitlement to compensation.

However, there **may be costs associated with requests for Independent Review**.

Because interest earned on the settlement fund is not likely to cover the costs of the administration process, costs incurred in administration will diminish the monies available for compensation of group members.

We therefore ask all registrants to assist in reducing administration costs by complying with obligations and processes in the Settlement Scheme.

## SECTION D – DEDUCTIONS AND REPAYMENTS FROM COMPENSATION

There are certain deductions and repayments which may apply to a group member's compensation sum, including:

- a) repayments to Medicare and/or a private health insurer of medical costs for treatment of Bonsoy related injuries;
- b) repayment to Centrelink of some benefits if loss of earnings compensation is awarded.

### D.1 Why might I have to make repayments from my compensation sum?

There is long standing legal principle that a person should not be compensated twice for the same injury. This is sometimes referred to as **double compensation**.

The prohibition on double compensation means, for example, that a group member cannot be compensated for medical expenses which have already been paid by Medicare. Another example is that a group member cannot be compensated for lost earnings to the extent that compensation or benefits have been received from another source (such as Centrelink) to cover those lost earnings.

The receipt of some benefits, such as payment of Bonsoy related medical expenses by Medicare, or benefits for loss of earnings paid by Centrelink, can result in an obligation to **repay some or all of the benefits**.

There are some exceptions to the rule against double compensation. For example: disability insurance, income protection insurance or superannuation received by a group member as compensation will not usually result in a reduction in compensation or an obligation to repay benefits. The position in each case will be **determined by the terms of the specific policy**.

### D.2 Will I be given advice and information about these deductions and repayments?

Maurice Blackburn will gather information from registrants regarding Centrelink or private health insurance benefits received in relation to losses related to a Bonsoy injury.

Information about any deductions and repayments will be included in the Notice of Assessment, the Reasons for Assessment, and correspondence to you from the assessment team explaining the effect of your assessment. This information will address whether any repayment is required to organisations such as Medicare, a private health insurer or Centrelink.

### D.3 Who will make the repayments?

If you receive compensation, but are required to make a repayment from that compensation to a third party such as Centrelink or Medicare, you will be informed of that obligation and given an estimate of the amount to be repaid.

For repayments to Medicare, Maurice Blackburn will, prior to distribution of the settlement funds, confirm the amount to be repaid to Medicare, deduct that amount from any settlement sums you are entitled to, and forward that payment directly to Medicare on your behalf.

The mechanism of repayment for Centrelink or private health insurers will depend on arrangements made with those third parties and group members who are affected will be advised of those arrangements in due course.

#### **D.4 Group members are obliged to disclose third party benefits received**

Group members are obliged under the terms of the Settlement Scheme to advise Maurice Blackburn of the existence of any third party benefits they have received that may be relevant to the assessment of their losses under this scheme; this includes benefits or payments from Centrelink, Medicare and private health insurers.

Where a group member fails to disclose the existence of a relevant third party benefit, the group member remains solely responsible for any sums to be repaid in respect of that benefit and indemnifies the Settlement Scheme for any liability otherwise arising.

### **Types of Deductions**

#### **D.5 Medicare**

##### ***Medicare Bulk Payment Agreement***

In normal circumstances the actual costs billed through Medicare by an individual claimant would be calculated through a rather complicated process that requires individuals to identify, from the list of all treatment expenses billed through Medicare since the date of the injury, those services which relate to the injury. This process then produces a calculated payback figure which is deemed valid for 6 months. This process then has to be repeated every 6 months throughout the course of the litigation to ensure a valid charge is available at the time of receipt of settlement funds. If a valid charge is not available at the time of distribution of settlement monies, 10% of the money is held on trust until a valid notice of charge is produced, a process that can in some instances take months.

Given the logistics and cost of repeatedly undertaking such a process for each of the approximately 550 group members throughout the assessment process, and the significant delays that would be involved, we have negotiated with Medicare to apply a deemed payback figure for all group members that meet the three criteria below. This is known as a **Bulk Payment Agreement**. Medicare proposed a deemed payback figure of \$210 and we anticipate finalising an agreement with Medicare shortly.

The deemed payback figure was arrived at by assessing a sample of group members, calculating their individual payback amounts, determining an average and applying that average across those group members who are required to make a payback.

The Bulk Payment Agreement will save considerable administrative expenses and avoid the delay and complications that would otherwise arise if we were required to obtain multiple individual notices of charge for each group member over the next 6 to 12 months.

For those group members who are required to make a repayment to Medicare, the deduction will be made by Maurice Blackburn from their settlement sums, and the amount forwarded to Medicare on their behalf.

Under the Medicare Bulk Payment Agreement a repayment to Medicare will only be required where the Group Member:

- a) has billed treatment expenses in relation to their Bonsoy injuries through Medicare, and

- b) is assessed as being entitled to receive compensation for past and future medical expenses, and
- c) is assessed as being entitled to receive total compensation from this scheme of more than \$5,000.

Not all group members will be obliged to make a repayment to Medicare.

## D.6 Private Health Insurance

Some group members may have billed their private health insurer for treatment expenses incurred in relation to their Bonsoy injuries. In those circumstances **an obligation to make a payback to that private health insurer may arise.**

While the position in respect of paybacks will vary depending on the individual insurance policy, the general position is that private health insurers do require a repayment where claimants receive compensation.

**Depending on the terms of the policy**, the group member may also be precluded, in whole or in part, from billing future treatment expenses for treatment of Bonsoy related injuries to the private health insurer.

Please note that only treatment expenses **that relate to injuries caused by Bonsoy** are compensable and can be subject to payback. The injuries and conditions that are compensable are discussed in more detail in part B of this booklet.

Maurice Blackburn will seek information from group members regarding claims made on private health insurance policies. Where a group member has billed relevant treatment expenses through a private health insurer, Maurice Blackburn will request or ask the group member to request a claims history statement and will identify the treatments that are found to be causally related to a Bonsoy injury.

The payback figure can then be calculated and advised to the group member. The mechanisms of repayment will depend on any arrangements made with private health insurers and group members who are affected will be advised of those arrangements in due course.

## D.7 Centrelink

A group member may be required to repay an amount to Centrelink, or may lose the entitlement to receive Centrelink benefits for a period of time, if their final assessment includes compensation for lost earnings or lost earning capacity.

If your final assessment does not include compensation for lost earnings or lost earning capacity, then there will be no obligation to make repayments to Centrelink.

If a group member's final assessment includes an amount for loss of earnings, or lost earning capacity, then that group member will be precluded from receiving relevant Centrelink benefits (such as Newstart, Jobsearch or disability pension) for a defined period known as **the preclusion period.**

The preclusion period is a period of time during which a group member may be precluded or prevented from receiving benefits under a statutory or some other benefit scheme.

The length of the preclusion period is based on a formula based on the amount of compensation received by the group member; which equates in general terms to: the **more compensation received, the longer the preclusion period.**

**Where the calculated preclusion period is in the past**, and relevant benefits from Centrelink were received during the preclusion period, then those benefits will need to be repaid from the settlement money to be received by the group member.

**Where the preclusion period extends into the future** and relevant benefits from Centrelink were received during the preclusion period, the group member will need to repay those benefits and will not be entitled to receive relevant benefits from Centrelink until the expiry of the preclusion period.

**Any Centrelink preclusion period and obligation to repay will only be imposed at the time the settlement money is payable to the group member**, it will not affect your Centrelink entitlements during the course of the assessment process.

Further information will be provided to persons who are affected as part of the assessment process and determination of compensation.

## **Taxation**

### **D.8 Do I have to pay tax on compensation I receive?**

No. Compensation for personal injury is not taxable, even if it includes compensation for lost earnings.

If, however, after receiving the compensation, you invest the sum and earn income on the investment, that income is likely to be treated in the same manner as any other taxable income.

We cannot provide individual taxation advice and you will need to obtain your own advice regarding taxation matters.