

ACPNS LEGAL CASE REPORTS SERIES

This series compiles short summaries of significant cases involving charitable, philanthropic, nonprofit and social enterprise organisations in Australia and overseas.



Matthews v Ausnet Electricity Services Pty Ltd & Ors; Rowe v Ausnet Electricity Services Pty Ltd & Ors (Final Ruling) [2023] VSC 313

Supreme Court of Victoria, Dixon J, 9 June 2023

The determination of a charity to receive the residual from a bushfire class action distribution scheme.

Key words: Class Action Settlement, Victoria, Bushfire, Residual Fund, Distribution

1. The Kilmore-East Kinglake bushfire class action was settled for \$494,666,667, and a Settlement Deed (the Deed) and the accompanying Settlement Distribution Schemes (SDS) were approved by the Court in 2014.
2. The SDS provided for a detailed scheme by which the claims of group members, whether for personal injury and dependency, or for economic loss and property damage, were to be assessed. There were more than 10,000 claims registered on behalf of over 5,000 individuals.
3. This proceeding dealt with the finalisation of the administration of the SDS involving minor unpaid claims, the contingency fund, costs, final distributions, and dealing with the residual fund.
4. This note only deals with the distribution of the residual fund.

Kilmore East Kinglake SDS

5. The Court noted that unless any further distribution was shared equally among group members, complicated assessments and calculations were needed, and costs would increase. A simplified process that could deliver the maximum benefit to the group members was estimated to cost approximately \$202,529.80, leaving approximately \$221,146.64 for distribution. Each group member would receive approximately \$35.00.
6. The Court was not persuaded that it was appropriate to approve a form of distribution of the residue that was likely to consume 52% of the residual sum.
7. The Court was invited by the scheme administrator to consider donating the residual sum to the Australian Red Cross and/or to the Immersive Bushfire Experience Foundation (the Foundation).

8. The foundation was a registered charity that was established by the lead plaintiff, Mrs Carol Matthews. The foundation aims to enhance people's bushfire preparedness and ability to enact a bushfire plan when faced with the threat of a bushfire through an immersive and sensory experience.
9. The Court found (at [22]):

[T]hat it is appropriate or necessary to ensure that justice is done in the proceeding that I give a further direction as to how the Scheme Administrator should deal with the residue, and that the proper administration of justice is best achieved by returning the residue to the benefit of the community that is substantially comprised of the group members and their neighbours, friends and relatives. This course will avoid a substantial loss of funds in administration costs in order to make a relatively nominal payment while maximising the opportunity for real community benefit generally through the proposed local charity.

10. And further that (at [21]):

Without wishing in any way to depreciate efforts and commitments of the Australian Red Cross, the Royal Commission into the Black Saturday Bushfires commented on the importance of planning and preparation in order to survive a bushfire, especially through having and following a bushfire plan. Improving the opportunities for Australians to appropriately develop, and implement, a bushfire plan is an essential tool for reducing the risk of death, injury and property loss. Further, the incidence of bushfires is likely to increase in coming years in Victoria and I am persuaded that this foundation is a worthy charity to put the remaining residual fund to good use and is specifically focussed on providing a benefit for all persons facing potential bushfires.

Murrindindi SDS

11. In this SDS, the Scheme Administrator estimated that costs of approximately \$127,825 (incl GST) would be incurred, resulting in a distribution of approximately \$523,815. Distributed equally amongst the group members, the Scheme Administrator estimated that each group member would receive approximately \$250.
12. Again, even though the costs would only be 20%, the Court decided in favour of a donation.
13. The Scheme Administrator invited the Court to consider donating the residue sum to one or more appropriate charitable institutions, nominating the Australian Red Cross and/or Foundation Murrindindi.
14. The Court favoured Foundation Murrindindi as (at [37]-[39]):

Foundation Murrindindi is a registered charity formed in 2012 by the local residents to help the community recover from the Black Saturday Bushfires. The foundation provides grants for various community initiatives. I am informed that Dr Rowe supports the proposal for a donation to Foundation Murrindindi.

Foundation Murrindindi has its origins in community advisory committees set up to assist in the allocation of funds by the Victorian Bushfire Appeal Fund. The foundation now provides benefits, not just for Marysville and surrounding communities, but for the wider Murrindindi Shire area by delivering services, making grants and undertaking community leadership and partnership activities.

I am persuaded that a donation of the residual sum to this foundation will provide a significant benefit to a worthwhile charity that will put the remaining residual funds to good use with a specific focus on providing benefits to the area that was greatly affected by the Murrindindi fire.

15. The Court reasoned that the proper administration of justice was best achieved by returning the residue to the benefit of the community that was substantially comprised of the group members and their neighbours, friends and relatives, rather than substantial costs for a nominal payment.
16. The Court ordered that the residuary be paid to the two charities.

COMMENT



The 2009 Black Saturday bushfires killed 119 people, destroyed 125,000 hectares and more than 1,000 homes. The Victorian Bushfires Royal Commission found the Kilmore East-Kinglake bushfire was caused by an ageing SP AusNet power line.

In December 2014, the Victorian Supreme Court, in what was considered to be the biggest class action in Australia's legal history at the time, approved a \$500 million settlement.

Most class actions in Australia are commenced under the Federal Court of Australia's representative proceeding regime: see Part IVA of the [Federal Court of Australia Act 1976](#) (Cth). There are also equivalent regimes for class actions in the Supreme Courts of Victoria (as in this case), New South Wales, Queensland and Western Australia.

Where seven or more persons appear to have claims against a defendant, and the claims arise out of similar or related circumstances, and all the claims give rise to a substantial common question of law or fact, then any one or more of those persons can commence a class action on behalf of some or all of the persons in the class.

The person who commences the class action instructs the lawyers who run the claim on behalf of the class, usually called group members.

In a class action, the court can resolve the common questions raised by the group claims. The decision is then binding on each group member and on the defendant. This means there only needs to be one proceeding for those common questions, rather than separate proceedings for each group member.

Where a class action settles on terms providing for compensation to be paid to the group members, the basic agreement will either be that the defendants will pay a percentage of the individual losses to each group member or pay a single dollar figure as a lump sum amount to be shared among the group members.

A scheme administrator is appointed by the Court and often will be a senior partner from the plaintiff's lawyers' firm of solicitors to assess the rate of compensation for each individual claimant. This is for reasons of efficiency – the lawyers who conducted the action will have accumulated knowledge that will enable them to administer the scheme more efficiently. Conflicts of interest arise from this situation, and group members seek their own legal advice, or the Court facilitates an independent review of the scheme administrator's decisions, supervised by the Court.

Refer: [KILMORE EAST KINGLAKE BUSHFIRE CLASS ACTION SETTLEMENT DISTRIBUTION SCHEME: FAIRNESS, COST AND DELAY POST-SETTLEMENT](#) by Michael Legg, *Monash University Law Review* (Vol 44, No 3) 658-686.

VIEW THE CASE



This case may be viewed at: <https://www.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2023/313.html>

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