



Australian Government Solicitor

DEED OF SETTLEMENT

DEED IN RELATION TO FEDERAL COURT PROCEEDING NO VID 1367 OF 2013

Tyson Duval Comrie on his own behalf and on behalf of the Defined Group Members (by his litigation representative Kairstien Wilson)

and

Commonwealth of Australia (represented by the Department of Finance)

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File reference: 13139365

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DEED OF SETTLEMENT

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Date

This Deed is made on 9 February 2016.

Parties

This Deed is made between and binds the following parties:

1. **the Applicant on his own behalf and on behalf of the Defined Group Members (by his litigation representative Kairstien Wilson)**
Suite 4, Level 9, 276 Flinders Street, Melbourne, 3000 (the Applicant)
2. **the Commonwealth of Australia** represented by the Department of Finance (the Commonwealth)

Context

This Deed is made in the following context:

- A. By the Application, the Applicant commenced the Representative Proceeding.
- B. The Representative Proceeding is brought by the Applicant as a representative party under Part IVA of the FCA Act on his own behalf and on behalf of the Defined Group Members.
- C. In the Application and Statement of Claim, the Applicant:
 - a. claims that the Commonwealth has discriminated against him and the Defined Group Members by causing, inducing or aiding the respective ADEs which employ or have employed the Applicant and the Defined Group Members to assess his and their wages under the BSWAT; and
 - b. alleges that the discrimination complained of is unlawful under sections 6, 15, 24, 29 and 122 of the DDA.
- D. The Commonwealth denies the unlawful discrimination:
 - a. claimed in the Application; and
 - b. alleged in the Statement of Claim.
- E. In October and November 2015, the Parties engaged in a Court ordered mediation, which was successful and the Parties entered into Heads of Agreement on 19 November 2015. Pursuant to clause 3.1.17 of the Heads of Agreement, the Parties agreed to enter into a deed of settlement embodying terms contained in this Deed.
- F. In discharge of the obligations imposed on the Applicant and the Commonwealth by clauses 3.1.4, 3.1.5 and 3.1.6.b of the Heads of Agreement:

- a. on 18 December 2015, the Applicant filed the Interlocutory Application and the Commonwealth supported the Interlocutory Application; and
 - b. the Parties consented to the orders sought by the Interlocutory Application.
- G. On 21 December 2015, the Court granted the Interlocutory Application and made the Orders.
- H. On 21 December 2015, in accordance with paragraph 1.2 of the Orders and in discharge of the obligations imposed on the Applicant by clause 3.1.6.a of the Heads of Agreement, the Applicant filed in the Representative Proceeding a Second Further Amended Application and Second Further Amended Statement of Claim.
- I. Further to the Heads of Agreement and the matters referred to in paragraphs F, G and H of this Deed above, the Parties have agreed to settle the Representative Proceeding as at the date of this Deed on the terms and conditions contained in this Deed.
- J. This Deed has been entered into by the Applicant for and on behalf of the Defined Group Members as representative of the Defined Group Members pursuant to Part IVA of the FCA Act.

Operative provisions

In consideration of the mutual promises contained in this Deed, the Parties agree as follows:

1. Interpretation

1.1. Definitions

1.1.1. In this Deed, unless the context indicates otherwise:

- a. a term in bold type has the meaning shown opposite it:

ADE means Australian Disability Enterprise.

**Amending
Legislation**

means a Bill to amend the BPS Act as follows (or to the following effect):

- a. To replace the reference to "50%" in s 8(3)(a) of the BPS Act with "70%" or otherwise make amendments to the BPS Act which would have that same effect.
- b. To extend by 12 months all dates referred to in the BPS Act, other than the dates referred to in sections 4 (definition of "BSWAT"), 6(2), 6(2A), 9(4)(a) and 15(1)(a).
- c. To ensure that a person who, prior to the enactment of the Amending Legislation (should it be enacted), has:
 - i. received a payment amount from the BSWAT payment scheme paid under s 40 of the BPS Act; or
 - ii. lodged an effective acceptance of an offer of a payment amount as determined by the Secretary under s 17(3) of the BPS Act,

is entitled to receive a top-up payment which broadly reflects the increase to the payment amount had the payment amount been determined by the Secretary after the Amending Legislation is enacted (should it be enacted).

- d. To implement any amendments that the Commonwealth considers appropriate in order to make voluntary rather than compulsory the requirement to obtain legal advice for there to be an effective acceptance.
- e. To make any other necessary or desirable amendments to the BPS Act to give effect to, or complement, subparagraphs a to d above of this definition.

**Amending
Legislative
Instrument
Application**

means an instrument to make consequential amendments to the BPS Rules, which are necessary or desirable by reason of the Amending Legislation.

means the originating application under s 46PO(1) of the *Australian Human Rights Commission Act 1986* (Cth) and s 33C of the FCA Act that commenced Federal Court Proceeding Number VID1367 of 2013, as amended on 6 May 2014, 14 January 2015 and 21 December 2015 and as further amended in accordance with any leave as may be granted by the Court.

appointed person	means a person who, under a law of the Commonwealth, State or a Territory of Australia or otherwise: <ul style="list-style-type: none"> a. has guardianship of another person; or b. is a person appointed by a court, tribunal, board or panel (howsoever described) who has power to make decisions for another person.
BPS Act	means the <i>Business Services Wages Assessment Tool Payment Scheme Act 2015</i> (Cth).
BPS Rules	means the <i>Business Services Wages Assessment Tool Payment Scheme Rules 2015</i> (Cth).
BSWAT	means the Business Services Wage Assessment Tool.
BSWAT payment scheme	means the BSWAT payment scheme established by the BPS Act.
Business Day	means a weekday other than a public holiday in the State of Victoria.
Court	means the Federal Court of Australia.
DDA	means <i>Disability Discrimination Act 1992</i> (Cth).
Deed	means this Deed and includes all schedules and attachments (if any) to this Deed.
Defined Group Members	means all persons who, as at the date of Settlement Approval, are described in the Application to be group members in the Representative Proceeding, save for those group members who have opted out of the Representative Proceeding pursuant to notices filed with the Court in accordance with s 33J of the FCA Act.
effective acceptance	has the meaning given by s 38 of the BPS Act.
FCA Act	means the <i>Federal Court of Australia Act 1976</i> (Cth).
group member	has the meaning given by s 33A of the FCA Act.
GST	has the meaning that it has in the <i>A New Tax System (Goods and Services Tax) Act 1999</i> (Cth).
Heads of Agreement	means the Heads of Agreement signed by the Parties on 19 November 2015 in relation to the Representative Proceeding.
Interlocutory Application	means the Applicant's interlocutory application filed in the Representative Proceeding on 18 December 2015.
Orders	means the Orders made by the Honourable Justice Davies on 21 December 2015 on granting the Interlocutory Application.

Parties	means the Applicant and the Commonwealth.
party and party basis	has the same meaning as the expression costs as between party and party in Schedule 1 to the <i>Federal Court Rules 2011</i> .
payment amount	has the meaning given by s 8(1) of the BPS Act.
Protocol	means the protocol referred to in clause 2.9.1.
Released Persons	means: <ul style="list-style-type: none"> a. the Commonwealth; b. past and present ministers, officers, employees, agents, professional advisors, executors, administrators or assigns of the Commonwealth; and c. all other persons.
Representative Proceeding	means Federal Court Proceeding Number VID1367 of 2013.
Secretary	means the Secretary of the Department of Social Services.
Settlement Approval	means approval by the Court of settlement of the Representative Proceeding under s 33V(1) of the FCA Act.
Statement of Claim	means the Statement of Claim filed in the Representative Proceeding on 12 February 2014, as amended on 17 March 2014, 6 May 2014 and 21 December 2015 and as further amended in accordance with any leave as may be granted by the Court.

1.2. Interpretation

1.2.1. In this Deed, unless the contrary intention appears:

- a. words importing a gender include any other gender;
- b. words in the singular include the plural and words in the plural include the singular;
- c. clause headings are for convenience reference only and have no effect in limiting or extending the language of provisions to which they refer;
- d. words importing a person include a partnership and a body whether corporate or otherwise;
- e. a reference to dollars is a reference to Australian dollars;
- f. a reference to any legislation or legislative provision includes any statutory modification, substitution or re-enactment of that legislation or legislative provision;

- g. if any word or phrase is given a defined meaning, any other part of speech or other grammatical form of that word or phrase has a corresponding meaning;
- h. a reference to writing is a reference to any representation of words, figures or symbols, whether or not in a visible form;
- i. a reference to a person includes any type of entity or body of persons, whether or not it is incorporated or has a separate legal identity, and any executor, administrator or successor in law of the person;
- j. a covenant on the part of two or more persons binds them jointly and severally and a covenant for the benefit of two or more persons is for the benefit of them jointly and severally;
- k. a reference to any deed, agreement, licence, document or other instrument (including this Deed) includes a reference to that deed, agreement, licence, document or other instrument as renewed, extended, novated, varied or substituted from time to time;
- l. where the day on or by which any act, matter or thing is to be done under or pursuant to this agreement is not a Business Day, the act, matter or thing must be done on the next Business Day;
- m. for the avoidance of doubt, a reference to the enactment of the Amending Legislation (howsoever described) means that the Amending Legislation has passed both Houses of the Commonwealth Parliament and received Royal Assent; and
- n. references to clauses or Parts are references to clauses or Parts of this Deed.

1.3. Guidance on construction of Deed

- 1.3.1. This Deed records the entire agreement between the Parties in relation to its subject matter and supersedes the Heads of Agreement.
- 1.3.2. As far as possible all provisions of this Deed will be construed so as not to be void or otherwise unenforceable.
- 1.3.3. If anything in this Deed, including any provision or part of a provision of this Deed, is void or otherwise unenforceable then, to the maximum extent possible, it will be severed and the rest of the Deed remains in force.
- 1.3.4. A provision of this Deed will not be construed to the disadvantage of a Party solely on the basis that it proposed that provision.

1.4. Commencement

- 1.4.1. Part 1 (Interpretation), clauses 2.1.1, 2.1.2, 2.1.3, 2.1.4, 2.4.4, 2.4.6, 2.4.7, 2.4.8, 2.5.1, 2.6.1, 2.6.2, 2.7.1, 2.7.2, 2.9.1, 2.9.2, 2.10.1, 3.1.2, 3.1.3, Part 4 (Notices) and Part 5 (General Provisions) will commence on the date this Deed is executed by the Parties.

- 1.4.2. Clauses 2.8.1 and 2.8.2 will:
- a. commence on the date of the enactment by the Commonwealth Parliament of the Amending Legislation but only if the Amending Legislation is enacted on or before 30 June 2016; and
 - b. not commence (and will have no effect) if the Amending Legislation is not enacted on or before 30 June 2016.
- 1.4.3. Clauses 2.2.1, 2.2.2, 2.3.1, 2.4.1, 2.4.2, 2.4.3, 2.4.5, 3.1.1 and 3.2.1 will:
- a. commence on the date of Settlement Approval; and
 - b. not commence (and will have no effect) if there is no Settlement Approval.

2. Settlement

2.1. Amendment to the BPS Act and BPS Rules

- 2.1.1. The Commonwealth intends to cause all necessary legal and legislative measures to be taken to:
- a. enact the Amending Legislation before 1 July 2016; and
 - b. amend the BPS Rules in accordance with the Amending Legislative Instrument as soon as is reasonably practicable after any enactment of the Amending Legislation.
- 2.1.2. The Commonwealth will use its best endeavours to cause the measures referred to in clause 2.1.1.a to occur in the first Parliamentary sitting period of 2016, or failing that, at the first opportunity thereafter.
- 2.1.3. The Applicant acknowledges each of the following matters:
- a. There are constitutional limitations in Australia's system of government that prevent the Commonwealth Executive binding the Commonwealth Parliament to enact legislation and binding the Commonwealth Executive to introduce legislation into the Commonwealth Parliament.
 - b. Those limitations apply to clause 2.1.1 and any legislation required in support of clause 2.1.1, including the Amending Legislation and the Amending Legislative Instrument.
 - c. The Commonwealth's statement of intent in clause 2.1.1 does not create any legally enforceable rights or obligations and cannot give rise to any remedy enforceable against the Commonwealth in any court or tribunal in or outside of Australia.
 - d. The Commonwealth does not warrant or represent to the Applicant or his legal advisers that the Amending Legislation or Amending Legislative Instrument will become laws of the Commonwealth.
- 2.1.4. The Applicant (through his legal advisers, Maurice Blackburn Lawyers and AED Legal Centre) will publicly support the Amending Legislation and will take all

reasonable steps to support the passage of the Amending Legislation through the Commonwealth Parliament.

2.2. Discharge and Release

2.2.1. Subject to both the enactment of the Amending Legislation and the Settlement Approval, the Representative Proceeding, as between the Applicant, for and on his own behalf and for and on behalf of the Defined Group Members, and the Commonwealth, including the claims for relief made by the Applicant on his own behalf and on behalf of the Defined Group Members as set out in the Application and the Statement of Claim, is fully and finally settled.

2.2.2. In consideration of the Commonwealth entering into this Deed:

- a. The Applicant forever discharges and releases the Released Persons from the claims made by the Applicant in the Representative Proceeding and all actions, proceedings, claims and demands whatsoever, which the Applicant now has or may in the future have against any of the Released Persons as a result of, or arising out of, directly or indirectly, the use of the BSWAT to work out a minimum wage payable to him.
- b. The Applicant, for and on behalf of the Defined Group Members, forever discharges and releases the Released Persons from the claims made by (or on behalf of) the Defined Group Members in the Representative Proceeding and all actions, proceedings, claims and demands whatsoever that each of the Defined Group Members now has or may in the future have against any of the Released Persons as a result of, or arising out of, directly or indirectly, the use of the BSWAT to work out a minimum wage payable to her or him.

2.3. Dismissal of the Representative Proceeding

2.3.1. Upon the enactment of the Amending Legislation and the Settlement Approval, the Applicant, for and on his own behalf and for and on behalf of the Defined Group Members, and the Commonwealth will consent to an order by the Court that the Representative Proceeding be dismissed.

2.4. Costs

2.4.1. The Commonwealth will pay the Applicant's costs of the Representative Proceeding on a party and party basis (including Maurice Blackburn Lawyers' costs incurred pursuant to clause 2.1.4), up to and including approval of the settlement of the Representative Proceeding under s 33V of the FCA Act.

2.4.2. Clause 2.4.1 is subject to the Applicant providing the Commonwealth with information as to the amount of the costs referred to in clause 2.4.1 so that relevant spending approvals can be obtained, with the Commonwealth to specify the level of information to be provided and to bear the costs of providing that information.

- 2.4.3. The Commonwealth will pay the costs referred to in clause 2.4.1 within 60 days of agreement between the Parties as to the amount of the costs or, failing agreement, within 60 days of the costs being taxed.
- 2.4.4. The Commonwealth will pay the reasonable costs of AED Legal Centre incurred pursuant to clause 2.1.4 if those costs are not covered by an existing funding agreement between the Commonwealth and AED Legal Centre.
- 2.4.5. The Commonwealth agrees not to enforce the costs order in its favour in paragraph 7 of the orders made on 2 May 2014 in the Representative Proceeding.
- 2.4.6. If the Amending Legislation is not enacted:
- a. the Commonwealth will pay the Applicant's costs on a party and party basis of:
 - i. the Interlocutory Application;
 - ii. complying with, or taking action pursuant to, orders 1.2, 5, 6, 9, 11 and 12.2 of the Orders; and
 - iii. work actually undertaken by the Applicant in entering this Deed; and
 - b. the Applicant shall have no other redress against the Commonwealth related to the Amending Legislation not being enacted and will not seek any other redress from the Commonwealth related to the Amending Legislation not being enacted.
- 2.4.7. For the avoidance of doubt, clause 2.4.6 does not prevent the Applicant from claiming his costs of the Representative Proceeding if the Representative Proceeding is continued because the Amending Legislation is not enacted.
- 2.4.8. Clause 2.4.6.a is subject to the Applicant providing the Commonwealth with information as to the amount of the costs referred to in clause 2.4.6.a so that relevant spending approvals can be obtained, with the Commonwealth to specify the level of information to be provided and to bear the costs of providing that information.
- 2.5. Commonwealth makes no admission of legal liability**
- 2.5.1. The Applicant agrees and acknowledges that the settlement as set out in this Deed is made without admitting or conceding any legal liability whatsoever on the part of the Commonwealth or any of the persons referred to in paragraph b of the definition of Released Persons in clause 1.1.1.a.
- 2.6. Applications to the BSWAT Payment Scheme**
- 2.6.1. The Applicant and the Defined Group Members are each at liberty to apply for a payment under the BSWAT payment scheme, subject to the requirements of Division 2 of Part 3 of the BPS Act regarding registration and application and the eligibility condition in s 6(4) of the BPS Act being met.

2.6.2. The Commonwealth will take active steps to promote and facilitate registration in, and application to, the BSWAT payment scheme by the Defined Group Members in particular, as well as others who may be eligible for the BSWAT payment scheme.

2.7. Defined Group Members are bound by this Deed

2.7.1. The Applicant enters into this Deed both on his own behalf and for and on behalf of the Defined Group Members pursuant to Part IV of the FCA Act.

2.7.2. This Deed binds:

- a. the Parties and any appointed person, executor, administrator, liquidator or trustee in bankruptcy appointed in respect of any Party.
- b. each of the Defined Group Members and any appointed person, executor, administrator, transferee, assignee, liquidator or trustee in bankruptcy appointed in respect of her or him.

2.8. Court approval of settlement

2.8.1. If the Amending Legislation is enacted by the Commonwealth Parliament, as soon as is reasonably practicable, and no later than 21 days, after such enactment the Parties will jointly apply to the Court for approval of the settlement as set out in this Deed under s 33V(1) of the FCA Act.

2.8.2. Upon the Court granting the Settlement Approval, the Parties will consent to the Court making consequential orders to the following effect to make it clear that the Court's judgment giving effect to the settlement as set out in this Deed is binding on the Defined Group Members, such orders supporting the effect of s 33ZB of the FCA Act.

Pursuant to s 33ZF of the FCA Act or otherwise, the Court authorises the Applicant *nunc pro tunc* on behalf of the Defined Group Members to enter into and to give effect to this Deed and the transactions thereby contemplated for and on behalf of the Defined Group Members.

Pursuant to s 33ZB(a) of the FCA Act, the Court declares that the persons affected and bound by [the Orders made giving effect, and consequential, to approval of the settlement as set out in this Deed] are the Applicant, the Commonwealth and the Defined Group Members.

2.9. Communication protocol

2.9.1. Subject to clause 2.9.2 below, the Parties will agree to, or in default of such agreement the Court will be asked by the Parties to order, a Protocol to which the Parties must adhere when communicating directly with group members in the Representative Proceeding about the settlement as set out in this Deed.

2.9.2. For the avoidance of doubt, the Protocol will not prevent:

- a. the Commonwealth from publishing:

- i. its intention to seek amendments of the BPS Act in accordance with the Amending Legislation or to amend the BPS Rules in accordance with the Amending Legislative Instrument;
 - ii. the Amending Legislation, including any fact, matter or thing relevant to the introduction into, consideration by, or passage through the Commonwealth Parliament of the Amending Legislation;
 - iii. the Amending Legislative Instrument, including any fact, matter or thing relevant to the making, tabling in Parliament, debate or disallowance of the Amending Legislative Instrument;
 - iv. any fact, matter or thing necessary or desirable to fulfil the Commonwealth's intention referred to in clause 2.1.1; and
 - v. the settlement as set out in this Deed or the Heads of Agreement (or details of such settlement) in connection with publishing anything referred to in clauses 2.9.2.a.i to 2.9.2.a.iv.
- b. the Applicant (through his legal advisors, Maurice Blackburn Lawyers and AED Legal Centre) from fulfilling the obligations in clause 2.1.4.

2.10. Taxes, duties and government charges

- 2.10.1. The Parties acknowledge and rely on GSTR 2001/4 for no taxable supplies being made under this Deed and for no GST being payable in relation to it.

3. Settlement of all claims

3.1. Acknowledgements

- 3.1.1. The Parties acknowledge that the promises made in, and transactions entered into under, this Deed by the Commonwealth are in full satisfaction of any claim for loss, damage, cost or expense in relation to the claims made by the Applicant, for and on his own behalf and for and on behalf of the Defined Group Members, in the Representative Proceeding.

3.1.2. Each Party:

- a. acknowledges that it enters into this Deed freely and voluntarily based upon its own information, legal advice and investigation;
- b. acknowledges that, other than set out in this Deed, it is not executing this Deed as a result of, by reason of, or in reliance on any promise, representation, advice, statement or information of any kind or nature whether in answer to any inquiry or not;
- c. represents and warrants that this Deed is valid and binding in respect of that Party; and
- d. must do all things and execute all further documents necessary or desirable to give full effect to this Deed.

- 3.1.3. In addition to the representations and warranties under clause 3.1.2, the Applicant represents and warrants that he is authorised to enter into this Deed on behalf of the Defined Group Members and to bind the Defined Group Members through execution of this Deed by his litigation representative.

3.2. Bar to proceedings

- 3.2.1. This Deed may be pleaded in bar in any proceedings which may be commenced by or through either Party or any of the Defined Group Members:
- a. in respect of the claims made by the Applicant, for and on his own behalf and for and on behalf of the Defined Group Members, in the Representative Proceeding;
 - b. in respect of, or arising out of, directly or indirectly, the use of the BSWAT to work out a minimum wage payable to the Applicant or any of the Defined Group Members.

4. Notices

4.1. Format, addressing and delivery

- 4.1.1. A notice under this Deed is only effective if it is in writing, and dealt with as follows:

- a. *if given by the Applicant to the Commonwealth - sent to the address specified below:*

*Robert Antich, Assistant Secretary, Comcover, Department of Finance
John Gorton Building
King Edward Terrace
PARKES ACT 2600
AUSTRALIA; or*

- b. *if given by the Commonwealth to the Applicant - sent to the address specified below:*

*Maurice Blackburn, Level 10, 456 Lonsdale Street, Melbourne, Victoria,
3000*

- 4.1.2. A notice is to be:

- a. signed by the person giving the notice and delivered by hand; or
- b. signed by the person giving the notice and sent by pre-paid post; or
- c. transmitted electronically by the person giving the notice by electronic mail or facsimile transmission.

4.2. When effective

- 4.2.1. A notice is deemed to be effected:

- a. *if delivered by hand* - upon delivery to the relevant address;

- b. *if sent by post* - upon delivery to the relevant address;
 - c. *if transmitted electronically* - upon actual receipt by the addressee.
- 4.2.2. A notice received after 5.00 pm, or on a day that is not a Business Day in the place of receipt, is deemed to be effected on the next Business Day in that place.

5. General provisions

5.1. Alternative Dispute Resolution Procedure

- 5.1.1. A Party must not commence court proceedings relating to any dispute arising from this Deed except where that Party seeks urgent relief from a court or where dispute resolution has failed under this clause. If a Party fails to comply with this clause the other Party is not required to undertake dispute resolution in accordance with this clause.
- 5.1.2. If a dispute arising from this Deed cannot be settled by negotiation between the Parties within 3 months the Parties may agree to use an alternative dispute resolution process to attempt to resolve the dispute.

5.2. Waiver

- 5.2.1. A failure or delay by a Party to exercise any right or remedy it holds under this Deed or at law does not operate as a waiver of that right.
- 5.2.2. A single or partial exercise by a Party of any right or remedy it holds under this Deed or at law does not prevent the Party from exercising the right again or to the extent it has not fully exercised the right.

5.3. Variation

- 5.3.1. A variation of this Deed is binding only if agreed in writing and signed by the Parties.

5.4. Assignment

- 5.4.1. The Applicant cannot assign its obligations and agrees not to assign its rights under this Deed without the Commonwealth's prior written approval in writing.

5.5. Applicable law

- 5.5.1. This Deed is to be construed in accordance with, and any matter related to it is to be governed by, the law of the State of Victoria.

5.6. Counterparts

- 5.6.1. This Deed may be signed in any number of counterparts and all such counterparts taken together will be deemed to constitute one and the same document. Execution of the Deed will be complete when each Party holds a copy of this Deed signed by the other Party.

Executed as a Deed

Signatures

SIGNED, SEALED AND DELIVERED)
for and on behalf of the)
Commonwealth of Australia)
represented by the Department of
Finance by:

Robert Antich
Assistant Secretary, ~~Comcover~~ Risk,
Department of Finance



Signature

*Insurance and special
claims branch*
R

In the presence of:

ROWENA URQUHART

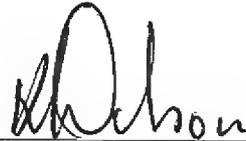
Name:



Signature of witness

SIGNED, SEALED AND DELIVERED)
for and on behalf of the Applicant and)
the Defined Group Members by the)
Applicant's litigation representative:

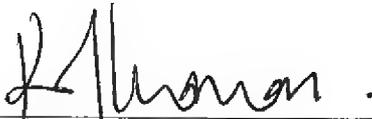
Kairstien Wilson



Signature

In the presence of:

Name: Kelly Maree
Thomas



Signature of witness