COMMONWEALTH LAW CONFERENCE 2025

VALETTA, MALTA

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- **CLASS ACTIONS WITHIN THE COMMONWEALTH – SAFETY IN NUMBERS?**
- **AN AUSTRALIAN PERSPECTIVE FOCUSING ON CLASS ACTIONS BROUGHT BY FIRST NATIONS AUSTRALIANS**

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INTRODUCTION

1. Safety in numbers? Definitely – at least in Australia in the context being discussed.

2. Since 2016 there have been about a dozen class actions brought by First Nations peoples leading to settlements involving large numbers of Group Members and substantial settlement amounts.

3. These proceedings are all proceedings where but for the class action regimes available in Australia it is highly unlikely that any of the various Group Members would have received any compensation in respect of the claims brought.

4. The proceedings are essentially of two types:

   (a) Claims based upon the historical treatment of First Nations People;[2]

   (b) Claims based upon human rights involving contraventions of the Racial Discrimination Act 1975 (Cth)("**RDA**") and other legislation.

The various First Nations class actions brought can be summarised as follows:

1. *Wotton v State of Queensland* [2016] – A claim arising out of the police response to rioting on Palm Island Queensland after the death of an Aboriginal man in police custody.

   (a) The claims were brought under the RDA;

   (b) A $30M settlement was reached after an "initial trial" resulted in the Applicants obtaining judgments in their favour with damages totalling $220,000. The settlement amount was shared by approximately 440 Group Members.

   See: *Wotton v State of Queensland (No. 5)* [2016] FCA 1457, Mortimer J (the current CJ of the FCA) – the Initial Trial.

   Wotton v State of Queensland (No. 10) [2018] FCA 915, Murphy J –Court approval of settlement in respect of Group Members.

   (c) A spinoff from Wotton is *Kyle-Sailor v Channel 9*. Comments were published by Channel 9 in May 2021 concerning the spending of monies received under the settlement scheme approved in the *Wotton* class action. The Applicant claimed

[2] These claims also involve claims under the RDA but only in respect of Reparations Schemes which the proceedings challenged.

in that class action the comments gave rise to contravention of s. 18C RDA (racial vilification) and damages were sought.

(d) In very broad terms it was alleged that the publications gave rise to a number of imputations including that the Group Members or a significant number of them were improper or unworthy recipients of compensation under the Wotton class action settlement or were wasteful or irresponsible in relation to the manner in which they were spending such compensation monies. The *Kyle-Sailor* class action settled for $3M. That settlement was approved by the Federal Court on 31 January 2025: *Kyle-Sailor v Heinke (No. 2)* [2025] FCA 33.

The *Wotton* class action and the *Street* class action referred to hereunder will be discussed in more detail later in this paper as a means of demonstrating the operation of class actions in Australia.

2. *Pearson v State of Queensland* [2016] – known as the Queensland "Stolen Wages" class action.

(a) The claim was brought in respect of a Claim Period – 12 October 1939 to 4 December 1972 – when certain protective legislation was in place which substantially controlled the lives of First Nations people in Queensland;

(b) A $190M settlement was shared between approximately 10,000 Group Members.

See: *Pearson v State of Queensland (No. 2)* [2020] FCA 619, Murphy J –Court approval of settlement.

Prior to the proceeding being brought the State of Queensland had paid approximately $95m to First Nations people by way of reparations for their treatment as workers during the protective legislation period.

3. *Street v State of Western Australia* [2020]

(a) The Western Australian Stolen Wages class action;

(b) The claim was brought in respect of a Claim Period – 11 December 1936 to 9 June 1972 – when protective legislation was in place which substantially controlled the lives of First Nations people in Western Australia;

(c) A settlement of "up to" $180.4M is to be shared by approximately 8,750 Group Members.

See: *Street v State of Western Australia* [2024] FCA 1368, Murphy J – 29 October 2024 – Court approval of settlement.

Prior to the proceeding being brought the State of Western Australia had paid reparations of approximately $2.552M to 1,276 First Nations people.

4. *McDonald v Commonwealth of Australia*

(a) The Northern Territory Stolen Wages class action;

(b) The claim was brought in respect of Northern Territory protective legislation which substantially controlled the lives of First Nations people in the Northern Territory

(c) A settlement of "up to" $202M is to be shared by approximately 10,000 Group Members;

(d) Orders approving initial payments under the settlement scheme have been made but further and final orders as to the mechanisms of settlement are yet to be made.

See: *McDonald v Commonwealth of Australia* FCA 312/2021

5. Stolen Generation Reparations and Class Actions – Arising out of the forced removal of children from First Nations families from the early 1900s to the 1970's with placement of children in various institutions run by government or churches.

(a) Reparations and settlements totalling approximately $430M have been agreed to be paid by various States and by the Commonwealth of Australia in respect of various Territories.

[IT CAN BE SEEN WITH REFERENCE TO THE ABOVE THAT THERE HAVE BEEN PAYMENTS BY WAY OF REPARATIONS / SETTLEMENT OF CLASS ACTIONS EXCEEDING $1 BILLION.]

The class actions listed below are all ongoing. They will be more difficult to settle than the *Wotton* class action (which settled after "a win" on liability) and the *Pearson* and *Street* class actions and the Stolen Wages / Reparations Class Actions – all of which can be regarded as righting historical wrongs. The class actions referred to below seek to bring about systemic change which will meet some opposition from respondent governments as the issues the subject of the class actions are ongoing issues continuing after relevant claim periods end.

6. *Banksia Hill Juvenile Detention and Unit 18 Class Actions* – Western Australia

   (a) Claims brought in respect of the treatment of First Nations children in detention in Western Australia. The claims are brought under the RDA, the *Young Offenders Act* and the *Disability Act*;

   (b) The class size is estimated at approximately 600;

   (c) Ongoing;

   (d) The issues the subject of these class actions are unresolved and ongoing.

7-9. Child Safety Class Actions – recently brought against the States of New South Wales, Queensland and Western Australia (Departments of Child Safety) in respect of the operation of fostering schemes affecting First Nations children and families.

   (a) The claims are brought under the RDA and with reference to child protection laws.

   (b) The number of Group Members in New South Wales alone could be as high as 100,000.

   (c) Ongoing;

   (d) The issues the subject of this class action are unresolved and ongoing.

10. New South Wales Fisheries Class Action arising out of the prosecution of First Nations fishers in New South Wales for illegal fishing – said to be the criminalisation of traditional fishing practices protected under Commonwealth native title law.

   (a) The number of Group Members is estimated at 10,000;

   (b) Ongoing;

   (c) The issues the subject of this class action are unresolved and ongoing.

11. Western Australian and Northern Territory Housing Class Actions in respect of thousands of tenants living in substandard public housing in remote communities across Western Australia and the Northern Territory. Allegations of unsafe drinking water, inadequate cooling and insulation, failure to carry out and delay in carrying out repairs.

   (a) The claims allege breach of tenancy contractual terms, contraventions of consumer law legislation and unconscionable conduct (supplying substandard housing under conditions unfair to a vulnerable group);

(b) The number of Group Members is estimated to be those living in about 5,000 houses in each of Western Australia and the Northern Territory;

(c) Ongoing;

(d) The issues the subject of this class action are unresolved and ongoing.

12. Of the class actions set out above only *Wotton* has proceeded to an initial trial with the others settling before trial at mediation. In *Wotton* the claim of the Group Members (apart from the Applicants) settled at mediation. Mediation has been the main way of resolving class actions in Australia – as is the case with litigation generally in Australia.

THE CLASS ACTIONS REGIME IN AUSTRALIA

1. The Australian Class Action regime was introduced in March 1992 through the enactment of Part IVA of the *Federal Court of Australia Act 1976 (Cth).*

2. It is an "opt-out" regime – ie. if you fall within the defined class you are a member of the class and bound by any outcome unless you opt out – or – in the case of a settlement – successfully oppose the settlement.

3. Any settlement of a class action is subject to Court approval. The Court's task is to determine whether the settlement is fair and reasonable and in the interests of Group Members who will be bound by it. The Court assumes an onerous and protective role in relation to Group Members' interests in some ways similar to Court approval of entitlements on behalf of persons with a legal disability. The Court must decide whether the proposed settlement is within the range of reasonable outcomes – rather than whether it is the best outcome which might have been won by better bargaining.

4. The Court is also required to approve any deductions from the settlement amount before distribution to Group Members being: the quantum of legal fees, the costs of administering any settlement scheme and the entitlements of litigation funders to reimbursement and commission.

5. The Court is assisted by the Applicant's lawyers providing a comprehensive confidential opinion as to prospects in the action and the reasonableness of settlement. Lawyers provide such opinions not as advocates but as officers of the Court.

6. Australia is a federation of States and Territories with a Federal Commonwealth Government. The States have over time introduced class action legislation which substantially mirrors the Federal legislation introduced in 1992.

7. The threshold requirements for the bringing of a class action are:

   (a) There must be seven or more persons with claims against the same Respondent;

   (b) The claims must be in respect of, or arise out of the same, similar or related circumstances;

   (c) The claims must give rise to at least one substantial common issue of law or fact.

8. The class action is brought by a representative Applicant(s) who is a party in the action. The Group Members are not parties.

9. Class definition is crucial.

10. The Applicant's claim (including quantum) and Common Questions (common to the class as a whole or in respect of certain subgroups of the class) are determined at an initial trial. Thereafter the claims of the Group Members (apart from the Applicant(s) remain to be determined. These can be determined at mediation – as occurred in the *Wotton* class action.

FUNDING CLASS ACTIONS IN AUSTRALIA

11. Until recently (with the adoption in the State of Victoria of legislation allowing contingency fees) the funding options in Australia have been:

   (a) Lawyers funding the action on a speculative basis ie. no-win/no-fee. Legislation allows an "up-lift" on fees in "spec'd" matters of up to 25%. Australian lawyers are not generally interested in "specing" matters (apart from person injury claims) although it could not be said to be unusual;

   (b) Litigation Funding – most of the larger class actions are funded by third party litigation funders. The funder accepts the risk of the action failing but is generously rewarded if the action succeeds. The funder meets the Applicant's costs of the action and indemnifies the Applicant in respect of the Respondent's costs should the action fail. However, if successful the usual funding arrangement has been that the funder will take a commission of anywhere between 20% - 35% of the gross settlement amount (it is not regulated) <u>plus</u> return of its investment in terms of costs and other disbursements.

   As an example – in *Pearson v State of Queensland* – (settlement of $190M) – the funder was paid commission of 20% = $38M plus it was reimbursed its costs of

$12M = total of $50M. This was a return of approximately four times its investment of $12M in costs. However the funder had taken the risk of the potential liability of meeting the Respondent's costs and not recovering any of its costs.

(c) A hybrid of Lawyer's funding / Litigation funding by Funders. More recently litigation funders have spread the risk by sharing costs with the Applicant's solicitors. Usually this has been on the basis that the solicitors will fund about 25% of the costs on a speculative basis (involving an entitlement to an up-lift of up to 25%) with the funder meeting the balance of their costs (and usually all outlays).

12. In 2016 the first Common Fund Order ("**CFO**") was made in the matter of *Money Max v QBE Insurance Group Ltd.* Such an order requires all Group Members (whether they have entered into a litigation funding agreement or not) to pay the costs equally. This led to an increase in funded class actions.

13. Before 2016 lawyers in class actions would "book build" by obtaining the agreement of Group Members to funding agreements with funders. The book build had to be sufficient to attract the interest of funders. By the time of the Street class action (approximately 8,750 Group Members) only approximately five Group Members had entered into funding agreements with the funder. This was sufficient as the Court made a CFO.

RECENT DEVELOPMENTS AFFECTING LITIGATION FUNDING

14. In 2019 the High Court of Australia in *BMW v Brewster* held that the relevant provisions of the *Federal Court Act* did not empower the Court to make CFO's in the early stages of proceedings as had occurred for example in the Pearson class action.

15. The Federal Court responded quickly by publishing a Practice Direction to the effect that the Court would continue to make CFO's at the conclusion of proceedings.

16. There is legislation proposed to "cap" funding commission but this proposal is not progressing quickly.

17. Contingency fees have been prohibited until recently in Australia primarily because of the obvious inevitable conflict that lawyers face when a party to such an arrangement.

18. Notwithstanding these concerns the Victorian Law Reform Commission in 2018 recommended the introduction of contingency fees <u>in class actions</u> on the basis that it

would improve access to justice, would introduce competition between litigation funders, would provide simplicity and transparency to Group Members together with the fact that there is a strong supervisory role of the Courts in class actions.

19. Victoria introduced Australia's first legislation allowing contingency fees in class actions taking effect from 1 July 2020 allowing Group Costs Orders (**GCO's**) – s. 33ZDA *Supreme Court Act 1986*. The onus is on a plaintiff to apply to the Court for approval of a GCO as being appropriate or necessary to ensure that justice is done in the proceeding. The court determines the percentage range for a GCO. The solicitors assume liability in respect of any adverse costs orders and must provide security for costs if ordered. Such orders are in practice inevitable.

20. On 5 July 2024 the Full Court of the Federal Court published its reasons in *R & B Investments Pty Ltd (Trustee) v Blue Sky (Reserved Question)* [2024] FCAFC 89 – (Murphy, Beach & Lee JJ) where the Court concluded on a question reserved to it that the Federal Court had the power under the *Federal Court Act* when making an order being a CFO to provide for the distribution of funds to a solicitor <u>otherwise than payment for costs and disbursements incurred in relation to the conduct of the proceeding.</u>

21. The Court observed at [86]:

> ***[86]*** *Any payment made by a Solicitors' CFO would not be pursuant to any bargain struck which forms part of a retainer.* [It had been argued that the proposed Solicitors' CFO was contrary to State Legislation prohibiting contingency fees payable under a retainer.] *As is evident from the terms of s 33V(2), the payment would be made pursuant to a Court order from an identifiable settlement fund controlled by the Court.*

And at [105]:

> ***[105]*** *Given the abolition of the tort and crime of maintenance and champerty, the reality of a highly developed market for litigation funding of class actions, the perceived value of open class actions providing redress for wrongs, the existence of "uplifts" based upon success, and the recent introduction of GCOs in Victoria, statements made in decisions prior to these related developments, which might suggest a policy-based aversion to remuneration of solicitors in exchange for funding class action litigation require, at the very least, re-examination. …*

And at [107]:

> ***[107]*** *… There is much to be said for the notion that there is no longer a coherent basis for a rule of public policy that precludes solicitors being remunerated in class actions on the same basis as litigation funders where providing overlapping services*

(namely, taking on risk, including as to adverse costs, in relation to class action litigation benefitting numerous other persons).

22. It remains to be seen whether many solicitors firms are prepared to act on a contingency basis involving as it does taking on the risk of liability for adverse costs orders. Class actions are usually large, complex matters with costs running into the many millions. Will partners in a legal firm (particularly non-litigation and non-class action partners) be prepared to take such a risk? Perhaps there will be spin-off firms (incorporated) which only engage in class actions which take the risks but keep the rewards if the action is successful.

A DIVE INTO THE WOTTON AND THE STREET CLASS ACTIONS

23. The *Wotton* class action will be discussed first but before going to these two class actions some background information will be helpful.

GENERAL BACKGROUND[3]

24. First Nations people[4] first arrived in Australia at least 50,000 years ago.

25. In 1788 the British established a colony in Sydney. The estimate of First Nations people at this time varies from no less than 315,000 to more than one million. However "*Recent archaeological evidence suggests that a population of 750,000 indigenous peoples could have been sustained."*[5] As at 1788, it is estimated there were approximately 260 distinct language groups and 500 dialects.

26. There was a dramatic decline in the population of First Nations people following colonisation under the impact of new diseases, oppressive and often brutal treatment and social and cultural disintegration.

27. Although the following numbers are regarded as underestimates – by 1900 the First Nations population was approximately 93,000 falling to a low by 1933 of 74,000. This number had increased dramatically to approximately 560,000 by 1995.

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3 This information has been sourced from many sources and is generally not footnoted

4 First Nations people are constituted by Aboriginal and Torres Strait Islander people. Currently there are about one million First Nations people in Australia with approximately 90% identifying as Aboriginal, approximately 5% as Torres Strait Islanders and approximately 5% Aboriginal / Torres Strait Islanders

5 Australian Bureau of Statistics

28. The 2022 census records 167 First Nations languages however with most First Nations people speaking English or Aboriginal English it is estimated that all but 13 of these languages are endangered.

29. Currently there are approximately 27 million people residing in Australia. The approximately one million First Nations people constitute approximately 3.7% of the Australian population.

LIFE OF FIRST NATIONS PEOPLE UNDER THE PROTECTION ACTS

> *2.1 In the late 19th and early 20th centuries, the governments of mainland states and the Northern Territory introduced legislation to regulate the lives of many Indigenous people. This legislation is commonly referred to as 'protection Acts' because its stated intention was to 'protect' Indigenous people. These Acts were used, in some cases until the 1980s, as a means of implementing policies of protection, separation, absorption and assimilation of Indigenous populations, depending on the prevailing philosophy of governments at the time.*[6]

30. By 1911 the Northern Territory and every State except Tasmania had a protection Act giving the Chief Protector or Protection Board extensive power to control First Nations people. This included powers to direct First Nations people to live on reserves.

31. Each State and Territory had somewhat different control measures. For example in Queensland the *Protection Act* provided for minimum wages (much lower than awards for non-indigenous Queenslanders) and wages were paid to Protectors who were only allowed to spend the wages on behalf of the employee for whom they were held. The Protector in effect held the wages on trust with an obligation to keep an account of money spent. The Protectors deposited the wages to an account in the worker's name in a Government bank account.

32. By contrast in Western Australia there was no legislated minimum wage and no payment of wages to Protectors. The legislation required that employees be provided with "*substantial good and sufficient rations*", clothing and blankets.

REPARATIONS

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6 Standing Committee on Legal and Constitutional Affairs *Unfinished Business: Indigenous Stolen Wages* (2006) ("**the 2006 Senate Report**")

33. In the late 1990's and early 2000's some States introduced reparations schemes acknowledging historical deficiencies in the treatment of First Nations people as employees and deficiencies in the handling of wages payable to them.

> *7.1 In 1999 the Queensland Government introduced a process referred to as the Underpayment of Award Wages Process (UAWP) to make reparations for the underpayment of award wages to Indigenous workers who had been employed by the government on Aboriginal reserves for the period 31 October 1975 to 29 October 1986.*
>
> *7.2 In 2002, the Queensland Government introduced the Indigenous Wages and Savings Reparations Offer (the reparations offer) for the reparation of money to Indigenous workers who had their wages and savings controlled under protection Acts. The NSW Government also introduced the Aboriginal Trust Fund Repayment Scheme (ATFR Scheme) to address the repayment of monies held in trust funds by the NSW Government. Evidence suggests that the ATFR Scheme for the repayment of monies is generally better regarded than the Queensland reparations offer.*[7]

34. The Queensland UAWP scheme provided for a one-off payment of $7,000 to workers employed on Aboriginal reserves between 31 October 1975 and 20 October 1986.[8] The Queensland reparations scheme provided for payments of $2,000 or $4,000 to workers depending on their date of birth.

35. The Queensland government paid approximately $40M to workers under the UAWP.

36. The Queensland government paid approximately $55M in reparations.

37. When the Queensland reparations scheme was presented to parliament the Queensland Premier acknowledged that there were estimates that the total amount owed to First Nations people in Queensland may be as much as $500M.[9]

38. Payments under the New South Wales ATFR Scheme varied from $1,000 to $24,000. The New South Wales reparations scheme was evidence based in that what was owed would be paid indexed to current dollar value. The scheme also provided for payments to descendants of deceased Aboriginal people who had money put into trust but who were never repaid those monies. No "stolen wages" class action has been brought in New South Wales primarily because the New South Wales ATFR was fair and equitable.

THE 2006 SENATE REPORT "UNFINISHED BUSINESS: INDIGENOUS STOLEN WAGES"

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7 2006 Senate Report

8 31 October 1975 was the commencement date of the *Racial Discrimination Act 1975 (Cth)*. 29 October 1986 was the date from which Award wages were paid to all workers.

9 2006 Senate Report – 7.24

39. The 2006 Senate Report discussed and analysed the above history in detail and made a number of recommendations including:

> ***Recommendation 4***
>
> *8.26 The committee recommends that:*
>
> *(a) the Western Australian Government:*
>
> *(i) urgently consult with Indigenous people in relation to the stolen wages issue; and*
>
> *(ii) establish a compensation scheme in relation to withholding, underpayment and non-payment of Indigenous wages and welfare entitlements using the New South Wales scheme as a model, and*
>
> *(b) the Commonwealth Government conduct preliminary research of its archival material in relation to the stolen wages issues in Western Australia.*
>
> ***Recommendation 5***
>
> *8.27 The committee recommends that the Commonwealth Government in relation to the Northern Territory and the Australian Capital Territory, and the state governments of South Australia, Tasmania and Victoria:*
>
> *(a) urgently consult with Indigenous people in relation to the stolen wages issue;*
>
> *(b) conduct preliminary research of their archival material; and*
>
> *(c) if this consultation and research reveals that similar practices operated in relation to the withholding, underpayment or non-payment of Indigenous wages and welfare entitlements in these states, then establish compensation schemes using the New South Wales scheme as a model.*
>
> ***Recommendation 6***
>
> *8.28 The committee recommends that the Queensland Government revise the terms of its reparations offer so that:*
>
> *(a) Indigenous claimants are fully compensated for monies withheld from them;*
>
> *(b) further time is provided for the lodgement of claims;*
>
> *(c) claimants are able to rely on oral and other circumstantial evidence where the records held by the state are incomplete or are allegedly affected by fraud or forgery;*
>
> *(d) new or further payments do not require claimants to indemnify the Queensland Government; and*

(e) the descendants of claimants who died before 9 May 2002 are included within the terms of the offer.[10]

WOTTON V STATE OF QUEENSLAND

40. Of all the First Nations class actions discussed in this paper this is the only matter that went to an initial trial – ie. a trial of the claims by the Applicants and the determination of Common Questions.

41. After an initial trial the State lodged an appeal however this was withdrawn.

42. Ultimately the claims of the Group Members (in addition to the Applicants) were settled at mediation.

INITIAL TRIAL

43. In 2004 Palm Island had a population of approximately 2,000 people, most of whom were Aboriginal people.

44. On 19 November 2004 a 36 year old Aboriginal man, Cameron Doomadgee (known posthumously as Mulrunji) died in police custody on Palm Island (Queensland). Mulrunji had been arrested by Senior Sergeant Christopher Hurley (SS Hurley) earlier that day for yelling abuse directed at him and an Aboriginal liaison officer.

45. Mulrunji was affected by alcohol and was protesting and struggling when arrested. On the way to the Palm Island police station, Mulrunji and SS Hurley fell through the rear door of the police station as they were entering it. Mulrunji ended up on the floor of the police station and was dragged limp and unresponsive into a police cell. Within the hour he had died.

46. The class action concerned the role played in the investigations by Queensland Police Service ("**QPS**") officers into Mulrunji's death in custody and the QPS's management of community concerns and protests, tensions and anger in the weeks after Mulrunji's death and the police responses to the protests and fires that occurred on Palm Island on 26 November 2004.

47. During rioting the police station was set on fire and this led to an emergency declaration being issued under the *Public Safety Preservation Act.* In the days that followed Palm Island was locked down and between 88 and 111 (Special Emergency Response Team)

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10 Senate Report

(**SERT**) officers were deployed to arrest suspects and enter and search approximately 18 homes.

48. On 5 December 2016 following a trial that ran over 22 sitting days the Court found that the QPS had contravened the *Racial Discrimination Act* in some of its conduct when investigating and responding to the Palm Island community's responses to Mulrunji's death – ie some of its conduct was based upon the race of the Palm Island residents.

49. The Applicants brought proceedings in the Federal Court on behalf of class members being those people who were ordinarily resident on Palm Island during the Claim Period and those persons who were affected by the SERT operation.

50. Section 9 of the RDA relevantly provides as follows:

> ***Racial discrimination to be unlawful***
>
> *(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.*

51. Australian Courts have held that the RDA should be interpreted broadly and beneficially in accordance with the fundamental purposes of the International Convention on the Elimination of All Forms of Racial Discrimination and in particular with the purpose that is emphasised in the preamble – the necessity of eliminating racial discrimination in all its forms and manifestations.

52. The phrase "based on race" means "by reference to race". The question is whether the manner in which the complainant was treated was in any way referable to their race not whether race was the cause of the distinction or exclusion.

53. A motive or intention to discriminate is not an element of a contravention.

54. It was found that the Applicants were entitled to compensation with respect to the contravening conduct of SERT officers in relation to arrests searches and entries into homes. The Court found that the arrests, searches and entries were illegal. It was also found that the lockdown was unlawful.

55. On April 2017 the Court made orders for a class registration process so as to close the class. The class closure orders required every class member who intended to advance an

individual claim in the proceeding to register his or her intention to do so by 1 July 2017. Difficulties with the concept used in the definition of the class of "ordinarily resident" were addressed by defining the class members bound by the settlement ultimately reached by reference to a list of registered class members filed with the Court.

56. Various subgroups of class members were established for the purposes of settlement:

(a) The SERT Subgroup - being those assaulted by a SERT officer, those present when the SERT officers raided homes, and persons whose home was raided by SERT officers;

(b) The Travel Restriction Subgroup – being persons who as a result of the making of the emergency declaration and associated conduct by QPS officers were subject to treatment based on race which nullified or impaired the rights of those subgroup members; and

(c) The General Damages Subgroup – being persons not falling within subgroups (a) and (b) who suffered loss or damage by reason of the contraventions of the RDA.

57. In *Wotton v State of Queensland (No. 10) (2018)* Murphy J approved a settlement reached at mediation of $30M for claims, interest and costs as well as the State providing a public apology. Of the 447 registrants 441 were determined to be eligible to receive payment under the Settlement Distribution Scheme.

58. Under the Distribution Scheme the Applicants' solicitor was appointed Scheme Administrator acting as trustee and was responsible for determining which subgroup a person should be allocated to.

59. The Scheme provided that every eligible class member would receive an initial payment of $3,000 as part payment of their eventual compensation.

60. The Scheme provided that the General Damages Subgroup members would each receive $10,000 and the Travel Restriction Subgroup Members would each receive up to $20,000 inclusive of the first payment and interest.

61. The Scheme recognised that where there were aggravating features in the claims of members of the General Damages and Travel Restriction Subgroups their claims were to be individually assessed and if appropriate they would receive an amount above the fixed sum. The assessments were to be made by independent junior Counsel with a right of review by independent senior Counsel. It was anticipated that there would not be many such claims.

62. Under the Scheme class members with SERT property and SERT witness claims were to receive compensation of up to $20,000 inclusive of the first payment and interest.

63. The SERT assault and SERT present claims were to have their claims for compensation individually assessed by independent junior Counsel (reviewable by independent senior Counsel) applying the principles and approach in relation to compensation in the liability judgment. In the liability judgment the Court awarded $65,000 plus interest to Lex Wotton for physical shock and temporary pain suffered by being tasered, the humiliation he suffered in front of his family and partner, the fear and anxiety he experienced listening to the terrorised screams of his partner and children and his fear his family might be shot during the home entry and search.

64. The liability judgment awarded $85,000 to Cecilia Wotton on the basis that although she did not suffer the same physical trauma as Lex Wotton she experienced deep feelings of terror during the search and entry the effects of which were continuing.

65. In respect of the violation of their privacy and home by the entry and search by SERT officers the liability judgment awarded each of Lex and Cecilia Wotton compensation of $30,000 plus interest.

66. As noted by Murphy J the range of compensation from the liability judgment being $65,000-$85,000 for SERT assault and SERT present class members – some class members under the Scheme were likely to receive compensation substantially less than this range and some may receive more.

67. The Scheme provided for an amount to be set aside sufficient to ensure that the members of the Palm Island community were given appropriate financial counselling, advice and assistance in dealing with the compensation amounts they were to receive.

68. The Wotton decision is a leading case on the application of s. 9 of the RDA. As discussed above the RDA has become the basis for various class actions brought by First Nations people.

STREET v. STATE OF WESTERN AUSTRALIA

69. The Western Australia “Stolen Wages” class action was not about wages paid, held on trust and then not accounted for. The protective historical legislation in Western Australia did not provide for minimum wages or Protectors holding wages on trust as was the case in the Queensland “Stolen Wages” case of *Pearson*.

70. Street was about non-payment and underpayment of wages to First Nations people who worked in Western Australia between 11 December 1936 and 9 June 1972. During this Claim Period many thousands of First Nations people lived under strict legislative controls and many (including children) worked for little or no pay.

71. Many Aboriginal men and boys worked on pastoral stations as ringers or stockmen, sometimes from dawn till dusk seven days a week and many Aboriginal women and girls worked as household domestics and nannies.

72. Workers were fed or given rations but (at least during the early decades of the Claim Period) were paid little or no wages for the work they performed.

73. During the Claim Period many Aboriginal children were taken away from their parents and placed in institutions run by the State or a church. In these institutions the children were required to work before and after school and on weekends (and in some cases full-time) in laundries, farms and other places attached to institutions.

74. The Applicant, Mervyn Street is a senior elder of the Gooniyandi People and an acclaimed artist born in about 1940. It was alleged that Mr Street had worked on pastoral stations in the Kimberley (Western Australia) from when he was about 10 years old and was not paid wages until he was in his 30s.

75. Mr Street brought his claim on his own behalf and on behalf of First Nations people who during all or part of the Claim Period worked in Western Australia under the relevant protective Acts including First Nations people claiming as their descendants.

76. On 17 October 2023 (about five days before the initial trial was to commence) after extensive mediation the parties entered into a settlement subject to the approval of the Court. Settlement was recorded in a Settlement Deed and an annexed Settlement Distribution Scheme (**SDS**). Under the Settlement Deed the State agreed to pay "up to" $180.4M comprised of:

    (a) Up to $165M in compensation (Settlement Fund Amount); and

    (b) $15.4M in respect of the Applicant's party / party costs of the proceeding to the date of settlement (Agreed Costs Component).

77. Settlement included a public apology by the State which was provided on the floor of Parliament.

78. In *Pearson* (the Queensland Stolen Wages class action) the likely number of recipients of compensation as Group Members was known at the time of settlement and hence is was possible to agree a lump sum settlement (in that case $190M).

79. In *Street* at the time of settlement the likely number of Group Members eligible for compensation under any settlement was not known and estimates of the possible number varied.

80. In the circumstances the State was only prepared to agree a settlement amount based upon an amount of dollars per eligible claimant under any settlement. The Settlement Fund of $165M is an amount of $16,500 per eligible claimant up to a maximum of 10,000 claimants. Hence the Settlement Fund Amount was an amount "up to" $165M.

81. To allow the settlement process to proceed the Court made orders providing for a Registration Process.

82. Orders were made on 14 and 20 November 2023 providing for class members to be given notice of the proposed settlement and for the conduct of a substantial physical outreach program to Aboriginal communities throughout Western Australia including remote locations so that Group Members were informed of the requirement to register if they wished to be eligible for payment under the SDS.

83. At the time of the hearing of the settlement approval application on 28-29 October 2024 the parties had agreed that there was likely to be about 8,000 to 9,500 eligible claimants once all eligible registrations had been determined by the Administrator under the SDS – ie. a Settlement Sum of between $132M and $156.75M. Murphy J. determined that it was appropriate to assess fairness of the settlement by reference to the middle of that range being 8,750 eligible claimants.

84. As noted by Murphy J at [13]:

> *… the applicant and his lawyers recommend the proposed settlement to the Court as the best result possible given the substantial legal hurdles facing the case and the substantial risk that the claim brought by the applicant and class members will fail or will succeed on claims that do not relate to all class members or in relation to which the quantum is relatively low compared to the proposed settlement.*

85. Many of the claims in the proceeding were novel and difficult carrying risks in relation to liability, causation and quantum. Given that most claims arose in respect of conduct between 1936 and 1972 they faced a significant risk of being barred by the application of various limitation periods upon which the State relied.

86. As part of the approval process the Applicant's solicitors sought approval for legal costs totalling $29,249,479 which included a discount down from $31,501,618.

87. In the particular circumstances of the case Murphy J reduced those fees by $4M (from $31,501,618). The solicitors fees had included $12M in fees (excluding disbursements) incurred in respect of the post-settlement Registration Process.

88. The class action was funded by a litigation funder. The funder sought reimbursement of $13,358,868 in costs and disbursements paid to the Applicant's solicitors for conducting the proceeding and $1,045,000 in premiums for After The Event ("**ATE**") insurance.

89. Additionally the funder sought a commission payment of 20% of the gross settlement amount estimated to be $159,775M (8,750 eligible claimants x $16,500 = $144.375M plus $15.4M costs) – ie. a commission of $31.951M on top of its reimbursement of costs and disbursements and insurance premiums.

90. The matter settled on the eve of trial. The Funder until settlement had capped its exposure to costs to $10M. It was only after settlement that the Funder provided further funding of approximately $3M to assist in the post-settlement Registration Process.

91. Of the approximate $31M in legal fees approximately $14M was met by the funder and $17M by the Applicant's solicitors. Contrast this with the *Pearson* (Queensland Stolen Wages class action) where the Funder met all the legal fees.

92. In all the circumstances Murphy J concluded that a funding rate of 16% (rather than 20%) was just. On the assumption of 8,750 eligible claimants the Funder was found to be entitled to a funding commission of $25.564M plus its costs and disbursements and ATE premiums rather than the figure sought by it of $31.955M – ie a reduction of $6.391M.

93. The settlement sums agreed to be paid in the Queensland, Western Australia and Northern Territory "stolen wages" class actions were amounts that governments agreed to pay notwithstanding the weaknesses of the cases brought. After deductions for costs and disbursements, the cost of administering settlement schemes and amounts payable to funders the average net amount received (or to be received) by each eligible Group Member is about $10,000. This amount was not an estimate of compensable loss. It was more in the nature of an amount by way of reparations.