FEDERAL COURT OF AUSTRALIA

Wotton v State of Queensland (No 6) [2017] FCA 245

File number:	QUD 535 of 2013
Judge:	**MORTIMER J**
Date of judgment:	15 March 2017
Catchwords:	**HUMAN RIGHTS** – where first respondent found to have engaged in unlawful discrimination – whether Court has power to grant relief against the second respondent when no findings of liability against him – whether appropriate to order the respondent to consider giving an apology – whether respondent should be ordered to publish public statement **PRE-JUDGMENT INTEREST** – entitlement and calculation **COSTS** – whether lump sum costs order appropriate – whether appropriate to order costs to be paid prior to the conclusion of the representative proceeding
Legislation:	*Federal Court of Australia Act 1976* (Cth), ss 22, 23, 33Z(1)(g), 37M, 37N, 51A *Racial Discrimination Act 1975* (Cth), s 18A *Police Service Administration Act* 1990 (Qld), ss 4.6, 4.8 *Australian Human Rights Commission Act 1986* (Cth), s 46PO(4)
Cases cited:	*Australian Competition and Consumer Commission v Clinica Internationale Pty Ltd (In Liquidation) (No 3)* [2016] FCA 284 *Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2007] FCA 2058 *Citron v Zündel* (2002) 41 CHRR D/274 (CHRT) *Courtney v Medtel Pty Limited (No 3)* [2004] FCA 347 *Eatock v Bolt (No 2)* [2011] FCA 1180 *Harris v Caladine* [1991] HCA 9; 172 CLR 84 *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19; 241 CLR 1 *Jones v Toben* [2002] FCA 1150; 71 ALD 629 *Le Roux v Dey* [2011] ZACC 4; [2011] 3 SA 274 *Management 3 Group Pty Ltd (in liq) and Ors v Lenny's*

	Commercial Kitchens and Anor (No 2) [2012] FCAFC 92; 203 FCR 283 *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd (No 5)* [2010] FCA 605 *Wotton v State of Queensland (No 5)* [2016] FCA 1457
Date of hearing:	Determined on the papers
Date of last submissions:	7 February 2017
Registry:	Queensland
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	58
Counsel for the Applicants:	Ms C Ronalds SC with Mr J Creamer
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Solicitor for the Respondents:	Crown Law

ORDERS

QUD 535 of 2013

BETWEEN:	**LEX WOTTON** First Applicant
	AGNES WOTTON Second Applicant
	CECILIA ANN WOTTON Third Applicant
AND:	**STATE OF QUEENSLAND** First Respondent
	COMMISSIONER OF THE POLICE SERVICE Second Respondent

JUDGE: **MORTIMER J**

DATE OF ORDER: **15 MARCH 2017**

THE COURT DECLARES THAT:

1. Each of the applicants is entitled to an award of pre-judgment interest under s 51A of the *Federal Court of Australia Act* 1977 (Cth) on the damages set out in the Court's orders of 5 December 2016, to be calculated in accordance with the *Interest on Judgments Practice Note* (GPN-INT) dated 25 October 2016.

THE COURT ORDERS THAT:

1. The respondents pay the applicants' costs of and incidental to the proceeding to the date of these orders on a party/party basis, including any reserved costs, such costs to be ordered by way of a lump sum figure.
2. Within 10 working days of receipt by its solicitors of an invoice from the Court, the first respondent pay to the Queensland District Registry of the Court the sum of $29,512.56 in refund of the transcript costs which the Court incurred on behalf of the applicants.
3. Paragraphs 2 and 3 of the orders made on 10 September 2015 be vacated.

4. The lump sum costs payable pursuant to paragraph 1 of these orders be paid by the respondents to the applicants as soon as reasonably practicable after an order is made by the Court fixing the lump sum figure.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

QUD 535 of 2013

BETWEEN:	**LEX WOTTON** First Applicant
	AGNES WOTTON Second Applicant
	CECILIA ANN WOTTON Third Applicant
AND:	**STATE OF QUEENSLAND** First Respondent
	COMMISSIONER OF THE POLICE SERVICE Second Respondent

JUDGE: **MORTIMER J**

DATE OF ORDER: **15 MARCH 2017**

THE COURT DIRECTS THAT:

1. On or before 4 pm on 12 April 2017, the applicants file and serve a Costs Summary prepared in accordance with paragraphs 4.10 to 4.12 of the Court's *Costs Practice Note* (GPN-COSTS) dated 25 October 2016.
2. On or before 4 pm on 26 April 2017, the respondents file and serve any Costs Response in accordance with paragraphs 4.13 to 4.14 of the *Costs Practice Note* (GPN-COSTS).
3. The parties use their best endeavours to reach agreement on an appropriate lump sum figure for the applicants' costs.
4. In the absence of any agreement having been reached on or before 24 May 2017, the matter of an appropriate lump sum figure for the applicants' costs be referred to a Registrar in the Queensland Registry for mediation, such mediation to occur at a date to be fixed by the Registrar after consultation with the parties, but no later than 21 June 2017.
5. If the parties agree on a lump sum figure at or before mediation, the parties are to file a minute of proposed consent orders as to costs including the agreed lump sum figure.

6. In the absence of any agreement after the mediation, the matter will be listed for a contested lump sum costs hearing at a date to be fixed by the Court, but no later than 2 August 2017.

7. On or before 4 pm on 22 March 2017, the parties are to file a minute of proposed consent orders reflecting the amount of pre-judgment interest to be awarded to each applicant.

8. The proceeding is adjourned to a case management hearing on a date to be fixed before 29 March 2017.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MORTIMER J:

1 On 5 December 2016, I delivered judgment on the applicants' claims in this proceeding: *Wotton v State of Queensland (No 5)* [2016] FCA 1457 (liability reasons). I made orders and also gave a number of directions related to some outstanding issues, and to the future conduct of the remainder of the proceeding. These reasons should be read together with the liability reasons.

2 In the liability reasons, I indicated I would give the parties an opportunity to make submissions on costs, prejudgment interest on the compensation that had been ordered, and on the further conduct of the proceeding. By agreement, the latter issue was postponed given that the respondents filed a notice of appeal from the orders made on 5 December 2016. At a case management hearing held on 31 January 2017, the first respondent also indicated that the stay I had ordered on the payment of compensation to each of the applicants could be vacated, notwithstanding the appeal. Accordingly on 3 February 2017 I made an order vacating that stay.

3 The parties agreed it was appropriate for submissions to be made on costs and prejudgment interest, notwithstanding the appeal.

4 The principal outstanding issue related to the relief sought by the applicants by way of an apology. Although the first respondent initially opposed this matter being dealt with prior to the hearing of the appeal, at the case management hearing on 31 January 2017, the Solicitor-General indicated that the State accepted it was appropriate for the issue to be determined.

5 The applicants and the State each filed written submissions on costs, prejudgment interest and relief by way of an apology.

6 I have concluded that the usual order as to costs is appropriate in this proceeding, in relation to the applicants' claims. In my opinion the applicants are also entitled to prejudgment interest in accordance with s 51A of the *Federal Court of Australia Act 1976* (Cth) (FCA Act) and the *Interest on Judgments Practice Note* (GPN-INT). I have also determined that the Court should not make any orders in relation to an apology, nor, at this time, order the respondents to publish any public statement. These are my reasons for those three conclusions.

Relief related to an apology

7 In their further amended originating application, relief was sought in the following terms:

> An apology from the Respondents to be provided and published on such terms as the Court directs.

8 In their final submissions the applicants addressed this relief, and pressed for it. The respondent resisted such relief. I considered the issue in detail in my liability reasons at [1550] – [1597].

9 At [1594]-[1597] of my liability reasons, I concluded:

> 1594 On the evidence, one of the attributes found wanting in the QPS by the Palm Island witnesses, and those who spoke or were interviewed in the contemporaneous video footage, was accountability. It is appropriate, in order to redress the damage done by the way QPS officers conducted themselves on Palm Island, for the group members to see the QPS having to be accountable for what the Court has found occurred. Accordingly what I propose to do is to direct the second respondent to consider whether, on the basis of the findings of the Court, it is appropriate to apologise on behalf of the QPS to the community on Palm Island. If the second respondent considers it is appropriate, the second respondent would then issue a public apology. The terms of that apology are a matter for the second respondent. I would be inclined to order it be published on Palm Island, in *The Australian*, *The Courier-Mail* and *The Townsville Bulletin* on a Saturday and in the first eight pages of each newspaper, and on the QPS website. If the second respondent, having considered the Court's reasons, decides it is not appropriate to apologise, then the second respondent will be directed to publish reasons for that decision and those reasons are to be published in the same places as the apology would have been published. In that way, the Commissioner must take responsibility for deciding whether an apology is appropriate, and what that apology should say in light of the Court's findings. The Commissioner will be accountable publicly for that decision. As I have said, the Court will not however impose an apology on the Commissioner. The Commissioner must sincerely and genuinely decide to offer one; or explain why he will not.
>
> 1595 The terms of the apology sought by the applicants would not be appropriate under any circumstances. This Court has made no findings about the "wilful blindness" of the State of Queensland and the Commissioner of Police, nor did the applicants' pleadings require any such findings to be made. Further, the references in the applicants' proposed wording to Palm Islanders being entitled to "appropriate levels of protection" from the QPS do not sit comfortably with the majority of the applicants' allegations concerning contraventions of s 9, which are not about the protection of residents on Palm Island.
>
> 1596 Another option I am prepared to consider is that an order be made for the Commissioner to make a public statement about the Court's findings in this case in lieu of an apology, but to be published in the same way as the apology would have been published. The statement could be in similar form to that ordered in *Eatock v Bolt (No 2)*, adapted to the circumstances of this case.
>
> 1597 Since the parties made very short submissions on the matter of an apology, and I have considered it at length, it is appropriate the parties have an opportunity to make further submissions on the matters I have raised. There will be directions

accordingly.

10 Paragraph 1594 set out a tentative view I had reached about what kind of relief might be appropriate. Having now read and considered the submissions made by the parties, and in particular the State, I am persuaded relief of the kind I contemplated in [1594] would not be appropriate.

11 The State submitted there was no power in the Court to make the kind of order contemplated in [1594]. It based that submission on the fact that the Court had made no finding of unlawful discrimination against the Commissioner, the second respondent. In those circumstances, it contended s 23 of the FCA Act could not support the making of such orders. Rather, the Court had made findings of liability against individual police officers, and a finding of liability under s 18A of the *Racial Discrimination Act 1975* (Cth) (RDA) against the State: see [1545] of the liability reasons. Therefore, the State reasoned, no substantive orders by way of relief could be made against the second respondent, since no allegations of unlawful discrimination were proven against him.

12 It is correct that no findings of unlawful discrimination were made against the Commissioner, and it is also correct that the Court accepted the agreed position by the parties that it was the State which was liable under s 18A of the RDA for the conduct of individual police officers. For that reason, no individual police officers were named as respondents to the proceeding. The State had, quite properly, always accepted liability under s 18A of the RDA. That entirely proper approach should not obscure the legal position that the individual police officers could properly have been named as respondents. If that had been the case, orders in the nature of apologies, or orders of the kind contemplated by [1594] could have been made against each of them.

13 The State accepted, as it had done throughout the trial, that pursuant to s 4.8(1) of the *Police Service Administration Act* 1990 (Qld), the Commissioner is

> the individual with responsibility for the efficient and proper administration, management and functioning of the Queensland Police Service.

14 The State has not referred to any authorities to support its contention on power, and so far as I am aware, it is a novel contention. Acceptance could entail substantial curtailment of the Court's power to make orders to ensure that justice is done between the parties given the Court's findings. The State made no submissions about the scope and application of s 33Z(1)(g) of the FCA Act, given that this is a representative proceeding, although the

applicants submitted this could also be another source of power for orders of the kind in issue.

15 There is no occasion to consider or determine the State's submission about s 23 of the FCA Act, nor the applicants' submissions about s 33Z(1)(g), because in my opinion s 46PO(4) of the *Australian Human Rights Commission Act 1986* (Cth) itself provides ample power for an order of the kind contemplated, in the circumstances of this case.

16 Section 46PO(4) provides:

> If the court concerned is satisfied that there has been unlawful discrimination by **any** respondent, the court may make such orders (including a declaration of right) as it thinks fit, including any of the following orders or any order to a similar effect:
>
> (a) an order declaring that **the** respondent has committed unlawful discrimination and directing **the** respondent not to repeat or continue such unlawful discrimination;
>
> (b) an order requiring **a** respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;
>
> (c) an order requiring **a** respondent to employ or re-employ an applicant;
>
> (d) an order requiring **a** respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;
>
> (e) an order requiring **a** respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant;
>
> (f) an order declaring that it would be inappropriate for any further action to be taken in the matter.

(Emphasis added.)

17 The words I have emphasised in bold should be noted. The word "any" in the chapeau must be given effect. It empowers the Court, subject to the express terms of the sub-paragraphs, to make orders based on unlawful discrimination by "any" respondent. Here, the unlawful discrimination is "by" the State, given its liability under s 18A of the RDA for the conduct of individual police officers.

18 Having found unlawful discrimination by "any" respondent, subpara (a) then limits the power of the Court in making an order of the kind there set out to making an order against "the" respondent who committed the unlawful discrimination. Given the order is in the nature of a mandatory injunction not to repeat such conduct, it is wholly explicable that the Court's

power to make such an order is limited to making the order against the person who engaged in the unlawful conduct in the first place.

19 However, the rest of the sub-paragraphs are not so limited. They empower the Court, having found unlawful discrimination by "any" respondent, to make an order requiring "a" respondent to do certain things. That is ample power to cover an order against the Commissioner, in circumstances where the Court has found the State to have engaged in unlawful discrimination, because its police officers engaged in unlawful discrimination. The importance of this wording for anti-discrimination cases is plain. Frequently, allegations of unlawful discrimination will be made against an individual in circumstances where the individual is part of a larger organisation. Superiors or supervisors of that individual may also be named as respondents, as might the individual's employer. In a hypothetical race discrimination claim, no liability may be found against the employer because of the exception in s 18A(2) of the RDA. However, the Court might make an order against an employer in those circumstances, to the effect that the employer take certain steps within the workplace to improve employees' awareness of unconscious racial bias, for example. Likewise, an individual's supervisor who was named as a respondent but not found to have engaged in any unlawful discrimination (although the individual was so found) may nevertheless be ordered by a Court to undergo some kind of additional training or, indeed, to apologise to an applicant where the supervisor had handled the applicant's complaint in a sub-standard way. I give these as no more than examples: many others can be conceived. The connection with the Court's power is that the person against whom an order is made should be a respondent: see *John Alexander's Clubs Pty Ltd v White City Tennis Club Ltd* [2010] HCA 19; 241 CLR 1 at [131] and [137], as I cited in *Australian Competition and Consumer Commission v Clinica Internationale Pty Ltd (In Liquidation) (No 3)* [2016] FCA 284 at [81].

20 Given the wording of s 46PO(4), together with the general role and responsibility of the Commissioner, I see no difficulty in concluding the Court has power to make an order of the kind contemplated against the Commissioner, despite no findings of unlawful discrimination being made against him, personally.

21 The applicants have submitted that any orders relating to apologies should extend to the State as well. They advance three reasons – the most obvious being the State's acceptance of liability under s 18A of the RDA. The other two reasons relate to the role and function of the Police Minister both under the *Police Service Administration Act*, where the Police Minister

has power in ss 4.6 and 4.8 to give Ministerial directions to the Commissioner concerning the overall administration, management, and superintendence of, the police service and the policy and priorities to be pursued in performing the functions of the police service. The applicants submit the State

> could and should have taken action at a much earlier stage seeking to redress the injustice done to the Applicants and Group Members. That the Applicants and Group Members have an ongoing sense that their grievances have been ignored is as much to be attributed to the lack of action of the First Respondent as to the actions of the Second Respondent.

22 Second, the applicants rely on the evidence which discloses that in the week after Mulrunji's death

> the community and the Council made a number of requests for the Premier, the Police Minister and the Police Commissioner to attend Palm Island or to at least take steps to address the sense of grievance and injustice in the community. Those requests were ignored. However, in the immediate aftermath of the emergency declaration on 28 November 2004, those same three government officials travelled to Palm Island to demonstrate that "order" had been restored. It is hard for the Applicants and Group Members to reconcile the different responses of those persons save by reference to the public objectives sought to be achieved. The Applicants accordingly submit that it would be appropriate for the same three institutions to be parties to any apology issued to the community, or if none is to be made, made publicly accountable by the publication of a corrective notice.

23 The applicants' submissions on the last two issues in particular are consistent with the views I had formed, and expressed in the liability reasons, about the ongoing sense of general community grievance on Palm Island. These are considerations relevant to the conclusion I reach at [27] below about what time, if any, would be an appropriate time for the Court to consider whether any broad orders of a 'restorative justice' nature might be made. Those submissions do not persuade me to make an order of the kind raised in [1594] of the liability reasons against the State, any more than I am persuaded, on reflection, that such an order should be made against the Commissioner.

24 Despite there being power, in my opinion the State is correct in two of the reasons it has identified as to why such an order is not appropriate. First, that the considerations and matters which the Commissioner might take into account in deciding whether to make an apology or not are at large and unspecified, and reasons given for a decision not to apologise might ultimately be embarrassing (or, I might add unpalatable, offensive or hurtful) to individuals or to the group members, and so end up doing more harm than good. This was a point also made by the applicants in their submissions, and on reflection I consider this point has considerable force.

25 Second, that there is an element of the Court abdicating its function of ordering a remedy by simply requiring the Commissioner to consider whether or not to take certain action. I accept that an order of this kind could be seen as some kind of impermissible delegation of the judicial function: *see Harris v Caladine* [1991] HCA 9; 172 CLR 84 at 95 (Mason CJ and Deane J) and 150-151 (Gaudron J).

26 Finally, even if I had been persuaded to adhere to the tentative view I had expressed in [1594] of the liability reasons, on reflection I consider any such orders would be premature. I have determined the claims of the applicants in this proceeding, but what remains outstanding are the claims of the class members, and in particular the claims of the sub-group members, being people affected by the SERT operations on the island on 27 and 28 November 2004. It may well be that having heard and determined those claims, it is apparent that one or more of the class members should be afforded relief related to an apology. Making orders connected with apologies or public acknowledgements in some kind of piecemeal fashion as the claims of the different members of the class are determined would be inappropriate, and ineffective. Whether, once all claims have been determined, any further relief in the nature of an apology or public statement is appropriate is a matter that can be revisited at that stage. The Court continues to have power under ss 22 and 23 of the FCA Act to make such final orders as it considers appropriate to determine all issues between the parties, in addition to the powers in s 46PO(4). That is not to say I have formed any view that orders relating to apologies or public statements should be made at the conclusion of the entire proceeding. Rather, I am identifying that to make such orders now would be premature, even if I otherwise considered them appropriate, which I do not.

27 A further consideration relevant to this issue is that the trial of this proceeding, and the outcome, has been widely reported and in my opinion the opportunity for general public awareness of the Court's findings already exists. The applicants have been able to witness the public airing of their allegations and the reporting of the Court's decision. In an age of social media and widespread internet access, the reporting of the trial and its outcome will remain generally accessible for the foreseeable future. In that sense the respondents, and the individual police officers, have already experienced a considerable level of public accountability for the conduct which was the subject of this proceeding: see, albeit in a different context, *Australian Competition and Consumer Commission v Telstra Corporation Ltd* [2007] FCA 2058 at [5] (Gordon J).

The applicant's submissions concerning a public statement/corrective notice

28 As an alternative proposal to the giving of an apology, or orders of the kind I had foreshadowed in [1594] of the liability reasons, the applicants in their submissions proposed that both respondents should be ordered to publish a "corrective notice". I understand that terminology to be taken from the decision of Bromberg J in *Eatock v Bolt (No 2)* [2011] FCA 1180.

29 At [1596] of the liability reasons I raised the possibility of a "public statement about the Court's findings in this case in lieu of an apology", and I consider the language of "public statement" may be more appropriate in the circumstances of this case. In *Eatock v Bolt*, the impugned conduct was the publication of statements in the media and the logic of a "corrective notice" as a remedy is apparent.

30 In his reasons as to relief, Bromberg J described (at [15]) the purposes which could be served by a corrective notice in the following terms:

> I indicated in my earlier reasons for judgment that I held the preliminary view that an order should be made by the Court requiring HWT to publish what I called a corrective notice. I identified at [466] four purposes which such an order would serve to facilitate. Those purposes are:
>
> - redressing the hurt felt by those injured;
> - restoring the esteem and social standing which has been lost as a consequence of the contravention;
> - informing those influenced by the contravening conduct of the wrongdoing involved; and
> - helping to negate the dissemination of racial prejudice.

31 As his Honour also noted at [16], an order requiring a corrective notice was the kind of remedy which had been considered in Australia and Canada in the context of legislation proscribing communications likely to expose a person to hatred or contempt by reason of race: his Honour referred to *Citron v Zündel* (2002) 41 CHRR D/274 (CHRT) at [300]–[301], and *Jones v Toben* [2002] FCA 1150; 71 ALD 629 at [111] (Branson J). At [23] Bromberg J also found that a corrective notice would serve "a wider informational and educative purpose".

32 The subject matter of the litigation in *Eatock v Bolt* was the publication of two newspaper articles written by Mr Bolt which were alleged to convey offensive messages about fair-skinned Aboriginal people, by saying that they were not genuinely Aboriginal, but were

choosing to identify falsely as Aboriginal so they could access benefits. In such a case, the publication of a corrective notice in the media which carried the original story is closely linked to the contraventions found by the Court. As Bromberg J noted, one of the features of the impugned conduct was that it was capable of disseminating racial prejudice, and a corrective notice might be thought to be capable, at least, of having the opposite effect.

33 Mr Bolt, and the publisher, the *Herald & Weekly Times*, had contended such an order would serve no necessary purpose and would be punitive. His Honour rejected this contention, essentially relying on the purposes he had found which supported the making of such an order.

34 Despite my reference to the possibility of a public statement at [1596] of the liability reasons, the State made no submissions about the appropriateness of such an order. Rather, it concentrated on the possible order raised at [1594] of the liability reasons.

35 The difficulties attending the kind of order I had raised at [1594], which difficulties I have accepted are real and tend against the making of any such order, do not attend an order requiring a public statement to be made. I accept the applicants' submission that in light of the findings made by the Court, the acceptance of liability by the State under s 18A of the RDA and the role of the Commissioner under s 4.8(1) of the *Police Service Administration Act*, it may be appropriate for the public statement to be made jointly by both respondents. That is not because the Court has found the current Commissioner has any personal legal responsibility for the contravening conduct. Nor because the Court found any previous holder of that office had any such legal responsibility. Rather, I found the applicants had not proven any such case against the (then) Commissioner. However, the Commissioner does have the overall legal responsibility set out in s 4.8(1) of the *Police Service Administration Act*, for the proper functioning and administration of the Queensland Police Service. At the centre of the Court's findings on liability was the conduct of individual police officers, but in a way which revealed pervasive attitudes to Aboriginal people on Palm Island, and to a community comprising Aboriginal people. The Court's liability findings revealed fundamental failures in how those police officers with command and control functions on Palm Island discharged their duties. The Court heard evidence from Inspector Dini about the steps which had been taken by the Queensland Police Service on Palm Island since 2004 to improve attitudes and relationships, demonstrating awareness by, amongst others, the incumbent Commissioner, of the need for systematic changes. Where appropriate, relief under the RDA and s 46PO of the

Australian Human Rights Commission Act, within a framework of the exercise of judicial power, should be capable of addressing broad and systemic issues arising from racial discrimination, as much as individual ones.

36 Given the findings I have made about the construction of s 46PO(4), I consider the Court has power to make an order against the Commissioner, as well as against the State, in relation to a public statement. At [1578] to [1583] of the liability reasons, by reference to decisions of the South African Constitutional Court, and other courts in South Africa, I emphasised that public statements about past wrongs are, as Froneman J and Cameron J said in *Le Roux v Dey* [2011] ZACC 4; [2011] 3 SA 274 at [200], capable of creating "the best conditions" to make reconciliation possible, although the law cannot enforce reconciliation. A public statement about the Court's decision may well contribute to the healing within the Palm island community of which Mr Ralph spoke in his evidence (see liability reasons at [1584]). I accept it may go some way to addressing the sense of injustice felt by the applicants, and, on the evidence in the proceeding, by many members of the Palm Island community. That is because the applicants and the community could see a clear and widespread publication of the Court's findings across the whole of the Queensland and Australian community which, I accept, would be likely to assist them to feel their complaints had been vindicated and the Court's findings about their grievances had not been ignored or sidelined.

37 However this brings me to the observation I made at [26] above. This proceeding, as a class action, is yet to be completed. Unless the parties resolve the remainder of the proceeding, there will be a trial on the claims of the remaining class members, and in particular, the sub-group members. More acutely than perhaps in the claims by the applicants, questions of community wide grievances, and community wide redress may assume some prominence. Those are the kinds of matters which might be appropriately addressed by an order relating to a public statement. It would not be appropriate to make two sets of orders of that nature, or any other restorative orders.

38 When all the claims are finalised and determined, the Court will be in the best position to consider whether orders of this kind are appropriate. None should be made now.

Pre-judgment interest

39 The respondents accepted the applicants were entitled to pre-judgment interest, in accordance with s 51A of the FCA Act, and their calculations accepted it should run from the date the cause of action arose: namely, 27 November 2004. There are minor differences between the parties' calculations. For the first applicant, the respondents' calculations total $93,216.47 and the applicants' total $93,569.93. For the second applicant the respondents' calculations total $9,812.26 and the applicants' total $9,849.47. For the third applicant, the respondents' calculations total $112,840.99 and the applicants' total $113, 268.86.

40 Both parties' calculations purported to comply with *Interests on Judgments Practice Note* (GPN-INT), 25 October 2016, para 2.2, and with the Full Court's decision in *Management 3 Group Pty Ltd (in liq) and Ors v Lenny's Commercial Kitchens and Anor (No 2)* [2012] FCAFC 92; 203 FCR 283.

41 From the tables in the parties' submissions, the differences appear to arise from slightly different interest rates and some differences in the number of days over which the calculations are made. Given the differences between them are minor, the parties will be directed to agree on interest sums for each of the three applicants.

Costs

42 The respondents accepted that costs should follow the event. That concession was properly made. The respondents also submitted costs should be awarded on a "standard" basis, which I take to mean on a party/party basis. I consider that is the appropriate basis for the costs order.

43 A particular cost issue relates to the transcript of the proceeding. Prior to the trial, the applicants adduced evidence of their impecuniosity as a basis for an application that they should receive the transcript without having to pay for it.

44 It was clear that the applicants could not have a fair trial in a proceeding of this kind without access to the transcript in the same way the respondents would have access to it. An order was made on 10 September 2015 that the applicants should be provided with the transcript, subject to certain conditions designed to restrict their use of the transcript so that it was only for the purposes of conducting the proceeding. Subsequently to the making of these orders, it became apparent that due to the Court's arrangements with Auscript, the transcript provider, a copy could not be made available to the applicants without payment. Accordingly, the Court bore the cost of having the transcript provided to the applicants, and further orders

giving effect to this were made on 5 October 2015. By those orders, the expenditure incurred by the Court in providing an electronic copy of the transcript to the applicants, were to be costs in the cause of the successful party to the proceeding.

45 The total cost of transcript for the applicants was $29,512.56 and it was paid in full by the Court. The amounts invoiced to the Court and paid included GST, and it is the GST inclusive amounts which will be the subject of an order. It is appropriate that payment be made directly to the Court, rather than through the applicants.

46 I also accept the applicants' submission that the balance of the orders in relation to the transcript made on 10 September 2015 are no longer necessary and should be vacated.

47 The question of payment for any further transcript, should the claims of the other class members continue to their conclusion, will need to be revisited at an appropriate time. No assumption should be made that the same arrangements will necessarily be put in place: the Court will consider the matter afresh on any evidence and argument put before it.

48 The applicants sought two further orders. The first was that the costs should be assessed on a "lump sum" basis. The second was that there should be orders that the respondents pay the applicants' costs, as assessed, forthwith, rather than at the end of the entire representative proceeding. The respondents had made no submissions on these matters, nor sought leave to reply to these submissions after the applicants' submissions had been filed and served.

49 As to lump sum costs order, the Court's current *Costs Practice Note* (GPN-COSTS), 25 October 2016) states (at para 4.1):

> The Court's preference, wherever it is practicable and appropriate to do so, is for the making of a lump-sum costs order.

50 There is no doubt this proceeding is appropriate for the making of an order of this kind: its length and complexity would make usual taxation processes disproportionately expensive and resource intensive, as well as adding substantially to delays in finalisation of the question of costs. Accordingly, I propose to make a lump sum costs order, and to give directions consistent with the steps set out in the Practice Note. I will include an order that if the parties cannot agree on an appropriate lump sum, they attend mediation to facilitate agreement, before any lump sum costs hearing is listed by the Court. To require the parties to mediate about the appropriate figures for a lump sum costs order before the Court deals with the matter as a contested application is consistent with the objectives of the Practice Note on

costs, and more generally with ss 37M and 37N of the FCA Act, which deal with the overarching purpose of civil practice and procedure in the Court.

51 As to the submission that the respondents should be ordered to pay the applicants' costs of the proceeding to date prior to the conclusion of the entire representative proceeding, I accept that such an order is appropriate. This proceeding was commenced on 9 August 2013. It has been labour and resource intensive. It is appropriate that a line be drawn under the costs of the proceeding to date, so that all parties know where they stand prior to heading into the second tranche of the proceeding which will deal with the outstanding claims of the class members, and in particular the claims of the sub-group members.

52 The applicants relied on the decisions and observations made by Sackville J in *Courtney v Medtel Pty Limited (No 3)* [2004] FCA 347, at [20]-[24] (*Courtney*), and Jessup J in *Peterson v Merck Sharpe & Dohme (Aust) Pty Ltd (No 5)* [2010] FCA 605 at [66].

53 In both those cases, observations were made that the Court's orders granting relief to the representative applicant in each respective proceeding were interlocutory. In *Courtney*, that was certainly the case because the parties had asked the Court to state and answer a series of separate questions (see [2] of Sackville J's reasons). Without determining if that is invariably the correct characterisation of orders made on the liability of respondents to claims made by the representative applicants in a representative proceeding, and whether it is the correct characterisation of the orders made by the Court on 5 December 2016, those two cases otherwise do provide some support for the applicants' contentions. In both cases, the Court found it would be unfair and unjust to compel a representative applicant to wait until the completion of the class action as a whole to receive an order for costs, to which there was no doubt she or he was entitled.

54 Although in this proceeding there were claims about the respondents' conduct in relation to the applicants personally (in particular, the entries and searches of the houses, and the arrest of Mr Wotton), the most substantial part of the proceeding concerned issues common to all class members. Further, most of the evidence adduced in relation to the claims personal to the applicants, aside from evidence as to damages, will also be relevant to the common questions of law and fact arising in relation to all class members and/or members of the sub-group.

55 I consider it would be unfair and unjust for the applicants to have to wait to be recompensed for the legal costs expended to date in preparing and presenting their case until the conclusion of the entire proceeding, which on any view will not be until well into 2018.

Conclusion

56 The orders and directions made reflect my conclusions in these reasons.

57 The determination of the final schedule of common questions of law and fact and the answers to those common questions, was held over by agreement of the parties pending the respondents' appeal from my orders of 5 December 2016.

58 That appeal was discontinued on 9 March 2017. Accordingly I propose to list the proceeding for a case management hearing to program the next steps in the proceeding as a whole, including the finalisation of the common questions of law and fact and the answers to them.

I certify that the preceding fifty-eight (58) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer.

Associate:

Dated: 15 March 2017