FEDERAL COURT OF AUSTRALIA

Pearson v State of Queensland (No 2) [2020] FCA 619

File number:	QUD 714 of 2016
Judge:	**MURPHY J**
Date of judgment:	17 January 2020
Date of publication of reasons:	8 May 2020
Catchwords:	**REPRESENTATIVE PROCEEDINGS** – application for court approval of settlement under s 33V of the *Federal Court of Australia Act 1976* (Cth) – claim by Aboriginal and Torres Strait Islander workers in respect of wages earned but not paid between 1939 and 1972 –relevant principles in relation to settlement approval – whether the settlement amount is fair and reasonable – whether proposed deductions including for legal costs and funding commission are fair and reasonable – consideration of objections to the settlement – the operation of the extant common fund order – settlement approved
Legislation:	*Australian Human Rights Commission Act 1986* (Cth) *Racial Discrimination Act 1975* (Cth) *Imperial Acts Application Act 1984* (Qld) *Limitation Act 1960* (Qld) *Limitation of Actions Act 1974* (Qld) *Statute of Frauds and Limitations 1867* (Qld) *Succession Act 1981* (Qld) *The Aboriginals Preservation and Protection Act of 1939* (Qld) *The Aborigines' and Torres Strait Islanders' Affairs Act 1965* (Qld) *The Aborigines' and Torres Strait Islanders' Regulations of 1966* *The Torres Strait Islanders Act of 1939* (Qld) *The Aboriginals Regulations of 1945* (Qld) *The Islanders Regulations 1946* (Qld) *Colonial Laws Validity Act 1865* (Imp) *Slavery Abolition Act 1833* (Imp)
Cases cited:	*Blairgowrie Trading Ltd v Allco Finance Group Ltd (Recs*

& Mgrs Apptd) (In Liq) (No 3) [2017] FCA 330; (2017) 343 ALR 476

BMW Australia Ltd v Brewster [2019] HCA 45 (2019) 374 ALR 627

Breen v Williams [1996] HCA 57; (1996) 186 CLR 71

Caason Investments Pty Ltd v Cao (No 2) [2018] FCA 527

Camilleri v Trust Company (Nominees) Ltd [2015] FCA 1468

Chubb Insurance Co of Australia Ltd v Moore [2013] NSWCA 212; (2013) 302 ALR 101

Commercial Bank of Australia v Amadio [1983] HCA 14; (1983) 151 CLR 447

Cubillo v Commonwealth of Australia [2001] FCA 1213; (2001) 112 FCR 455

Darwalla Milling Co Ltd v F Hoffman-La Roche (No 2) [2006] FCA 1388; (2006) 236 ALR 322

Earglow Pty Ltd v Newcrest Mining Limited [2016] FCA 1433

Forbes v Cochrane (1824) 107 ER 450

Grant v John Grant & Sons [1954] HCA 23; (1954) 91 CLR 112

Kelly v Willmott Forests Ltd (in liquidation) (No 4) [2016] FCA 323; (2016) 335 ALR 439

Kuterba v Sirtex Medical Ltd (No 3) [2019] FCA 1374

Lifeplan Australia Friendly Society Limited v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Company Incorporated in New York) [2018] FCA 379

Mabo v Queensland (No 2) [1992] HCA 23; (1992) 175 CLR 1

Money Max Int Pty Limited (Trustee) v QBE Insurance Group Limited [2016] FCAFC 148; (2016) 338 ALR 188

Pearson v State of Queensland [2017] FCA 1096

Santa Trade Concerns Pty Limited v Robinson (No 2) [2018] FCA 1491

Somerset v Stewart (1772) 98 ER 499

State of New South Wales v Kable [2013] HCA 26; (2013) 252 CLR 118

Timbercorp Finance Pty Ltd (in liquidation) v Collins; Timbercorp Finance Pty Ltd (in liquidation) v Tomes [2016] HCA 44; (2016) 259 CLR 212

Tito v Waddell (No 2) [1977] Ch 106

Wik Peoples v Queensland [1996] HCA 40; (1996) 187 CLR 1

Williams v The Minister, Aboriginal Land Rights Act & Anor (1994) 35 NSWLR 497

Wotton v State of Queensland (No 11) [2018] FCA 1841

Date of hearing:	21 November, 11 December, 19 December 2019
Registry:	Queensland
Division:	General Division
National Practice Area:	Administrative and Constitutional Law and Human Rights
Category:	Catchwords
Number of paragraphs:	297
Counsel for the Applicant:	Mr D J Campbell QC, Mr J Creamer, Mr A Newman and Mr A Edwards
Solicitor for the Applicant:	Bottoms English Lawyers
Counsel for the Respondent:	Mr A Crowe QC, Mr C Murdoch QC and Ms G Dann
Solicitor for the Respondent:	Crown Law
Counsel for the Intervener:	Mr L Armstrong QC and Mx N Chow

ORDERS

QUD 714 of 2016

BETWEEN:	**HANS PEARSON** Applicant
AND:	**STATE OF QUEENSLAND** Respondent
	LITIGATION LENDING SERVICES LTD Intervener

JUDGE: **MURPHY J**

DATE OF ORDER: **17 JANUARY 2020**

OTHER MATTERS:

A. The Court notes that the common fund order, Order 2 of the Orders made on 25 August 2017, continues in effect.

AND THE COURT ORDERS THAT:

Confidentiality

1. Pursuant to ss 37AF and 37AG(1)(a) of the *Federal Court of Australia Act* 1976 (the **Act**), and to prevent prejudice to the proper administration of justice, each of:

   (a) Exhibits JT1, JT2, the second sentence of paragraph 21 and paragraph 22 of the Second Affidavit of Jerry Tucker filed 19 November 2019;

   (b) Exhibit JB1 of the Sixth Affidavit of John Bottoms filed 13 December 2019;

   (c) the Applicant's confidential submissions in response to Mr Msii's submissions, filed 10 December 2019,

   shall be treated as confidential and, subject to further order of the Court:

   (i) the relevant exhibits, affidavits and submissions be sealed on the Court file in envelopes marked "*Not to be opened except by leave of the Court or a Judge*" and are not to be published or made available in the Registry or on the Court's internet platform;

   (ii) not disclosed to any person other than:

1. the Court;
2. the Applicant and his legal representatives;
3. LLS and its legal representatives;
4. upon the giving of a confidentiality undertaking in a form reasonably satisfactory to the Applicant or approved by the Court – group members and their legal representatives.

Group member registration

2. The 168 persons referred to at paragraph 17 of the Sixth Affidavit of Jerry Tucker filed 17 December 2019, being persons from Papua New Guinea who have provided registration forms to Bottoms English Lawyers (**BELAW**), are deemed to have been registered in accordance with the orders of 4 September 2019.

3. The Applicant's solicitors are to write to Mr Kebei Salee, referred to at paragraph 14 of the Sixth Affidavit of Jerry Tucker filed 17 December 2019, to advise that registration forms will be accepted by BELAW from Papuans who maintain that they are group members prior to 4.00 pm (in Queensland) on 7 February 2020. Any such persons who provide a registration form prior to 4.00 pm (in Queensland) on 7 February 2020 will be deemed to have registered in accordance with the orders of 4 September 2019.

Settlement approval

4. Pursuant to s 33V of the Act, the settlement of this proceeding be approved on the terms set out in:

   (a) the Settlement Deed (**Deed**) annexed to the First Affidavit of John Bottoms filed 15 November 2019; and

   (b) the Settlement Distribution Scheme (**Scheme**), in the form annexed to these orders as Annexure A.

5. Pursuant to ss 33V and 33ZF of the Act:

   (a) on and from the date of this order, the Applicant and Group Members shall be barred from any further proceedings made in, arising out of, or in connection with, whether directly or indirectly the allegations in and the facts, matters and/or circumstances of the proceeding against the Respondent (including its present and former officers, servants, employees, agents, successors or assigns), save that such bar will not prevent the Applicant and Group Members

from making any application to the Court in connection with the administration of the Scheme; and

(b) the Applicant is authorised, *nunc pro tunc*, to enter into the Deed for and on behalf of group members.

Approval of further amounts to be deducted, pursuant to the Scheme

6. Pursuant to ss 33V and 33ZF of the Act:

(a) the legal costs rendered by BELAW to 17 October 2019 and disbursements rendered to 31 October 2019 in the sum of $12,742,357.79; and

(b) the legal costs rendered by BELAW from 17 October 2019 to 12 December 2019 and disbursements rendered from 31 October 2019 to 12 December 2019 in the sum of $841,876.13,

making total legal costs and disbursements to 12 December 2019 of $13,584,233.92, are approved as the "Applicant's Legal Costs and Disbursements" for the purposes of the Scheme.

7. Subject to any contrary order by the Court, any further amount allowed or certified by Elizabeth Harris as Referee in respect of "Approval Costs" are deemed to be approved as the "Applicant's Legal Costs and Disbursements" for the purposes of the Scheme.

8. Pursuant to ss 33V and 33ZF of the Act, the amount of $35,000 be paid to the Applicant in recognition of the time and inconvenience in acting as the representative Applicant and prosecuting the proceeding on behalf of Group Members.

Appointment of Administrator

9. Pursuant to ss 33V and 33ZF of the Act, Anthony James Jonsson and Anthony Raymond Beven of Grant Thornton Australia Ltd be appointed as Administrators of the Scheme, to act in accordance with the Scheme and have the powers and immunities contemplated by the Scheme.

Matters consequential upon settlement approval

10. Pursuant to ss 33V and 33ZF of the Act, upon the coming into effect of Orders 0 to 0 above, each of the undertakings given by:

(a) the Applicant;

(b) BELAW; and

(c) Litigation Lending Services Ltd,

to each other, and to the Court, on 12 September 2017 to comply with their obligations under the Funding Terms being Annexure A to the orders of the Court dated 25 August 2017, be discharged.

11. The Referee, Ms Elizabeth Harris, is directed to inquire and report to the Court at 3-monthly intervals as to the reasonableness and proportionality of costs charged or proposed to be charged by the Advisor to the Scheme for work undertaken under the Scheme.

12. Further to Order 0, upon the coming into effect of Orders 0 to 0 above, the undertaking given by Litigation Lending Services Ltd to the Respondent on 13 March 2017 to meet the terms of any order as to costs made against the Applicant in favour of the Respondent, be discharged.

13. All existing costs orders in the proceeding be vacated.

14. Pursuant to s 33ZB of the Act, the persons affected and bound by Orders 0 to 0 above are the Applicant, group members (other than those who have opted out pursuant to Order 1 of the Orders made 12 December 2017 and Order 4 of the Orders made 4 September 2019), and the Respondent.

15. The Applicant shall apply for the proceeding to be dismissed within 7 days after the Court is notified that the administration of the Scheme is complete.

Access to State Database

16. For the purpose of data verification by the Administrator in relation to the Settlement Distribution Scheme, the respondent provide the Administrator with access to the database established by the Queensland Government Department of Aboriginal and Torres Strait Islander Partnerships for the purposes of the Indigenous Wages and Savings Reparations Scheme(s), subject to an appropriate confidentiality regime agreed between the parties, or in the absence of agreement as determined by the Court.

17. Leave to apply.

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

Annexure A

HANS PEARSON

v

STATE OF QUEENSLAND

APPLICANT'S SETTLEMENT DISTRIBUTION SCHEME

APPLICANT'S SETTLEMENT DISTRIBUTION SCHEME

Hans Pearson

v

State of Queensland

BACKGROUND TO THE SCHEME

A. This Scheme provides for the distribution of money paid by the State of Queensland in settlement of the Proceeding.

B. The Applicant has agreed to settle the Proceeding on his own behalf and on behalf of all Group Members for the Settlement Sum of $190 million, inclusive of costs.

C. The Applicant has incurred legal costs and disbursements in conducting the proceeding and has entered a funding agreement with a litigation funder (**LLS**).

D. Pursuant to an order of the Court made on 25 August 2017, LLS is (subject to further order) entitled to a funding commission from the Settlement Sum.

E. Costs will also be incurred in administering this Scheme.

F. This Scheme provides for: (1) deduction from the Settlement Sum of Court-approved costs, litigation funding commission, Court approved Approval Costs, administration costs and other costs; and (2) distribution to Participating Claimants of the net amount remaining following such deductions.

OPERATIVE PART

A. DEFINED TERMS

1. The following definitions apply unless the context requires otherwise:

Stolen Wages Administrator (SWA) Pty Ltd (ACN 638 118 466) means a private company incorporated, or to be incorporated, under the *Corporations Act 2001* (Cth):

(a). the constitution of which is to be substantially in the form provided to the Court two days prior to the hearing of the Settlement Approval Application;

(b). the sole director of which is the Administrator; and

(c). all of the shares in which are held by the Administrator as Administrator of this Scheme;

Administration Costs means the expenses of and incidental to the administration of the Scheme incurred by the Administrator, and includes the costs of the Advisor or any other advisor, in an amount approved by the Court.

Administrator means the person or persons that will administer this Scheme as provided for in clause 4.

Advisor means the person appointed as advisor to the Administrator as provided for in clause 5.

Applicant's Legal Costs and Disbursements means the legal costs and disbursements incurred by the Applicant in conducting the Proceeding, in the amount approved by the Court.

Applicant's Reimbursement Payment means the amount of no more than $35,000 as approved by the Court, payable to the Applicant in recognition of time and inconvenience in acting as representative in the Proceeding.

Approval Costs means the outstanding legal costs and disbursements (not being part of the Applicant's Legal Costs and Disbursements) incurred by the Applicant in obtaining Court approval of the settlement including the cost of defending any appeals from the approval, as approved by the Court.

Assessment Methodology Schedule means the formula set out in the schedule to this Scheme.

BELAW means Bottoms English Lawyers, which has been the solicitor for the Applicant in the Proceeding.

BELAW Database means the record of Prior Registrants maintained by BELAW.

Children means a person who was alive on the Effective Date and who is a natural child of a person, including any illegitimate child, as well as any child who was legally adopted or was adopted pursuant to Traditional Torres Strait Islander Adoption.

Claimants means the Applicant and all Group Members, as defined in paragraphs 2 and 3 of the Fourth Amended Statement of Claim in the Proceeding (a copy of paragraphs 2 and 3 of the Fourth Amended Statement of Claim is annexed hereto as Schedule 3).

Court means the Federal Court of Australia.

Deceased Claimant means a Claimant who has died prior to the Effective Date.

Deed means the Deed of Settlement between the Applicant and the State dated 2 September 2019.

De Facto Relationship means a relationship where the persons were not legally married to each other, were not related by family and were living together as a couple on a domestic basis for a period of at least two years.

Distribution means an amount distributed to a Participating Claimant including a Registered Representative in respect of a Deceased Claimant from the Settlement Distribution Fund in accordance with this Scheme.

Distribution Statement means a notice provided in accordance with clause 39.

Effective Date means the date upon which this Scheme is approved by the Court.

Final Approval Date means the business day following the Exhaustion of Appeal Date.

Final Settlement Entitlement means:

(a). a Settlement Entitlement contained in a Distribution Notice or an amended Distribution Notice which is taken to have been accepted by a Participating Claimant including a Registered Representative on behalf of a Deceased Claimant under clauses 41 or 43; and

(b). a revised Settlement Entitlement, contained in, or consequential on, a Review Determination under clause 44.

Funding Costs means the amount to be paid to LLS by way of funding commission, as approved by the Court.

Independent Counsel means two senior junior counsel practising in Queensland as nominated by the Advisor.

Loss Assessment Formula means the formulae set out in the operative part of the Assessment Methodology Schedule.

LLS means Litigation Lending Services, the litigation funder of the proceeding.

Net Claimant Distribution Sum means the amount of the Settlement Distribution Fund available for distribution to Claimants after the deduction of:

(a). the Applicant's Legal Costs and Disbursements;

(b). the Funding Costs;

(c). the Applicant's Reimbursement Payment;

(d). the Approval Costs;

(e). the Administration Costs; and

(f). any other amount required or permitted to be withheld by the Administrator pursuant to this Scheme.

New Registrants means those Claimants who are not Prior Registrants.

Participating Claimants means:

(a). Prior Registrants (including, for the avoidance of doubt, the Applicant), save for any Prior Registrants excluded by the Administrator in accordance with clause 18(b)(ii); and

(b) New Registrants, save for any New Registrants excluded by the Administrator in accordance with clause 23(b)(ii).

Prior Registrants means those Claimants who have prior to 4 September 2019 already registered with BELAW as group members in the Proceeding.

Proceeding means the representative proceeding *Hans Pearson v State of Queensland* (QUD714 of 2016).

Registration Notice means a notice by which New Registrants register as Participating Claimants, such notice to be in a form and to be advertised and sent in a manner approved by the Court.

Registered Representative means, in respect of a Deceased Claimant, the person or persons ascertained to be a Registered Representative of a Deceased Claimant in accordance with clauses 24 to 28.

Registration Date means the date specified in the Registration Notice as being the date by which the Registration Notice of New Registrants must be received by the Administrator.

Review means a request for a review of a Distribution Statement made in accordance with clause 41.

Scheme means this Settlement Distribution Scheme.

Settlement Distribution Fund means the Settlement Sum (plus any accrued interest on that sum less any bank fees or tax) paid into the Settlement Fund Account in accordance with clause 5.4 of the Deed.

Settlement Entitlement means the individual entitlement of a Participating Claimant calculated in accordance with the Loss Assessment Formula or as varied by Review.

Settlement Fund Account means the account established under clause 5.3 of the Deed.

Settlement Sum means the sum of $190,000,000.

Spouse means a person who is alive on the Effective Date and who was (a) a party to a marriage or (b) a party to a De Facto Relationship with a Deceased Claimant.

State means the State of Queensland.

Tax means a tax, levy, duty, charge, deduction or withholding or an imposition, however it is described, that is imposed by law of a Government of Australia or elsewhere, together with any related interest, penalty, fine or other charge.

Traditional Torres Strait Islander Adoption means the practice found in the Torres Strait of permanently transferring a child from one family to another, with the child usually remaining within the extended family and the child taking the name of the new family.

Uncollected Amounts means any Distribution by cheque which remains unpresented within 120 days of the date on which the cheque was sent to the Claimant.

2. Terms defined in the Deed have the meaning set out in the Deed, unless this Scheme otherwise provides, or the context otherwise provides.

3. The following rules apply unless the context requires otherwise:

   (a). Headings are for convenience only and do not affect interpretation.

   (b). Mentioning anything after includes, including, for example, or similar expressions, does not limit what else might be included.

   (c). Nothing in this document is to be interpreted against a party solely on the ground that the party put forward this document or a relevant part of it.

   (d). The singular includes the plural, and the converse also applies.

   (e). If a word or phrase is defined, its other grammatical forms have a corresponding meaning.

   (f). A reference to a clause is a reference to a clause of this document unless stated otherwise.

   (g). A reference to an agreement, deed or document (including a reference to this document) is to the agreement or document as amended, supplemented, novated or replaced, except to the extent prohibited by this document or that other agreement or document, and includes the recitals, schedules and annexures to that agreement or document.

   (h). A reference to writing includes any method of representing or reproducing words, figures, drawings or symbols in a visible and tangible form.

   (i). A reference to a party to a deed, agreement or document includes the party's successors, permitted substitutes and permitted assigns (and, where applicable, the party's legal personal representatives).

   (j). A reference to legislation or to a provision of legislation includes an amendment or re-enactment of it, a legislative provision substituted for it and a regulation or statutory instrument issued under it.

   (k). A reference to a right or obligation of any two or more people comprising a single party confers that right, or imposes that obligation, as the case

may be, on each of them severally and each two or more of them jointly. A reference to that party is a reference to each of those people separately (so that, for example, a representation or warranty by that party is given by each of them separately).

(l). All references to time are to Australian Eastern Standard time.

(m). A reference to dollars or $ is to Australian currency.

B. ADMINISTRATOR

I Appointment

4. The Scheme will be administered by Anthony James Jonsson and Anthony Raymond Beven of Grant Thornton Australia Ltd as joint and several Administrators.

II Powers and duties of Administrator

5. The Administrator:

(a). is responsible for administering and distributing the monies in the Settlement Distribution Fund, and doing so at a cost which is reasonable and proportionate;

(b). may act by delegates appointed by the Administrator subject to the Administrator first obtaining from any such delegate an acknowledgement in writing that such person is to be bound to the obligations and duties set out herein as if that person was the Administrator;

(c). will act fairly in the interests of all Claimants;

(d). must act independently;

(e). must perform obligations conscientiously;

(f). may obtain legal advice, including from the Advisor;

(g). may engage third party service providers including, but not limited to, accountants, lawyers, tax advisors, registry service providers and mailing houses;

(h). may obtain advice in respect of tax matters arising from the administration of, and making payments from, the Settlement Distribution Fund and may seek a ruling from the Federal Commissioner of Taxation and any of the Commissioners of State Revenue if the Administrator determines that obtaining such a ruling would be in the best interests of the Claimants;

(i). will determine the Settlement Entitlements; and

(j). in so far as is consistent with this Scheme, is authorised to make decisions that, in the Administrator's sole discretion, ultimately benefit the body of Claimants as a whole.

6. Notwithstanding anything elsewhere in this Scheme, the Administrator may at any time correct any error, slip or omission occurring during the course of the administration of this Scheme.

III Advisor

7. BELAW, or such other firm of solicitors the Administrator decides in its discretion to appoint, will act as Advisor to the Administrator in respect of:

(a). any of the matters in relation to which the Administrator is required by clause 8 to consult with the Advisor;

(b). any matter in relation to the exercise of the Administrator's functions set out in this Scheme which requires instructions or documents, or additional instructions or documents to be obtained from or in respect of a Claimant, including but not limited to the matters set out in clauses 15, 18(a) and 23(a) of this Scheme; or

(c). any other matter in relation to which the Administrator considers it is appropriate to consult with the Advisor, in its sole discretion.

For the avoidance of doubt, the Administrator may in its discretion decide to change the Advisor.

8. The Administrator is required to consult the Advisor before making a determination under:

(a). clause 26;

(b). clause 27; and

(c). clause 42 (but only in respect of any Review relating to a determination upon which the Administrator consulted the Advisor).

8A Subject to clauses 7 and 8, the extent of the Advisor's role under the Scheme is a matter for the Administrator. The Scheme however contemplates that, provided that the cost of doing so is reasonable and proportionate, the Administrator will engage the Advisor as a primary point of contact with Claimants and Registered Representatives in relation to specified tasks and to work as directed. It is envisaged that the Advisor will be engaged to assist with communications with Claimants and Registered Representatives, complex verification and eligibility cases, the resolution of multiple claims and the review process. In assessing the reasonableness and proportionality of the Advisor's proposed charges the Administrator will be assisted by Ms Elizabeth Harris, the Costs Referee appointed by the Court.

9. The Advisor shall not act as solicitor for any Claimant in connection with or in relation to its work as Advisor under the Scheme.

IV Establishment of the Settlement Distribution Fund

10. Following payment into the Settlement Fund Account pursuant to clause 5.4 of the Deed, the monies in the Settlement Fund Account shall comprise the Settlement Distribution Fund.

11. The Administrator shall:

    (a). hold the Settlement Distribution Fund in trust until it is to be distributed; and

    (b). distribute the Settlement Distribution Fund (plus any interest accrued) as expeditiously as possible; and

    (c). hold any shares in Stolen Wages Administrator (SWA) Pty Ltd in their capacity as Administrator of this Scheme until Stolen Wages Administrator (SWA) Pty Ltd is wound up.

    in accordance with this Scheme.

V Retirement of Administrator

12. If the Administrator retires or is unable to act at a given time so as to leave the Scheme without an Administrator (**Retired Administrator**), the Retired Administrator must refer the matter of appointing a replacement Administrator to the Court pursuant to clause 59.

13. A Retired Administrator must do all things necessary to promptly transfer legal title to:

    (a). the Settlement Distribution Fund; and

    (b). any other property held on trust subject to the terms of this Scheme,

    to the person or persons who are appointed as the replacement Administrator by the Court.

C. CLAIMANT REGISTRATION AND VERIFICATION

I Claimant Database

14. As soon as practicable after the Effective Date, the Administrator shall create and maintain a Claimant Database, which shall maintain details of:

    (a). the identity of:

        (i). the Claimant;

(ii). in respect of Deceased Claimants, the identity of the Registered Representative or Registered Representatives and his, her or their kinship to the Deceased Claimant;

(b). the date of birth of the Claimant as provided by the Claimant or, in the case of Deceased Claimants, as provided by the Registered Representative(s) thereof;

(c). the gender of the Claimant (being either male or female);

(d). the ethnicity of the Claimant (being either Aboriginal or Torres Strait Islander),

(e). details of:

(i). the bank account of the living Claimant or Registered Representative or Registered Representatives into which any Distribution may be paid by Electronic Funds Transfer, or,

(ii). alternatively, a mailing address to which any cheque for the amount of the Distribution may be posted,

(**Claim Data**).

15. The Administrator must use reasonable endeavours to ensure the accuracy of the Claimant Database and Claim Data, including, to the extent necessary, requesting the Advisor to obtain further information or documents from a Claimant or by requesting or obtaining other information or documents.

II Claimants who have already registered with BELAW

16. Subject to clauses 17 and 18, a Prior Registrant shall be eligible to participate in this Scheme without taking any further step, and the Registration Notice shall not require Prior Registrants to provide any further information.

17. The Administrator may rely upon the BELAW Database to enter the Claim Data of the Prior Registrants in the Claimant Database, to be created and maintained under clause 14.

18. Notwithstanding clause 17, if (in the Administrator's absolute discretion), the BELAW Database does not contain the information necessary to enter all the Claim Data of particular Prior Registrants into the Claimant Database:

(a). the Administrator may request the Advisor to make such inquiries of those Prior Registrants pursuant to clause 15 as are reasonably necessary to enter their Claim Data in the Claimant Database; and

(b). if the Prior Registrant does not provide such further information within 28 days of the request in (a) being made, the Administrator may (in their absolute discretion) determine that:

(i). the distribution from the Settlement Distribution Fund to which the Prior Registrant is entitled shall be calculated on the basis of the Claim Data that the Prior Registrant has provided and on the assumption that any further Claim Data they could have provided would have been the least favourable to them, in the application of the Loss Assessment Formula; or

(ii). the Prior Registrant is not entitled to receive a distribution from the Settlement Distribution Fund and, save for notice of that determination, the Administrator shall not be required to provide to any such Prior Registrant any further notices under this Scheme.

19. Notwithstanding clauses 16 and 17, a Prior Registrant who claims on behalf of a Deceased Claimant will not be eligible to participate in this Scheme unless that person fulfils the requirements set out in clauses 24 and 25.

III New Registrants

20. A New Registrant shall only be eligible to participate in this Scheme if, in response to the Registration Notice, the New Registrant (and where the New Registrant is a Deceased Claimant, the Registered Representative(s) thereof) provides by the Registration Date:

(a). the Claim Data; and

(b). a signed statement indicating that the Claim Data is true and correct.

21. In the case of a New Registrant who has been adopted by a Deceased Claimant by Traditional Torres Strait Islander Adoption, a New Registrant is also to provide the Administrator with a signed statement indicating that he or she has been so adopted.

22. In circumstances where the Administrator has been provided with a signed statement by a New Registrant that he or she has been adopted by Traditional Torres Strait Islander Adoption, then no further enquiry or investigation needs to be made by the Administrator with regard to the status of that person as an adopted child of a Deceased Claimant.

23. If (in the Administrator's absolute discretion), the information provided by a New Registrant (or in the case of a Deceased Claimant by a New Registrant who seeks to be a Registered Representative of a Deceased Claimant) does not contain the information necessary to enter all the Claim Data for that New Registrant in the Claimant Database:

(a). the Administrator may request the Adviser to make such inquiries of the New Registrant pursuant to clause 15 as are reasonably necessary to enter their Claim Data in the Claimant Database; and

(b). if the New Registrant does not provide such further information within 28 days of such request being made, the Administrator may (in its absolute discretion) determine that:

(i). the distribution from the Settlement Distribution Fund to which the New Registrant is entitled shall be calculated on the basis of the Claim Data that the New Registrant has provided and on the assumption that any further Claim Data they could have provided would have been the least favourable to them, in the application of the Loss Assessment Formula; or

(ii). the New Registrant is not entitled to receive a distribution from the Settlement Distribution Fund and, save for notice of that determination, the Administrator shall not be required to provide to any such New Registrant any further notices under this Scheme.

IV Deceased Claimants

24. A Deceased Claimant shall only be entitled to participate in this Scheme if one or more persons have registered to be that Deceased Claimant's Registered Representative or Registered Representatives in accordance with this Scheme.

25. Subject to clause 25A, a person shall only be eligible to be the Registered Representative of a Deceased Claimant in the following circumstances:

(a). where the Deceased Claimant is survived by a Spouse, the Deceased Claimant's Spouse; or

(b). where the Deceased Claimant is survived by Children but not by a Spouse, the Deceased Claimant's Children, provided that Children who were legally adopted or adopted pursuant to Traditional Torres Strait Islander Adoption are eligible to become the Registered Representative of one or both of their natural parents or one or both of their adopted parents, but not of both their natural parents and adopted parents.

25A. This clause applies where, prior to the Administrator making any Distribution, a Claimant (including a Deceased Claimant) dies having executed a legally valid will (**Will**). Notwithstanding clause 25:

(a). each executor of the Will is to be treated for the purposes of this Scheme as if they were a Registered Representative of the Claimant who has died (or Deceased Claimant as the case may be);

(b). no person other than the executor (or executors as the case may be) under the Will of the Claimant who has died (or Deceased Claimant as the case may be) shall be entitled to be a Registered Representative of that Claimant who has died (or Deceased Claimant as the case may be);

(c). the executor or executors under the Will shall within eight weeks of the Final Approval Date register his or her holding of that office with the Administrator:

(i) where probate has been granted in respect of the deceased estate, by providing the Administrator with a copy of the will and grant of probate; and

(ii) where probate has not been granted in respect of the deceased estate, by providing a statutory declaration acceptable to the Administrator, substantially in the form annexed as Schedule 2 to this Scheme;

(d). if the executor or executors so registers his or her holding of that office within eight weeks of the Final Approval Date, any Distribution in respect of the Claimant who has died (or Deceased Claimant as the case may be) is to be made to the executor(s) under the Will and to no other person;

(e). where the executor(s) does not declare his or her holding of that office within eight weeks of the Final Approval Date, the Administrator may in its absolute discretion:

(i) allow a person other than the executor(s) to be a Registered Representative of that Claimant who has died (or Deceased Claimant as the case may be); and

(ii) make any Distribution in respect of the Claimant who has died (or Deceased Claimant as the case may be) to a person other than the executor(s).

26. Subject to clause 25A, the Administrator shall:

(a). in the case of Deceased Claimants who are Prior Registrants, treat the person (or persons) who registered the claim of the Deceased Claimant as the Registered Representative, provided the Administrator in its absolute discretion (having regard to the information contained in the BELAW Database, and such inquiries as the Administrator deems it appropriate to make under clause 15) is satisfied that the person is eligible to be the Registered Representative in accordance with clause 25;

(b). in the case of Deceased Claimants who are New Registrants, treat the person (or persons) who registered the claim of the Deceased Claimant as the Registered Representative, provided the Administrator in its absolute discretion (having regard to the information provided in conjunction with the Registration Form, and such inquiries as the Administrator deems it appropriate to make under clause 15) is satisfied that they are eligible to be the Registered Representative in accordance with clause 25.

27. In determining claims in respect of Deceased Claimants, the Administrator shall have regard to the BELAW Database and all completed Registration Notices, and where it appears to the Administrator in its absolute discretion that:

(a). multiple claims have been lodged in respect of the one Deceased Claimant; or

(b). multiple persons are seeking to be Registered Representatives in relation the same Deceased Claimant,

the Administrator must consolidate such claims, and shall treat as the Registered Representative in respect of the Deceased Claimant: *first*, the person or persons satisfying clause 25(a); *secondly*, the person or persons satisfying clause 25(b) (and where more than one, they shall be deemed to be joint and several Registered Representatives).

28. Where no person is eligible to be the Registered Representative of a Deceased Claimant in accordance with clause 25 or clause 25A, that Deceased Claimant is not entitled to be a Participating Claimant.

D. APPLICATION OF INTEREST

29. If the Administrator considers it would be in the interests of Claimants to do so, the Administrator may, in its absolute discretion, distribute any interest on the Settlement Distribution Fund to Stolen Wages Administrator (SWA) Pty Ltd.

30. Amounts distributed to Stolen Wages Administrator (SWA) Pty Ltd under clause 29 and any further interest which Stolen Wages Administrator (SWA) Pty Ltd earns on those amounts, shall be held by Stolen Wages Administrator (SWA) Pty Ltd absolutely and beneficially.

31. Interest on the Settlement Distribution Fund may be applied in the first instance to the payment of Administration Costs.

32. Any interest which:

(a). is not distributed to Stolen Wages Administrator (SWA) Pty Ltd; and

(b). is not otherwise required for the payment of Administration Costs,

will form part of the Settlement Distribution Fund and be available for distribution to Claimants.

33. The Administrator must, upon receipt of any dividend or other distribution from Stolen Wages Administrator (SWA) Pty Ltd (including any dividend or other distribution paid on or immediately prior to the winding up of Stolen Wages Administrator (SWA) Pty Ltd), deposit the funds received in the Settlement Fund Account, such funds to form part of the Settlement Distribution Fund and be available for distribution to Claimants.

34. The Administrator:

(a). acknowledges that all the issued shares in the capital of Stolen Wages Administrator (SWA) Pty Ltd are owned by it in its capacity as Administrator and are an asset of the Settlement Distribution Scheme;

(b). must:

(i). obtain the prior approval of the Court before approving any change to the constitution of Stolen Wages Administrator (SWA) Pty Ltd, or appointing any new director to the board of Stolen Wages Administrator (SWA) Pty Ltd;

(ii). not dispose of any interest in the issued shares in the capital of Stolen Wages Administrator (SWA) Pty Ltd; and

(iii). do all things necessary as the sole shareholders of Stolen Wages Administrator (SWA) Pty Ltd to approve and facilitate the winding up of Stolen Wages Administrator (SWA) Pty Ltd in accordance with its constitution.

E. SETTLEMENT DISTRIBUTION

I Preliminary Distributions from the Settlement Distribution Fund

35. Prior to any distribution from the Settlement Distribution Fund, it shall be treated as a common fund and, on the Final Approval Date, the Administrator will make the following payments from it, as approved by the Court:

(a). to BELAW, the Applicant's Legal Costs and Disbursements not already paid by LLS; and

(b). to LLS, the Applicant's Legal Costs and Disbursements paid by LLS;

(c). to LLS, the Funding Costs;

(d). to BELAW or LLS (as applicable depending upon who has paid or incurred the same), the Approval Costs;

(e). to the Applicant, the Applicant's Reimbursement Payment.

II Determination of Claimant Settlement Entitlement

36. The Net Claimant Distribution Sum shall be distributed to Participating Claimants, according to the Loss Assessment Formula, applied by reference to the Claim Data of each Participating Claimant.

37. Each Participating Claimant shall receive his or her Final Settlement Entitlement by Distribution.

38. Where the Participating Claimant is a Deceased Claimant, the Final Settlement Entitlement shall be provided to the Registered Representative by Distribution(or, if there is more than one, to the Registered Representatives in equal shares).

III Distribution Statements

39. Within six months of the Final Approval Date, the Administrator will send a Distribution Statement to each Participating Claimant (including in the case of Deceased Claimants, the Registered Representative (or Registered Representatives) in respect of the Deceased Claimant), as the case may be.

40. Each Distribution Statement will include, without limitation, the following information:

(a). the relevant Claim Data used to ascertain the particular Participating Claimant's eligibility and Settlement Entitlement;

(b). the estimated amount of the Settlement Entitlement in respect of that Participating Claimant (including, in the case of Deceased Claimants, the estimated amount that each Registered Representative will receive); and

(c). a statement as to the composition or characterisation of the Settlement Entitlement so as to permit the Claimant or Registered Representative to obtain taxation advice.

41. The accuracy of a Distribution Statement shall be deemed to be accepted by each Participating Claimant (including a Registered Representative on behalf of a Deceased Claimant), within 30 days of the date of sending the Distribution Statement, unless he or she delivers to the Administrator a written request for a Review together with copies of all documents on which the Participating Claimant (or Registered Representative) relies for the purposes of the Review, including any statement of reasons for seeking the Review. For the avoidance of doubt, a Participating Claimant (or Registered Representative) may only seek a Review of their own proposed Distribution.

IV Reviews

42. If a Participating Claimant (including a Registered Representative on behalf of a Deceased Claimant) requests a Review, the Administrator shall consider the request and copies of documents on which the Participating Claimant relies for the purposes of the review and:

(a). if satisfied that the request discloses an error, slip or omission by the Administrator or any other administrative or clerical error, correct the notice to which the request relates; or

(b). in all other cases:

(i). the Administrator and the Participating Claimant (or Registered Representative) must first attempt to resolve any dispute within twenty one (21) days from the date on which a request for a Review is received by the Administrator by negotiating in good faith, including by the Participating Claimant (or Registered Representative) providing any documents to the Administrator that the Administrator requests and deems relevant and attending any negotiation conference the Administrator requests to be held in person, by telephone or video conference to attempt to resolve the dispute in good faith;

(ii). if the dispute cannot be resolved within the 21 days, the Administrator must refer the request for a Review to the Independent Counsel.

43. If a Review is referred to the Independent Counsel, the Independent Counsel may by written notice direct the Participating Claimant (or Registered Representative

where relevant) to submit such further documentation or information in support of the Review as the Independent Counsel may consider appropriate. Such documentation or information must be submitted within 25 days of the date of any such written notice, failing which the request for Review shall be deemed never to have been made and the accuracy of the Distribution Statement shall be deemed to be accepted by the Participating Claimant (or Registered Representative).

44. The Independent Counsel shall, within 21 days after either the receipt by the Administrator of the request for the Review or receipt by the Independent Counsel of documentation provided in response to a written direction under clause 43, whichever is the later, review the information provided by the Participating Claimant (or Registered Representative) and give written notice of the result of the Review to the Participating Claimant (or Registered Representative) and the Administrator (Review Determination).

45. A Review Determination is final and binding, save that, prior to the expiry of 21 days after notice is given of the Review Determination in accordance with clause 44, the Participating Claimant (or Registered Representative) has liberty to apply to the Court only on a question of law arising from the Review Determination.

46. A Participating Claimant (or Registered Representative) requesting a review shall pay the costs of the Review calculated at $800 exclusive of GST for the first two hours' attendance by the Independent Counsel (or any part thereof) and $450 per hour exclusive of GST for each subsequent hour (or any part thereof), such costs to be deducted from any payments to be made to the person seeking the review.

47. The Administrator shall deduct the costs of the Review from any sum which otherwise would be distributed to the Participating Claimant (or Registered Representative) who sought the Review in priority to all other entitlements. That Participating Claimant (or Registered Representative) shall remain liable for any costs not recovered by a deduction pursuant to this clause and the Administrator, in administering the Scheme, may apply to the Court for an order requiring the Participating Claimant (or Registered Representative) to pay those costs.

48. The Administrator may in its absolute discretion waive the costs of a Review.

V Distributions

49. The Administrator shall, as expeditiously as possible following the day which is three months after Distribution Statements are mailed or the expiration of the 21 day period referred to in clause 45 in respect of a Review Determination (whichever is the last to occur), distribute from the Settlement Distribution Fund the Net Claimant Distribution Sum to the Participating Claimants and Registered Representatives of Deceased Claimants, such that they receive the Final Settlement Entitlement. For the avoidance of doubt, no Distribution is to be made to any Participating Claimant (or Registered Representative) who has applied to the Court on a question of law as referred to in clause 45, until such time as the Court has decided that question, in which case any Distribution is to be made within 30 days of the date of the Court's decision. Where there is more than one Registered

Reprentative of a Deceased Claimant and one or more Registered Representatives have applied to the Court on a question of law, no Distribution is to be made to any Registered Representative of the Deceased Claimant until the question of law has been determined.

50. The completion of Distributions pursuant to clause 49 will satisfy any and all rights, claims or entitlements of all Claimants in connexion with this Scheme and in or arising out of the Proceeding.

VII Withholding Amounts

51. The Administrator may withhold from the Settlement Distribution Fund and retain, the Administration Costs.

52. The Administrator may withhold from the Settlement Distribution Fund any Tax:

(a). payable (or reasonably assessed by the Administrator as likely to become payable) by them as trustees and relating to or resulting from its role as Administrator of the Scheme; and

(b). required to be withheld by them as trustees from any Distributions made from the Settlement Distribution Fund,

and in each case the withheld sums must be paid to the relevant revenue authority imposing such a Tax whether or not pursuant to an assessment or notice issued by the relevant revenue authority.

VIII Preliminary Distributions

53. The Administrator may in its absolute discretion make preliminary payments to Participating Claimants including Registered Representatives on behalf of Deceased Claimants in accordance with this clause, in circumstances where the only matters preventing finalisation of the Final Settlement Entitlements are:

(a). Court approval of Administration Costs;

(b). finalisation of reviews in accordance with the procedure contemplated by clauses 40 to 47, provided that the highest reasonable estimate of the value of the Settlement Entitlements still awaiting the determination of Final Settlement Entitlements is less than 20% of the amount available for distribution to Participating Claimants including Registered Representatives on behalf of Deceased Claimants; or

(c). finalisation of the amount of Tax (if any) required to be withheld;

54. The Administrator may calculate and withhold the following amounts from the Settlement Distribution Fund so as to work out the Net Claimant Distribution Sum for the purposes of making a preliminary payment to Participating Claimants including Registered Representatives on behalf of Deceased Claimants:

(a). *First*, an amount equal to the Administrator's highest reasonable estimate of Administration Costs likely to be incurred prior to the final distribution

of the Settlement Distribution Fund, notwithstanding that such Administration Costs have not yet been approved by the Court;

(b). *Secondly*, in circumstances where reviews have been requested and the procedure contemplated by clauses 42 to 47 is not yet complete, an amount not less than double the highest reasonable estimate of the Settlement Entitlements still awaiting the determination of Final Settlement Entitlements;

(c). *Thirdly*, any Tax payable (or reasonably assessed by the Administrator as likely to become payable) by them as trustees and relating to or resulting from its role as Administrator of the Scheme, and required to be withheld by them as trustees from any Distributions made from the Settlement Distribution Fund.

55. If a preliminary payment is made under clause 53, any Administration Costs shall be paid to the Administrator prior to the final distribution of the remaining amount in the Settlement Distribution Fund.

55A. The Administrator may, in its absolute discretion, make a preliminary Distribution to living Claimants and Registered Representatives in circumstances where the living Claimant or Registered Representative is in a position of extreme hardship..

IX Mode of payment

56. Each of the distributions pursuant to clause 49 and/or 53 will be made to the Participating Claimants including Registered Representatives on behalf of Deceased Claimants, either by:

(a). Electronic Funds Transfer, where bank details are available; or

(b). by cheque.

X Uncollected Amounts and residues

57. Any Uncollected Amount will be applied within 7 days between the other Claimants in accordance with the Loss Assessment Formula in the Assessment Methodology Schedule.

58. Notwithstanding clause 57, where:

(a). the residue in the Settlement Distribution Fund (including the aggregate amount of all Uncollected Claims) is less than $100,000; or

(b). the Administrator determines that the costs associated with making a further distribution in accordance with the Loss Assessment Formula in the Assessment Methodology Schedule (including payment in accordance with clause 57) are excessive, inefficient or disproportionate to the additional return achieved for Participating Claimants,

the Administrator may in its absolute discretion apply some or all of the residue in the Settlement Distribution Fund (including the aggregate amount of all Uncollected Claims) to Link-Up (Qld).

F. GENERAL MATTERS

I Court referral

59. The Administrator may at any time refer any issues arising in relation to the administration of the Scheme to the Court for directions.

59A. The Administrator may apply to the Court on the giving of three days' notice to the Applicant and the Respondent for an order varying the terms of the Scheme. The application and any supporting material must set out the variation sought and the reason(s) for seeking the variation.

II Priority of payments

60. The funds standing from time to time in the Settlement Distribution Fund will be held by the Administrator upon trust for the persons entitled to payments from the Settlement Distribution Fund, and all taxes, duties, levies, charges and other imposts payable in respect of the funds in the Settlement Distribution Fund will be paid from the Settlement Distribution Fund in priority to any distribution to the persons beneficially entitled to the funds.

III Immunity of Administrator

61. The Administrator is immune from any demand, claim or suit, at law or in equity made, by any Claimant in respect of any loss or damage arising as a result of any payment made by the Administrator in accordance with the terms of this Scheme including without limitation, any payment made by the Administrator in accordance with clause 35.

IV Claimant personal taxation issues

62. Each Participating Claimant or Registered Representative is responsible for obtaining his or her own taxation or government entitlements advice in respect of the Distribution he or she receives.

63. Notwithstanding clause 10(h), the Administrator is not obliged to obtain any taxation advice or taxation rulings (class, public or private) concerning any tax potentially payable by a Participating Claimant or Registered Representative in respect of Distributions they receive.

V Time

64. The time for doing any act or thing under this Scheme may be extended by the Administrator in its absolute discretion, or by order of the Court, provided that, subject to clause 65, the Administrator should not extend any time period beyond 45 days after the period specified in this Scheme except by order of the Court.

65. Where the time for doing any act or thing under this Scheme is contingent upon any other act or thing under this Scheme, an extension of time for performance of the prior step will result in a commensurate extension of time for performance of the contingent step (in the exercise of the absolute discretion of the Administrator or by order of the Court).

VI Notices

66. Any notice to be given pursuant to this Scheme will be deemed given and received for all purposes associated with this Scheme if it is:

(a). addressed to the person to whom it is to be given; and

(b). either:

(i). delivered, or sent by pre-paid mail, to that person's postal address (being, in respect of any Claimant or Registered Representative, the postal address with which the person registered as a Claimant);

(ii). sent by fax to that person's fax number (being, in respect of any Claimant or Registered Representative, the fax number address with which the person registered as a Claimant or Registered Representative) and the machine from which it is sent produces a report that states that it was sent in full; or

(iii). sent by email to that person's email address (being, in respect of any Claimant or Registered Representative, the email address last provided by the Claimant or Registered Representative to either BELAW or the Administrator) and a server through which it is transmitted produces a report that states that the email has been delivered to the inbox of the person

(iv). delivered personally to the person by leaving the document with the person.

67. A notice that complies with clause 66 will be deemed to have been given and received:

(a). if it was sent by mail to an addressee in Australia, five clear business days after being sent;

(b). if it is sent by mail to an addressee overseas, five clear business days after being sent;

(c). if it is delivered or sent by fax, at the time stated on the report that is produced by the machine from which it is sent;

(d). if it is sent by email, at the time it is sent; and

(e). if delivered personally, at the time it is delivered.

68. The Administrator's address and email address will be as set out below unless and until the Administrator notifies the sender otherwise:

Anthony Beven and Anthony Jonsson
Grant Thornton
15 Lake Street / PO Box 7200
CAIRNS QLD 4870
cairns@au.gt.com

VII Administrator to report at conclusion of Scheme

69. Upon the conclusion of the Scheme the Administrator is to prepare a report for the Court, with a copy to be provided to the Applicant and Respondent, such report to give consideration to the following matters:

(a). the total number of Claimants who applied to participate in the Scheme including the names of Deceased Claimants;

(b). the total number of Registered Representatives who applied to participate in the Scheme and the number of Deceased Claimants in respect of those Registered Representatives;

(c). the number of people the Administrator notified were ineligible to participate in the Scheme, and the reason therefore;

(d). the amount distributed under the Scheme to Claimants and Registered Representatives, including the amount of any preliminary Distribution or any preliminary payment made because of a Claimant or Registered Representative experiencing extreme hardship, as permitted by clause 55A;

(e). the amount distributed under the Scheme by reference to the categories of persons specified in the Assessment Methodology Schedule;

(f). the amount of the Administration Costs, including a breakdown of the constituent components of those costs;

(g). whether any time periods specified in the Scheme were missed;

(h). the total of the Uncollected Amounts;

(i). the amount of any residue in the Settlement Distribution Fund and the manner of any application of that residue.

VIII Financial counselling

70. The Administrator is to make available from the Settlement Sum the sum of up to $200,000 for the funding of a financial counselling telephone hotline service to be provided by the Indigenous Consumer Assistance Network Ltd (ICAN). For the avoidance of doubt, Distributions under the Scheme are not contingent on a living Claimant or Registered Representative having first received financial

counselling. The Administrator may apply to the Court to increase the amount to be made available for financial counselling if it considers that it is appropriate to do so.

IX Persons under a legal disability

71. In respect of any living Claimant or Registered Representative who is person under a legal disability as defined in s 59(1A) of the *Public Trustee Act* 1978 (Qld) (**PTA**), the Administrator shall cause any Distribution to be paid to the 'appropriate person' (as defined in s 59(1A) of the PTA), for that Claimant or Registered Representative, being:

(a). an administrator for the person under the *Guardianship and Administration Act* 2000; or

(b). if the person does not have an administrator – an attorney for a financial matter for the person under an enduring power of attorney under the *Powers of Attorney Act* 1998; or

(c). if the person does not have an administrator or an attorney mentioned in paragraph (b) – the Queensland Public Trustee.

SCHEDULE

Assessment Methodology Schedule

A. Outline

1. The intention of the Scheme and this Assessment Methodology Schedule is to provide for a fair apportionment of the Net Claimant Distribution Sum between Participating Claimants, having regard to the views formed by the Applicant, having taken advice, as to the differences in the claims between certain groups of Participating Claimants.

2. In outline, this Assessment Methodology Schedule:

   (a). applies a primary weighting between Participating Claimants who are Aboriginal and male, Aboriginal and female, Torres Strait Islander and male, Torres Strait Islander and female (**Section B**);

   (b). applies a secondary weighting between Participating Claimants who are Aboriginal and male and Aboriginal and female, respectively, based upon the date of birth of the Participating Claimant (**Section C**);

   (c). applies a tertiary weighting between Participating Claimants who are alive at the Effective Date or are a Deceased Claimant (**Section D**); and

   (d). calculates the Settlement Entitlement of each Participating Claimant by reference to their proportionate share of the final category to which they are allocated by reason of their Claim Data (**Section E**).

3. The operative part of this Assessment Methodology Schedule is set out below.

B. Primary Category Pools

4. The Net Claimant Distribution Sum is to be divided into four pools amongst the following categories of Participating Claimants (**Primary Category**) in accordance with the proportionate entitlement of each Participating Claimant in each category to the Net Claimant Distribution Sum:

   (a). Participating Claimants who are Aboriginal and male (**AM Pool**);

   (b). Participating Claimants who are Aboriginal and female (**AF Pool**);

   (c). Participating Claimants who are Torres Strait Islander and male (**TSIM Pool**);

   (d). Participating Claimants who are Torres Strait Islander and female (**TSIF Pool**),

(together, **Primary Category Pools**).

5. The calculation of the Primary Category Pools may be represented by the following formula:

*[AM/AF/TSIM/TSIF] Primary Category Pool = Net Claimant Distribution Sum * (Participating Claimants in Primary Category / Total Participating Claimants)*

6. The proportion each of the Primary Category Pools bears to the Net Claimant Distribution Sum is to be adjusted by the application of the following discounts (**Primary Category Discounts**):

   (a). the AM Pool, no adjustment (**Adjusted AM Pool**);

   (b). the AF Pool, a discount of 20% (**Adjusted AF Pool**);

   (c). the TSIM Pool, a discount of 50% (**Adjusted TSIM Pool**);

   (d). the TSIF Pool, a discount of 60% (**Adjusted TSIF Pool**),

   (together, **Adjusted Primary Category Pools**).

7. The calculation of the Adjusted Primary Category Pools may be represented by the following formula:

*([AM/AF/TSIM/TSIF] Adjusted Primary Category Pool = ([AM/AF/TSIM/TSIF] Pool * Inverse of the Primary Category Discount) / (Sum of discounted Primary Category Pools * Net Claimant Distribution Sum)*

C. DOB Pools for Adjusted AM Pool and Adjusted AF Pool

8. The Adjusted AM Pool and the Adjusted AF Pool are to each be further divided into three pools amongst the following categories of Participating Claimants (**DOB Category**) in accordance with the proportionate entitlement of each Participating Claimant in each category to the Adjusted AM Pool and the Adjusted AF Pool, as the case may be:

   (a). Participating Claimants in the Adjusted AM Pool or Adjusted AF Pool who were born between 12/10/1911 and 30/10/1936 (**DOB1 AM Pool** and **DOB1 AF Pool**, respectively);

   (b). Participating Claimants in the Adjusted AM Pool or Adjusted AF Pool who were born before 12/10/1911 or between 31/10/1936 and 18/11/1947 (**DOB2 AM Pool** and **DOB2 AF Pool**, respectively)

   (c). Participating Claimants in the Adjusted AM Pool or Adjusted AF Pool who were born between 19/11/1947 and 4/12/1958 (**DOB3 AM Pool** and **DOB3 AF Pool**, respectively),

   (together, **DOB Category Pools**).

9. The calculation of the DOB Category Pools may be represented by the following formula:

*[DOB1/DOB2/DOB3/AM/AF] Pool = Adjusted [AM/AF] Primary Category Pool * (Participating Claimants in DOB Category / Total Participating Claimants in Adjusted [AM/AF] Primary Category Pool)*

10. The proportionate entitlement of each Participating Claimant in the DOB Category Pools to the Adjusted AM Pool or Adjusted AF Pool is to be further adjusted by the application of the following discounts (**DOB Discounts**):

    (a). Participating Claimants in the DOB1 AM Pool or DOB1 AF Pool, no discount (**Adjusted DOB1 AM Pool** and **Adjusted DOB1 AF Pool**, respectively);

    (b). Participating Claimants in the DOB2 AM Pool or DOB2 AF Pool, a discount of 10% (**Adjusted DOB2 AM Pool** and **Adjusted DOB2 AF Pool**, respectively)

    (c). Participating Claimants in the DOB3 AM Pool or DOB3 AF Pool, a discount of 20% (**Adjusted DOB3 AM Pool** and **Adjusted DOB3 AF Pool**, respectively),

    (together, **Adjusted DOB Pools,** respectively).

11. The calculation of the Adjusted DOB Pools may be represented by the following formula:

*Adjusted [DOB1/DOB2/DOB3/AM/AF] Pool = ([DOB1/DOB2/DOB3/AM/AF] Category Pool * Inverse of the DOB Discount) / (Sum of discounted [DOB1/DOB2 /DOB3/AM/AF] Category Pools) * ([AM/AF] Adjusted Primary Category Pool)*

D. Living or Deceased Pools

12. The Adjusted DOB Pools, Adjusted TSIM Pool and Adjusted TSIF Pools are to each be further divided into two pools amongst the following categories of Participating Claimants (**Living or Deceased Category**) in accordance with the proportionate entitlement of each Participating Claimant in each category to the Adjusted DOB Pools, Adjusted TSIM Pool or Adjusted TSIF Pools, as the case may be:

    (a). Participating Claimants who are living as at the Effective Date (**Living Pool**);

    (b). Participating Claimants who are Deceased Claimants (**Deceased Pool**),

    (together, **Living or Deceased Pools**).

13. The calculation of the Living or Deceased Pools may be represented by the following formula:

[Living/Deceased] Pool = Adjusted [DOB/TSIM/TSIF] Pool / Participating Claimants in Living or Deceased Category

14. The proportionate entitlement of each Participating Claimant in the Living or Deceased Pools to the Adjusted DOB Pools, Adjusted TSIM Pools and Adjusted TSIF Pools is to be further adjusted by the application of the following discounts (**Living or Deceased Discounts**):

    (a). the Living Pool, no adjustment (**Adjusted Living Pool**);

    (b). the Deceased Pool, a discount of 30% (**Adjusted Deceased Pool**),

    (together, **Adjusted Living or Deceased Pools**).

15. The calculation of the Adjusted Living or Deceased Pools may be represented by the following formula:

*Adjusted [DOB/TSIM/TSIF] [Living/Deceased] Pool = [DOB/TSIM/TSIF] [Living/Deceased] Pool * Inverse of Living or Deceased Discount / Sum of discounted [DOB/TSIM/TSIF] [Living/Deceased] Pool * Adjusted [DOB/TSIM/TSIF] Pool*

E. Distributions

16. Following identification of:

    (a). the Adjusted Primary Category Pools;

    (b). the Adjusted DOB Pools within the Adjusted Primary Category Pools; and

    (c). the Living or Deceased Pools within the Adjusted DOB Pools,

    the Net Claimant Distribution Sum is to be distributed to the Participating Claimants in accordance with their proportionate entitlement to the amount in the particular Living or Deceased Pool to which they are allocated by the information held in the Claimant Database (i.e. the Settlement Entitlement).

17. The calculation of the Settlement Entitlement of Participating Claimants may be represented by the following formula:

Settlement Entitlement = Relevant Living or Deceased Pool / (Participating Claimants in Relevant Living or Deceased Pool)

Assessment Methodology Guidance Statement

A. Outline

1. The purpose of this Guidance Statement is to illustrate the potential application of the Assessment Methodology Schedule. Each step is illustrated by a working example using hypothetical figures for the purpose of demonstrating the relevant formulas and calculations (**Worked Examples**). The worked examples are for reference only and are not to be regarded as in any way indicative of the final composition of the Participating Claimants or of any individual Settlement Entitlement (though they are based on approximate working figures having regard to the profile of existing registered claimants).

2. Each of the Worked Examples in the Guidance Statement assumes the following information:

   - *The Net Claimant Distribution Sum is $140,000,000 and there are 7,000 Participating Claimants.*
   - *The Claimant Database indicates that of the Participating Claimants: 2500 are Aboriginal males; 2500 are Aboriginal females; 1000 are Torres Strait Islander males, and 1000 are Torres Strait Islander females.*
   - *The Claimant Database indicates that of the Participating Claimants who are Aboriginal males and Aboriginal females, the persons who are born in each of the date of birth categories are evenly distributed (i.e. for Aboriginal males: 834 in DOB1, 833 in DOB2, 833 in DOB3, allowing for rounding).*
   - *The Claimant Database indicates that of the Participating Claimants, three-fifths are Deceased Claimants, evenly distributed amongst all categories.*

B. Primary Category Pools

3. Prior to the application of any adjustment, in this Worked Example the proportionate entitlement of each Participating Claimant to the Net Claimant Distribution Sum is $20,000 (i.e. $140,000,000 / 7000).

4. The calculation of the Adjusted Primary Category Pools may be illustrated by the following Worked Example:

The Primary Category Pools are:

*(i) AM Pool = $50,000,000 = $140,000,000 * (2500/7000);*

*(ii) AF Pool = $50,000,000 = $140,000,000 * (2500/7000);*

*(iii) TSIM Pool = $20,000,000 = $140,000,000 * (1000/7000); and*

*(iv) TSIF Pool = $20,000,000 = $140,000,000 * (1000/7000).*

The next stage is calculating the Adjusted Primary Category Pools. As an example, using the Adjusted AF Pool and following the working above:

*Adjusted AF Pool = AF Pool * 0.8 / Sum of discounted Primary Category Pools * Net Claimant Distribution Sum*

*= 50,000,000 * 0.8 / (50,000,000 * 1 + 50,000,000 * 0.8 + 20,000,000 * 0.5 * 20,000,000 * 0.4) * 140,000,000*

= $51,851,851.85

Performing this calculation for all Primary Category Pools, the Adjusted Primary Category Pools are as follows:

Participating Claimant category	Number of Participating Claimants	Adjusted category settlement proportion
Male Aboriginal	2,500	$ 64,814,814.81
Female Aboriginal	2,500	$ 51,851,851.85
Male TSI	1,000	$ 12,962,962.96
Female TSI	1,000	$ 10,370,370.37
	7,000	$ 140,000,000.00

C. DOB Pools for Adjusted AM Pool and Adjusted AF Pool

5. The calculation of the Adjusted DOB Pools may be illustrated by the following Worked Example:

In the previous Worked Example, the Adjusted AF Pool was calculated at $51,851,851.85. The Claimant Database indicates that of the 2500 members (i.e. Aboriginal females): 834 are in the DOB1 AF Pool; 833 are in the DOB2 AF Pool; and 833 are in the DOB3 AF Pool, allowing for rounding. The Adjusted DOB Pools for the Adjusted AF Pool are therefore:

*(i) DOB1 AF Pool = $17,297,777.78 = 51,851,851.85 * (834/2500);*

*(ii) DOB2 AF Pool = $17,277,037.04 = 51,851,851.85 * (833/2500); and*

*(iii) DOB3 AF Pool = $17,277,037.04 = 51,851,851.85 * (833/2500).*

Performing this calculation for the AM and AF Adjusted Primary Category Pools, the DOB Pools are as follows:

Participating Claimant subcategory	Number of Participating Claimant	Subcategory settlement proportion
Male Aboriginal DOB1	834	$ 21,622,222.22
Male Aboriginal DOB2	833	$ 21,596,296.30
Male Aboriginal DOB3	833	$ 21,596,296.30
Female Aboriginal DOB1	834	$ 17,297,777.78
Female Aboriginal DOB2	833	$ 17,277,037.04
Female Aboriginal DOB3	833	$ 17,277,037.04
Male TSI	1,000	$ 12,962,962.96
Female TSI	1,000	$ 10,370,370.37
	7,000	**$ 140,000,000.00**

The next stage is calculating the Adjusted DOB Pools. As an example, using the Adjusted DOB 1 AF Pool and following the working above:

Adjusted DOB 1 AF Pool = *DOB1 AF Pool * 1 / Sum of discounted AF DOB Pools * Adjusted AF Pool*

= *17,297,777.78 * 1 / (17,297,777.78 * 1 + 17,277,037.04 * 0.9 + 17,277,037.04 * 0.8) * 51,851,851.85*

= *$19,218,898.91*

Performing this calculation for all DOB Pools, the Adjusted DOB Pools are:

Participating Claimant subcategory	Number of Participating Claimant	Adjusted subcategory settlement proportion
Male Aboriginal DOB1	834	$ 24,023,623.64
Male Aboriginal DOB2	833	$ 21,595,336.50
Male Aboriginal DOB3	833	$ 19,195,854.67
Female Aboriginal DOB1	834	$ 19,218,898.91
Female Aboriginal DOB2	833	$ 17,276,269.20
Female Aboriginal DOB3	833	$ 15,356,683.74
Male TSI	1,000	$ 12,962,962.96
Female TSI	1,000	$ 10,370,370.37
	7,000	**$ 140,000,000.00**

(The Adjusted TSIM Pool and Adjusted TSIF Pool are not affected by this stage.)

D. Living or Deceased Pools

6. The calculation of the Adjusted Living or Deceased Pools may be illustrated by the following Worked Example:

In the previous Worked Example, the Adjusted DOB1 AF Pool was calculated at $19,218,898.91. The Claimant Database indicates that of the 834 members (i.e. Aboriginal females born between 12/10/1911 and 30/10/1936): 334 are in the Living Pool; and 500 are in the Deceased Pool. The Living or Deceased Pools for the Adjusted DOB1 AF Pool are therefore:

*(i) Living Pool = $7,687,559.57 = 19,218,898.91 * (334/834); and*

*(ii) Deceased Pool = $11,531,339.35 = 19,218,898.91 * (500/834).*

Repeating this calculation for the Adjusted DOB Pools, Adjusted TSIM Pool, Adjusted TSIF Pool, the Living and Deceased Pools are:

Participating Claimant subcategory	Number of Participating Claimant	Subcategory settlement sum
Male Aboriginal DOB1	334	$ 9,620,971.58
Male Aboriginal DOB1 Deceased	500	$ 14,402,652.06
Male Aboriginal DOB2	333	$ 8,632,949.65
Male Aboriginal DOB2 Deceased	500	$ 12,962,386.86
Male Aboriginal DOB3	333	$ 7,673,733.02
Male Aboriginal DOB3 Deceased	500	$ 11,522,121.65
Female Aboriginal DOB1	334	$ 7,696,777.26
Female Aboriginal DOB1 Deceased	500	$ 11,522,121.65
Female Aboriginal DOB2	333	$ 6,906,359.72
Female Aboriginal DOB2 Deceased	500	$ 10,369,909.49
Female Aboriginal DOB3	333	$ 6,138,986.42
Female Aboriginal DOB3 Deceased	500	$ 9,217,697.32
Male TSI	400	$ 5,185,185.19
Male TSI Deceased	600	$ 7,777,777.78
Female TSI	400	$ 4,148,148.15
Female TSI Deceased	600	$ 6,222,222.22
	7,000	$ 140,000,000.00

The next stage is calculating the Adjusted Living or Deceased Pools. As an example, using the Adjusted DOB1 AF Living Pool and following the working above:

*Adjusted DOB 1 AF Living Pool = DOB1 AF Living Pool * 1 / Sum of discounted DOB1 AF Living and Deceased Pools * Adjusted DOB1 AF Pool*

*= 7,687,559.57 * 1 / (7,687,559.57 * 1 + 11,531,339.35 * 0.7) * 19,218,898.91*

= $9,375,072.64

Repeating this calculation for the Living and Deceased Pools, the Adjusted Living and Deceased Pools are:

Participating Claimant subcategory	Number of Participating Claimant	Adjusted subcategory settlement proportion
Male Aboriginal DOB1	334	$ 11,730,833.77
Male Aboriginal DOB1 Deceased	500	$ 12,292,789.87
Male Aboriginal DOB2	333	$ 10,528,912.23
Male Aboriginal DOB2 Deceased	500	$ 11,066,424.27
Male Aboriginal DOB3	333	$ 9,359,033.10
Male Aboriginal DOB3 Deceased	500	$ 9,836,821.57
Female Aboriginal DOB1	334	$ 9,384,667.01
Female Aboriginal DOB1 Deceased	500	$ 9,834,231.90
Female Aboriginal DOB2	333	$ 8,423,129.79
Female Aboriginal DOB2 Deceased	500	$ 8,853,139.42
Female Aboriginal DOB3	333	$ 7,487,226.48
Female Aboriginal DOB3 Deceased	500	$ 7,869,457.26
Male TSI	400	$ 6,323,396.57
Male TSI Deceased	600	$ 6,639,566.40
Female TSI	400	$ 5,058,717.25
Female TSI Deceased	600	$ 5,311,653.12
	7,000	**$ 140,000,000.00**

E. Distributions

7. The calculation of the Settlement Entitlement may be illustrated by the following Worked Example:

In the previous Worked Example, the Adjusted DOB 1 AF Living Pool was calculated at $9,375,072.64. It comprises 334 Participating Claimants. The Settlement Entitlement of each Participating Claimant in the Adjusted DOB 1 AF Living Pool is therefore:

Settlement Entitlement = *Adjusted DOB 1 AF Living Pool / Participating Claimants in Adjusted DOB 1 AF Living Pool*

= *9,375,072.64 / 334*

= *$28,069.08.*

Repeating this calculation for the Living and Deceased Pools, the Adjusted Living and Deceased Pools are:

Subcategory	Participating Claimants	Individual Distribution of Settlement Sum
Male Aboriginal DOB1	334	$ 35,122.26
Male Aboriginal DOB1 Deceased	500	$ 24,585.58
Male Aboriginal DOB2	333	$ 31,618.36
Male Aboriginal DOB2 Deceased	500	$ 22,132.85
Male Aboriginal DOB3	333	$ 28,105.20
Male Aboriginal DOB3 Deceased	500	$ 19,673.64
Female Aboriginal DOB1	334	$ 28,097.81
Female Aboriginal DOB1 Deceased	500	$ 19,668.46
Female Aboriginal DOB2	333	$ 25,294.68
Female Aboriginal DOB2 Deceased	500	$ 17,706.28
Female Aboriginal DOB3	333	$ 22,484.16
Female Aboriginal DOB3 Deceased	500	$ 15,738.91
Male TSI	400	$ 15,808.49
Male TSI Deceased	600	$ 11,065.94
Female TSI	400	$ 12,646.79
Female TSI Deceased	600	$ 8,852.76

Schedule 2

Oaths Act 1867

STATUTORY DECLARATION

QUEENSLAND
TO WIT

I, _____
[***insert full name***],

of

_____
_____ [***insert address***], in the State of Queensland, **do solemnly and sincerely declare that:**

1. _____, the Deceased Claimant, died on _____ [*date*] in _____ [*city/town*].

2. My relationship to the Deceased Claimant was _____ [*indicate your relationship to the Deceased Claimant*]

3. The Deceased Claimant died leaving a valid Will, a copy of which is attached hereto and marked with the letter "A".

4. I am the Executor named in the last Will made by the Deceased Claimant.

5. I do not intend to make an application for a grant of Probate of the Deceased's Will in a Court of competent jurisdiction.

6. I hereby undertake to distribute any monies received for an on behalf of the estate of the Deceased Claimant from the Stolen Wages Class Action Settlement, to those persons entitled to benefit under the Will and in accordance with the terms of the Will.

7. I hereby undertake to forever discharge and release the Administrator of the Applicant's Settlement Distribution Scheme (**Scheme Administrator**) and further, will indemnify and keep indemnified the Scheme Administrator, from any and all liabilities or claims of whatsoever nature in relation to the claim in this proceeding of the estate of the Deceased Claimant.

And I make this solemn declaration conscientiously believing the same to be true and by virtue of the provisions of the *Oaths Act 1867*.

.....
[*Signature of person making this Declaration*]
Declarant

Taken and declared before me at

_____

this _____ day of _____ 20____, before me:

.....
Signature
Justice of the Peace/Commissioner for Declarations/Solicitor

Note about Statutory Declarations in Queensland

1. Statutory declarations are written statements declaration that something is true and correct.

2. The statutory declaration must contain the truth. It is a criminal offence to make a false statutory declaration. If a statutory declaration is found to be untruthful, the person making the statutory declaration may be charged under the Criminal Code and be liable to penalties including imprisonment.

3. Each document attached to the statutory declaration (e.g., any Will of a Deceased Claimant) should be marked with the following:

   "This is the Will of [*Deceased Claimant*] marked with the letter "A" referred to in the statutory declaration of [*person making the statutory declaration*] declared before me this _____ day of _____ 20____.

   .....
   Signature
   Justice of the Peace/Commissioner for Declarations/Solicitor"

Schedule 3

Extract of paragraphs 2 and 3 of the Fourth Amended Statement of Claim (Group Membership in the Proceeding)

2. A Group Member to whom these proceedings relate is a person who:

(a) during all or part of the period from 12 October 1939 to 4 December 1972 (**Claim Period**) was, or was deemed to be, an "Aboriginal" as that term is used in *The Aboriginals Preservation and Protection Act of 1939* (Qld) (as amended) (**1939 Act**); or

(aa) during all or part of the Claim Period was, or was deemed to be, an "islander" as that term is used in *The Torres Strait Islanders Act of 1939* (Qld) (as amended) (**Islander Act**); and/or

(b) during all or part of the Claim Period was an "Aborigine" or a "part-Aborigine" who fell within the category of "assisted Aborigines," or an "Islander" who fell within the category of "assisted Islanders," as those terms are used in *The Aborigines' and Torres Strait Islanders' Affairs Act of 1965* (Qld) (as amended) (**1965 Act**); or

(c) [blank]

(d) during all or part of the Claim Period was subject to the 1939 Act and/or *The Aboriginals Regulations of 1945* (Qld) (as amended) (**1945 regulations**) (collectively referred to in this pleading as the 1939 Act and regulations); or

(e) during all or part of the Claim Period was subject to the Islander Act and/or *The Islanders Regulations, 1946* (Qld) (as amended) (**Islander regulations**) (collectively referred to in this pleading as the Islander Act and regulations); and/or

(f) during all or part of the Claim Period was subject to the 1965 Act and *The Aborigines' and Torres Strait Islanders' Regulations of 1966* (as amended) (**1966 regulations**) (collectively referred to in this pleading as the 1965 Act and regulations);

(g) during all or part of the Claim Period lived in Queensland in one or more of the following areas, that is to say:

(i) an area which had been proclaimed as or was otherwise deemed to be a "District" for the purposes of the 1939 Act, the Islander Act or the 1965 Act (**Districts**);

(ii) on land granted in trust or reserved from sale or lease by the Governor in Council for the benefit of Aborigines of Queensland and defined as (or deemed to be) a "reserve" for the purposes of the 1939 Act or the 1965 Act (**reserves**);

(iii) on any Torres Strait island (as defined in the Islander Act) or part of a Torres Strait island granted in trust or reserved from sale or lease by the Governor in Council for the benefits of islanders and defined as (or deemed to be) a "reserve" for the purposes of the Islander Act or regulations (**islander reserve**);

(iv) in a settlement built on a reserve or on a islander reserve; or

(v) in a mission operated by a religious institution on a reserve or islander reserve (which is referred to as a "mission reserve" in s.2 of the 1945 regulations);

(h) was employed or was required to work during all or part of the Claim Period, such employment being controlled or which was required to be controlled by the 1939 Act and regulations or the Islander Act and regulations and/or the 1965 Act and regulations;

(i) [blank]

(j) [blank]

(k) by reason of the matters pleaded herein is entitled to equitable relief and/or the payment of compensation and/or the relief set out in Section Z hereto.

(The persons who the Applicant represents in these proceedings will be referred to as **Group Members**. The Applicant and Group Members collectively will be referred to as **Claimants**).

3. If a person who would otherwise be a Group Member has died, then a reference to "Group Member" in this pleading includes the executor, administrator or beneficiary of that deceased person's estate who has the capacity to claim on behalf of the deceased estate or (in the case of a beneficiary of the deceased person's estate) a person who has a right, equitable or otherwise, in respect of the administration of, or property forming part of, the estate of the deceased person.

REASONS FOR JUDGMENT

MURPHY J:

INTRODUCTION

1 This class action, colloquially known as the "Stolen Wages Case" arose out of discriminatory, unjust and, it should be said, disgraceful legislation and policies that applied to Aboriginal and Torres Strait Islander people living in Queensland in the period between 12 October 1939 and 4 December 1972 (the **claim period**). The applicant, Mr Hans Pearson brought the proceeding against the respondent, the State of Queensland (the **State**), on his own behalf and on behalf of all persons who during all or any part of the 33 years of the claim period:

(a) was or was deemed to be an "aboriginal" as that term was used in *The Aboriginals Preservation and Protection Act of 1939* (Qld) as amended (**1939 Act**); or

(b) was or was deemed to be an "islander" as that term was used in *The Torres Strait Islanders Act of 1939* (Qld) as amended (**Islander Act**); and/or

(c) was an "aborigine" or a "part-aborigine" who fell within the category of "assisted aborigines", or an "Islander" who fell within the category of "assisted Islanders" as those terms were used in *The Aborigines' and Torres Strait Islanders' Affairs Act 1965* (Qld) as amended (**1965 Act**); or

(d) was subject to the 1939 Act and/or *The Aboriginals Regulations of 1945* (Qld) as amended (**1945 regulations**) (collectively, **the 1939 Act and regulations**); or

(e) was subject to the Islander Act and/or *The Islanders Regulations 1946* (Qld) as amended (**Islander regulations**) (collectively, the **Islander Act and regulations**"; or

(f) was subject to the 1965 Act and *The Aborigines' and Torres Strait Islanders' Regulations of 1966* as amended (**1966 regulations**) (collectively, **the 1965 Act and regulations**);

(g) lived in Queensland in one or more of the following areas, namely:

(i) an area which had been proclaimed or was otherwise deemed to be a "District" for the purposes of the 1939 Act, the Islander Act, or the 1965 Act (**Districts**);

(ii) on land granted in trust or reserved from sale or lease by the Governor in Council for the benefit of Aborigines of Queensland and defined as (or

deemed to be) a "reserve" for the purposes of the 1939 Act or the 1965 Act (**reserves**);

(iii) on any Torres Strait island (as defined in the Islander Act) or part of a Torres Strait island granted in trust or reserved from sale or lease by the Governor in Council for the benefit of islanders and defined as (or deemed to be) a "reserve" for the purposes of the Islander Act or regulations (**islander reserve**);

(iv) in a settlement built on a reserve or on a islander reserve; or

(v) in a mission operated by a religious institution on a reserve or islander reserve (referred to as a "mission reserve" in r 2 of the 1945 regulations);

(h) was employed or was required to work, such employment being controlled or which was required to be controlled by the 1939 Act and regulations, the Islander Act and regulations and/or the 1965 Act and regulations; and

(i) by reason of the pleaded claims is entitled to equitable and other relief.

The class includes people who claim a right in respect of property forming part of the estate of a person who met the above description and I use the term 'class member' to describe living Aboriginal and Islander people who were subject to the Protection Acts during the claim period and also persons who claim on behalf of their estates.

2 The parties agreed to settle the claims of the applicant and class members for $190 million inclusive of legal costs and interest, subject to Court approval under s 33V of the *Federal Court of Australia Act 1976* (Cth) (the **FCA**), with the settlement monies (after various deductions) to be distributed to class members under a Court-approved settlement distribution scheme (**SDS**). In return the applicant and class members provide broad releases from all actions, claims and demands they have in relation to the subject matter of the proceeding.

3 In announcing the settlement the Deputy Premier of Queensland and Minister for Aboriginal and Torres Strait Islander Partnerships and the Queensland Attorney-General and Minister for Justice said:

> This settlement has been reached in the spirit of reconciliation and in recognition of the legacy and impact of the 'control' policies on Aboriginal and Torres Strait Islander Queenslanders, including elders past and present….The Queensland Government is committed to righting historic wrongs and [we] look forward to continuing to work closely with the community as we move forward together.

4 On 17 January 2020 I made orders to approve the settlement and I now provide reasons for doing so. The reasons are unavoidably lengthy because of the need to explain various matters in detail having regard to public importance of the case. For convenience, I now provide a summary.

Summary

5 I commence by noting that the parties referred to Mr Pearson and the class members as "Aboriginals" and "Islanders" throughout the proceeding. For clarity I have adopted those expressions but I am concerned to explain that I intend no disrespect to Mr Pearson or other indigenous Australians by doing so. The parties also described the 1939 Act, the Islander Act, the 1965 Act and the subordinate legislation as the "**Protection Acts**". I have similarly adopted that description, even though I would not describe the effect of the statutory controls placed upon Aboriginals and Islanders under those Acts as protective.

6 The proceeding alleged the following three broad causes of action.

(1) During the claim period Aboriginals and Islanders were subject to various controls under the Protection Acts, including that any wages they earned while working away from the settlements, reserves or mission reserves (**settlements**) on which they were required to live were required to be paid by their employers to the Superintendent or Protector on the settlement rather than to them, to be held on their behalf in communal savings accounts created and maintained by the State (**savings accounts**). The proceeding alleged breach of trust and fiduciary duties owed by the State to Mr Pearson and class members and asserted that a substantial amount of the wages paid to the State were never paid to the Aboriginal and Islander employees who undertook the work, and that some of those monies were instead taken by the State and put to its own uses (the **Stolen Wages Case**).

(2) Contravention of the *Racial Discrimination Act 1975* (Cth) (the **RDA**) in the provision of legal advice as part of the reparations scheme instituted by the State from 2002 (the **Reparations Scheme**) in respect of wages earned by Aboriginals and Islanders and held by the State which had not been paid to them (the **Racial Discrimination Case**).

(3) That the provisions of the 1939 Act and regulations which authorised the Superintendent or Protector to direct Aboriginals to undertake compulsory unpaid work on settlements were repugnant to Imperial anti-slavery legislation then in force

in Queensland, and therefore invalid, because they authorised the enslavement of Mr Pearson and Aboriginal class members. The proceeding alleged that Aboriginals who were required to perform compulsory unpaid work were entitled to damages representing the reasonable value of their compulsory labour (the **Slavery Case**). This case does not apply to Islander class members as it is based in the 1939 Act and regulations which applied only to Aboriginals.

7 The salient considerations for the decision to approve the settlement include the following.

8 *First*, the Court had the benefit of a comprehensive confidential opinion from senior and junior counsel for the applicant and class members (**Counsels' Opinion**), which candidly considered the fairness and reasonable of the settlement as between the parties and as between the class members. Counsel assessed the strengths and weaknesses of each of the cases advanced in the proceeding and considered the difficulties and risks the applicant and class members faced in: proving that the State is liable to pay damages; and if the applicant and class members succeeded in proving liability, obtaining judgment in an amount commensurate to the substantial settlement that has been achieved. Counsel recommended that the Court approve the proposed settlement. It is appropriate to place significant weight on Counsels' Opinion.

9 *Second*, in my view the proceeding faced real risks and difficulties on liability and quantum, such that it was impossible for the applicant's lawyers to be confident of succeeding in the causes of action pleaded or, if they did succeed, obtaining any better result than the proposed settlement.

10 It is clear from the materials that Aboriginals and Islanders who were subject to the Protection Acts during the claim period suffered serious racial discrimination, being treated as lesser human beings than non-indigenous Australians, incompetent to manage their own affairs, and appropriate to be 'controlled' by government-appointed Superintendents or Protectors in relation to their ability or capacity to earn income, own property, move or travel to areas outside the settlements, marry, or even engage in customary native practices. On top of the discrimination and the indignity they suffered, it is clear enough for the purposes of the application that many class members did not receive all of the wages which were paid or ought to have been paid by their employers to the State for their work during the claim period.

11 As much has been acknowledged by the State in public statements and by the institution of the Reparations Scheme. But in the absence of the proposed settlement, the applicant and class members bore the onus to establish their claims to the requisite legal standard. The materials before the Court indicate that many class members would have likely faced real difficulties in doing so, or alternatively in proving an entitlement to compensation anywhere near the substantial amount that has been achieved through the proposed settlement. For claims brought on behalf of deceased estates, which comprise the majority of claims, those difficulties would likely have been extreme.

12 The difficulties and risks vary between the three cases advanced but each faced serious obstacles. For example, in the Stolen Wages Case the applicant and many class members faced difficulties in proving on the balance of probabilities that: (a) they were not paid 'pocket money' at the time, or that they were only paid modest amounts; (b) they did not withdraw monies from the savings accounts or withdrew little; (c) they did not make withdrawals from the savings accounts by placing orders in the settlement store or made few orders; and (d) they did not receive all the wages that their employers paid or ought to have paid to the State for their work. Insofar as class members were able to overcome these obstacles, they also faced risks in relation to the quantum of their claims; that the losses they were able to prove would be less than they would achieve through the proposed settlement.

13 For many class members the difficulties they would face include that:

(a) the relevant events occurred between 48 and 81 years ago, many class members are elderly and their recall in relation to everyday events from that time such as whether they withdrew money from a savings account or placed an order at a settlement store are likely to have faded with the effluxion of time. Recollections of such events occurring so long ago may be honestly held but nevertheless be unreliable, or at least not as rationally probative as evidence such as contemporaneous documentary records which contradict them;

(b) there is a general paucity of records in relation to the relevant events and the former employers, and the former Superintendents and Protectors, are mostly deceased. Where records do exist they sometimes, apparently often, do not accord with class members' recollections; and

(c) the majority of claims are on behalf of deceased estates. The paucity of records and the fact that in such cases there can be no direct evidence from the person who

undertook the work as to the wages earned, whether pocket money was paid, and the extent of any withdrawals from the savings accounts or orders placed in the settlement store, means that the difficulties of establishing many such claims are likely to be extreme.

14 The applicant and many of the class members assert that they did not make any, or only made modest, withdrawals from their respective savings accounts. However, in relation to Mr Pearson (and also some of the ten sample class members), the State produced contemporaneous records which tended to show that Mr Pearson and the relevant sample class members made many more withdrawals than they now recall. To explain the inconsistency between their evidence regarding the extent of withdrawals and the documentary records upon which the State relies, the applicant's lawyers submitted that it should be inferred that:

(a) the withdrawals were made without Mr Pearson's knowledge or permission to cover shortfalls in the rations provided by the State to him and other people on the settlement, when the State was obligated to provide adequate rations without payment; and/or

(b) the withdrawals were fraudulent.

15 Mr Pearson denied making or authorising such withdrawals but there is no other evidence that withdrawals were made without Mr Pearson's knowledge or permission for rations. It is likely the State would have contended that Mr Pearson was mistaken in his recall of everyday events from so long ago. Nor is there any direct evidence that withdrawals from the savings account in relation to Mr Pearson were fraudulent. There is material which indicates deficiencies in the administration of the savings accounts generally and that some misappropriation occurred, and the State has publicly acknowledged that some misappropriation occurred. There is though little to show misappropriation by reference to the particular savings accounts of identified class members. In each case it would have been up to the class member to prove that the general failings in the administration of the savings accounts applied in their particular case and that fraud was the explanation for particular withdrawals. Class members were likely face substantial difficulties establishing to the requisite legal standard that fraud was the explanation for withdrawals where there is little to show that other than that they do not recall making such withdrawals. Some aspects of the

litigation also faced serious difficulties because of the *Limitation of Actions Act 1974* (Qld) (**Limitations Act**).

16 *Third*, the proposed settlement is substantial, and is in addition to $56.5 million paid under the Reparations Scheme. In my view the proposed settlement falls comfortably at the high end of the range of reasonable settlements.

17 *Fourth*, the complexity and likely duration of the litigation meant that, assuming that the proceeding was ultimately successful, it would have been years before class members received any compensation absent the proposed settlement. The vast majority of living class members are elderly, with an approximate age range between 63 and 96. Many have passed away since the proceeding was commenced. The advanced age of many class members, and the importance of their receiving compensation in their lifetime, to the extent possible, is an important consideration.

18 *Fifth*, the size of the class, their ethnic and socio-economic background and frequently their remote location, would have meant that it would have been extremely expensive, difficult and time-consuming to litigate class members' individual claims if they were successful in the initial trial. The applicant proposed to seek aggregate damages but that path would have been fraught with difficulty.

19 *Sixth*, the SDS employs a loss assessment methodology which takes into account broad differences between class members in a way that is essentially fair and reasonable, and it provides mechanisms for review and appeal of the assessment of the compensation payable.

20 The proposed costs of the settlement administration under the SDS are fair and reasonable. The role of the Administrator was put to tender to four accounting firms. Ultimately I appointed Mr Anthony James Jonsson and Mr Anthony Raymond Beven of Grant Thornton Australia Ltd (**Grant Thornton**) to the role because they possess relevant expertise including a history of working with indigenous communities, have a Cairns-based office, provided a fixed quote subject only to Court-approved increases, and the solicitor for the applicant recommended their appointment.

21 BELAW, or any such firm of solicitors the Administrator decides in its discretion to appoint, will act as Advisor to the Administrator. The costs of the Advisor could not be entirely fixed, largely because of difficulties in estimating at the outset the cost of communicating with class members, given the particular characteristics of the class. Instead, the orders provide for the

Advisor's costs to be the subject of ongoing reporting to the Court at three monthly intervals by Ms Elizabeth Harris, an independent legal costs expert, as a referee (**Costs Referee**). This would allow the Court to monitor and supervise the reasonableness and proportionality of costs charged or proposed to be charged by the Advisor under the SDS.

22 *Seven*, I was satisfied that the proposed deductions from the settlement sum for legal costs and litigation funding charges are fair and reasonable.

(a) The applicant's legal costs are substantial, totalling $13,881,952.17. The applicant relied upon the report of an independent legal costs consultant, Mr Alan Adrian, and I appointed the Costs Referee to review aspects of the proposed charges. I was satisfied that the legal costs are reasonable for a class action of this size, novelty and difficulty and having regard to the unique challenges the case presented in terms of communicating effectively with the class.

(b) The litigation funding commission payable under the extant common fund order made on 25 August 2017 is $38 million, representing 20% of the gross settlement. To those not experienced in large, complex and strenuously defended class action litigation, $38 million may seem an extraordinary amount for litigation funding. But having given careful thought to the question, I considered the size of the charge to be fair and reasonable, including because:

(i) the funder, Litigation Lending Services Ltd (**LLS**), paid approximately $12.65 million in legal costs and disbursements, and I estimate it would have been required to pay close to $17 million by the end of the trial of the common issues. It was also exposed to further legal costs to be incurred in a later hearing seeking aggregate damages. I estimate that LLS faced a risk of an adverse costs order of $15 million or higher if the case was ultimately unsuccessful. The costs and risks faced by a funder are central considerations in assessing the reasonableness of the proposed funding commission, and in light of those matters, the amount is fair and reasonable;

(ii) at the time LLS agreed to fund the proceeding, a 20% funding rate compared favourably with the rates generally offered for 'standard' class actions in the litigation funding marketplace, and this is far from a standard class action. A 20% funding rate was (and remains) highly favourable for a high-risk case like this one which involved a large class, high costs, novel causes of action,

historical claims with evidentiary problems, and real risks on liability and quantum. A higher funding rate would have been justifiable; and

(iii) the case concluded with a favourable result for the applicant and class members, and the funding commission is proportionate to the compensation the proceeding recovered. Class members will receive approximately 73% of the settlement after deduction of litigation funding charges and legal costs.

23 In passing I note that making the common fund order at that early stage of the proceeding meant that a seriously disadvantaged section of the Australian community were provided with greatly enhanced access to justice. The case was commenced on a 'closed' class basis and the applicant only sought orders to 'open' the class on the proviso that a common fund order was also made: see *Pearson v State of Queensland* [2017] FCA 1096 (***Pearson***) at [7]-[17]). The common fund order that was made allowed thousands more people, many of whom are elderly, not well-educated, lack commercial and legal sophistication and who live in isolated communities, to become class members and to share in the settlement. Converting the proceeding from a 'closed' to an 'open' class action also benefited the State by enabling it to approach the case on the basis that it would be able to achieve greater finality in relation to the claims made in the proceeding.

24 *Ninth*, thirteen class members raised objections to the proposed settlement on behalf of themselves and their families. One thing which stands out from the objections is the evident anguish, torment and anger which some class members still feel about the discriminatory and unjust way Aboriginals and Islanders were treated between 1939 and 1972, and the lasting legacy of economic and social hardship still felt by their families. Those objections were powerful and the emotion with which they were expressed reflected the importance of the proposed settlement to class members and the historical trauma to which it relates. The objections also show that for some class members achieving justice through the proceeding is about more than just money.

25 I gave the objections serious consideration but, for the reasons I explain, none of them justified refusing to approve the proposed settlement. The proposed settlement is eminently fair and reasonable having regard to the difficulties the proceeding faced on liability and quantum. I hope that the public recognition of the historical wrongs that were perpetrated, both through the settlement itself and through the Queensland government's public announcement, will provide some closure.

The parties' conduct of the litigation

26 I commend the parties and their legal representatives for the way in which they conducted the case. BELAW is a small Cairns-based law firm with no previous experience in class actions or complex commercial litigation and it relied heavily on a large team of senior and junior counsel. The difficulties of the proceeding for the applicant's lawyers were significant, and through their work they achieved a substantial settlement. The challenges for the State's legal team were different but also significant.

27 The underlying issues in the litigation are matters of public importance about which opinions differ, and may be strongly held. The legal and factual issues in the case were complex and difficult, and the amount in dispute was large. It would have been unsurprising if the parties' lawyers became lost in the fog of such strenuously contested litigation yet the solicitors and counsel for both sides conducted themselves appropriately and responsibly while strongly representing their clients' interests. I saw no sign that the State sought to misuse its greater resources by engaging in a war of attrition. As a result of the settlement, the parties have achieved finality in relation to an issue that has been a matter of public controversy for decades.

28 I now turn to consider the settlement in detail. I thank the parties for their detailed submissions, upon which I have directly drawn at some points.

THE EVIDENCE

29 The applicants relied on the following evidence in the application:

(a) Eight affidavits of Ms Jerry Mae Tucker, an associate with the solicitors for the applicant, Bottoms English Lawyers (**BELAW**), who had the day-to-day conduct of the proceeding, affirmed:

(i) 25 August 2019;

(ii) 26 August 2019;

(iii) 27 August 2019;

(iv) 15 November 2019;

(v) 19 November 2019;

(vi) 20 November 2019;

(vii) 10 December 2019; and

(viii) 17 December 2019;

(b) Seven affidavits of Mr John Raymond Reis Bottoms, the principal of BELAW responsible for the supervision and conduct of the proceeding, affirmed:

(i) 15 November 2019;

(ii) 15 November 2019;

(iii) 19 November 2019;

(iv) 21 November 2019;

(v) 10 December 2019;

(vi) 13 December 2019; and

(vii) 18 December 2019;

(c) Three affidavits of costs consultant, Mr Alan Adrian affirmed:

(i) 15 November 2019;

(ii) 20 November 2019; and

(iii) 21 November 2019.

30 The State filed an affidavit of Yvonne Carol Little of the Department of Aboriginal and Torres Strait Islander Partnerships sworn 17 December 2019.

31 LLS relied on affidavits of Mr Stuart Price affirmed on 15 November 2019 and 16 and 18 December 2019.

32 The Court has also been provided with four reports by the Costs Referee, Ms Elizabeth Harris, which were filed on 13 and 16 December 2019, and following settlement approval on 28 January and 23 March 2020.

THE CLASS

The class member registration process

33 The proceeding was commenced as a 'closed' class action in September 2016, on behalf of all persons who met the class definition and had entered into a litigation funding agreement with LLS.

34 In 2016 and the first half of 2017 BELAW undertook an extensive outreach program to indigenous communities including the following: Cairns, Kuranda, Mareeba, Mossman, Ravenshoe, Mount Garnet, Hopevale, Wujal Wujal, Yarrabah, Palm Island, Innisfail, Tully,

Cardwell, Townsville, Ayr, Bowen, Aurukun, Mapoon, Weipa, Napranum, Normanton, Burketown, Doomadgee, Camooweal, Cloncurry, Mount Isa, Dajarra, Boulia, Rockhampton, Woorabinda, Cherbourg, Murgon, Ipswich, Logan, Zillmere, Jagera, Horn Island, Mer/Murray Island, Darnley Island, Yorke Island (Masig), Badu Island, Saibai, Boigu, Warraber, Yam Island (Iama), Moa Island (Kubin and St Pauls), Mabuiag, Hammond Island and Thursday Island. Mr Bottoms and his staff met with approximately 3,267 persons during that time whom Mr Bottoms considered would qualify as class members, and recommended to them that they register their claims with BELAW.

35 In 2017, following the decision in *Money Max Int Pty Limited (Trustee) v QBE Insurance Group Limited* [2016] FCAFC 148; (2016) 338 ALR 188 (***Money Max***), the applicant applied for orders to 'open' the class. On 25 August 2017 I made the orders sought, with the result that it was no longer a requirement for class members to enter into a litigation funding agreement with LLS if they wished to be class members in the class action.

36 Pursuant to a Court-ordered notice regime undertaken between December 2017 and March 2018, class members were notified of the common fund order and their right to opt out of the proceeding, and also notified that BELAW would conduct meetings in 29 indigenous communities to provide further information about the case. By use of an electronic database created by the State for the Reparations Scheme called the "Community and Personal Histories database" (**CPH database**) class members were sent a notice and those who had not already registered their claims with BELAW were also sent an information brochure titled "Join the Stolen Wages Class Actions – Let's do this together". The information brochure invited class members to register their claims with BELAW and I infer that BELAW advised class members attending the information meetings to register their claims.

37 In July 2019, the parties reached the in-principle settlement which is the subject of the present application. Ms Tucker deposed that at around the time of settlement 6,846 class members had registered their claims with BELAW.

38 On 26 August 2019 the applicant applied for orders which required class members to register their claims with BELAW if they wished to share in the compensation under the proposed settlement, and provided that class members who neither opted out nor registered their claim would be bound by the settlement but precluded from sharing in the compensation under the settlement.

39 In the present case there was no suggestion that the class member registration orders were for the purpose of facilitating settlement because an in-principle settlement had already been reached. I considered it was appropriate to ensure justice was done in the proceeding pursuant to s 33ZF of the FCA to make the orders because:

(a) the vast majority of living class members are elderly, with an approximate age range between 63 and 96. Many had passed away since the proceeding was commenced. There was (and there remains) a need for expedition in getting settlement monies to class members within their lifetimes. The information proposed to be gathered through the registration process was the basic information required to identity and verify class membership, date of birth, gender (being either male or female) and ethnicity (being either Aboriginal or Islander) which was the information by which the proposed SDS distinguished between the respective claims of class members. It was more efficient to collect that data at that point than later, and doing so was likely to ensure more speedy distribution of settlement monies;

(b) if a registration process was not immediately undertaken there would have been two notice procedures in connection with the settlement: one in advance of the settlement approval hearing and another in the course of the settlement administration. Because of the characteristics of the class, many of whom are elderly, not well-educated, lack commercial and legal sophistication and live in relatively isolated communities, the necessary notice procedures would be time-consuming and expensive, including because of the requirement for outreach programs. A process which involved two separate notice procedures was likely to cause substantial delay and extra cost and also had the potential to confuse class members;

(c) the registration requirements were not onerous and thus were unlikely to act as a disincentive, particularly having regard to the outreach program and the telephone registration service provided for class members who could not read or write;

(d) undertaking class member registration at that point would allow the applicant's legal representatives to more accurately model class members' likely recoveries under the proposed settlement, and therefore assist the Court in deciding whether the proposed settlement is fair and reasonable; and

(e) in any open class action it is necessary for class members to come forward at some point and register in order to claim compensation under a settlement or judgment.

40 On 4 September 2019 I made orders providing that any class member who wished to seek any benefit pursuant to the proposed settlement must register his or her claim with BELAW by 8 November 2019. Any class member who was already a client of that firm in relation to the proceeding or who had already registered their claim with that firm was to be accepted as having registered already. Any class member who neither opted out nor registered for the proceeding would remain a class member for all purposes of the proceeding, but shall not be permitted to seek any benefit under the proposed settlement (the **class member registration and class closure orders**).

41 The orders included a comprehensive notice regime, requiring that:

(a) a notice (**Notice of Proposed Settlement**) be posted by 18 September 2019 to all persons whose details were contained within the CPH database, de-duplicated to remove the names of persons who had previously registered;

(b) the Notice of Proposed Settlement be sent by 11 September 2019 to 68 Aboriginal and Islander communities and towns and, where applicable, to the Councils thereof, in the manner best calculated by BELAW to bring the notice to the attention of class members;

(c) information meetings be conducted by BELAW at 22 specified Aboriginal or Islander communities by 18 October 2019, with the object of bringing the Notice of Proposed Settlement to the attention of class members and explaining its content. This community outreach program had a broad geographical spread, including information sessions at six large centres and 16 smaller, remote indigenous communities whose residents were considered unlikely to travel to the larger centres around the areas of Cape York, Torres Strait Islands, North and Central Queensland, South East Queensland and Western and North-Western Queensland;

(d) the Notice of Proposed Settlement be posted by 6 September 2019 on the Federal Court of Australia website and made available for inspection at each registry;

(e) a short version of the Notice of Proposed Settlement (**Settlement Advertisement**) be published at least once by 11 September 2019 in each of the following newspapers: *Cape York News*, *Courier Mail*, *Koori Mail* and *National Indigenous Times*; and

(f) a radio advertisement (**Settlement Radio Announcement**) be broadcast at least once in the months of September and October 2019 on each of six radio stations, being: 4BSN Black Star based in Cairns which reaches 30 remote communities, 4MUR

(Murri FM) based in Mackay, BIMA 98.9 based in Brisbane, 4RR FM in Mid-West Queensland, 4KIG (TAIMA) based in Townsville and 4UM based in Cherbourg.

Late registrants

42 I considered that it was appropriate to take a flexible approach to class members' compliance with the deadline for registration because of the characteristics of the class. Ms Tucker deposed that:

(a) BELAW received a total of 210 registration forms between 9 November 2019 and 20 November 2019. On 21 November 2019 I made orders to extend the deadline for class member registration to 21 November 2019, such that those 210 class members were accepted as registered in accordance with the orders of 4 September 2019;

(b) there were 1,816 persons who provided their registration information orally to BELAW. On 21 November 2019 and 10 December 2019 I made orders that those persons be deemed to have registered in accordance with the orders of 4 September 2019;

(c) there were 1,539 persons who provided registration forms but did not sign them as required. On 21 November 2019 and 10 December 2019 I made orders that persons who provided information by means of an unsigned registration form be deemed to have registered in accordance with the orders of 4 September 2019.

Potential Papua New Guinean class members

43 Another cohort of potential class members whose registration deadline was extended was Papua New Guineans who claimed to have worked in the Torres Strait during the period 1939 to 1972 and to have been controlled under the Protection Acts.

44 On 9 December 2019 BELAW received correspondence from Mr Kebei Salee Koeget, the elected member for Sigabaduru in the Forecoast Kiwai Local Level Government, South Fly District, Western Province of Papua New Guinea. Mr Salee said that his father was one of approximately 300 persons who came from the Australian Territory of Papua (as it then was) to work in Torres Strait during the claim period. He said that they were classified by the Queensland government as Torres Strait Islanders and their employment and their wages were controlled by the Queensland government in the same way as Islanders. BELAW provided Mr Salee with information regarding eligibility to register and invited him to notify

potential class members that they should register their claims soon as possible, and in any event prior to 18 December 2019.

45 Such persons may be eligible to claim under the SDS as the definition of "islander" under the 1939 Islander Act is broad. Relevantly that definition of an "islander" is:

> (a) One of the native race to the Torres Strait islands;
>
> (b) A descendant of the native race of the Torres Strait islands and is habitually associating with islanders as defined in paragraph (a) of this definition; or
>
> (c) A person other than an islander as defined in paragraph (a) or (b) of this definition who is living on a reserve with an islander as so defined as wife or husband or any such person other than an official or person authorised by the protector who habitually associates on a reserve with islanders as so defined.

Similar considerations apply under the legislation that followed the Islander Act, being the 1965 Act. Whether a Papuan (or indeed any other person who is neither an Aboriginal nor Islander) meets the relevant criteria to participate in the compensation payable under the SDS will be a matter to be determined by the Administrator.

46 Because some Papuan claimants were initially given inaccurate advice as to their eligibility to participate in the class action, I made the following orders to permit them to register their claims out of time:

(a) as at 17 December 2019 BELAW had received registration forms from a total of 168 Papuans. On 17 January 2020 I made orders that those persons be deemed to have registered in accordance with the orders of 4 September 2019. I also made orders directing BELAW to write to Mr Salee to inform him that registration forms will be accepted from Papuans who asserted that they are class members until 4.00 pm on 7 February 2020, and that persons that register by that date be deemed to a registered in accordance with the orders of 4 September 2019;

(b) on 7 February 2020 BELAW wrote to chambers advising that Mr Salee had encountered difficulties assisting the communities in Papua New Guinea with obtaining registration forms due to the remoteness of the relevant villages, no fuel having been available at the distribution centre until 28 January 2020 for Mr Salee's transport by boat to the relevant villages, limited electronic communication means with potential class members, and anticipated border closures due to control measures in relation to the COVID-19 pandemic; and

(c) on 18 February 2020 I varied the earlier orders such that the registration forms of Papuans received by BELAW after 7 February 2020 that were post-marked on or before that date are deemed to have been provided in accordance with the orders of 4 September 2019.

The composition of the class

47 Following the class member registration process 19,082 persons registered to make a claim under the proposed settlement (**Registered Representatives**) on behalf of 11,948 class members. 6,503 of the Registered Representatives claimed in respect of more than one class member. Those figures were subject to further verification and de-duplication of the data.

48 The class of 11,948 class members (i.e. not counting Registered Representatives) comprised 3,760 male Aboriginals, 3,791 female Aboriginals, 1,533 male Islanders, 1,358 female Islanders and 1,506 people of unknown ethnicity (i.e. those who had not indicated ethnicity or had indicated both Aboriginal and Islander). By extrapolating the known gender and ethnicity proportions of the class members to the cohort of unknown ethnicity, it was assumed for the purposes of settlement approval that the class members comprise:

(a) 4,302 male Aboriginals being 36% of the class;

(b) 4,338 female Aboriginals being 36.3% of the class;

(c) 1,754 male Islanders being 14% of the class; and

(d) 1,554 female Islanders being 13% of the class.

49 In relation to being living or deceased, of the 11,948 class members:

(a) of the Aboriginal males, 858 are living and 2,902 are deceased;

(b) of the Aboriginal females,1,285 are living and 2,506 are deceased;

(c) of the Islander males, 406 are living and 1,127 are deceased;

(d) of the Islander females, 454 are living and 904 are deceased; and

(e) there were 1,506 persons for whom the information is not available to categorise whether they are living or deceased.

50 After extrapolating the known proportion of living and deceased class members to the 1,506 persons for whom that information was not available, it was assumed for the purposes of settlement approval that the class members comprised:

(a) 982 living male Aboriginals and 3,321 deceased male Aboriginals;

(b) 1,470 living female Aboriginals and 2,867 deceased Aboriginal females;

(c) 465 living male Islanders and 1,290 deceased male Islanders; and

(d) 519 living female Islanders and 1,034 deceased female Islanders.

Thus it is estimated that 8,512 or approximately 71% of claims in the proceeding are claims on behalf of deceased estates.

OVERVIEW OF THE APPLICANT'S CASE

The Stolen Wages Case

51 During the claim period Aboriginals and Islanders in Queensland, who had not been granted an exemption from statutory control under the Protection Acts, were required to live on a settlement and were under the control of the relevant Superintendent or Protector. The control extended to their ability or capacity to earn income, own property, move to or live at an area outside the relevant settlement or travel outside such places, marry, and engage in customary native practices. Aboriginals and Islanders living on settlements were reliant upon the State, through the Superintendent or Protector, for the necessities of life including food, housing and medical services.

52 It was unlawful for Aboriginals and Islanders under such control to be employed without the permission of a Superintendent or Protector, and the Protection Acts required a written employment agreement which contained the wages or other remuneration to be paid, any pocket money to be paid, the nature of the food and accommodation to be provided, the period of the employment and the occupation or work to be performed. The system provided for employers to directly pay a percentage of wages to the employees as 'pocket money', and to pay the balance of the wages to the Superintendent or Protector to be paid into the communal savings accounts created and maintained by the State to hold those wages.

Mr Pearson's claim

53 It is useful to explain this part of the proceeding through the prism of Mr Pearson's claim. I have drawn this summary from the pleadings and his outline of anticipated evidence.

54 Mr Pearson is an Aboriginal man, born at Spring Hill Mission, in Far North Queensland on 17 April 1939, and is a member of the Bargarrmuga clan. He was subject to control under the Protection Acts during the claim period.

55 During the Second World War, when he was only a small child, his family was forcibly removed from Spring Hill Mission to a government-run Aboriginal settlement at Woorabinda, some 230 kms west of Rockhampton. They lived there for about eight years, and life was primitive and hard.

Move to Hopevale

56 In 1950 Mr Pearson's family moved to Hopevale, about 45 kms north of Cooktown, which was a mission run by the Lutheran Church. It was a restricted community and the inhabitants could not leave without the permission of the Superintendent, who was the Lutheran pastor. They lived in a house which his father and others built from local timber. The house was very modest; there was an outdoor drop toilet, and it had no septic system, running hot water or electricity.

57 Mr Pearson and his family survived on rations which consisted of basic items such as flour, tea, treacle and soap. No meat or vegetables were provided, and the family supplemented the rations by what they could grow, fish or hunt. At Christmas time the Lutheran Church sent second-hand clothes for the mission inhabitants. There was a settlement store which contained basic items, and which operated principally through a voucher system. There was no doctor at the mission only a nursing sister who had rudimentary training.

58 Mr Pearson was educated until he was approximately 14 years old and completed the equivalent of grade 3, which was the highest level of education then available at Hopevale. He remained at Hopevale until he was 14 or 15 years old, whereupon he commenced employment.

External employment

59 In 1954, after obtaining the consent of the Superintendent, Mr Pearson obtained his first job working externally from the mission, as a stockman at Starcke Station which was 15 to 20 kms north. He did not sign any written employment agreement prior to commencing work, and there was no discussion with the Superintendent regarding what the wages would be, or what pocket money he was to receive.

60 He was told by the Superintendent and also by Mr Foster of Starcke Station that his wages were being paid to the Department of Native Affairs (the **Department**). The amount of his wages was not discussed with him and he did not ask about it as that was not something that an Aboriginal worker in his position would do and he trusted that the Superintendent and his

employer would look after his interests. However, other workers at the camp told him that he would be paid £3 per week as a 15 year-old, increasing to £5 per week when he turned 16.

61 He worked for about seven or eight months on Starcke Station, until the beginning of the wet season. When he finished working at Starcke Station he returned to Hopevale where he continued to reside in his parent's house.

62 In the years between 1954 and 1962 he worked each season for different head drovers and cattle stations for various periods, each time obtaining the permission of the Superintendent before doing so. Understandably given the passage of time, Mr Pearson was only able to supply approximate dates and times in relation to these jobs. He stated that he worked as a stockman or drover as follows:

(a) for Len Elmes, head drover, for nine or 10 weeks in approximately 1955, meeting cattle halfway from stations up near Coen (including Maloona Station, Rokeby Station and Merpa Station) and driving them to the sale yards at Mareeba. There was no written employment agreement for this employment and again Mr Pearson did not enquire about the money that he was to be paid for this job, as this was not something that Aboriginals workers were in a position to do. He said that Aboriginal men did not speak up for themselves in the presence of white men and there was an underlying threat of being sent to Palm Island as a punishment if an Aboriginal person stepped out of line. Such a punishment was particularly harsh including because it often meant the person's family was split up;

(b) at Starcke Station again for two or three months very shortly after returning from droving with Len Elmes;

(c) at Laura Station for two or three months in 1956 or 1957. This was the only place where he ever received some money. He was not paid wages but the manager of the station gave him a cheque for £5 at the conclusion of the job, which he gave to his mother;

(d) at Lakefield Station for six or seven months until the wet season. Lakefield Station and Laura Station were owned by the same company and were adjoining properties, and he went straight there after leaving Laura Station, without returning first to Hopevale;

(e) at Kings Plains Station for about three or four weeks. He received no pocket money or wages for this work;

(f) at Starcke Station again for a period of approximately three or four months, after which he returned to Hopevale. He received no pocket money or wages for this work;

(g) at Laura Station and Lakefield Station again for approximately another two or three months, for which he received no wages or pocket money;

(h) for Phil Parsons, head drover, on two or three occasions for five or six weeks each time, driving cattle down to the saleyards at Mareeba. He never saw a written employment agreement for this work, nor was there any mention of money. He received no wages or pocket money for this work; and

(i) for Bill Wallace, head drover, on two or three occasions the shortest of which was four and a half to five weeks in duration and the longest about six weeks. He received no wages or pocket money for this work.

Except where otherwise indicated, Mr Pearson would return to Hopevale when he finished a job.

63 He said that work as a stockman generally involved long hours and arduous work; working six days a week with a day off on Sunday, except when droving which required working seven days a week, rising at 5:00 am to muster the horses and get them ready to commence mustering cattle at 6:00 am, and then working until dusk. He was often in the saddle for 10 to 12 hours per day. This work routine essentially remain unchanged for all of the stock work and droving work that he did during the years 1954 to 1962. His employers provided him with food, a cook to prepare the food, horses, a saddle and other equipment necessary for him to perform his work duties.

64 The accommodations and working conditions for his work in the Cape York Peninsula were much harsher than were the jobs at Hughenden. When Mr Pearson was not mustering or driving cattle and sleeping out in the bush, he would sleep at the cattle stations. There, he would be given a wire bed with no mattresses, in a tin shed with a dirt floor. In some cases, no bathing facilities were provided, and if he wanted a shower, he had to go down to the creek to wash himself. The food he was provided was usually damper and grisly corned beef and he was rarely given vegetables. As an Aboriginal worker, he was not trusted by his employers to handle certain items like sugar or butter, and if he wanted some sugar with his tea, a teaspoon of sugar would be paced in his tea by someone else.

Move to Palm Island

65 In around late 1958 or 1959 Mr Pearson visited Palm Island where he met his future wife, Anna May Prior. He ended up living on Palm Island for most of 1960 and until about July or August 1961.

66 In September 1960, after first having obtained the permission of the Superintendent of Palm Island Aboriginal Settlement, he married Ms Prior on Palm Island. He adopted his wife's child, Julie-Anne Teresa who was born in 1959 and he and his wife had seven children between 1961 and 1971.

67 In the next few years, with the permission of the Superintendent of Palm Island, he worked at the following cattle stations as a stockman:

(a) Dunraven Station, near Hughenden, for about five or six weeks in about April or May 1960, after which he returned to Palm Island. The owner of the station told him he was to be paid £14 per week but he did not receive any wages directly and assumed they were paid directly to the Superintendent of Palm Island, who had arranged the job;

(b) Rokeby Station, near Coen, for about six months, during which he ran one of the stocks sub-camps. His wife and child accompanied him, they stayed in an uncomfortable shed and they had to make do with the rations they were provided for food. It was his understanding that his wages were being sent to the Superintendent at Palm Island; and

(c) Kalinga Station, north of Laura, for approximately six or seven months after finishing work at Rokeby Station, and without first returning to Palm Island. He was not paid for this work and presumed that payment was being made to the Superintendent of Palm Island. On occasion, he would shoot crocodiles with one of the other fellows in the station, and then skin and salt the crocodile hides before selling them to the owner of Kalinga station for cash. In early 1962 Mr Pearson was exempted from the 1939 Act, but he did not directly receive any wages for his work at Kalinga Station because that employment had been arranged prior to his exemption being granted.

Employment on the missions

68 Mr Pearson also undertook work at Palm Island and Hopevale between his external jobs. He did not sign or otherwise enter into employment agreements in relation to that work either.

69 While living on Palm Island he worked at the settlement in jobs arranged by the Superintendent which included working as a ringer and at the butcher shop. He only received £1 or £2 per fortnight for that work, irrespective of the nature of the work undertaken. He was paid those amounts cash in hand from the Superintendent. He stated that there was never any discussion about payment for the work, he was simply required to work and that was the end of it, and that in those times Aboriginals could not speak up for themselves.

70 When he was at Hopevale he was required to do work directed by the Superintendent within the community, including helping out with the stock work, clearing land and working in the sawmill. Everyone at Hope Vale was given work to do and that no one was allowed to be idle. This work was unpaid and he was not given any pocket money for it.

The employment arrangements generally

71 Although he was employed by many external employers between 1954 and 1962, he never signed or otherwise entered into a written employment agreement as required under the 1939 Act, he was not told the wages he was to be paid. Except for three instances, he was never paid directly. He did not receive pocket money from his various employers, which he believed to be because he did not smoke, drink or gamble and therefore was believed to have no need for such money. When he would return to Hopevale or Palm Island, the Superintendents would never ask whether he had been paid pocket money or how much he had received.

72 Mr Pearson stated that between 1954 and 1962 he received nothing on account of his wages other than some small withdrawals he was permitted to make and the three occasions he was paid directly as mentioned above. He made only modest withdrawals from the savings account, being no more than £10 a year, with such withdrawals being arranged through the relevant Superintendents. He cannot now recall any specific withdrawals, but that he may have withdrawn £5 or £10 in 1957 at Hopevale to pay for a second-hand horse saddle, and he may have made other withdrawals at Hopevale to pay his parents for board. He also recalls that he made withdrawals to attend the horseraces in Laura and Coen when he was working nearby, and he withdrew money through the local Protector so he had money for food at the races. He was not provided with any statements or written accounts which set out how much money had been paid into the savings account on his behalf or how that money had been spent.

73 Mr Pearson recalled witnessing a police sergeant, acting as a Superintendent, taking advantage of illiterate Aboriginal workers by recording amounts of withdrawals in excess of what he was written in the book recording the transactions, meaning that those workers were being short-changed. He saw that occur about three or four times. Although he saw it happening, he was too scared to say anything so he stayed quiet, and none of the workers spoke about it because they were all too scared to do so.

Move to Innisfail

74 After Mr Pearson finished work at Kalinga Station he went on a cattle drive for five weeks and afterwards he moved with his family to Innisfail. For all of his subsequent employment, Mr Pearson was paid directly by his employer for his work.

75 He and his family lived in Innisfail for about three years, and after a period of living in Ingham for several years, they moved to Townsville where he worked for around 28 years at a meat works. For a short period Mr Pearson worked at the meat works in Ipswich, which was run by the same company.

76 At the time Mr Pearson and his wife were living in Innisfail, he believed that the savings account held on his behalf should have contained substantial monies from wages paid by his various employers for the work he had completed. He and his wife estimated that the amount due was around £7,000, which they thought would be sufficient to purchase a family home. They commenced to plan the purchase and went so far as to narrow their search down to two houses in Innisfail that they considered to be suitable to buy. However, when he went to speak to Sergeant Hegarty, the Protector at Innisfail, he was extremely surprised to be told that the Department only held a very small sum on his behalf. That was devastating to him and his wife, and he felt badly "ripped off".

77 Not being paid his wages was an enormous setback for Mr Pearson, especially given that he ended up having a very large family and was responsible for looking after eight children. He considers that it was outrageous that he undertook a large volume of hard work from 1954 until 1962 and then when he went to access the wages he had fairly earned, his savings account held only a small amount of money. To this day he wonders where all the money went and he described the State's conduct as dehumanising.

78 Mr Pearson alleged that, by the prevailing legislative system of wage controls and forced savings under the Protection Acts, the State imposed on itself a statutory trust with certain

express and implied duties. He seeks an account of money held by the State for him, being either an account on the basis of a wilful neglect or default, or a common account.

79 Further and alternatively, Mr Pearson alleged that the combined effect of:

(a) the provisions of the Protection Acts and the fact that the State through its servants or agents (principally, the Director of Native Affairs and legislative successors, who I will call the **Director**, and Superintendents and Protectors) held or managed Aboriginals' and Islanders' wages;

(b) the relationship of trust and confidence which existed between 'controlled' Aboriginals and Islanders and the State and its servants or agents;

(c) the inequity of power between 'controlled' Aboriginals and Islanders and the State and its servants or agents;

(d) the ability of the State and its servants or agents to unilaterally exercise the rights of 'controlled' Aboriginals and Islanders in relation to their employment or wages; and

(e) the particular vulnerability of Aboriginals and Islanders to the State in the circumstances,

meant that the State owed a continuing fiduciary duty to class members to act in their best interests with regard to their treatment, the payment of their wages and pocket money, and the care and control of the money the State received from their employers.

80 Mr Pearson alleged that the State through its servants and agents, including the Director and/or the Superintendents of Hopevale and Palm Island, breached the trustee and fiduciary duties they owed to him by, amongst other things:

(a) failing to ensure that:

(i) his employment only took place with the permission of the relevant Superintendent or Protector and when there was an employment agreement in place between him and the employer as required by the Protection Acts;

(ii) appropriate recovery action was taken against any employer who failed to pay him wages or pocket money in accordance with any employment agreement;

(iii) all money owed to him had been identified by an examination of the relevant employment agreement and pocket money book and paid by the employer either into the savings accounts or, in the case of pocket money, directly to him;

(iv) he was paid for the full time he spent working for each of his employers; and

(v) all monies owed by an employer to him pursuant to an employment agreement were collected and paid into the savings accounts;

(b) failing to keep and maintain records concerning his employment and relevant payments;

(c) failing to pay all money received from employers as wages into the savings account or any other account into which his wages were placed;

(d) failing to preserve the corpus of money which was paid into the savings accounts;

(e) failing to take reasonable care, diligence and prudence with regard to investing or dealing with the money held on his behalf on trust, including by:

(i) permitting money held on trust to be paid into the Welfare Fund;

(ii) permitting money held on trust to be intermingled with money held in the Welfare Fund;

(iii) permitting money held on trust to be used to pay for the maintenance of Aboriginal families, settlements and communities;

(iv) permitting trust money to be used to pay for rations which the State had an obligation to provide in any event;

(v) withdrawing money from the savings accounts in order to either make up a shortfall in government revenue or expenditure or to save the State from having to make a payment from its own funds;

(vi) failing to pay or otherwise credit to the savings accounts all of the interest which has accrued on the accounts;

(vii) permitting loans to be made from the savings accounts for the building of hospitals in Queensland where the interest on those loans was not paid to the accounts; and

(viii) forgiving loans made from the savings accounts for the building of hospitals in Queensland;

(f) failing to act in good faith with regard to the investment of money held on trust including because:

(i) interest on investments made with trust money was classified as "surplus interest" and was not paid to the savings accounts or otherwise held on trust, but instead paid to the Welfare Fund; and

(ii) investments from the savings accounts were loaned to build hospitals in Queensland were for the benefit of the State only and not for his direct benefit or commercial advantage;

(g) failing to act in good faith when accounting to him about money held by the State on trust for him;

(h) failing to act in good faith with regard to the payment of money to him from the savings accounts;

(i) failing to account to him with regard to payments which were made to and from the savings account, and amounts paid directly to him as pocket money;

(j) failing to invest the money held on trust only for his benefit;

(k) failing to place his interests ahead of their own interests with regard to the investment and use of the money held on trust;

(l) failing to take action once misappropriation of money from the trust fund was drawn to their attention;

(m) failing to have in place proper or adequate control systems which would have operated to avert or check any fraudulent withdrawal of money from the accounts;

(n) failing to act with reasonable skill and diligence with respect to the administration of the trust; and

(o) requiring, deducting or retaining payments made to the Welfare Fund and/or investment returns from the savings accounts paid to the Welfare Fund.

81 Mr Pearson also alleged that the State breached the trust and fiduciary duties that it owed to class members. Further particulars in relation to those breaches were to be provided following the initial trial of his claims.

The Welfare Fund

82 Regulations 6 to 11 of the 1945 regulations required all Aboriginal workers who were earning wages in controlled employment under the 1939 Act to contribute amounts from their gross earnings of 2.5%, 5% or 10%, depending on the workers' circumstances, including whether they lived on a settlement or mission and whether they had dependants. The State alleged, I

assume on the basis of records, that it made the following deductions from the savings account in relation to Mr Pearson for this purpose:

Date	Particulars	Withdrawal
30/09/1954	[indecipherable] A.P.F	£1/4/8
30/11/1954	Sh 50 A.P.F	£2/12
31/03/1955	Sh 15 A.P.F	£-/14/4
31/10/1955	Sh 25 A.P.F	£2/9/-
31/05/1956	Sh 31 A.P.F	£-/4/8
31/08/1956	Sh 34 A.P.F	£2/11/11
31/10/1956	Sh 56 A.P.F	£2/12/6
31/08/1957	Sh 48 A.P.F	£2/1/8
30/11/1957	Sh 1 A.P.F	£-/18/4
31/05/1958	Sh 13 A.P.F	£-/8/9
31/07/1958	Sh 15 A.P.F	£-/19/10
31/07/1958	Sh 15 A.P.F	£-/8/6
31/07/1958	Sh 14 A.P.F	£2/18/1
31/12/1958	Sh 19 A.P.F	£3/10/10
31/01/1959	Sh 24 A.P.F	£1/14/-
31/08/1959	Sh 29 A.P.F	£1/0/7
30/09/1959	Sh 29 A.P.F	£2/18/7
30/11/1959	Sh 31 A.P.F	£-/14/2
31/01/1960	Sh 33 A.P.F	£1/1/3
TOTAL		£31/3/8

83 The applicant alleged that:

(a) the Welfare Fund deductions amounted to a compulsory exaction of money for public purposes which was enforceable by law, and that they were invalid as they amounted to a tax which had not been authorised by Parliament. Aboriginal workers already paid income tax on the wages they earned and by requiring these additional payments based on the amount of money they earned, the regulations imposed an additional tax which was invalid; and

(b) by making deductions prior to the introduction of the 1945 regulations, the State acted unlawfully and for an improper purpose.

84 The applicant further alleged that the State also wrongfully took for itself any excess return gained through interest and investment of the money held in the savings accounts (described as "surplus interest"), for which payment the regulations provide no support.

The Racial Discrimination Case

85 In 2002 the State offered to pay reparations to Aboriginals, Islanders, South Sea Islanders and Papua New Guineans who were subjected to control under the Protection Acts. The Reparations Scheme was established after consultations with indigenous communities and was administered by the Department of Aboriginal and Torres Strait Islander Policy and its successors.

86 The Department established a panel of legal practitioners who were required to provide legal services on an individual basis to eligible claimants. The stated purpose of the panel was to ensure that each claimant understood his or her rights including the contents and effect of the claim form and the applicable deed of settlement, and was fully informed having regard to all the relevant circumstances. The applicant however asserted that the duties that the legal practitioners employed by the State were required to perform were limited, and it appeared that they were merely required to ensure that matters raised in a checklist were followed.

87 In order to receive a payment under the Reparations Scheme claimants were required to execute a deed of settlement (**Reparations Deed**) which contained a release which stated:

> …the claimant acknowledges and agrees that he/she accepts the payment in full and final satisfaction and discharges of all actions, suits, claims, costs and demands which the claimant, and all other persons claiming through or under the claimant may now have or could have, whether pursuant to common law or under the protection of acts, against the State, its servants or agents, arising out of or in any way related to the controls, and this deed may be pleaded as a bar to any such claim.

: (the **release**).

88 The State pleaded the release as a bar to claims in the Stolen Wages Case by class members who had signed a Reparations Deed and received compensation under the Reparations Scheme.

89 The applicant alleged that the State failed to ensure that appropriate and complete legal advice was provided to the applicant and class members so as to enable them to make an

informed decision as to whether to sign a Reparations Deed, including by failing to equip the panel of legal practitioners with the requisite information to enable them to give full and independent advice.

90 The applicant argued that such conduct amounted to unlawful racial discrimination in contravention of s 9 of the RDA in that:

(a) the class members share a race; and

(b) the conduct of the Reparations Scheme including the provision of legal advice:

(i) involved a distinction, exclusion, restriction or preference which was based on race; and

(ii) had the effect of nullifying or impairing the recognition, enjoyment or exercise of the applicant's and class members' rights and freedoms.

91 The applicant also contended that the conduct of the State was in contravention of s 10 of the RDA which provides as follows:

> (1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.
>
> (2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.
>
> (3) Where a law contains a provision that:
>
> (a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or
>
> (b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;
>
> not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person.

The applicant did not particularise the asserted breach of s 10 of the RDA and it is unclear precisely how this alleged contravention was proposed to be argued.

92 In respect of these alleged breaches of the RDA, the applicant sought damages and aggravated damages pursuant to s 46PO of the *Australian Human Rights Commission Act 1986* (Cth) (**AHRC Act**).

93 Again, it is useful to explain this part of the case through the prism of Mr Pearson's claim. Mr Pearson said that in about 2002 he went to a meeting at the Aitkenvale Aboriginal Reserve near Townsville, with about 30 other attendees, to discuss proposed payments to be made under the Reparations Scheme. He said that the meeting was rowdy and noisy and people were unhappy with what was happening. He recalled someone at the meeting saying that if a person signed the agreement under the Reparations Scheme they would not be able to sue the government. However, he was living in a Housing Commission house and from pension payment to pension payment, and did not have the wherewithal or resources to sue the government in any event. Mr Pearson said that no one told him the amount of missing wages he was owed by the State. He and his wife thought that at least he could get something through the Reparations Scheme so he kept quiet and decided to take what was being offered.

94 Subsequently Mr Pearson met with a solicitor in Townsville concerning the documents that he was asked to sign. The solicitor did not produce any documents showing what had been paid to the State on account of his wages and gave him no advice about what may have actually been owed on account of his wages. He signed the Reparations Scheme documents, including the Reparations Deed, as requested and he subsequently received $9,200 in three payments between 2003 and 2016.

95 Mr Pearson alleged that the conduct of that State in providing the legal advice in the way that it did, as part of the Reparations Scheme, was in breach of ss 9 and 10 of the RDA. It pleaded a number of acts as the basis for this claim, which can be summarised as follows:

(a) the State did not provide Mr Pearson (or ensure that the was provided with) legal services which would enable him to make an informed decision on whether to sign the Reparations Deed, in that he was not informed about:

(i) the amount of money that had, or ought to have been paid, into the savings account on his behalf;

(ii) the State's duty to keep records with regard to the account into which his wages were paid, and of payments out;

(iii) the amount of interest and other accretions earned on that money;

(iv) whether the State as a trustee or otherwise owed a fiduciary duty to him with regard to the way in which the savings account was operated (and whether the State was in breach of any trust or fiduciary duty); and

(v) the quantum of any legal claim he may have against the State;

(b) the State mandated legal advice that was "pro forma" in nature and did not include any matters which were relevant to the determination of Mr Pearson's personal claim against the State;

(c) the State did not provide documents or other information which would have assisted Mr Pearson in making a proper determination of the monies held by the State on his behalf and/or his legal rights and remedies against the State; and

(d) the State failed to ensure that Mr Pearson received full independent legal advice and did not provide information to the solicitor he met with to enable the solicitor to provide appropriate independent legal advice.

96 Mr Pearson alleged that the State's conduct had the effect of impairing his right to seek damages for the historical racial discrimination he had suffered which itself amounted to a contravention of ss 9 and 10 of the RDA.

The Slavery Case

97 Under the 1939 Act and regulations the Superintendent or Protector of a settlement had wide powers, including a power to require Aboriginals to perform any work deemed to be necessary for the development and maintenance of the settlement. Failure to work as directed without reasonable excuse constituted an offence. These provisions, which were repealed in 1966, applied only to Aboriginal settlements on mainland Australia and did not apply to Islanders.

98 Mr Pearson alleged that when he returned to the Hopevale mission following his work away from the settlement he was required by the Superintendent to perform unpaid labour. He said that the same applied at Palm Island although there he received a small amount of pocket money for doing so, being £1 to £2 per fortnight.

99 Mr Pearson contended that the *Slavery Abolition Act 1833* (Imp) effectively outlawed slavery across the British Empire, and the *Colonial Laws Validity Act 1865* (Imp) provided that Imperial legislation extended to any colony, which meant that any Colonial laws repugnant to such legislation were void. The *Slavery Abolition Act* and the *Colonial Laws Validity Act*

were not repealed in Queensland until 1984 by s 7 of the *Imperial Acts Application Act 1984* (Qld).

100 Mr Pearson contended that the compulsory labour he was directed to undertake on the settlements amounted to slavery under the *Slavery Abolition Act*. He further argued that the 1939 Act and regulations were repugnant to the *Slavery Abolition Act* and therefore void and unenforceable, the consequence of which is that the State is liable to pay wages to those Aboriginals who were required to undertake unpaid work on the settlements.

THE PRINCIPLES RELEVANT TO SETTLEMENT APPROVAL

101 The applicable principles are well established, and were set out in: *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Recs & Mgrs Apptd) (In Liq) (No 3)* [2017] FCA 330; (2017) 343 ALR 476 (***Blairgowrie***) at [81] to [85] (Beach J); *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323; (2016) 335 ALR 439 (***Kelly***) at [62] to [77]; *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 (***Caason***) at [12] to [13]; and *Camilleri v Trust Company (Nominees) Ltd* [2015] FCA 1468 (***Camilleri***) at [5], [32], [43] to [44], and [53] to [54] (Moshinsky J). The principles were conveniently summarised in *Camilleri* at [5], as follows:

> (a) the central question for the Court is whether the proposed settlement is fair and reasonable in the interests of the group members considered as a whole;
>
> (b) there will rarely be one single or obvious way in which a settlement should be framed, either between the claimants and the defendants (*inter partes* aspects) or in relation to sharing the compensation among claimants (the *inter se* aspects) – reasonableness is a range, and the question is whether the proposed settlement falls within that range;
>
> (c) it is not the task of the Court to 'second-guess' or go behind the tactical or other decisions made by the plaintiff's legal representatives, but rather to satisfy itself that the decisions are within the reasonable range of decisions, having regard to: the circumstances which are 'knowable' to the plaintiffs and their representatives; and a reasonable assessment of risks, based on those circumstances;
>
> (d) the list of factors typically relevant to an assessment of the reasonableness of a proposed settlement, set out in *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459 at [19] is a useful guide but is neither mandatory nor necessarily exhaustive – it is just a guide, and additional consideration needs to be given to factors relevant to the fairness of the settlement *inter se*;
>
> (e) in relation to the *inter se* fairness, a particular concern of the Court is to confirm that the interests of the lead plaintiff, or signed-up clients of a given firm of solicitors, are not being preferred over the interests of other group members. The arrangement should be framed to achieve a broadly fair division of the proceeds, treating like group members alike, as cost-

effectively as possible;

(f) an important consideration will be whether group members were given timely notice of the critical elements, so that they had an opportunity to take steps to protect their own position if they wished. Once appropriate notice is given, the absence of objections or other response action from group members is a highly relevant consideration in support of a settlement, and all its elements;

(g) where a group member does object to the settlement, an important further question is whether the objector is prepared to assume the role − and risks – of being lead plaintiff;

(h) in relation to provisions for costs-sharing among the successful group members, again an important consideration is where the group members were alerted at an early stage to the potential costs-sharing consequences of subsequent participation in the action. It is not, thereafter, the role of the Court to go behind the costs agreements, but rather to satisfy itself that the agreements have been applied reasonably according to their terms;

(i) further, the level of detail which the Court will require in order to be satisfied that costs have been calculated in accordance with the applicable agreements will vary, depending on factors such as whether the group members are all clients, or include non-client claimants, and the proportion of the settlement funds to be applied to costs.

(Citations omitted.)

102 I now turn to consider whether the proposed settlement is fair and reasonable

THE KEY TERMS OF THE PROPOSED SETTLEMENT

103 The key terms of the proposed settlement provide that the State will pay $190 million (**settlement sum**) in full and final settlement of the claims of the applicant and class members, inclusive of costs and interest and without admission of liability, in return for binding releases from the applicant and class members. The Deed of Settlement (**settlement deed**) executed by the parties on 2 September 2019 provides that:

(a) the State shall pay the settlement sum into an interest-bearing controlled monies account (**holding account**) within seven days of signature;

(b) if there has been no appeal from the settlement approval orders and no other proceeding commenced which otherwise challenged the validity of the settlement approval orders, the State shall release the monies from the holding account to be placed into a settlement fund account (**settlement fund**) to be administered pursuant to the SDS, by no later than five days after the expiry of the time period for appeal;

(c) after the transfer of the monies to the settlement fund the State will cease to have any right, title or interest in or claim to any part of the settlement sum; and

(d) no monies shall be paid out of the settlement fund save in accordance with the terms of the Court-approved SDS.

THE SALIENT CONSIDERATIONS FOR SETTLEMENT APPROVAL

The releases and bars against suit

104 The settlement deed includes a broad release by the applicant and class members in the following terms:

> The Applicant and Group Members release and forever discharge the Respondent (including the Respondent's present and former officers, servants, employees, agents, successors and assigns), from all actions, proceedings, claims and demands whatsoever which the Applicant and Group Members or any person claiming by, through or under any of them may now or hereafter have against them or any of them for loss or damage sustained by any Applicant or Group Member or any person claiming by, through or under them as a result of or arising out of or in connection with, whether directly or indirectly, the allegations in and the facts, matters and/or circumstances giving rise to the Proceeding.

The settlement deed provides that it may be pleaded as a bar to any further proceedings against the State by the applicant and class members arising out of or in connection with, whether directly or indirectly, the allegations in and the facts, matters, and/or circumstances of the proceeding.

105 While the releases are broadly drafted, they do not in practical terms extend beyond the subject matter of the proceedings such as to affect releases of class members' claims beyond the common claims related to the subject matter of the proceeding, and thus do not extend into claims for which the applicant has no representative authority under the FCA: see *Timbercorp Finance Pty Ltd (in liquidation) v Collins; Timbercorp Finance Pty Ltd (in liquidation) v Tomes* [2016] HCA 44; (2016) 259 CLR 212 at [53]-[54]; and *Santa Trade Concerns Pty Limited v Robinson (No 2)* [2018] FCA 1491 at [18]-[23].

The preclusion of unregistered class members sharing in the settlement

106 The releases together with the class member registration and class closure orders mean that, upon settlement approval, class members that neither opted out nor registered pursuant to those orders are bound by the releases that form part of the settlement and therefore lose their right to sue, but are precluded from sharing in the compensation under the settlement.

107 That may seem a harsh result for such class members but the fact that the orders have that effect does not mean that the proposed settlement is not fair and reasonable. Having regard to the far-reaching notice regime in relation to the Notice of Proposed Settlement, I was

satisfied that class members were given appropriate notice that should they neither register nor opt out before deadline they would be bound by the proposed settlement (and thereby lose their rights to claim damages) but precluded from sharing in the compensation under the settlement. Further, class members were informed of their right to object to any aspect of the settlement, and none objected to this aspect. It is also relevant that I took a flexible approach to allowing late registrants to share in the settlement fund. It should be kept in mind that the preclusion of class members who neither opt out nor register is a key term of the settlement as it allowed the State to achieve a high level of finality in relation to the claims in the proceeding.

Counsels' Opinion

108 The Court has had the benefit of the confidential Counsels' Opinion of Mr D. C. Campbell QC, Mr W.A.D. Edwards and Mr A.H. Edwards of counsel, each of whom was involved in preparing the case for trial. Counsel provide the opinion as officers of the Court rather than as advocates for the applicant and class members and the opinion dealt candidly with the considerations set out in the Class Actions Practice Note (GPN-CA) and other relevant considerations.

109 Counsels' Opinion is privileged and confidential and I cannot go to its substance. It must suffice to note that the opinion comprehensively and in my view cogently addressed the relevant considerations for settlement approval, including:

(a) the fairness and reasonableness of the settlement as between the parties by reference to, amongst other things:

(i) the risks class members faced in establishing the liability of the State under the three cases advanced;

(ii) the risks class members faced in proving the amount of compensable damage which resulted from the State's breaches under the three cases advanced;

(iii) a comparison between the settlement sum and the estimated 'best case' outcome for class members;

(iv) the likely delays and risk of appeals if settlement is not approved and the case proceeded to trial; and

(v) the further unrecoverable 'solicitor-client' costs that would be incurred in further proceedings if settlement is not approved and the case proceeded to trial;

(b) the fairness and reasonable of the settlement as between class members by reference to, amongst other things:

(i) the principles and procedures for assessing class members' respective share of the settlement;

(ii) the consistency of the loss assessment methodology with the case that was to be advanced at trial and supportable as a matter of legal principle;

(iii) whether in allocating the fixed settlement sum the SDS is likely to deliver a broadly fair assessment of the relativities between class members;

(iv) whether the costs of a more nuanced assessment procedure would erode the notional benefit of a more exact distribution, including by giving rise to excessive delay or cost;

(v) the appropriateness of the nomination for the persons charged with administering the SDS;

(vi) the procedures for lodging and assessing claims and the timeframe over which the SDS is to be executed; and

(vii) the procedures for ensuring consistency between assessments including the opportunities for review and objection by class members;

(c) the proposed deductions from the settlement fund prior to the distribution to class members, including whether:

(i) the applicant's legal costs are reasonable and should be shared by the class on a pro rata basis;

(ii) the 20% funding commission payable by class members on a pro rata basis under the extant common fund order is fair and reasonable;

(iii) appropriate steps have been taken to minimise the proposed costs of settlement administration; and

(iv) the proposed reimbursement payment to the applicant is fair and reasonable.

110 The opinion, particularly as to the liability and quantum risks for the class members, is central to my view that the settlement is fair and reasonable in the interests of class members, including as between them.

The stage of the proceedings at which settlement was reached

111 The proceeding was listed for an initial trial of eight weeks commencing in February 2020. At the time settlement was reached there had been a total of seven reconvened mediations, which occurred on 28 September 2017, 23 October 2017, 8 November 2017, 27 March 2018, 8 and 9 November 2018, 15 February 2019 and 16 May 2019. The parties exchanged substantial materials as part of the mediation process and on 9 July 2019 they reached an in-principle settlement, subject to documentation and Court approval.

112 The in-principle settlement was not reached until after discovery was complete, and most of the evidence of the applicant and 10 sample class members had been served. The State had not yet served its evidence.

113 It was reached at a point in the proceeding when the parties and their lawyers were in a position to make an informed assessment of the evidence to be adduced at trial, the strengths and weaknesses of their respective cases on both liability and quantum, and the costs likely to be incurred by proceeding to trial. This pointed in favour of approval of the settlement.

The risks of establishing liability and quantum

114 Each of the three cases advanced in the proceeding posed different risks on liability and quantum, and they must be separately addressed.

The Stolen Wages Case

The evidentiary or factual issues

115 It is common ground between the parties that the documentary records relating to the affairs and employment of class members during the claim period is incomplete. The State said that the Department kept a centralised and comprehensive record keeping system using a uniform filing system with central records in the Brisbane office which included wages and savings ledger cards, taxation cards, withdrawal registers, general cash books, and general administrative files, and that a parallel record keeping system was generally maintained in the protectorates, the settlements and reserves and to a lesser extent the church managed missions. The administrators of the settlements also maintained the wages and savings

registers, the child endowment ledger cards and collection summary, deposit and withdrawals sheets.

116 The State said, however, that over time significant documentary records which could address the claims of the applicant and class members were lost as they were regularly disposed of under the authority of the State Auditor-General or the Treasurer. Records kept on the settlements were typically incinerated when they were no longer current, and other records were lost or destroyed through problems associated with inadequate storage facilities.

117 As I have said, having regard to the materials before the Court as part of the settlement approval application, and taking into account the consistency of the accounts of the applicant and sample class members and the testimony of class members that gave preservation evidence in Cairns in August 2017, it is clear enough for the purposes of the application that many class members did not receive all of the wages which were paid or ought to have been paid to the State by their employers during the claim period. To an extent that has been publicly acknowledged by the State, including by the institution of the Reparations Scheme. But in the absence of the settlement, the applicant and class members had the onus to establish on the balance of probabilities that they have not been paid all of the wages they were due to receive. The materials before the Court indicate that many class members were likely to face real difficulties in doing so, and for claims on behalf of deceased estates the difficulties were likely to be extreme.

118 It is useful to consider some of these difficulties in the context of Mr Pearson's claim. It will be recalled that Mr Pearson said that:

(a) he never entered into a written employment agreement as required for any of his periods of employment;

(b) he received very little pocket money over the various periods of his employment;

(c) he made only very modest withdrawals from the monies held on his behalf in the savings accounts; and

(d) the State has not paid him all the monies it received from his employers for the work he undertook away from Hopevale and Palm Island.

Similar allegations are made by some of the sample class members.

119 The State denied Mr Pearson's assertions in this regard. In its Further Amended Defence it alleged, I assume on the basis of records, that between 1954 and 18 January 1962 Mr Pearson was employed as set out in the following table:

PLACE OF EMPLOYMENT	EMPLOYER	MISSION, SETTLEMENT OR RESERVE	AGREEMENT NUMBER	PERIOD OF EMPLOYMENT	WAGES			PAID YES NO	AMOUNT PAID TO SUPERINTENDENT
					GROSS	POCKET MONEY	NET		
Cooktown	Starcke Graziers	Hopevale	275 [indecipherable]	(approximately) 19.5.54 – 20.9.54	£4/-/- per week	£-/10/- per week	£3/10/- per week	Yes	£67/1/8
Cooktown	Starcke Graziers	Hopevale	20245	1.10.54 for 26 days	£4/-/- per week	£-/10/- per week	£3/10/- per week	Yes	£15/3/4
Cooktown	Mr Len Elmes	Hopevale	P20299	28.6.55 – 15.8.55	£7/-/- per week	£2/-/- per week	£5/-/- per week	Yes	£35/-/-
Cooktown	Starcke Graziers	Hopevale	P21074	28.12.55 – 31.12.55	£7/-/- per week	£1/-/- per week	£6/-/- per week	Yes	£4/-/-
Cooktown	Starcke Graziers	Hopevale	P21081	2.1.56 for 9 days	£7/-/- per week	£1/-/- per week	£6/-/- per week	Yes	£44/10/-
Cooktown	Starcke Graziers	Hopevale	P21082	21.2.56 for 35 days	£7/-/- per week	£1/-/- per week	£6/-/- per week	Yes	
Cooktown	Starcke Graziers	Hopevale	P21027 and P21028	2.4.56 for 45 days	£7/-/- per week	£1/-/- per week	£6/-/- per week	Yes	£45/-/-
Laura	Mossman Butchering Co	Hopevale	P22366	4.4.57 for 23 days	£5/-/- per week	£1/-/- per week	£4/-/- per week	Yes	£33/3/4
Laura	Mossman Butchering Co	Hopevale	P22367	1.5.57 for 27 days	£5/-/- per week	£1/-/- per week	£4/-/- per week	Yes	
Laura	Mossman Butchering Co	Hopevale	P22379	1.6.57 for 22 days	£5/-/- per week	£1/-/- per week	£4/-/- per week	Yes	£14/13/4
Cooktown	Starcke Graziers	Hopevale	P22439	24.12.57 for 7 days	£7/-/- per week	£1/-/- per week	£6/10/- per week	Yes	£7/-/-
Cooktown	Starcke Graziers	Hopevale	P22535	27.12.57 for 14 days	£8/10/- per week	£1/-/- per week	£7/10/- per week	Yes	£7/10/-

Harvest Home	W.H. Wallace	Hopevale	P22521	13.1.58 for 17 days	£8/10/- per week	£1/-/- per week	£7/10/- per week	Yes	£51/5/-
Harvest Home	W.H. Wallace	Hopevale	P22522	1.2.58 for 24 days	£8/10/- per week	£1/-/- per week	£7/10/- per week	Yes	
Cooktown	Starcke Graziers	Hopevale	22537	22.3.58 for 6 days	£8/10/- per week	£1/-/- per week	£7/10/- per week	Yes	£7/10/-
Mossman	Mossman Butchering Co	Hopevale	P22483	25.6.58 for 5 days	£8/10/- per week	£1/-/- per week	£7/10/- per week	Yes (stock work)	£6/5/-
Mossman	Mossman Butchering Co	Hopevale	P22484	1.7.58 for 27 days	£8/10/- per week	£1/-/- per week	£7/10/- per week	Yes (stock work)	£33/15/-
Mossman	Mossman Butchering Co	Hopevale	P22485	1.8.58 for 18 days	£8/10/- per week	£1/-/- per week	£7/10/- per week	Yes (stock work)	£22/10/-
Crocodile	B. Wallace	Hopevale or Palm Island	P23497	30.01.59 for 24 days	£8/10/- per week	£1/-/- per week	£7/10/- per week	Yes	£30/-/-
Olive Vale	L. Elmes	Hopevale or Palm Island	P22568	8.4.59 for 20 days	£9/10/- per week	£1/-/- per week	£8/10/- per week	Yes	£52/8/4
Olive Vale	L. Elmes	Hopevale or Palm Island	P22574	1.5.59 for 17 days	£9/10/- per week	£1/-/- per week	£8/10/- per week	Yes	
Crocodile	B. Wallace	Hopevale	P22575	21.5.59 to 4.6.59	£9/10/- per week	£2/-/- per week	£7/10/- per week	Yes	£16/5/-
Starcke Graziers	C. King	Hopevale or Palm Island	P23522	1.7.59 for 10 days	£8/10/- per week	£1/-/- per week	£7/10/- per week	Yes	£12/10/-
Cooktown	[L]. C. Chisholm	Hopevale or Palm Island	P24204	4.11.59 for 15 days	£8/10/- per week	£1/-/- per week	£7/10/- per week	Yes (stock work)	£18/15/-
Dunraven Station	NV & ART Rose of Hughenden	Taxation Record at Palm Island		F/Y ending 30.6.60				Yes	£65/-/-
	Rokeby Cattle Co	Palm Island	38145	5.9.61 – 18.12.61	£14/-/- per week	£8/-/- per week	£6/-/- per week	Yes	£101/3/-
Kalinga Station				As at 16.2.62					

120 The State denies Mr Pearson's account that:

(a) he never entered into a written employment agreement for any of his periods of employment, and provided an Agreement Number for each of his various periods of employment;

(b) some of the employers failed to pay wages to the Superintendent for his work away from Hopevale and Palm Island. The table tends to show that the appropriate wages were paid to the Superintendent for each period of employment, totalling £700/8/-. On the basis that Mr Pearson did not file an income tax return for the financial years ended 30/6/1954 – 30/6/1959, or for the financial years ended 30/6/1961 – 30/6/1962, and that his income tax return for the financial year ended 30/6/1960 is recorded as his first tax return, the State alleged that it can be inferred that he did not earn income exceeding the minimum declarable amount of £104 after deductions in any of those years;

(c) the employers paid Mr Pearson very little pocket money over the periods of his employment. The table shows, the various amounts of pocket money the State alleged he was paid; and

(d) he made only very modest withdrawals from the savings account, as explained below.

121 In relation to Mr Pearson's withdrawals from the relevant savings account, the State alleged that the Hopevale mission kept Withdrawals Books and it was the practice to have Aboriginal people sign for withdrawals which were then witnessed and cross-referenced by sheet number to the ledger card for the person in question. The State asserted, I assume on the basis of records, that the Withdrawals Book from December 1956 to January 1958 recorded withdrawals totalling £42/10/- in 1957, signed for by Mr Pearson and witnessed. It said that those withdrawals coincide with entries in the Hopevale ledger cards for 1957, by reference to the notation "Sh" and the number in the "Particulars" column.

122 The State alleged that one of the withdrawals on account of the applicant in the month ended 31 August 1957 is for £3/4/7 recorded "As per order form", which coincides with a corresponding entry in the ledger card for 1957. It sought an inference that this recorded an order by Mr Pearson at the Hopevale mission store, where Aboriginal people living on missions could acquire goods.

123 By reference to the ledger cards in other years for further withdrawals under the notation "Sh" the State alleged that Mr Pearson, or others on his behalf, made the following withdrawals by making orders at the Hopevale mission store:

i. for 1954 totalling £31/0/9

ii. for 1955 totalling £61/5/11

iii. for 1956 totalling £56/18/2

iv. for 1958 totalling £85/19/3

v. for 1959 totalling £118/-/-

vi. for 1960 totalling £37/3/-

TOTAL: £446/1/8

124 The State contended that further withdrawals totalling £36/2/- are recorded in the Hopevale ledger cards as having been made for the benefit of Mr Pearson, namely:

Date	Particulars	Withdrawal
31/03/1956	Ref to Y'bah s 54	£10/-
30/06/1956	Ref Mareeba s 75	£10/-
30/09/1956	[indecipherable] s 100	£5/-
30/04/1959	Ref Cairns J90	£6/-
30/09/1959	Boat fare T13	£2/10/-
January 1960	Meals Aitkenvale V91	£-/18/-
30/04/1960	Meals Hughenden CB4	£1/8/-
30.06.1960	Meals Cairns V589	£-/6/-
TOTAL		£36/2/-

125 In relation to the period that Mr Pearson was working in and around Laura, the State asserted that the Hopevale ledger card:

(a) for 1956 includes a withdrawal on 31 May 1956 with the notation "ref Laura J-182" in the amount of £22/11/6; and

(b) for 1958 includes a withdrawal on 31 August 1958 with the notation "ref Laura J-25" in the amount of £13/7/-, at which time Mr Pearson was working at Mossman Butchering Company at Laura.

The State invited the inference that those withdrawals were arranged by Mr Pearson through the local Superintendent or Protector while he was at Laura.

126 The State also contended, again I assume on the basis of records, that Mr Pearson made the following withdrawals while he was living on Palm Island:

i.	as at 31 March 1960	£3/-
ii.	as at 30 April 1960	£5/-
iii.	as at 30 April 1960	£5/-
iv.	as at 31 May 1960	£7/-
v.	as at 31 December 1960	£3/-
vi.	TOTAL:	£23/-

127 The State alleged various withdrawals were made from the savings account for Mr Pearson for payments to the Welfare Fund (as set out at [82] above).

128 In summary, the State alleged that withdrawals were made by or on behalf of Mr Pearson in the sum of £572/5/10 during the claim period, comprising:

(a) £446/1/8 while he was at Hopevale mission from 1954 to 1960;

(b) £36/2/- in deductions made for his benefit while he was at Hopevale;

(c) £35/18/6 while he was working in the district of Laura;

(d) £23/-while he was on Palm Island; and

(e) £31/3/8 for payments made on his behalf to the Welfare Fund.

129 The State also relied upon the fact that Mr Pearson was paid $9,200 between October 2003 and January 2016 through the Reparations Scheme, which it said that it was entitled to set off against any amount owed to Mr Pearson.

130 While the records upon which the State relied are incomplete, they include ledger cards which show a substantially higher level of withdrawals by Mr Pearson than he said that he made. If that evidence is accepted at face value the ledger cards indicate that he was paid pocket money while he was employed, and that over time he either withdrew all or most of the balance of the savings account or used it to order goods from the Hopevale mission store. If accepted, they tend to show that he was paid all or almost all of the wages that his employers paid or ought to have paid to the State on his behalf. While the records that the State retain are likely to vary between class members, the materials tend to show that many class members are likely to be in a similar position.

131 The materials indicate that many class members claim that: (a) they were paid little pocket money at the time; (b) they made few and only modest withdrawals from the savings accounts and/or bought little at the settlement store; and (c) they were not paid all of the wages that were paid or ought to have been paid by their employers to the State and held in the savings accounts on their behalf. Such claims were expressly articulated by the sample class members and by four elderly class members from whom I took preservation evidence in 2017.

132 I have no reason to doubt that the accounts given by Mr Pearson, the sample class members and the class members who gave preservation evidence represent their honestly held memories of the events of those times. When I took the preservation evidence I was impressed by those witnesses' forthright evidence. But as I have said, I consider the applicant and many class members would have faced serious impediments to proving the relevant matters on the balance of probabilities, including to the *Briginshaw* standard where fraud is alleged.

133 The position will vary between claimants, but any evidence to be adduced by the applicant and class members in relation to the wages they earned, the withdrawals they made from the savings accounts, the orders they placed at the settlement store and the pocket money they received, will concern innocuous everyday events which occurred between 48 and 81 years ago. Recollections of such events occurring so long ago may be honestly held but nevertheless be unreliable, or at least not as rationally probative as other evidence. Generally, no assistance can be obtained from the former Superintendent or Protector or former employers as they are deceased. Records no longer exist or are quite limited, and where records exist they sometimes, apparently often, do not accord with class members' recollections. Mr Pearson's case is an example of this.

134 Where a class member's recollection of such events differs from contemporaneous documentary records, he or she is likely to face a difficult task in persuading the Court to prefer their evidence, and thus in proving their claims on the balance of probabilities, at least in the quantum in which they are advanced.

135 The difficulties are particularly acute in relation to claims on behalf of deceased estates, which comprised the majority of claims in the proceeding. The claimants in those cases are likely to face considerable difficulty in adducing reliable evidence of relevant matters, including: (a) the periods over which the deceased person was employed between 48 and 81

years ago; (b) the amount the deceased person was paid or ought to have been paid in wages; (c) the amount of pocket money the deceased person received at the time; and/or (d) the amount the deceased person withdrew from the savings account maintained on their behalf, either by withdrawing monies from the savings account or by placing orders in the settlement store.

136 One explanation the applicant proffered for the inconsistency between his and the sample class members' recollections and contemporaneous records is that the ledger cards do not show to whom the payments made by Mr Pearson and other Aboriginal residents were made. What they do show is that payments made by Mr Pearson were often also made by other residents to the same source and by way of the same cheque. That is, one cheque would be issued to the (unknown) source covering the payments from a number of workers. The applicant contended that the most likely explanation is that money was withdrawn from the savings accounts relating to Aboriginal workers who earnt money in outside employment, without their knowledge or permission, with the money being used to purchase rations, notwithstanding that the State had a responsibility to provide rations without payment.

137 The applicant argued that this inference can more readily be drawn because Aboriginal people living on settlements were confined there and had little opportunity to spend money at other places. They were not allowed to leave to visit a local town or other community, nor were there visiting vendors from whom they could purchase items. The only source for purchasing goods was the settlement store, which also provided the community with its rations. While it is possible that the applicant and class members supplemented their rations by purchasing goods from the store, they said that except on limited occasions they had no recollection of doing so nor of giving permission for money to be withdrawn from their accounts.

138 The applicant also invited the inference on the basis that money and resources were 'tight' on the settlements. The State supported the settlements through grants made to the organisations that ran them, often religious institutions, which organisations could only supplement deficiencies in the rations from their own limited charitable resources. The grants were only enough to provide basic rations, food was issued in accordance with "ration scales" set out in the regulations, and it was necessary for the settlement inhabitants to supplement the rations. For example, Mr Pearson said that when he returned to Hopevale following an episode of employment he was required by the Superintendent to work within the Hopevale community

in various roles, including in growing crops and vegetables, presumably to supplement the State's rations. He also said that he supplemented the basic rations that were provided by hunting and fishing and other class members, including Mr Bowen, a sample group member, said that they were required to purchase their rations. The applicant's contention as to the inference to be drawn has reasonable prospects of success, but is not without risk.

139 Another explanation the applicant proffered is that some of the withdrawals the State purported to have recorded were fraudulent. The applicant contended that misappropriation from the savings accounts was not unknown, and that fraudulent withdrawals were identified in the Consultancy Bureau Report commissioned by the State in approximately 1991, although often without particularity. Mr Pearson asserted that the State Auditor-General's reports on the books and accounts of the Department during the relevant period revealed shortcomings with respect to the administration of the Protection Acts including in relation to the management of savings accounts under the control of the Superintendents or Protectors. The applicant relies on a public statement of the Honourable Judy Spence, Queensland Minister for Aboriginal and Islander Affairs, on 9 September 2002, in the following terms:

> Certainly, we acknowledge that there was probably some fraud by individuals out there in the community. Don't forget these were local protectors and public servants who were managing these funds.

140 It is, however, one thing to show that there were deficiencies in the way the savings accounts were administered and that there is evidence of fraud in relation to some unspecified savings accounts, and another thing to show on the balance of probabilities to the *Briginshaw* standard that fraud is the explanation in relation to identified withdrawals from the savings accounts of particular class members. The evidentiary material may support the proposition that some fraud existed, but given the passage of time and the nature of concealed fraud, often the documents provide no real record of how much was defrauded, or from whom, or when, or by whom. If a withdrawal from a savings account was improperly made and someone was misappropriating money from the account, the ledger cards are unlikely to record that. In each case it would have been up to the class member to prove that the general failings in the administration of the savings accounts applied to their particular case and that fraud is the explanation for specific withdrawals. Again, where a class member's recollection of innocuous everyday events from so long ago differs from contemporaneous documentary records, they would face a difficult task in persuading the Court to prefer their evidence, and thus in proving their claims to the requisite legal standard, at least in the quantum in which

they advanced them. They were likely to face substantial difficulties in establishing that fraud is the explanation for withdrawals that they have no recollection of making.

141 Another part of the Stolen Wages Case is the allegation that the State breached the alleged statutory trust by failing to get money in from employers, including by failing to take appropriate recovery action against any employer who failed to pay wages or pocket money in accordance with an employment agreement; failing to ensure that employees were paid by the employers for the full period they spent working; and failing to ensure that all monies owed by employers to the employees were collected and paid into the savings accounts. Absent the settlement, class members would be required to prove to the requisite legal standard that their former employers failed to pay pocket money to them and failed to pay the balance of their wages to the State in accordance with any employment agreement, and that the State failed to meet its obligation to ensure employers did so. They would usually be required to do so without proper records and by reference only to their recollection of everyday events from many decades ago, and without evidence of what the Superintendent or Protector did or did not do in relation to pursuing employers in relation to non-payment or underpayment of wages. There was a real risk that many class members would be unable to establish their claims, and for claims made on behalf of deceased estates, the difficulties were likely to be acute.

142 The substantial hurdles the applicant and class members were likely to face is significant to my view that the proposed settlement should be approved. As is the fact that, if class members were able to establish that they did not receive all of their wages, there would be a real risk that their provable losses were not, in aggregate, commensurate with the substantial settlement that has been achieved.

The legal issues

143 The State denied that the Protection Acts created the alleged statutory trust with attendant express and implied duties. It contended that at all material times it acted in the exercise of its governmental and statutory functions and obligations, which did not create a trust according to private law principles. It denied that money paid by an employer to a Superintendent or Protector for wages earned by a class member was held on trust for that employee by the State.

144 One difficulty for the State in this regard is that it was only under the 1945 regulations that statutory power was given to the State to permit it to receive and hold class members' wages

in trust. It is arguable that there was no statutory power for the State to receive and hold money prior to the 1945 regulations. However, the amount of wages received and held in that period was only approximately $8 million, which is not material in the case.

145 Whether the Protection Acts created the alleged statutory trust with the attendant express and implied duties is one of statutory construction, and it has not previously been decided. In my view the applicant had reasonable prospects of establishing that a statutory trust was created by the Protection Acts. Amongst other things, I note that reg 12(1) of the 1945 regulations required the Director to "establish with the Commonwealth Savings Bank of Australia a trust fund or trust funds into which shall be paid all money being wages, property, or savings of Aboriginals". However, such a finding would only assist the applicant and class members if they could also prove that the State breached the duties under the trust by failing to ensure that they received all of the wages that their employers paid or ought to have paid the State for their work. As I have said, the applicant and many class members faced real obstacles in doing so.

146 In relation to the alternative claim that the State owed a general or "at-large" fiduciary duty to Aboriginal and Islander workers under statutory controls, the State denies that it was under any such duty. It alleged that it was required through its servants and agents to act in accordance with the terms of the Protection Acts, and did not act as a fiduciary. The applicant's contention that the circumstances of the case give rise to a fiduciary relationship, in which the fiduciary duties are alleged to be prescriptive, is novel and there was a real risk that the applicant and class members would be unable to establish this part of the case.

The release in the Reparations Deeds

147 The State alleged that the release contained in the Reparations Deeds prevented any class member who signed a deed from taking any further action against the State, including in the present proceeding. The applicant had several responses to this:

(a) that on a proper construction, bearing in mind the strict approach taken to the construction of releases set out in *Grant v John Grant & Sons* [1954] HCA 23; (1954) 91 CLR 112 (***Grant***), the terms of the Reparations Deeds did not release the applicant's and class members' claims in equity, as they only referred to claims "pursuant to common-law or under the Protection Acts";

(b) equity will not generally construe a release as applying to a claim in circumstances where one party was ignorant of "the existence, character and extent of the liability in question": *Grant* at 130. In the present case the applicant and class members were seemingly not advised as to the precise nature and extent of the claims they were releasing the State from; and

(c) the circumstances in which the releases were procured was unconscionable in that in many cases the State took advantage of elderly and unsophisticated persons who were "unable to make a worthwhile judgment as to what is in [their] best interests": *Commercial Bank of Australia v Amadio* [1983] HCA 14; (1983) 151 CLR 447 at 461 (Mason CJ).

148 The operation of equity in relation to the releases is not a common issue in the proceeding as it depends upon the particular circumstances and relationship of each class member to the State, but I consider the State's prospects of relying om the releases to bar class members' claims to be weak.

The payments to the Aboriginal Welfare Fund

149 The State admitted that the deductions from savings accounts for payments into the Welfare Fund constituted a tax, but contended that the 1939 Act and regulations authorised such deductions. To the extent that such deductions were not properly authorised, the State contended the claim is statute barred by ss 10A and 10(1)(d) of the Limitations Act.

150 The State also contended that deductions made prior to the 1945 regulations were authorised by ss 14 and 16 of the 1939 Act. That argument appears weak but not much turns on the issue when the wages received and held by the State prior to the introduction of the 1945 regulations was only about $8 million.

151 In my view this part of the applicant's case faced difficulties because the 1945 regulations were made under a broad power, and there was a risk it would not succeed.

Limitations of Actions

152 In relation to the Stolen Wages Case, the State alleged that the claims are statute barred due to the effluxion of time. Section 27 of the Limitations Act provides as follows with respect to trust property:

> (1) A period of limitation prescribed by this Act shall not apply to an action by a beneficiary under a trust, being an action –

(a) in respect of a fraud or fraudulent breach of trust to which the trustee was a party or privy; or

(b) to recover from the trustee, trust property or the proceeds thereof in the possession of the trustee, or previously received by the trustee and converted to the trustee's use.

(2) Subject to subsection (1), an action by a beneficiary to recover trust property or in respect of a breach of trust, not being an action for which a limitation is prescribed by another provision of this Act, shall not be brought after the expiration of six years from the date on which the right of action accrued.

The State also relies on the predecessors to that legislation, s 9 of the *Limitation Act 1960* (Qld) and s 16 of the *Statute of Frauds and Limitations 1867* (Qld), as far as they may be relevant.

153 Subsection (1) operates as an exception to the general rule set out in subs (2), such that the standard limitation period of six years does not apply to actions in respect to any fraud or fraudulent breach of trust to which the trustee was party or privy, or to an action to recover, from the trustee, trust property or the proceeds thereof in the trustee's possession or previously received by the trustee and converted to his use.

154 The period over which the State received and held wages from employers paid to it on behalf of class members is well beyond the standard six year limitation period, but the applicant and class members argued that limitation period did not apply because:

(a) the duty to account is a continuing one that subsists so long as the trustee is in possession of trust property or the trust has not been brought to an end, and the State has a current and continuing obligation to account to the applicant and class members. On that basis the action was brought within time, as time only began to run when the applicant called upon the State to account to him and class members through service of the proceeding; and/or

(b) the applicant alleged that the State knew or ought to have known about a number of actions which constituted various breaches of trust, that it was morally complicit in those actions or its conduct was unconscionable, and had accordingly engaged in conduct which constituted an equitable fraud. If the applicant could establish that the actions of the State amounted to fraud in the equitable sense then, pursuant to s 27(1)(a) of the Limitations Act the six year limitation period would not apply.

155 It suffices to note that there is a real risk that the applicant's limitations argument would not have succeeded. If the Stolen Wages Case claims are statute barred, then the applicant and

class members could not recover under this part of the proceeding, which is far and away the largest claim advanced in the proceeding.

Conclusion

156 The Stolen Wages Case was a complex and strenuously defended claim in which the applicant and class members faced real risks on both liability and quantum. Those risks strongly favour making orders to approve the settlement.

The Racial Discrimination Case

157 To succeed in the first limb of the Racial Discrimination Case – breach of s 9 of the RDA – it would have been necessary for Mr Pearson to establish that the State's provision of legal advice to him and class members through the operation of the Reparations Scheme involved a distinction based on race, and had 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.

158 It is not clear to me precisely how the second limb of the Racial Discrimination Case – breach of s 10 of the RDA – is put but it would have been necessary for Mr Pearson to establish that the provision of legal advice to him and class members through the operation of the Reparations Scheme was by reason of a 'law' of Queensland Parliament which operated to deprive or limit the enjoyment by Aboriginal or Islander people of a right enjoyed by non-indigenous Australians, in satisfaction of either ss 10(1) or 10(3) of the RDA. The applicant did not point to the relevant Queensland law, the operation of which he proposed to rely on.

159 The proceeding did not allege that the State intentionally set up a low quality Reparations Scheme because of the race of the potential reparation recipients, rather it asserted that the historical subjugation of Aboriginal and Islander people involved a distinction based on race which gave rise to a particular vulnerability in the class, including as to their finances and level of education. It alleged that their ongoing vulnerability required that protective steps be taken in the design and administration of the Reparations Scheme, which steps were not undertaken.

160 The State's argued that Mr Pearson and the other claimants under the Reparations Scheme were provided with competent independent legal advice about their rights, that they were provided sufficient information to make an informed decision as to whether to accept the offer and sign the release, that Mr Pearson's outline of anticipated evidence shows that he

understood the rights he was giving up by entering into the release, and that he decided to choose a 'bird in the hand' rather than to maintain his right to sue the State in uncertain and costly litigation. The State also pleaded that the Reparations Scheme was developed in close and extended consultation with the Queensland Aboriginal and Torres Strait Islander Legal Services Secretariat.

161 The State denied any breach of the Racial Discrimination Act. It could be expected to argue that there was no racial discrimination in the Reparations Scheme, and that the provision of independent legal advice to claimants by private legal practitioners does not show a distinction based on race as it was provided primarily to Aboriginal and Islander claimants because the Reparations Scheme was aimed at compensating such people.

162 The State also alleged that the Court did not have jurisdiction to hear the Racial Discrimination Case because the unlawful discrimination alleged is not the same as, or the same in substance, as the unlawful discrimination that was the subject of a complaint in the Australian Human Rights Commission. A fresh complaint by Mr Pearson to the Australian Human Rights Commission had been made prior to the settlement of the case, in response to that pleading.

163 While the applicant and class members had some prospect of success with the first limb of the Racial Discrimination Case, it faced some real hurdles. If the case succeeded on liability, the damages that might be achieved through this part of the case are unclear, and unlikely to be commensurate to the settlement that has been achieved. This too favoured settlement approval.

The Slavery Case

164 The Slavery Case is novel and strenuously contested by the State on a number of grounds, and there is a real risk it would not have succeeded.

165 *First*, the contention that the 1939 Act is invalid because it is repugnant to the *Slavery Abolition Act* requires construing the word "slavery" in that Act in a way different to its intent at the time of enactment. "Slavery" as it was likely to have been understood by the Parliament in the United Kingdom in 1833 meant "chattel" slavery – that is, the ability to buy and sell a person as if they were chattels.

166 The State denied that the relationship between it and Aboriginals and Islanders during the claim period could properly be described as "slavery". The State said that it could not and

did not buy or sell them as chattels, and it denied that any compulsory work they were required to perform pursuant to the 1939 Act and regulations to maintain and assist the settlements where they housed, fed and provided any necessary medical treatment, amounted to slavery.

167 Against that the applicant contended that s 12 of the *Slavery Abolition Act* is intended to have a permanent effect, and is an example of legislation which should be construed as adapting and applying to situations and concepts which develop after the legislation is passed: see *Chubb Insurance Co of Australia Ltd v Moore* [2013] NSWCA 212; (2013) 302 ALR 101 at [82]. The applicant submitted that the concept of slavery extends beyond the ability to buy or sell a person and the *Slavery Abolition Act* encompassed conduct of the type that occurred on the Aboriginal settlement, as what was meant by "slavery" was not fixed at the specific time the legislation was passed, citing *Somerset v Stewart* (1772) 98 ER 499 and *Forbes v Cochrane* (1824) 107 ER 450 for that proposition. The applicant contended that "slavery" connotes a number of indicia which are concerned with power and are often associated with property ownership, rather than legal ownership.

168 *Second*, assuming the applicant could make out the legal arguments advanced, there were evidentiary difficulties which limited the quantum of damages that might be payable. There are no documentary records evidencing the amount of time class members were engaged in such work and the only evidence will be the class members' recollections of the work they completed many decades ago. Some of this evidence was unlikely to be sufficiently certain to be rationally probative, and the difficulties for claims on behalf of the estates of deceased class members were likely to be acute.

169 *Third*, the case faced what appeared to be an intractable limitations issue. The claim was for payment of reasonable wages on a *quantum meruit* basis for the time the applicant and class members spent undertaking compulsory unpaid labour during the claim period. Pursuant to the Limitations Act such claims appear to have long since become statute barred.

170 The difficulties the applicant faced in proving the Slavery Case pointed in favour of settlement approval.

Conclusion on the risk of establishing liability and quantum

171 Having regard to the discussion of the risks of establishing liability and quantum set out above, in my view the proposed settlement falls comfortably at the upper end of the range of reasonable settlements of the proceeding.

Reasonableness of the settlement in light of the best recovery and the attendant risks of the litigation

172 It is exceedingly difficult to reach a well-founded estimate of the undiscounted aggregate value of class members' claims in the present case, and what "best recovery" might realistically be depends upon a series of uncertain assumptions. BELAW engaged Mr Brian Wood of KordaMentha to estimate the aggregate losses suffered by class members under the following heads of loss: Unauthorised Withdrawals; Failure to get in money/Underpayments; Interest; Welfare Fund Deductions; and the Slavery Case. He was not asked to estimate the aggregate losses under the Racial Discrimination or Trust Misadministration heads of loss. Mr Wood provided a confidential report (**KM report**) which, in high-level summary,

(a) estimated the gross wages earned by all class members in the claim period, allowing for currency conversion and compounding interest;

(b) assessed the heads of loss for each of a random selection of 15 class members (including the applicant and the sample group members), on an individual basis;

(c) identified assumptions from the individual analysis for the purpose of extrapolating that analysis to the entire class; and then

(d) estimated the value of the heads of loss for the whole class.

173 The KM report was prepared for mediation, not trial, and the applicant did not suggest that it was capable of forming a basis for an aggregate assessment of damages, or even that it rose to the level of providing a reasonably accurate picture of aggregate loss. The nature of the claims required understanding the idiosyncratic individual experiences of many thousands of class members over several decades, and making a reasonably accurate assessment of aggregate loss using statistical sampling techniques would require the location and analysis of records relating to hundreds more sample class members than were used. But undertaking such a process would have been enormously expensive and time-consuming, and it was not done.

174 The KM report made an estimate of gross aggregate loss at a level substantially higher than the proposed settlement sum. In my view it provided little assistance in assessing best recovery because, on the basis of instructions, the report was based in some assumptions which were highly favourable to the applicant and class members, including:

(a) in relation to the Unauthorised Withdrawals head of loss in the Stolen Wages Case (which was by far the largest part of the largest case in the proceeding), the report concluded that almost 90% of the transactions on the 15 class members' savings accounts were "unauthorised", largely because of the absence of documents to show authorisation. However, it is uncontentious that over many decades the records have been destroyed as part of ordinary record-keeping practice or otherwise deteriorated or been lost. In such circumstances it cannot reasonably be extrapolated from an absence of records proving that a transaction was authorised, that the transaction was fraudulent, that the class member did not request the transaction or that the class member did not have the benefit of the transaction;

(b) the report assumed that all class members would be able to establish the factual underpinnings of their claim for unpaid pocket money and unpaid wages, when that is far from likely to be the case; and

(c) the report assumed that all class members would be able to establish the factual underpinnings of their claim for reasonable wages for any periods of compulsory unpaid work they undertook on the settlement when that was, again, unlikely to be the case.

175 The State filed a report of Mr Paul Vincent of Vincents, forensic accountant, which opined on the quantum of the claim made by the applicant and the approach taken in the KM report. It demonstrated that experts' views on the question of aggregate class losses could diverge significantly depending on the assumptions which underpinned them, and highlighted the difficulty in attempting to make an accurate estimate of aggregate losses.

176 Having regard to the KM report and the Vincents report, and having had the benefit of Counsels' Opinion, I was satisfied that the proposed settlement falls within the range of reasonable settlements in light of best recovery.

177 But assessing the reasonableness of the settlement against "best recovery" is of limited assistance as it involves the unrealistic assumption that the applicant will succeed in full on both liability and quantum. It is more useful to assess the reasonableness of the proposed

settlement in light of the attendant risks of litigation. Having regard to the risks the applicant faced on liability and quantum the proposed settlement falls comfortably in the high end of the range of possible settlements of the case, and is plainly fair and reasonable. The applicant made estimates, based on modelling, of the approximate compensation amounts payable to class members in each category (as set out at [251] below).

The complexity and likely duration of the litigation

178 Each of the three cases advanced in the proceeding was related but distinct from the other, and the factual bases and legal arguments relevant to each were different. The legal issues in each were complex and, particularly in the Stolen Wages Case, there were some likely evidentiary difficulties. Each of the three cases would themselves give rise to a substantial trial. In addition to the applicant, there are a total of 10 sample class members whose claims would require individual determination.

179 The initial trial of eight weeks in February 2020 was listed to decide the common liability issues arising from the claims of the applicant and the sample class members, but it was only the applicant's individual claim for which quantum was to be determined. If the proceeding was successful on one or more of the common liability issues, the applicant proposed a second, later hearing to seek an account of money held by the State for him and aggregate damages. No date had been fixed for the second hearing. On the assumption that the applicant succeeded in establishing an entitlement to aggregate damages at the later hearing, it would likely have been two years before damages might begin to flow to class members.

180 On the assumption that the applicant failed to establish an entitlement to aggregate damages at the later hearing, each class member's claim would be required to be individually heard and decided, or at least decided by category or sub-group. The materials indicate that the process of locating and inspecting the records relating to class members is time-consuming and expensive. If each of the 11,948 class members were required to gather whatever records could be located and go through the same exercise as Mr Pearson and the sample class members; that is, to compare his or her recollection against whatever records could be located and explain any discrepancy, that process was likely to take many years.

181 Thus, assuming the case was successful, because of: the complexity of the three cases; the likely duration of the initial trial; the requirement for a subsequent hearing which had not yet been listed; and the possibility of multiple hearings to deal with class members claims either individually or within sub-groups; it would likely have been a long time before class

members received any compensation. There was also a real prospect of appeals against the decision in the first trial and any decision in relation to aggregate damages. Given the size and complexity of the case such appeals could also be expected to take more than a year each. The vast majority of living class members are elderly, and many have passed away since the proceeding was commenced. There is a substantial benefit in class members receiving any compensation during their lifetimes. This pointed strongly in favour of settlement approval.

The reaction of the class to the proposed settlement

182 Thirty-nine written objections to the proposed settlement were filed with the Court, but a number of them either gave no reason for the objection or provided reasons which in fact supported the proposed settlement and thus appeared to have been filed in error. I directed BELAW to communicate with the class members who had filed such objections and Ms Tucker subsequently deposed that thirty-one of the objections had been filed in error and had been withdrawn. Three late written objections were filed after the deadline, and I accepted them for filing. Two further class members did not file written objections but I granted leave for them to voice their objections at the settlement approval hearing.

183 Ms Tucker said, and I accept, that the overall reaction of the class to the settlement was positive, and it is relevant that only thirteen class members out of 11,948 Participating Claimants or 19,082 Registered Representatives objected to the proposed settlement. But that is not determinative of its fairness. It is the Court's task to assess the fairness and reasonableness of a proposed settlement and the objections provide a convenient focus by reference to which the court may decide matters of fairness and reasonableness: *Darwalla Milling Co Ltd v F Hoffman-La Roche (No 2)* [2006] FCA 1388; (2006) 236 ALR 322 at [39].

184 As I have said, some of the objections revealed the anguish, torment and anger which some class members still feel because of the discriminatory and unjust way 'controlled' Aboriginal and Islander people were treated between 1939 and 1972, and the lasting legacy of economic and social hardship for those families. The emotion in those objections reflect the importance of the proposed settlement to class members and the historical trauma to which it relates. The objections all deserved serious consideration.

185 The objections may be summarised as follows:

(a) Ms Teresa Gibson objected on behalf of herself and her family. She said that her father had worked from age 14 without wages, that his adolescent life was stolen from him and his education denied, which meant that he did not reach his full potential as an adult. She said that her family "was subjected to poverty equal to a third world country, poor working conditions that led to a family breakdown, the death of a sibling and the lingering hurt and shame that has scarred us." Ms Gibson objected to the proposed settlement on the basis that the settlement sum was insufficient to compensate for the wrongs that class members had suffered through the Protection Acts. She said that $500 million, which she said was estimated by former Queensland Premier Mr Peter Beattie as the total amount of the missing wages, was a more appropriate settlement amount. Ms Gibson appeared at the settlement approval hearing on 21 November 2019 and made submissions in opposition to settlement approval.

(b) Ms Adeline Blohm objected on behalf of herself and her family, doing so on the basis of the insufficiency of the settlement amount. She also complained that because the claim period commenced in 1939 the settlement operated to unfairly exclude her grandparents. She said that her grandfather spent 55 years in servitude which had a resounding and transgenerational social, monetary, psychological and educational impact upon her family, including the malnutrition and death of two of her grandfather's sons.

(c) Ms Alisa Snider objected on the basis that she was excluded from claiming compensation under the SDS. She said that she should be able to receive compensation in respect of her grandfather's cousin, who had no siblings, and died in 1964 without a wife or child died. She said that her grandfather's cousin had worked his whole life as a gardener and farmer on the Valley of Lagoons Station, and had only received small amounts of cash twice yearly, for Christmas and for the local show. She claimed that his wages were stolen by the local police who were appointed as Protectors under the 1939 Act, and that a policeman was later convicted and jailed in relation to that theft.

(d) Ms Colleen Power objected as a beneficiary of the estate of her deceased mother. She attached affidavits by her mother made in 2011 and 2013 in support of the Jangga and Birriah native title claims which detailed some of the hardship she had suffered through the Protection Acts, including a moving letter she sent to the local Protector

during WWII seeking exemption from the 1939 Act. In the letter her mother said "the whole world is fighting for freedom today and I don't see why I should not fight for my own freedom." Ms Power supported some features of the proposed settlement but objected to the terms of the SDS which: (a) provided a reimbursement payment to Mr Pearson for acting in the role of applicant; (b) used gender as one of the factors for assessing the amount of compensation; and (c) provided a significant discount for claims on behalf of deceased estates. She also objected on the basis that the legal costs and litigation funding commission were excessive and expressed concern that the costs of administering the proposed SDS were at that time undisclosed. Ms Power appeared at the settlement approval hearing, accompanied by her son, Justin Power, and her sister, Ms Nicol-Tullah, and made submissions in opposition to settlement approval.

(e) Mr Charles Msii objected to the settlement, doing so on the basis of the insufficiency of the settlement amount in light of the strength of the case, citing the decisions in *Tito v Waddell (No 2)* [1977] Ch 106; *Cubillo v Commonwealth of Australia* [2001] FCA 1213; (2001) 112 FCR 455; *Williams v The Minister, Aboriginal Land Rights Act & Anor* (1994) 35 NSWLR 497; *Breen v Williams* [1996] HCA 57; (1996) 186 CLR 71; *Mabo v Queensland (No 2)* [1992] HCA 23; (1992) 175 CLR 1; and *Wik Peoples v Queensland* [1996] HCA 40; (1996) 187 CLR 1. His central contention was that the legislative framework of the Protection Acts gave rise to "solid legal bases, either in trust or fiduciary law, for arguing that governments should be made to account for missing moneys". He argued that the strength of the claim meant that a settlement of $190 million was "daylight robbery".

(f) Ms Berice Anning objected on behalf of herself and her family, doing so on the basis of the insufficiency of the settlement amount. She contended that the settlement should take account of amounts which the State would have earned by its retention of the money (such as interest), for aggravated damages and exemplary damages for hurt humiliation and distress, and for unlawful discrimination under s 46PO(4) of the AHRC Act. Ms Anning, in her capacity as a beneficiary of her deceased mother's estate, also sought access to various records she said were held by the State and said that absent receiving that material she would not agree to settle;

(g) Mr Roy Savo objected on the basis that the proposed funding commission of $38 million was excessive. In his view 10% of the gross settlement, being $19 million, was appropriate;

(h) Ms Felicity Holt objected on the basis that the SDS was not fair as between class members. She said that older class members should receive a greater share to reflect that the work they completed was more difficult and over longer periods, that living claimants should receive a greater share than the relatives of deceased claimants, and that men should not receive more than women;

(i) Mr Dion Murray objected on the basis that all parties should be paid at the same time, which I understand to be an objection to the applicant's lawyers and LLS being paid before the class members receive their compensation under the SDS;

(j) Ms Maxine Frescon objected on the basis that the notice regime in relation to the settlement was inadequate. She said that there would be class members who failed to register because they did not know about the settlement. She also objected on the basis of the insufficiency of the settlement amount and on the basis that the proposed deductions from the settlement were excessive; and

(k) Mr Ashley Coleman, on behalf of himself and his wife Ann Maree Coleman, objected on the basis of the insufficiency of the settlement amount and on the basis that the proposed deductions for legal costs and funding commission were excessive. He said that the case should have been undertaken on a pro bono basis. He also made some baseless remarks to the effect that BELAW had inflated the number of class members for their own benefit and made lengthy reference to climate change policy being reflective of broader governmental unconscionability.

186 Mr Herb Wharton and Ms Grace Hegarty did not file a written objection but were given leave to raise their objections at the settlement approval hearing. Mr Wharton objected on the basis of the insufficiency of the settlement amount. Ms Hegarty described the discrimination her family suffered under the Protection Acts but did not object to the settlement in specific terms.

187 For convenience the objections can be tabulated as follows:

Reason for objection	**Objector(s)**
The quantum of the proposed settlement is insufficient	Ms Teresa Gibson

	Ms Adeline Blohm Mr Charles Msii Ms Berice Anning Ms Maxine Frescon Mr Ashley Coleman Mr Herb Wharton
The proposed deductions for legal costs and/or funding commission are excessive	Ms Colleen Power Mr Roy Savo Ms Maxine Frescon Mr Ashley Coleman
The proposed SDS is not fair as between class members	Ms Colleen Power Ms Felicity Holt
The class definition should have been broader so more people could claim compensation	Ms Adeline Blohm Ms Alisa Snider
The applicant's lawyers and the funder should not be paid before the class members receive compensation	Mr Dion Murray
The applicant should not receive a reimbursement payment	Ms Colleen Power
Class members have not received sufficient notice of the settlement	Ms Maxine Frescon
The claim should include provision for breaches of the *Australian Human Rights Commission Act 1986* (Cth)	Ms Berice Anning
Class members require better and more particularised information about the scope of relatives' work during the claim period	Ms Berice Anning

Insufficient settlement amount

188 There were seven objections to settlement approval which contended that settlement approval should be refused because the settlement amount is insufficient.

189 I have set out my view regarding the reasonableness of the settlement amount (at [172]-[177] above), and it would be repetitive to reiterate those matters. As I have said, I consider the settlement falls comfortably in the high end of the range of reasonable settlements of the proceeding.

190 Mr Msii's objection was the only objection which purported to set out a legal basis as to why the settlement amount was insufficient. In order to be satisfied in relation to his objection I requested counsel to file confidential submissions which directly responded to the points Mr Msii raised. Those submissions must remain confidential but, having regard to Counsels' Opinion and the confidential submissions I was satisfied that Mr Msii's view as to the prospects of success on liability and quantum was overly optimistic. Furthermore, as I said in *Kelly* (at [74]):

> It is established that the Court should not second-guess the applicant's lawyers as to whether the settlement ought to have been accepted, or to proceed as if it knows more about the actual risks of the litigation than those lawyers. The Court takes the applicant's lawyers as it finds them, recognising that different applicants and different lawyers will have different appetites for risk. The question is whether the proposed settlement is within the range of reasonable outcomes, not whether it is the best outcome which the Court considers might have been won by better bargaining: *Darwalla* at [50]; *Harrison v Sandhurst Trustees Limited* [2011] FCA 541 at [13] (Gordon J).

191 These objections did not justify declining to approve the settlement.

The proposed deductions for legal costs and/or funding commission are excessive

192 There were four objections which contended that settlement approval should be refused on the basis that the legal costs of $13.88 million and/or the aggregate funding commission of $38 million were excessive.

193 Having regard to the sheer size of those amounts, it is well understandable that some class members would consider such amounts to be excessive and unwarranted. But for the reasons I explain below (at [252]-[260] in relation to legal costs and at [261]-[275] in relation to funding charges) I was satisfied that the proposed deductions for legal costs and litigation funding charges are fair and reasonable.

194 Mr Coleman's assertion that the case should have been undertaken on a *pro bono* does not take things far when no firm offered to undertake the case on that basis and few law firms would have the size or risk appetite to do so. BELAW could not have done so.

195 Ms Power's objection in relation to inadequate disclosure of the settlement administration costs was expressed prior to the tender process for the appointment of the Administrator, and prior to the appointment of the Costs Referee to inquire and report to the Court. For the reasons I explain below (at [276]-[285]) I was satisfied that the proposed settlement administration costs are fair and reasonable.

196 These objections did not justify declining to approve the settlement.

The proposed SDS is not fair as between class members

197 There were two objections which contended that the SDS is not fair as between class members because the relevant factors in the loss assessment methodology are age, ethnicity, gender, and whether the class member is alive or deceased. One can readily understand objectors' concerns regarding the use of ethnicity and gender as factors to determine the differing amounts of compensation to be distributed between class members, particularly when the proceeding itself concerns discrimination. But, as I explain below (at [220]-[235] above), it is axiomatic that to achieve fairness between class members the compensation payable under the SDS should broadly reflect the differing quantum values of class members' claims, and age, ethnicity, gender, and whether the class member is alive or deceased are all relevant factors in assessing the quantum of class member's claim. These objections did not justify declining to approve the settlement.

The class definition should have been broader so more people could claim compensation

198 Ms Blohm objected to settlement approval on the basis that her grandparents suffered similar treatment to that suffered by Mr Pearson, but which occurred prior to 1939. She contended that it was unfair that she was precluded from participating in the settlement because the claim period in the proceeding commences in 1939.

199 The applicant submitted that the decision to define the claim period to commence in 1939 was a forensic decision in light of the improbability of establishing the relevant claims under prior cognate legislation. It was permissible for the applicant's lawyers to plead the claim definition as they saw fit, and the fact that they chose a claim period that commenced later than Ms Blohm considers appropriate is not a basis for declining to approve the settlement. The scope of the release given in the settlement is restricted to the pleaded claims, and so a litigant who chooses to bring an action relating to an earlier period is not precluded from doing so by the settlement of this case.

200 Ms Snider raised an objection in relation to claims on behalf of a deceased estate. She objected on the basis that the SDS does not allow her to recover compensation on behalf of her grandfather's cousin, who died intestate without leaving a surviving spouse or children. For the reasons I explain below (at [236]-[250]) I was satisfied that the limitation in the SDS

on claims on behalf of deceased estates is fair and reasonable. This objection did not justify declining to approve the settlement.

The applicant's lawyers and the litigation funder should not be paid before the class members receive compensation

201 Mr Murray filed an objection which appeared to contend that the settlement was not fair and reasonable because it provided for the applicant's legal costs and the funding commission to be deducted prior to class members receiving their compensation. He said that BELAW and LLS should not be paid before the class members receive compensation.

202 This objection had little force because, pursuant to the prescribed Funding Terms under the common fund order, LLS was entitled to be:

(a) reimbursed the Court-approved legal costs it paid on the applicant's behalf; and

(b) paid a 20% funding commission (or such lower percentage as the Court considers reasonable at that time);

when the settlement monies are paid into the control of the Administrator. The common fund order is valid and enforceable unless set aside and its operation was not a basis to refuse settlement approval. In any event, I did not consider it would be just to delay those payments to LLS when it opened the class and took on greater costs and risks on the basis of the common fund order, and when it was likely to be many months before the distribution of compensation could occur.

The applicant should not receive a reimbursement payment

203 Ms Power filed an objection which contended that settlement approval should be refused on the basis that the proposed $35,000 reimbursement payment to Mr Pearson undermined the equality of the settlement.

204 For the reasons I explain below (at [286]-[290]), I considered it to be fair and reasonable that Mr Pearson receive that amount to compensate him for the time, expense and inconvenience of prosecuting the proceeding on behalf of the class members.

Class members have not received sufficient notice of the settlement

205 Ms Frescon contended that settlement approval should be refused on the basis that the notice regime in relation to the proposed settlement was inadequate, and that many class members would not have registered because they were not aware of the proposed settlement.

206 As I have previously said, in 2016 and the first half of 2017 and between December 2017 and March 2018 BELAW recommended to a great many class members that they register their claims including through extensive outreach programs. I have previously set out the comprehensive notice regime ordered to inform class members about the proposed settlement, and the requirement to register if they wished to share in the benefit of the proposed settlement. The provision of proper notice to the class was a matter given close attention by the applicant and the Court throughout the proceeding and the notice processes were designed to be far-reaching.

207 Especially given the characteristics of the class, the notice to class members is unlikely to be perfect, but there is little force in the objection when all reasonable steps have been taken to ensure that class members were informed of the requirement to register if they wished to share in the proposed settlement. This objection did not justify refusing to approve the settlement.

The claim should include provision for breaches of the Australian Human Rights Commission Act 1986 (Cth)

208 Ms Anning objected to settlement approval on the basis that the Court should order a declaration under s 46PO(4) of the AHRC Act that unlawful discrimination has occurred and award damages on that basis. This objection misunderstood the power of the Court in a settlement approval application under s 33V of the FCA. Under this provision the Court has power to approve or decline to approve a proposed settlement as fair and reasonable but no power to make findings in relation to whether a breach of the law occurred or not. The Court could make a declaration that an identified breach of the law has occurred if that is part of the settlement but otherwise it does not have power to do so. A declaration under s 46PO(4) of the AHRC Act was not agreed by the parties.

Class members require better and more particularised information about the scope of relatives' work during the claim period

209 Ms Anning also objected to the proposed settlement on the basis that she considered she was unable to settle without better information as to the scope of her mother's work during the claim period.

210 The materials show that the process of locating and inspecting the records relating to class members was time-consuming and expensive. If the applicant was required to gather whatever records can be located for each of the 11,948 class members who were subject to

the Protection Acts, and go through the same exercise as for Mr Pearson and the sample class members by comparing their recollection of what occurred against whatever records can be located, and seeking to explain any discrepancy, that would likely take years. Imposing such a requirement would substantially reduce the utility of the class action mechanism in the case.

211 In any event, because of the time, expense and the impossibility, or at least inordinate difficulty, of verifying the assertions made by class members about events that occurred so long ago and for which there are few records, the SDS does not provide for individualised assessment based upon their records. There is no requirement for class members to locate records because under the SDS compensation will be assessed by reference to the four factors set out in the loss assessment methodology. This objection does not justify refusing to approve the settlement.

212 Ms Anning also seeks access to various record said to be held by the State in relation to her relative. To the extent that her objection relies on this matter, the releases provided under the settlement deed do not affect her statutory rights of access to such documents.

The SDS

Appointment of the Administrator

213 BELAW sought tenders for appointment as the Administrator of the SDS from four accounting firms – KordaMentha, Grant Thornton, Findex and BDO, and each firm tendered for the work. It was clear enough from the tenders that each firm had the capacity to undertake the work, each had relevant experience, and each was likely to be able to work cooperatively with indigenous claimants.

214 The applicant ultimately proposed that Grant Thornton be appointed as Administrator essentially on the basis that it provided a fixed quote subject only to any Court-approved increase. It was relevant too that the firm had considerable experience in dealing with indigenous communities, in particular through Mr Beven who was previously the Registrar of Indigenous Corporations. I was satisfied that it was appropriate to appoint Mr Jonsson and Mr Beven of Grant Thornton as Administrator.

Key terms

215 In the SDS, "Claimants" means the applicant and class members as defined in the proceeding; "Participating Claimants" means registered class members who have not been excluded by the Administrator on the basis that the person has not provided the required

information; "Deceased Claimant" means a Claimant who had died prior to settlement approval and "Registered Representative" means, in respect of a Deceased Claimant, the person or persons ascertained in accordance with the SDS to be a registered representative of the Deceased Claimant.

216 The terms of the SDS, which are annexed to the settlement approval orders, identify the powers of the Administrator, the loss assessment formula, and prescribes processes for determining entitlements, processing claims and distributing compensation to class members.

217 In broad terms, the SDS requires the Administrator to:

(a) establish a Settlement Distribution Fund to hold the settlement sum in trust and to allow the Administrator in their discretion to distribute any interest accruing on the settlement sum to a special purpose company (Stolen Wages Administrator (SWA) Pty Ltd ACN 638 118 466) to ensure that interest is treated in the most tax effective way, for the benefit of Participating Claimants;

(b) prior to any distribution to Participating Claimants, to make payment of any outstanding legal costs and disbursements, the litigation funding commission, and the applicant's reimbursement payment;

(c) create and maintain a database of Participating Claimants containing the information required to identify them and to ascertain their individual entitlements by the application of the Assessment Methodology Schedule;

(d) send distribution statements to class members identifying their estimated settlement entitlement; and

(e) facilitate a review process such that participating claimants can appeal any administrative or substantive error they may assert has been made regarding their claim, including the right to have that dispute adjudicated by Independent Counsel.

218 Additionally, the Administrator may refer any issue arising in relation to the administration of the SDS to the Court for directions and must prepare a report for the Court at the conclusion of the Scheme to give an overview of its operation.

219 The SDS provides that BELAW, or such other firm of solicitors that the Administrator may choose at its discretion, will act as Advisor to the Administrator. The SDS envisages that the Advisor will be engaged to assist with communications with Participating Claimants, complex verification and eligibility cases, the resolution of multiple claims and the review

process. In assessing the reasonableness and proportionality of the Advisor's charges the Administrator will be assisted by the Costs Referee.

Whether a flat distribution scheme is appropriate

220 The SDS does not utilise a flat distribution method under which all Participating Claimants would receive the same amount of compensation. I accepted that it would be unfair if all class members received the same amount of compensation as it would not deal with the variety of the claims that individual class members have, and the reality that some of the claims have greater value than others. In particular, it would ignore the fact that some class members worked in "controlled" employment for much longer than others and thus the amount of any "stolen wages" was likely to be greater. A flat distribution method would be inappropriate when the case was brought and the settlement was achieved on the basis that class members had different claims with different values. Providing for a flat distribution would in my view tend to impair rather than enhance fairness between class members.

The proposed differential distribution scheme

221 Under the loss assessment methodology in the SDS the Administrator is required to assess the claims of class members and to calculate entitlements to compensation by reference to class member's characteristics in a manner broadly consistent with the way the case was articulated. However, for reasons of the time, expense and the impossibility, or at least inordinate difficulty, of verifying the assertions made by class members about events that occurred so long ago and for which there are few records, the SDS does not provide for individualised assessment based upon their assertions as to: their periods of employment, the amount of any 'pocket money' they received, the wages which were paid or ought to have been paid to the Superintendent or Protector, or the amount of any withdrawals they made from the savings accounts.

222 Instead, the loss assessment methodology under the SDS takes into account the following four factors:

(a) the ethnicity of the class member (i.e. whether the class member is Aboriginal or Islander);

(b) the sex of the class member;

(c) the date of birth of the class member; and

(d) whether the class member is living or deceased.

I now turn to consider each of these factors. The Assessment Methodology Schedule setting out the various applicable discounts and multipliers is annexed to the SDS.

223 Overall, I consider the SDS takes into account the broad differences between class members in a way that is essentially fair and reasonable. There is no requirement for the applicant to show scientific exactitude in the differential distribution of settlement monies, and as Moshinsky J said in *Camilleri* at [43], it is relevant to ask "whether the costs of a more perfect assessment procedure would erode the notional benefit of a more exact distribution."

The ethnicity of the class member

224 This factor reflects the applicant's submissions based on information gathered from class members that the wages claims of Islander class members were based primarily on lesser-paid work on fishing boats and that, generally speaking, Islanders had more access to money and were likely to have received a greater proportion of any wages than Aboriginal class members. Islander class members also have no claims relating to Welfare Fund Deductions because they were not subject to the same provisions. Based on this the loss assessment methodology provides for a 50% discount for the claims of male and female Islanders overall.

The sex of the class member

225 This material shows that during the claim period the wage rates applicable to female Aboriginal workers (primarily cooks and domestic servants) were substantially lower than the wage rates payable to male Aboriginal workers (which included well-paid droving work). The KM report estimated that the "average present value wage" of female Aboriginal claimants, being the sum of gross unpaid wages and compound interest on that amount, was only 40% of the "average present value wage" of male Aboriginal claimants.

226 Based on that data, and using a male Aboriginal claimant as the baseline, the loss assessment methodology provides for a discount of 20% on the claims of female Aboriginal claimants. That discount is arrived at by applying a higher discount to the heads of loss of female Aboriginal workers that comprise or are derivative of wages claims, but not to other claims. For example, the Slavery Case claims are not affected by gender as the minimum applicable pay rates for work on a settlement reflect substantially lower disparity between genders, nor are the Racial Discrimination Case claims affected by gender. Those claims depends upon the applicant establishing unlawful discrimination in the legal advice provided in the

Reparations Scheme rather than the comparative wage rate of male and female Aboriginal workers in the claim period.

227 In relation to the claims of female Islanders, the KM report identified a slightly lower but nevertheless substantial differential in the wages paid to male and female Islanders during the claim period. It estimated that the "average present value wage" of female Islanders was only 60% of that of male Islanders. Based on this and some other discounts particular to Islander class members, and using a male Islander class member as the baseline, the loss assessment methodology provides for a discount of 20% on the claims of female Islander class members.

228 This factor recognises an unfortunate historical reality; that women were paid less than men during the claim period. The idea of discriminating between claimants on the basis of gender is unattractive to say the least, but the reality is that, if successful at trial, the Stolen Wages claims of Aboriginal and Islander women were likely to achieve damages awards which were substantially lower in quantum than the awards for Aboriginal and Islander men. It is axiomatic that to achieve fairness between class members the compensation payable should broadly reflect the value of class members' claims. I do not lightly take this view but having regard to the requirement for fairness *inter se* there is no principled alternative to these discounts, and I consider them to be appropriate.

The date of birth of the class member

229 A major determinant of a person's claim to wages and wage-derived heads of loss in the proceeding is the length of time they worked during the claim period of 12 October 1939 to 4 December 1972. In general terms, the older the class member, the longer the period he or she is likely to have worked in 'controlled' external employment under the Protection Acts or been required to undertake compulsory unpaid work on a settlement.

230 To take account of this, the loss assessment methodology divides Participating Claimants into three broad subcategories by age and applies a sliding scale of compensation (the **working life discount**):

Claimant subcategory	DOB	Corresponding Portion of Relevant Period (at 14yo)	Discount
DOB1	pre-12/10/1925 - 30/10/1936	12/10/1939 - 4/12/1972	Nil
DOB2	31/10/1936 - 18/11/1947	31/10/1950 - 4/12/1972	10%

DOB3	19/11/1947 - 4/12/1958	19/11/1961 - 4/12/1972	20%

231 As the total claim period is 33 years it is possible that a person in category DOB1 who was born, for example, before 1911 (who would almost certainly be deceased) could have worked less in the claim period than others in his or her cohort. That claimant would have finished working at some point during the claim period. As a solution to this, the loss assessment methodology places persons born at or before that time into category DOB2.

232 The working life discount only applies to Aboriginal claimants because, as set out above, the loss assessment methodology already imposes a 50% discount on Islander claimants, and it assumes that the working life discount is subsumed within that.

233 In my view the working life discount is broadly fair in differentiating the compensation payable to Participating Claimants, who would have necessarily worked for different amounts of time during the claim period.

Whether the class member is living or deceased

234 As I have made reference to above, there were clear issues of proof for any claim on behalf of a deceased estate. The deceased class member cannot give evidence, and the relevant records relating to their employment are unlikely to be available in full, or possibly at all. Their next of kin were likely to have faced acute difficulties in proving their Stolen Wages claim and to a lesser extent their claim under the Slavery Case for any compulsory unpaid work undertaken on a settlement. I accepted the applicant's contention, that it is appropriate to apply a significant discount to reflect these difficulties of proof.

235 Based on this, the loss assessment methodology imposes a 30% discount for claims of behalf of deceased estates. This discount is applied within each sub-category of claimant and its effect is therefore only to take funds otherwise allocated to deceased class members and reallocate them to living class members within the same sub-category. I was satisfied that this approach is fair.

The limitation on claims in respect of deceased estates

236 The definition of class member in the statement of claim includes persons who have "a right, equitable or otherwise, in respect of the…property forming part of, the estate of the deceased person", and the release in the settlement deed extends to such persons. Thus the class members in the proceeding include:

(a) persons who are beneficiaries under the will of a Deceased Claimant (under the SDS, any class member who had passed away before the date of settlement approval);

(b) persons who would be entitled to claim on the estate of an intestate Deceased Claimant; and

(c) persons with miscellaneous legal and equitable claims on the estate of a Deceased Claimant.

237 It is important to understand however that by operation of cls 25 and 25A of the SDS not all such persons are entitled to receive compensation notwithstanding that their claims were to be released upon settlement approval. Clause 25 of the SDS provides that, subject to cl 25A, a person is eligible to be a Registered Representative of a Deceased Claimant:

(a) where the Deceased Claimant is survived by a spouse, the spouse; and

(b) where the Deceased Claimant is survived by children but not by a spouse, the children.

238 Clause 25A provides that, notwithstanding cl 25, where a Deceased Claimant dies having executed a legally valid will, the executor of the will is to be treated as the Registered Representative and no other person shall be entitled to be a Registered Representative of that Deceased Claimant. The executor must within eight weeks of the Final Approval Date register his or her holding of that office with the Administrator:

(a) where probate has been granted in respect of the deceased estate, by providing the Administrator with a copy of the will and grant of probate; or

(b) where probate has not been granted, by providing a statutory declaration acceptable to the Administrator, substantially in the form annexed to the SDS.

Where the executor does not within the prescribed eight week period declare that he or she is holding that office, the Administrator may in its absolute discretion allow a person other than the executor to be a Registered Representative of that Deceased Claimant and make any distribution in respect of that Deceased Claimant to a person other than the executor.

239 Thus, where a Deceased Claimant has made a will, the distribution of any compensation payable under the SDS will be in accordance with the testator's wishes (provided the executor comes forward). The materials though indicate that the great majority of Deceased Claimants died intestate and in that event cl 25 confines the distribution of compensation to the near kin of the person; being his or her surviving spouse, and if there is no surviving

spouse then any surviving children. In this way, in the event of intestacy, the SDS limits the class members who are entitled to receive compensation and makes direct provision for its distribution rather than allow it to be distributed subject to the laws of intestacy.

240 The persons who might be prejudiced by this restriction are:

(a) persons who would be entitled to claim on the estate of an intestate Deceased Claimant because the Deceased Claimant is not survived by either a spouse or children. Examples include grandchildren, by operation of s 36A of the *Succession Act 1981* (Qld) (**Succession Act**), and other kin if there are no grandchildren, such as siblings, great-grandchildren, nieces and nephews; and

(b) persons with miscellaneous legal and equitable claims on the estate of an intestate Deceased Claimant.

241 My main area of concern in relation to this proposed restriction is claims by grandchildren of Deceased Claimants. In the event of intestacy and where there is no surviving spouse or children, unless grandchildren are permitted to recover, that family may not receive any compensation in respect of the Deceased Claimant. That is an undesirable outcome but, for the reasons I now explain, I was satisfied that it was 'just' pursuant to s 33V(2) of the FCA to approve this aspect of the SDS.

242 *First*, the two proposed tiers of participation for Registered Representative set out in cl 25 have a principled basis that follows the position of law (albeit excluding more remote claimants). Schedule 2 of the Succession Act provides that where an intestate is survived by spouse only or issue only, the spouse or issue (as the case may be) are entitled to the estate. Where an intestate is survived by a spouse *and* issue the spouse is entitled to the first $150,000 of the estate and the balance is distributed. That limit will not be exceeded by any distribution under the settlement and to that extent the SDS adopts the tiered structure of Schedule 2.

243 *Second*, within the categories of spouse and issue, the SDS adopts an expansive approach. "Spouse" is defined to include parties to a marriage or a de facto relationship and is not limited to persons who were still in that relationship with Deceased Claimants at the time of death. In this respect it reflects s 36 of the Succession Act in providing that more than one spouse may be entitled to be a Registered Representative in respect of a Deceased Claimant, for example if there is both a de facto spouse and a legal marriage at time of death. The

definition of "children" in the SDS includes adopted and in the case of Islander families, traditionally adopted children.

244 *Third,* if grandchildren and more remote kin of Deceased Claimants are to be permitted to share in the settlement a further registration process would have been required to be undertaken, including another outreach program, which would give rise to significant further costs, and substantial further delay in the distribution of the settlement. Any requirement for such a further registration process would result in the registration of class members who have a low likelihood of receiving compensation under the SDS in any event, because even if grandchildren and more remote next of kin are entitled to register, spouses and children come first. The net result of requiring a further registration process would be significant further costs and delay without a correlative increase in the class members who stood to receive compensation under the settlement.

245 *Fourth*, Ms Tucker deposed to the further work that is likely to be required if grandchildren of a Deceased Claimant are permitted to register and receive compensation under the SDS. She stated that most indigenous families are significantly larger than the national average. For example, Ms Tucker deposed that Mr Pearson is one of eight children and he has nine children, his brother Glen has seven children and his remaining siblings have a similar number, each of whom has between three and seven children. Ms Pearson said that many of his friends have between 40 and 50 grandchildren. The historical data available from Australian Bureau of Statistics shows that the average birth rate for indigenous mothers was as high as six children per mother before declining in the 1970s.

246 Ms Tucker's estimate of the costs likely to be incurred in dealing with claims by grandchildren was premised on the conservative assumption that a Deceased Claimant would have four children, each of whom in turn would have four children, resulting in 16 grandchildren per Deceased Claimant. Ms Tucker assumed that 10 out of the assumed 16 grandchildren would claim as a Registered Representative of their deceased grandparent. She deposes that this will involve substantial further work and expense for the Administrator who would be required to:

(a) establish that no spouse or children are still alive, as they will have a higher priority claim;

(b) take claim details from each grandchild which is likely to result in conflicting data;

(c) verify the eligibility and claim data of each grandchild. Each grandchild claim is likely to require the verification of three sets of birth certificates which may cover a span up to a century. This verification does not include proof (nor could it) that the person making the claim is the only person that would be entitled to claim;

(d) make reasonable enquiries to identify and locate grandchildren who do not register, to ensure that all grandchildren are able to participate in the interests of fairness;

(e) correspond with the assumed 10 grandchildren on an ongoing basis, including in relation to the status of their claim and verification work being undertaken;

(f) address potential difficulties that arise such as conflicting documentation, and where familial connection is established for some but not all of the Registered Representative grandchildren; and

(g) provide summary advice to the Administrator on the findings of the verification process.

247 Ms Tucker estimated the extra time likely to be spent in respect of one Deceased Claimant at approximately 13 hours, at a cost of approximately $4,384 (incl GST). When it is kept in mind that approximately 8,512 of the Participating Claimants are deceased, and that the great majority died intestate, the substantiality of the increased cost is plain. Even on the assumption that it is appropriate to halve Ms Tucker's estimate of the extra time likely to be spent, the increased costs total in the vicinity of $18 million. Again, the net result of undertaking this work would be significant further costs and delay without a correlative increase in the class members who receive a distribution because, even if grandchildren are permitted to register, spouses and children take first priority.

248 Having regard to the applicant's modelling of the amounts of compensation likely to be payable to each category of class member (set out at [251] below) a deceased male Aboriginal claimant in the DOB1 band is estimated to receive approximately $15,885 in compensation whereas at the other end of the scale a deceased female Islander claimant is estimated to receive approximately $5,283. Thus:

(a) for the male Aboriginal Deceased Claimant the estimated cost of processing claims by the assumed 10 grandchildren would be 27.6% of the total amount to be distributed, in circumstances where each grandchild would only receive $1,588.50; and

(b) for the female Islander Deceased Claimant the estimated cost of processing claims by the assumed 10 grandchildren would be 82.9% of the total amount to be distributed, in circumstances where each grandchild would only receive $528.33.

The costs of a more perfect distribution procedure would erode the notional benefit of doing so.

249 *Fifth*, the comprehensive notice regime in relation to the proposed settlement informed class members in clear terms that it was proposed that only the living spouses and children of deceased class members would be allowed to claim on their behalf, and that grandchildren could not. The Notice of Proposed Settlement informed class members that Participating Claimants could object to the proposed settlement if they wished to do so, and none of the objections raised this issue. Ms Snider objected on the basis that the SDS does not allow her to recover compensation on behalf of her grandfather's cousin, who died intestate without leaving a surviving spouse or children, but that involved an even more remote assertion of kinship.

250 Having regard to the above I was satisfied that the proposal to limit the kin who are able to claim on behalf of Deceased Claimants strikes an appropriate balance between allowing the family of Deceased Claimants to benefit from the settlement without the cost, delay and inefficiency that would result if every person that may be entitled to claim under an intestacy were eligible to claim under the SDS.

The estimated distribution to each category claimant

251 For the purposes of settlement approval, based on a net settlement amount of $140 million after Court-approved deductions, the applicant's estimated the following approximate compensation amounts payable to Participating Claimants in each category:

Subcategory	Eligible Claimants	Adjusted Distribution of Settlement Sum
Male Aboriginal DOB1	181	$22,693.92
Male Aboriginal DOB1 Deceased	1,402	$15,885.75
Male Aboriginal DOB2	321	$19,514.78
Male Aboriginal DOB2 Deceased	1,085	$13,660.35
Male Aboriginal DOB3	300	$17,346.47

Male Aboriginal DOB3 Deceased	1,014	$12,142.53
Female Aboriginal DOB1	270	$17,753.38
Female Aboriginal DOB1 Deceased	1,326	$12,427.37
Female Aboriginal DOB2	481	$14,964.70
Female Aboriginal DOB2 Deceased	937	$10,475.29
Female Aboriginal DOB3	449	$13,301.95
Female Aboriginal DOB3 Deceased	875	$9,311.37
Male TSI	465	$9,686.75
Male TSI Deceased	1,290	$6,780.72
Female TSI	519	$7,547.58
Female TSI Deceased	1,034	$5,283.30

The reasonableness of the applicant's legal costs

252 The Court has a supervisory role in relation to costs paid by class members and should scrutinise costs as part of the settlement approval process: *Kelly* at [11], [333] and [346]. As I said in *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433 at [91]:

> The Court should satisfy itself that the arrangements in relation to legal costs meet any relevant legal requirements, contain reasonable and proportionate terms relative to the commercial context in which they were entered, and that the costs and disbursements are in accordance with the terms of the relevant agreements and are otherwise "reasonable": *Courtney v Medtel Pty Limited (No 5)* (2004) 212 ALR 311; [2004] FCA 1406 at [61] (Sackville J); *Modtech* at [32]; *Newstart* at [14].

253 The SDS provides that the Court-approved legal costs incurred by Mr Pearson be deducted from the settlement sum prior to distribution of any compensation to class members, which reflects the Funding Terms under the common fund order. It is fair and reasonable that all class members who share in the benefits of the settlement pay a proportionate share of the costs incurred to obtain it: see *Caason* at [108] and the cases there cited.

254 The applicant's legal cost and disbursements are substantial, totalling $13.88 million. To establish their reasonableness the applicant relied upon affidavits of Mr Bottoms and Mr Alan Adrian of QICS Pty Ltd, an independent legal costs consultant retained pursuant to a memorandum of understanding between BELAW, LLS and QICS Pty Ltd dated 12 December 2017. The applicant submitted that the Court should be satisfied as to the

reasonableness of the costs and disbursements charged because they had been independently checked and verified by Mr Adrian on an ongoing basis, and because LLS (which had an interest in minimising legal costs) had been satisfied that BELAW's charges were fair and reasonable.

255 While I was satisfied on the basis of the evidence that the great bulk of the costs invoices rendered by BELAW and paid by LLS were reasonable, I had concerns about two categories of costs and disbursements described as "Deferred Administrative Tasks" and "Deferred Financial and Budgeting Tasks", totalling $872,720.90.

256 The work undertaken and costs in each category may be summarised as follows:

(a) Deferred Administrative Tasks totalling $558,835.62, which comprised:

- Administrative Tasks chargeable pursuant to the funding agreement (known as B21 tasks) – $343,102.30;
- "Potential Claimants" – enquiries which didn't result in a signed funding agreement before the class opened – $124,746.04;
- Sundries – $23,392.28; and
- QICS fees – $67,595.00;

(b) Deferred Financial and Budgeting Tasks totalling $313,751.49 which comprised:

- "New work" – unbilled entries, found to be chargeable during a costs assessment review – approximately $50,952.55;
- 50% of travel costs incurred by BELAW – approximately $136,441.47;
- Financial and budgeting tasks, chargeable according to QICS (known as B22 tasks) – approximately $95,702.59;
- Sundries – approximately $14,288.67; and
- QICS fees – approximately $16,500.

257 Mr Adrian deposed that following a joint review in 2017 of the invoices, the costs and disbursements in those two categories were deemed to be non-payable by LLS. He also deposed however that in his view those amounts were necessarily and properly incurred and formed part of the reasonable costs of the proceeding. I was concerned with this apparent inconsistency and requested that Mr Adrian and Mr Bottoms give oral evidence in that regard.

258 The evidence of Mr Bottoms and Mr Adrian did not resolve my concerns and I concluded that the interests of class members in relation to costs would be best protected through the appointment of a Court-appointed referee to review those costs: see *Caason* at [111]-[124] and also the remarks of Lee J in *Lifeplan Australia Friendly Society Limited v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Company Incorporated in New York)* [2018] FCA 379 at [40]-[41]. I appointed Ms Harris as Costs Referee to inquire and report to the Court in relation to:

(a) the reasonableness of the costs and disbursements claimed in the two categories to which I have referred ; and

(b) costs and disbursements incurred in the settlement approval process since Mr Adrian's first affidavit.

259 Ms Harris provided a report dated 13 December 2019 in which she gave thorough consideration to the issues in relation to the reasonableness of the costs and disbursements in those categories, adopting a rigorous approach and providing cogent reasons for her conclusions. Ms Harris concluded that only some of the costs in the two categories were reasonable and recommended allowing those costs in the reduced amount of $326,589.76, representing a reduction of almost $550,000 from the amount claimed. Ms Harris also later provided a supplementary report dated 16 December 2019 and later reports dated 28 January 2020 and 23 March 2020 in relation to some other issues regarding the costs claimed.

260 I considered it appropriate to adopt each of the Costs Referee's reports. Having regard to the evidence of Mr Adrian and Mr Bottoms, the Costs Referee's independent scrutiny, the size, novelty, and complexity of the proceeding, and the substantial extra expense involved in communicating with class members including through the outreach programs, I was satisfied that it was appropriate to approve total costs and disbursements of $13,881,952.17 as the "Applicant's Legal Costs and Disbursements" for the purposes of the SDS, being the sum of the $13,584,233.92 approved in the settlement approval orders and a further amount of $297,718.25 pursuant to the Costs Referee's later assessments of costs including in relation to the settlement approval application.

The reasonableness of the litigation funding commission

261 On 25 August 2017 the Court made a common fund order pursuant to s 33ZF of the FCA, pursuant to which LLS was obliged to pay the costs incurred in bringing the litigation, pay

any security for costs and meet any adverse costs liability. In return the applicant and class members were required pay to LLS from any settlement achieved in the proceeding:

(a) the costs and expenses of the proceeding;

(b) 20% of the settlement sum (or such lower percentage as the Court considers reasonable at that time); and

(c) GST.

262 The common fund order was made at an early stage in the proceeding, but it was not made to "assure a potential funder of the litigation of a sufficient level of return upon its investment to secure its support for the proceeding": see *BMW Australia Ltd v Brewster* [2019] HCA 45 (2019) 374 ALR 627 (***Brewster***) at [3] (Kiefel CJ, Bell and Keane JJ). The proceeding was well underway at the time the order was made and there was already a substantial number of signed-up class members, such that the proceeding was financially viable for LLS. In *Pearson* at [23] I explained that I approved the funding commission at a rate of 20% "or such lower percentage as the Court considers reasonable at a point when the Court is armed with more complete information as to the quantum or likely quantum of any settlement or judgment. That is likely to be at the stage of settlement approval, or if there is no settlement, at the stage of distribution of damages" I made the common fund order because, amongst other things: an order requiring all class members who benefit from a settlement or judgment to pay the same pro rata share of the funding commission incurred to obtain the settlement or judgment was fair; the funding rate of 20% was reasonable having regard to several specified considerations; the Court could later reduce the funding rate and class members thus had the benefit of continued judicial oversight in relation to funding charges; and making the order at that point allowed class members to make an informed decision as to whether to opt out: see *Pearson* at [22]-[33].

263 Subsequently, on 4 December 2019, part way through the settlement approval hearing, the High Court handed down judgment in *Brewster*. The majority in *Brewster* held that s 33ZF does not empower the Court to make a common fund order.

264 However, and importantly, as an order of a superior court, the common fund order remained valid until and unless set aside. As the High Court explained in *State of New South Wales v Kable* [2013] HCA 26; (2013) 252 CLR 118 at [32]:

> It is now firmly established by the decisions of this Court that the orders of a federal court which is established as a superior court of record are valid until set aside, even

> if the orders are made in excess of jurisdiction (whether on constitutional grounds or for reasons of some statutory limitation on jurisdiction).

This applies to interlocutory orders as to final orders.

265 Neither the applicant nor the respondent, nor any class member, applied to set aside the common fund order. The applicant and LLS submitted that the common fund order remained valid, that it was capable of operating without further order, and that there was no reason for the Court to make any other order with respect to the payment of the litigation funding commission.

266 LLS argued that the extant common fund order had not been shown to have produced an unforeseen or inappropriate outcome and that it ought not be disturbed. It submitted that there was no reason for the Court to disturb the order, and that the order can and would then operate according to its terms. The State also supported the continuation of the common fund order instead of the Court making some other order to equitably apportion the burden of litigation funding charges amongst the class members.

267 LLS also submitted that if the Court took any step that might be regarded as a further order that might be seen to overtake the original order and make the new order amenable to appellate review and resultant delay. It argued that mischief was avoided if the common fund order was not reconsidered.

268 In my view the extant common fund order can operate without further order of the Court, and I consider it would only be necessary or appropriate to revisit that order if I was not satisfied that 20% represented a fair and reasonable funding commission rate. In the circumstances of the case I saw no reason to make a further order in relation to litigation funding charges.

269 As I have said, to those uninitiated in large, complex class action litigation, a funding commission of $38 million, representing 20% of the gross settlement, may seem an extraordinary and unwarranted reduction in the amount available for distribution to class members. But having thought carefully on the issue I considered the funding rate under the extant order to be fair and reasonable.

270 *First*, the case required LLS to take on substantial costs and risks from the outset of the litigation, when the outcome was far from certain. I have already described the risks on liability and quantum and I need not reiterate them. By the date of the settlement approval orders, LLS had paid $12.65 million in costs and disbursements incurred in the proceeding.

If the initial trial on the common issues had proceeded to hearing, LLS's total costs were likely to have been close to $17 million, with further legal costs to be incurred in a later hearing in regard to aggregate damages. Appeals would have also been likely, further adding to those potential costs.

271 LLS indemnified the applicant and class members in respect of any adverse costs orders made in the proceeding, which indemnity was not capped. Although LLS estimated the quantum of its adverse costs exposure at a lower level, in my view it faced a risk of an adverse costs order in the order of $15 million if the case was ultimately unsuccessful. The evidence is that LLS would meet any such order from its own balance sheet, and it did not lay off that risk through After the Event insurance. Having regard to that expenditure and risk, I was satisfied that the 20% funding rate in the common fund order remained reasonable.

272 *Second*, the Court accepted in 2017 that a funding rate of 20% of the gross settlement compared favourably with the rates generally offered in the litigation funding marketplace and that, at least in part, LLS offered that rate because of its interest in the social justice aspect of the case: *Pearson* at [24]. In my view 20% of the gross settlement (which equates to approximately 21.58% of the net settlement after deduction of approved legal costs) continued to compare favourably with the rates offered in 'standard' class actions. For class actions which settled during the period January 2013 to December 2018 the median funding rate was in the range of 25.5 to 26.0% of the gross settlement: *Kuterba v Sirtex Medical Ltd (No 3)* [2019] FCA 1374 at [10] (Beach J). But the present case is far from a 'standard' class action; it was novel and complex, it involved a high level of risk and uncertainty as to the outcome and it posed unique challenges and expense. Those matters would justify a funding rate above the median, and well-above the 20% set under the common fund order.

273 *Third*, the evidence tends to show that most class members accept that 20% is a reasonable funding rate. 3,766 class members entered into a funding agreement with LLS and thereby accepted a 20% funding rate, the balance of the participating class members registered to share in the compensation after being informed of the 20% funding rate. Only four class members objected to settlement approval on the basis that the funding commission was excessive, and in my view those objections had little force and displayed hindsight bias. Mr Savo asserted that a 10% funding rate was appropriate but, with respect, that funding rate appeared to be plucked from thin air and it failed to take into account the substantial costs and risks LLS assumed and the funding rates generally available in the litigation funding

marketplace. At the outset of this proceeding no commercial litigation funder would have taken on its costs and risks for a funding commission of 10%.

274 *Fourth*, the $190 million result achieved in the litigation is excellent given the difficulties in the case. It could not have been achieved without the funding provided by LLS and it is important that the courts approve funding rates that "recognise the important role of litigation funding,…are commercially realistic and properly reflect the costs and risks taken by the funder", without hindsight bias: *Money Max* at [120]. I consider the aggregate funding commission of $38 million to be proportionate to the amount recovered in the proceeding and the risks assumed by LLS. It does not constitute a windfall gain for LLS and it results in a reasonable and proportionate outcome for class members. After deduction of litigation funding charges *and* legal costs, class members will receive approximately 73% of the settlement achieved.

275 Finally, it is perhaps worth noting that, while I considered it unnecessary to revisit the extant common fund order, had I done so the result is unlikely to been any different. In the circumstances of this case it would have been appropriate to make an order under s 33V(2) of the FCA to distribute the burden of costs, fees and all other expenses, including litigation funding charges, equitably among all persons who have benefited from the class action from the common fund of their recoveries, as provided under Class Actions Practice Note (GPN-CA) at [15.4]. For similar reasons to those set out above I would have been satisfied that it fell comfortably within the concept of "justness" in s 33V(2) to order that 20% of the gross settlement be paid to LLS from the settlement fund.

The reasonableness of the settlement administration costs

276 Unfortunately, the tender documents provided to the four accounting firms inviting them to tender for the role of Administrator failed to clearly delineate the respective roles of the Administrator and BELAW as the proposed Advisor. The tenderers proposed a wide range of fee estimates but they reflected different assumptions as to the costs likely to be incurred by the Advisor. For example, one tender provided a quote of $2.9 million which included $1.2 million in fees charged by the Advisor, and another tender provided a quote of $950,000 which allowed only $50,000 for the Advisor's fees.

277 In an affidavit made 15 November 2019 Mr Bottoms deposed that the following work was likely to be required to be undertaken by BELAW as Advisor:

(a) Completing data entry of Claimants to Database;

(b) Transfer of database to Administrator;

(c) Consultation with Administrator regarding verification process and missing data needed;

(d) Preparation of court applications and directions;

(e) Adding late registrants to the database;

(f) Correspondence with claimants regarding further information required;

(g) Notification and correspondence with ineligible claimants;

(h) Conferring with Administrator regarding the settlement distribution calculation;

(i) Correspondence with claimants regarding distribution statements;

(j) Correspondence with claimants regarding distribution amounts;

(k) Handling inbound correspondence with claimants throughout scheme process.

In an affidavit made 21 November 2019 Mr Bottoms estimated BELAW's charges as Advisor in the amount of $827,531.60.

278 Initially BELAW's proposed role as Advisor extended well beyond advising the Administrator on legal issues in relation to the SDS, and it was proposed to have the primary role in communicating with class members, inputting claims information into a database and corresponding and communicating with class members. I considered there were likely to be advantages in having BELAW as the primary point of contact with class members given its long history of acting for indigenous communities in Queensland, that it was well known to the class through the proceeding and had developed a good relationship with many class members, and that it had successfully communicated with class members throughout the proceeding. But having regard to the tender documents, there appeared to be a significant overlap between the respective roles of the Administrator and the Advisor and I was concerned that some of the estimated costs may have been double counted. There was also potential for wasted costs to arise from the lack of clarity about the respective roles.

279 By orders made 21 November 2019 I directed the Costs Referee to inquire and report to the Court regarding the reasonableness of BELAW's estimate of its fees for acting as the Advisor. On 10 December 2019 the Costs Referee advised that she was unable at that point to provide a report because the SDS was not finalised and because the tenders took different

positions as to the role of the Advisor and the assessment therefore depended on which firm was appointed as Administrator.

280 Initially Grant Thornton provided a fixed fee estimate of $762,300 (exclusive of BELAW's costs as Advisor) subject only to Court-approved increases. Subsequently, in light of the increased number of participating class members revealed as more claimant data was entered into the database, Grant Thornton increased its fixed cost estimate to $1.07 million, subject to any Court-approved increase. That increase seemed reasonable enough but BELAW made a dramatically increased estimate of its proposed charges as Advisor – up to a total of $4.54 million. That increase would have meant total settlement administration costs in the order of $5.6 million.

281 At the resumed settlement approval hearing on 19 December 2019 I informed the applicant that I had concerns regarding the substantial increase in the Advisor's fee estimate and I was not prepared to approve settlement administration costs of $5.6 million. I said that I would not approve the SDS (which proposed the appointment of BELAW as Advisor) until I could be satisfied that BELAW's proposed charges were reasonable.

282 On 20 December 2019 I held a telephone mention with Mr Bottoms together with Mr Jonsson and Mr Beven. Mr Bottoms expressed various difficulties with providing a more accurate and lower estimate of the likely charges, essentially because he considered the characteristics of the class meant that there were likely to be many repetitive communications with class members regarding compensation entitlements, and a high level of disputation. I informed Mr Jonsson and Mr Beven that the appointment of an appropriate Advisor was a matter for the Administrator, the tasks necessary to be performed by the Advisor were a matter for the Administrator, and that it was the Administrator's responsibility to ensure that the settlement administration was conducted efficiently, including by ensuring that the cost of communication with class members was reasonable and proportionate. I directed Grant Thornton and BELAW to propose a better delineation of their respective roles under the SDS and requested them to reconsider the fee estimates they had provided.

283 On 6 January 2020 Grant Thornton wrote to my Chambers and said that in consultation with BELAW it had reviewed the proposed scope of works to be undertaken under the SDS and clarified the responsibilities of Grant Thornton as Administrator, including by:

(a) assuming responsibility for many of the tasks previously allocated to be undertaken by BELAW;

(b) reassessing the tasks that could be undertaken at lower levels, particularly in regard to the verification of claimants and standard communications with claimants; and

(c) avoiding duplication and monitoring the reasonableness of the Advisor's charges through an oversight mechanism, including a recent legal costs agreement with BELAW.

Based on its assumption of the increased work it would undertake Grant Thornton revised its quote upward to $1.81 million, subject only to Court-approved increases. BELAW revised its fee estimate downwards to $2.22 million. The revised total was therefore $4.03 million, a reduction of about $1.57 million on the previous estimate.

284 I accepted that there were difficulties for Mr Bottoms in reaching a reasonably accurate estimate of BELAW's likely fees but I was not satisfied that the estimate of $4.03 million was reasonable. Given the Costs Referee's difficulties in making an assessment at that point I decided not to approve any estimate for the Advisor's fees and instead:

(a) to amend the SDS to provide for the Costs Referee to assist the Administrator to assess the reasonableness and proportionality of the Advisor's charges on an ongoing basis; and

(b) to direct that the Costs Referee inquire and report to the Court at three monthly intervals as to the reasonableness and proportionality of settlement administration costs charged or proposed to be charged by the Advisor.

On 17 January 2020 I made such orders.

285 The early signs are that this regime to supervise and control settlement administration costs is working. On 1 May 2020 the Costs Referee informed chambers that the communication with class members was proceeding in an effective and an efficient manner and that a formal arrangement has been implemented whereby the Administrators provided clear instructions to the Advisor setting out the scope of advice and assistance required. Where necessary, the Advisor contacted the Administrators to seek to expand the scope of the work. The Costs Referee reported that this arrangement was working well.

The reimbursement payment to the applicant

286 It is established that that an applicant in a class action who has sacrificed time and/or incurred expenses in prosecuting the action on behalf of the class may be entitled to some reimbursement from the corpus of any settlement or judgment. The compensation is for the time and expense attributable to the representative features of the applicant's involvement as a party in the litigation, not to compensate the applicant for the time and expense which are an ordinary incident of the applicant's involvement in his, her or its own interests: *Caason* at [176] and the cases there cited.

287 The applicant sought a payment of $35,000 for the time, cost and inconvenience of his acting as the lead applicant in the proceeding, for the benefit of the class members.

288 Mr Bottoms deposed to the significant amount of work that Mr Pearson undertook throughout the proceeding, which included significant time giving instructions and receiving advice, many days spent providing a detailed statement for use in the trial on the common issues, attending case management hearings and interlocutory hearings held in Brisbane in 2016 and 2017 as well as the two-day preservation of evidence hearing in Cairns, and attending six of the seven one to two-day mediations. These attendances required Mr Pearson to travel from his home in Townsville and stay in Brisbane and Cairns.

289 Mr Pearson also spent significant time and effort in explaining the class action to class members and his role as an elder in the Aboriginal community in North Queensland was important in drawing class members' attention to the class action and in building trust with the community in relation to it. He attended Court-ordered information meetings where he spoke with and answered class members' questions at Murgon in 2016, and at Cherbourg, Palm Island and Townsville in 2018 and 2019, and throughout the duration of the proceeding he also fielded telephone calls from class members. Following the announcement of the settlement he was so inundated with telephone calls that he ultimately decided to change his telephone number. Mr Bottoms deposed that Mr Pearson's importance to the proceeding was such that he became a focal point for the indigenous community in relation to the class action.

290 Such a high level of time, travel and personal involvement must have been very onerous for a man who is now aged 80, and I considered it to be fair and reasonable that he receive the proposed reimbursement payment for his work on behalf of the class.

Financial counselling

291 Having regard to the fact that many of the class members are not well-educated and lack commercial and legal sophistication, I had a concern that upon receipt of lump sum compensation some might be might be vulnerable to exploitation. I asked the applicant to consider whether the SDS should include provision to set aside an amount so that those class members who wish to do so can be provided with financial counselling, advice and assistance.

292 Ultimately both parties admitted that it was appropriate to set aside an amount for the purpose of providing class members with financial counselling and advice. BELAW approached national accounting firms BDO, Grant Thornton, and KordaMentha, and also the Indigenous Consumer Assistance Network (**ICAN**), regarding their preparedness and capacity to provide financial counselling services to class members who are to receive compensation under the SDS. Each of the firms said that from their experience there was a legitimate concern that class members may be vulnerable to exploitation, and each indicated a preparedness and capacity to provide financial counselling, advice and assistance.

293 Ultimately the applicant proposed ICAN to undertake this work. It is a not-for-profit charity that has been operating in North Queensland and the Torres Strait since October 2007, with the objective of empowering indigenous consumers. It is structured as a public company limited by guarantee, with six directors and 20 employees across four offices located in Cairns, Townsville and the Yarrabah and Palm Island Aboriginal communities, and funded by the federal government. It is registered with the Australian Charities and Not for Profits Commission and has experience in delivering financial counselling and capability services to indigenous communities across Queensland. The materials state that it delivers financial counselling, and financial capability and training services to indigenous people with a particular focus on delivering these services to remote communities. It was recently appointed to provide financial counselling and advice to the Palm Island Aboriginal community in relation to the Palm Island class action settlement: see *Wotton v State of Queensland (No 11)* [2018] FCA 1841 (***Wotton***).

294 In response to BELAW's approach ICAN said:

> Remote and discrete Indigenous communities experience a combination of geographical, historical and cultural factors which increase situational vulnerability to consumer detriment, when coupled with lower literacy rates and limited access to financial counselling services. The combination of these factors presents a 'unique

> set of circumstances' for Indigenous-specific consumer exploitation to occur.
>
> Over its 11 years of financial counselling and capability service delivery to Aboriginal and Torres Strait Islander peoples, ICAN has uncovered a number of systemic consumer issues where traders were found to be targeting Indigenous consumers through practices of telemarketing, door-to-door trading of goods and services at inflated prices and signing residents up to inflated and illegal consumer credit contracts. Usually, Indigenous consumers do not have the financial capacity to enforce their legal rights in respect of these predatory behaviours. ICAN's consumer advocacy work in the above areas has led to a number of enforcement actions by state and federal consumer regulators against various traders who were found to be operating unconscionably or in direct breach of consumer credit laws.
>
> ***There are potential financial implications for Queensland Stolen Wages settlement recipients, which can have short and longer-term impacts***. Historically, where lump-sum payments have been available to residents of the Yarrabah Aboriginal community (located 45 minutes south-east of Cairns), ICAN notes there were significant longer-term financial implications.

ICAN then set out several examples in which members of indigenous communities that had received lump-sum payments were allegedly exploited by predatory traders and credit providers.

295 ICAN set out an overview of the financial counselling and advice services it proposed to provide to claimants under the SDS, namely:

(a) specialist advice about the implications of the settlement on existing government payments and entitlements;

(b) specialist advice on dealing with creditors wanting payments for existing debts;

(c) referrals to ethical investment advice, including Indigenous Business Australia home ownership;

(d) referral and linkages to the Queensland Public Trustee for people that are wanting to create a will or have a disability which impacts their capacity to make reasoned financial judgements;

(e) support to prevent economic abuse by family or friends; and

(f) financial literacy education/advocacy to prevent/address exploitative trader behaviour.

Because of the much greater number of claimants in the present class action and the breadth of their geographical spread across Queensland, ICAN did not offer the same face-to-face financial counselling services as it offered in relation to the Palm Island class action settlement service. It instead proposed that the service to be provided through a telephone hotline service.

296 The applicant sought an order that ICAN be appointed to provide financial counselling and advice to recipients of compensation under the SDS who wish to receive it, for a fixed amount of $200,000. I was satisfied that it is fair and reasonable to make that order, for similar reasons to those I expressed in *Wotton* at [15]-[18]. In summary, because:

(a) many of the class members are likely to be vulnerable to exploitation;

(b) class members who receive a lump sum may benefit from the provision of access to impartial advice from financial counsellors who have expertise in providing advice to members of indigenous communities. It will be the class member's choice as to whether he or she accesses the available advice;

(c) some Registered Representatives have more than one claim, and thus some families may receive an amount of compensation which provides an opportunity to make a significant change to their situation. Given their possible vulnerability to exploitation that might not occur unless they receive advice directed to putting the compensation to their best use; and

(d) the recoveries by class members will not be materially diminished by setting aside this amount. The cost will be more than offset by interest on the settlement fund.

CONCLUSION

297 This case was a good example of the successful operation of the Part IVA and analogous regimes. It shows, yet again, that when class actions are properly conducted and appropriately managed by the courts, many affected persons can recover compensation for civil wrongs which they would not otherwise have been able to obtain, including people suffering from substantial disadvantages in terms of economic capacity, education, geographic location and cultural issues, which otherwise present significant barriers to their access to justice.

I certify that the preceding two hundred and ninety-seven (297) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Murphy.

Associate:

Dated: 8 May 2020