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SEAL OF THE FEDERAL COURT OF AUSTRALIA

FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL NO VID 312 OF 2021

MINNIE MCDONALD
Applicant

COMMONWEALTH OF AUSTRALIA
Respondent

RESPONDENT'S FURTHER SUBMISSIONS ON SETTLEMENT APPLICATION

1. These submissions have been prepared for the purposes of the further settlement approval hearing on 17 December 2024. In these submissions, the Commonwealth briefly addresses the following matters in light of the further material that has been filed following the settlement approval hearing on 7 November 2024, and the Court's recent judgment in *Street v State of Western Australia* [2024] FCA 1368 (***Street***): (i) the amount to be paid to the Funder from the Settlement Fund Account, (ii) the amount to be paid from the Settlement Fund Account to the Applicant's legal representatives (Shine) including in relation to its proposed outreach and registration program, and (iii) the priority and sequence of payments to be made from the Settlement Fund Account. The Commonwealth otherwise relies on its submissions of 1 November 2024 (**CS**) in relation to these matters.

A. DEDUCTIONS FOR FUNDER'S COMMISSION AND INSURANCE

2. In its submissions of 1 November 2024, the Commonwealth addressed deductions for the Funder's commission and after the event (**ATE**) insurance[1], and proposed that the Court consider not approving a deduction in respect of the ATE insurance premium, and approve a commission calculated as a percentage of the per person payments, not the gross settlement payment (inclusive of costs), subject to a cap in the event that the number of Eligible Claimants is in the upper range of possible outcomes.[2]

3. In *Street*, Murphy J rejected the approach proposed by the respondent in that case – to not approve the ATE insurance premium and fix the funding commission as a percentage of the net settlement payment – and instead decided to allow a deduction

[1] CS at [134]–[164].

[2] CS [155].

for the ATE insurance premium, and approve a funding commission of 16% of the gross settlement sum.[3]

4. In light of the Court's recent decision in *Street*, the Commonwealth makes the following observations regarding the general approach that the Court should take to determining the Funder's claim for approval of deductions in respect of its commission and reimbursement for costs.

5. First, there is no single correct approach to fixing the method for calculation of the Funder's commission. Despite the similarities between the structure of the settlement in *Street* and this case, there are some differences which the Court may consider justify a different approach to that taken by Murphy J. In particular, given that the Court in this case is asked to approve a deduction in respect of the Funder's commission before the registration process has been completed (or even substantially started) and therefore before the number of Eligible Claimants and therefore the total amount of the Settlement Sum is known, the Court may consider that an appropriate mechanism to prevent an excessive sum being paid to the Funder is to place a cap on the amount of the funding commission allowed.

6. Secondly, a number of the considerations that informed the Court's decision in *Street* to reduce the amount of the funder's commission also apply in this case. The Court should not approve deduction of an amount from the Settlement Sum in respect of the Funder's commission calculated in the way sought by the Funder, because it would result in an excessive deduction. However, whether the amount to be paid to the Funder is reduced by reducing the percentage at which the funding commission is calculated (as in *Street*), or by limiting the components of the settlement that are subject to the commission and not approving reimbursement of the ATE insurance premium (as proposed by the Commonwealth in its submissions dated 1 November 2024), requires consideration of which approach will produce an outcome that is fair and reasonable. As outlined in Annexure A to these submissions, the two methods produce different outcomes and different rates of return on investment, with the method proposed by the Commonwealth producing a higher return on investment for the Funder than the method approved by Murphy J in *Street* if the number of Eligible Claimants exceeds 6,000. Which method is appropriate therefore depends on whether the Court is minded to impose a cap on the amount of the Funder's commission. If it is not, then to avoid payment of a commission to the Funder that would be unjust in all of the circumstances, the Court should approve a deduction in respect of the Funder's commission calculated in the same way as that

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3 *Street* at [357]-[363].

approved by Murphy J (or use a lower funding commission percentage if the Court considers that the percentage applied by Murphy J would provide a return on investment that is excessive).

7. In light of the approach taken to determination of the funding commission in *Street*, the Commonwealth makes the following additional submissions.

A.1 The funding arrangements

8. In *Street*, Murphy J described the funding arrangements in that case, which his Honour observed had the "unusual effect" that, from about one year before the trial, "the burden of the fees and disbursements incurred in bringing the case to trial had shifted entirely to Shine".[4] The Funder's limited funding contribution formed a significant part of his Honour's decision to approve a reduced funding commission of 16%.[5]

9. Although the quantum of the burden of the fees and disbursements that have been born by Shine in this case is less than in *Street*, that largely reflects the fact that this case settled significantly earlier than *Street*, in which the proposed settlement was reached only five days before trial.[6] Contrary to the Funder's submission (Funder's Supplementary Submissions dated 3 December 2024 (**FSS**) at [20] – [21]), there are similarities between *Street* and this case in relation to the extent of the Funder's commitment to fund each proceeding. As in *Street*, this consideration should inform the determination of what is a fair and reasonable proportion of the settlement sum to be received by the Funder as its commission.

10. In this case, the Funder committed a fixed budget (capped funding) of $10,520,758.[7] In *Street*, the amount of the funding cap was $10 million.[8] Similarly to *Street*, the funding cap would not have been enough to take the matter to trial.[9] In circumstances where the Funder had only agreed to fund the proceeding up to the amount of the cap, and there is no evidence that the Funder would have inevitably agreed to provide further funding beyond the cap if the matter did not resolve at mediation, the Funder's confined risk exposure should be taken into account in determining the return to the Funder that is fair and reasonable.

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4 *Street* at [303], and see generally [290]–[305].

5 *Street* at [362(b)–(d)].

6 *Street* at [29].

7 Affidavit of Vicky Antzoulatos dated 25 October 2024, [141] (**Antzoulatos**).

8 *Street* at [343].

9 *Street* at [305].

11. In this case, although the matter was, at the time the proposed settlement was agreed, a significant way off being ready for trial, the funding cap had almost been reached.[10] Shine's evidence is that it has carried an amount of $4,150,411.05 in respect of legal costs and disbursements (including GST and uplift).[11] Had the proceeding not settled when it did, the Funder had essentially no further contractual exposure and had made no commitment to fund the matter to trial.

12. If the matter had not settled, the "unrealistic"[12] funding cap of just over $10 million would have come at a cost to the Applicant and class members through additional uplift fees charged by Shine on the costs it would have needed to carry. The Commonwealth refers to Lee J's warning in *Lenthall v Westpac Life Insurance Services Limited* that "it would be an incomplete analysis to fail to have regard to the existence of such an 'uplift' arrangement in the context of assessing the reasonableness of a proposed funding fee which has, as its justification, the assumption of risk by the funder".[13]

13. Further, as in *Street*, in this case there were issues with delayed payment of Shine's invoices by the Funder.[14] In *Street*, his Honour referred to similar non-compliance by the Funder with the Litigation Funding Agreement, and observed that the Funder cannot "have it both ways" — that is, be granted a 20% funding commission provided for in the litigation funding agreement but not meet its side of the bargain.[15] The payment of the applicant's solicitor's invoices within normal trading terms is significant to a funder's entitlement to its funding commission.[16]

14. It is appropriate that the Funder's confined risk exposure be taken into account in determining the return to the Funder that is fair and reasonable.

A.2 Extent of Funder's risk of adverse costs order

15. In *Street*, the Funder's risk of an adverse costs order was quantified at $3.6 million, a "relatively modest" figure compared to the funding commission.[17]

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10 Antzoulatos, [142]; see also Affidavit of Stephen James Conrad dated 3 December 2024, [4(a)], [4(d)] (**Second Conrad Affidavit**).

11 Antzoulatos, [144].

12 *Street* at [305].

13 *Lenthall v Westpac Life Insurance Services Limited* [2018] FCA 1422, [49].

14 Antzoulatos, [141]-[150], Affidavit of Stephen James Conrad dated 29 October 2024, [114] (**Conrad**).

15 *Street* at [362(f)]

16 *Street* at [326].

17 *Street* at [322].

16. The Funder's exposure in this matter was much the same. The Commonwealth's actual legal costs as at mediation were approximately $7,241,500.[18] The Commonwealth's estimate of its legal costs up to and including the initial trial (listed for March 2025) is approximately $12.5 million (although its costs may have been lower).[19] Applying a rough approximation that 70% of actual costs may be recoverable as party-party costs, the Commonwealth's party-party costs as at the conclusion of the initial trial would have been approximately $8.75 million.[20] Given the Funder was insured for an adverse costs order up to $5 million, the Funder's exposure was around $3.75 million. It is accepted that, given the difficulties with the Applicant's case, there was a risk of an adverse costs order and the funding commission should reflect that risk (CS [144]). However, the relevant question in this case is what was the extent of the risk (*cf* FSS [35]). It is relevant to the assessment of the fairness and reasonableness of the proposed return to the Funder that the value of the risk of an adverse costs order taken on by the Funder was limited to approximately $3.75 million.

A.3 Return on investment

17. In its initial submissions, the Commonwealth set out the Funder's potential return on its investment, including the recovery of its funded legal costs.[21] Murphy J applied a similar analysis in considering the fairness and reasonableness of the Funder's commission in *Street*.[22] His Honour's analysis included, in particular, comparison of the total amount the Funder would receive from the settlement fund in that case, including reimbursement of funded legal fees,[23] against the Funder's investment. His Honour observed that the Funder's claimed commission would have provided a return on investment of 3.22 times[24] which, in light of the quantum of the settlement and the operation of the funding terms in practice was not fair and reasonable.[25] Justice Murphy instead adopted a funding commission rate that would provide a return on investment of 2.77 times.[26]

18. Set out below is an updated version of the table from the Commonwealth's initial submissions,[27] adjusted to take into account the Funder's Reply at [9.a] and to otherwise align with Murphy J's approach in *Street*. The table illustrates that, provided there are

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18 Second Affidavit of Paul Christopher made 9 December 2024 (**Second Barker Affidavit**) at [5].
19 Second Barker Affidavit, [8].
20 Second Barker Affidavit, [9].
21 CS at [137]–[138].
22 *Street* at [268]–[272], [311] and [358]–[363].
23 *Cf* Funder's Reply at [9.b].
24 *Street* at [359].
25 *Street* at [361].
26 *Street* at [362(g)].
27 CS at [137].

more than 4,000 Eligible Claimants, the Funder's claimed commission of 20% would provide a return on investment above that which the Court considered to be fair and reasonable in *Street*. If the number of Eligible Claimants is in the range of 6,000-8,000 – as the parties consider reasonably likely – the Funder's return on investment would be between 3.19 and 3.84 of its at-risk outlay.

Eligible Claimants	**20% Commission[28]**	**Funder's at-risk outlay[29]**	**Total claimed payments to the Funder[30]**	**Funder's return on investment**
3000	$14,212,800.00	$11,070,758.00	$24,506,762.08	2.21
4000	$17,812,800.00	$11,070,758.00	$28,106,762.08	2.54
5000	$21,412,800.00	$11,070,758.00	$31,706,762.08	2.86
6000	$25,012,800.00	$11,070,758.00	$35,306,762.08	3.19
7000	$28,612,800.00	$11,070,758.00	$38,906,762.08	3.51
8000	$32,212,800.00	$11,070,758.00	$42,506,762.08	3.84
9000	$35,812,800.00	$11,070,758.00	$46,106,762.08	4.16
10000	$39,412,800.00	$11,070,758.00	$49,706,762.08	4.49

19. The Court is considering the Funder's commission at an earlier stage than in *Street*, when there is significant uncertainty regarding the total settlement sum. As the above table illustrates, the Funder's return on investment will vary significantly depending on the final number of Eligible Claimants. A particular percentage funding commission may or may not be fair and reasonable, depending on the quantum of the settlement sum.[31] A cap on the Funder's commission of the kind proposed by the Commonwealth in its initial submissions,[32] would allow the Court to approve the funding commission now, with greater certainty that the commission will be fair and reasonable, regardless of what the number of Eligible Claimants ends up being.

20. The Commonwealth proposed a cap in the range of $21.6 to $28.8 million.[33] A funding commission cap at approximately $19.6 million (corresponding to around 4,221 Eligible

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[28] Calculated on the basis that the commission is paid on all settlement sums. On the Costs Components, this calculation assumes: the Applicant's Agreed Costs will reach $15 million; the Administration Costs are $1.8 million (reflecting Order 11 of the Orders of 14 November 2024) and the Costs Assessor Costs are $264,000 (reflecting Order 12 of the Orders of 14 November 2024, plus allowing $64,000 for the costs of the *amici curiae*).

[29] The total amount the Funder was contractually required to fund ($10,520,758), plus the ATE insurance premiums paid to date of $550,000 (Conrad, [122]). The supplemental premium of $495,000 was only payable on receipt of a funding commission following the successful conclusion of the proceeding (Conrad [123] and page 78 of Exh SC1), so was not an at-risk outlay.

[30] The 20% Commission, plus reimbursement of $9,743,962.08 (Second Conrad Affidavit, [4](a)), plus reimbursement of the ATE premium paid to date ($550,000). Reimbursement of the supplemental premium of $495,000 has been excluded for the reasons in the footnote above.

[31] *Street* [311]; *Blairgowrie Trading Ltd v Allco Finance Group (in liq) (No 3)* (2017) 343 ALR 476 at [160].

[32] CS at [162]–[164].

[33] CS [162]. The range corresponded to 6,000–8,000 Eligible Claimants, but on the basis that a commission would not be paid on the Costs Components.

Claimants) would provide the Funder with a return that aligned with that in *Street* (2.77 times). However, the appropriate cap would also depend on the Court's decision regarding whether to approve a deduction by the Funder in respect of the ATE insurance premium. That is, if the Court decides that it is not fair and reasonable for the Funder to be reimbursed for the cost of the ATE insurance policy, then a slightly higher funding commission of around $21.4 million would provide a return on investment (or on the Funder's 'at risk outlay' per the table above) of 2.77 times.

B. DEDUCTIONS FOR APPLICANT'S COSTS

B1. Costs Referee's Report

21. Pursuant to the orders made on 16 and 24 September 2024, the Court has received a report of expert legal costs assessor Elizabeth Harris (the **Costs Referee**) dated 28 November 2024 (the **CRR**). There are three aspects of the opinion given by the Costs Referee that should not be accepted.

22. First, the hourly rates for Law Clerks that were accepted by the Costs Referee in assessing the reasonableness of the Applicant's costs on a solicitor-client basis are excessive, and the Court should not accept the Costs Referee's opinion on this issue.

23. Secondly, the Costs Referee incorrectly treated the costs of the Applicant's complaint to the Australian Human Rights Commission (**AHRC**) as recoverable for the purpose of assessing the Applicant's costs on a party-party basis. The Costs Referee's opinion on that issue should not be accepted, which will impact the amount that should be approved by the Court for the purpose of the Applicant's Agreed Costs.

24. Thirdly, the Costs Referee's assessment of the Applicant's reasonable costs on a solicitor-client basis includes an amount of $874,832.20 in respect of 'Future Work' between 1 November and 17 December 2024.[34] The assessment of the Future Work is based on an estimate of work to be undertaken in this period, rather than an assessment of the actual costs. The Court should not approve payment of these amounts as part of the Applicant's Agreed Costs or the Applicant's Actual Costs, but should await the Costs Referee's assessment of the value of the work actually performed during that period.

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[34] CRR at [4], [223]-[237].

25. Otherwise, the Commonwealth accepts that it is open to the Court to accept the balance of the CRR. It is a matter for the Court as to whether the uplift fee should be allowed as part of the Applicant's solicitor and client costs. [35]

26. The Commonwealth agrees with the Applicant that the costs of the CRR ($61,710 (inc GST)) should be paid from the $1 million allocated in the Settlement Deed to the Costs Assessor's Costs, rather than forming part of the Applicant's Agreed Costs.[36]

Excessive rates for Law Clerks

27. The Costs Referee considered it appropriate to calculate fees by reference to the Legal Costs Agreement (**LCA**) signed by the Applicant as the rates in the LCA were within the range of rates charged by plaintiff law firms with the expertise to conduct a class action.[37]

28. Shine has charged its Law Clerks at the following hourly rates:

    (a) $325 (GSTe) or $357.50 (GSTi) prior to 1 August 2020; and

    (b) $341 (GSTe) or $375.10 (GSTi from 1 August 2022.[38]

29. Clause 27 of the LCA provides that the applicable law is the Uniform Law (**LPUL**) as applied in New South Wales. The NSW Costs Assessment Rules Committee Guidelines (**Guidelines**) provide the following ranges of hourly rates on a party-party basis:

    (a) for paralegals (not admitted but holding a law degree or diploma or equivalent experience), a range of $120 – $250 (excl. GST) from 2016, and $135 – $300 (excl. GST) from May 2023; and

    (b) for 'clerks/secretaries' (unqualified), a range of $75 – $150 (excl. GST) from 2016, and $90 – $180 (excl. GST) from May 2023.

30. Under the Federal Court Scale (**Scale**), the following rates apply:

    (a) attendances capable of performance by a law graduate or articled clerk for each unit of 6 minutes: $27 i.e. $270 per hour (excl. GST); and

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35 CRR, [3], [194]-[195].

36 *cf* CRR, [238].

37 CRR, [49], [69].

38 See CRR, [50]. CRR, [50] indicates that the LCR provided that the Law Clerk rate prior to 1 August 2022 was $385 (GSTi). However, the LCR (see First Antzoulatos Exh VA-4 Tab 2) contains the GSTe rate of $325 ph and a GSTi rate of $385ph. The GSTi rate appears incorrect, as GST on $325 would be $32.50 making the GSTi rate $357.50 ph.

(b) attendances capable of performance by a clerk or paralegal – for each unit of 6 minutes: $13 i.e. $130 per hour (excl. GST).

31. In relation to unqualified Law Clerks, the hourly rate charged by Shine ($325 ph (excl. GST) until mid-2022, and thereafter at $341 per hour (excl. GST)) was/is significantly higher than that provided for by the Guidelines and by the Scale.

32. In *Street*, Murphy J:

(a) set out the principles for exercising the Court's discretion to reject or not adopt part of a referee's report;[39]

(b) found that the costs referee in that matter erred in concluding that Shine's hourly rates for law clerks (which were the same as for this matter) were fair and reasonable because they fell within 'the range of rates routinely charged by lawyers in complex commercial and representative proceedings'.[40] Relevantly, his Honour found[41] that the costs referee erred by:

(i) failing to sufficiently take account of the different hourly rates under the Guidelines and Scale that applied to qualified paralegals and unqualified law clerks;

(ii) failing to identify that approximately 75% of the Shine paralegals/law clerks were not legally qualified and attracted lower hourly rates under the Guidelines and Scale;

(iii) failing to appreciate that much of the class member registration work, opt out work and class member communication could have reasonably been undertaken by call centre and data entry workers, at substantially lower rates. In this regard, the costs referee's assessment of 'the range of rates routinely charged' was made expressly by reference to lawyers engaged in 'complex commercial litigation and representative proceedings'. In his Honour's view that broad brush approach failed to sufficiently take into account '*the nature of the work done'* by the law clerks;[42]

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39 *Street* at [224].

40 *Street* at [227].

41 *Street* at [227]-[228].

42 Citing *Downie v Spiral Foods Pty Ltd* [2015] VSC 190 at [181].

(iv) failing to take a global view as to the fairness and reasonableness of the costs associated with law clerk work in that case

(c) accordingly, approved Shine's professional fees as fair and reasonable with a reduction of $4 million from the amount approved by the costs referee,[43] which was roughly in line with the State's submission that hourly rates of unqualified law clerks should be reduced from $375.10 to $187.55 ph (which is a rate just above the maximum party-party rate allowed for clerks under the Guidelines) and that the claimed uplift should also be reduced in line with the reduced hourly rate.[44]

33. The Commonwealth submits that the Costs Referee similarly erred in the present matter and that the amount assessed by the Costs Referee on a solicitor-client basis should be similarly reduced by an amount which reflects a reduction by half of the hourly rate of unqualified Law Clerks, namely:

(a) $162.50 (GSTe) or $178.75 (GSTi) prior to 1 August 2020; and

(b) $170.50 (GSTe) or $187.55 (GSTi) from 1 August 2022.

34. Further, should the Court allow the uplift fee claimed (see [24] above), it should also be reduced in line with the reduced hourly rate.

35. The evidence does not disclose what proportion of the Law Clerks used by Shine in this matter were legally qualified (but not admitted) and not legally qualified. In *Street*,[45] Murphy J proceeded on the basis that about 25% of the law clerks employed on the *Street* proceeding were legally qualified (but not admitted) and the rest were unqualified. In the absence of further evidence from the Applicant on this issue, it seems reasonable to proceed on the same basis as in *Street*, given the two proceedings largely ran simultaneously[46] and it seems likely that many of the same law clerks would have worked on the two proceedings. AGS has written to Shine to seek information regarding the proportion of Law Clerks who worked on this matter who were unqualified and the proportion of the 'law clerk' work that they undertook.[47]

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[43] *Street* at [239].

[44] *Street* at [230]-[232], [234].

[45] *Street* at [210].

[46] Although, the *Street* proceeding commenced around 8 months before this proceeding (*Street,* [39]).

[47] See Second Barker Affidavit, Annexure PCB-16.

36. There is little evidence before the Court to justify charging Law Clerks at the rates set out in [28] above.[48] The CRR identifies that:

(a) 'clerical' work was undertaken by Law Clerks and charged for, which included arranging appointments, deliveries, collation of documents and arranging travel and attendances at the various communities.[49] The Costs Referee accepted that it was necessary for some of this work to be undertaken by Law Clerks and lawyers with knowledge of the specific requirements, but there was a proportion of this work which could have been undertaken by administrative assistants.[50] The Costs Assessor adopted a broad-brush approach in her reductions to take this into account;[51]

(b) Law Clerks had some involvement with 'searches', 'research', 'compilation of briefs to Counsel' and 'discovery' (although the nature and complexity of the work undertaken is not identified in the CRR)[52]

(c) 88.65% of the work in the group member communications/management and in-office time/group member communications and registration phase was undertaken by Law Clerks and members of the 'New Client Team';[53]

(d) Law Clerks were responsible for first drafts of subpoenas, which were settled by more senior practitioners and in some case counsel. The Costs Referee expressed the opinion that the overall time spent by Law Clerks on this task was 'unreasonable', and she took this into account in her global adjustment;[54]

(e) Law Clerks were involved in extensive planning and organisation of the Opt Out outreach program.[55] The Costs Referee noted that there was a level of administrative work which should have been undertaken by administrative assistants,[56] which was addressed as identified in subparagraph (a) above;

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48 In *Downie v Spiral Foods Pty Ltd* [2015] VSC 190 at [181], Forrest J said that the question as to the reasonableness of legal fees includes an assessment of "whether the charge out rate was appropriate having regard to the level of seniority of that practitioner and the nature of the work undertaken".

49 CRR, [106]-[108].

50 CRR, [109].

51 CRR, [115].

52 CRR, [73], [94], [126].

53 CRR, [138].

54 CRR, [147].

55 CRR, [154].

56 CRR, [155].

(f) Law Clerks were recorded as undertaking 362.6 hours work (at a cost of $123,515.40) for work associated with the Dr Skyring report.[57] This work may have included transcribing from typewritten or handwritten archival records, locating regulations, ordinances, particular archival documents and published sources, formatting the final report, formatting the footnotes, proof-reading and compiling the Annexures.[58] Some of this work was not allowed;

(g) Law Clerks provided assistance to Mr Box/Grant Thornton by searching for documents and drafting 'memoranda' (although the nature and complexity of the memoranda is not disclosed in the CRR);[59]

(h) Law Clerks attended the Pre-Approval Outreach Program sessions;[60]

(i) Law Clerks would be answering group member enquiries in the Future Costs Spreadsheet.[61]

37. As was found to be the case in *Street*, much of the work identified above is not complex (or there is no evidence of complexity) and "should not command such top of the market hourly rates".[62] While other work may have been undertaken by Law Clerks (which is not expressly identified in the CRR), there is no evidence to indicate that it was of sufficient complexity to justify the "top of the market" hourly rates charged.

38. For substantially the same reasons identified by Murphy J in *Street* (see [32(b)] above), the Costs Assessor's opinion that the rates charged by Shine for unqualified Law Clerks were reasonable should not be accepted.

39. The CRR[63] records that Law Clerks spent 77,595 units on the matter, resulting in a cost of $2,722,986.80. Whilst not stated in the report, that amount appears to be GST exclusive.

40. Assuming that:

(a) 75% of Law Clerks were unqualified; and

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57 CRR, [173].
58 CRR, [171].
59 CRR, [182].
60 CRR, Annexure G, [30(d)].
61 CRR, [234].
62 *Street* at [227]. See also [220].
63 CRR, [72].

(b) those unqualified Law Clerks undertook 75% of the work undertaken by all Law Clerks on the matter; and

(c) the Court were to reduce the hourly rate for Law Clerks by half (see [33] above) for unqualified Law Clerks,

then the fees charged for Law Clerks (see [39] above) would reduce by $1,021,120.05 (GSTe) or $1,123,232.06 (GSTi).

41. Applying the 6% global 'broad brush' reduction used by the Costs Referee to the above figures[64] would bring these figures to $963,320.80 (GSTe) and $1,059,652.88 (GSTI).

42. Accordingly, based on the assumptions set out in [40] above, it would be appropriate for the Court to reduce Shine's solicitor-client professional fees by the above amount, bringing the allowable amounts to $6,667,790.68 (GSTe) and $7,334,569.75 (GSTi).

43. The issue in relation to the hourly rate for Law Clerks applied by the Costs Referee only impacts her assessment of the Applicant's solicitor-client costs; it does not affect her assessment of the Applicant's party-party costs. That is because for the purpose of the assessment of the Applicant's party-party costs, the Costs Referee (amongst other things) adjusted the hourly rates to reflect the Scale rates[65]. Rates for non-lawyers were adjusted in accordance with items 1.2 and 1.3 of the Scale and the Costs Referee applied a minimum Scale rate of $110 ph and maximum of $130 ph for Law Clerks/Paralegals.[66]

Costs of AHRC complaint not recoverable on party-party basis

44. The Court should also not accept the Costs Referee's conclusion at CRR [134] that the costs of the AHRC complaint formed part of the reasonable costs in this proceeding on a party-party basis.

45. The AHRC is a 'no-costs' jurisdiction. The AHRC has no power to award costs against an applicant or respondent in relation to unlawful discrimination claims pursued in the AHRC.

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64 See CRR, [193].

65 CRR, [244].

66 CRR, [249].

46. The power to award costs under s 46PSA of the AHRC Act does not apply to applications made under s 46PO(1) of the AHRC Act before 2 October 2024.[67] Thus, for the purpose of this proceeding, the power to award costs is located in s 43(1) of the *Federal Court of Australia Act 1976* (**FCA Act**).[68] Section 46PSA of the AHRC Act (as it existed prior to 2 October 2024) is not relevant to the circumstances of this matter.[69]

47. The Court's power under s 43(1) of the FCA Act to award costs in a proceeding under s 46PO(1) of the AHRC Act does not extend to the costs of the AHRC Complaint.[70] Costs as between party-party means only the costs that have been fairly and reasonably incurred by the party in the conduct of the litigation.[71] Accordingly, the Applicant's costs of the complaint to the AHRC do not form part of the Applicant's Agreed Costs (as that term is defined in the Settlement Deed) and should not be paid from the $15 million that the Commonwealth has agreed to pay in respect of those costs.

48. The Commonwealth otherwise takes no position as to whether the Applicant's costs of the AHRC complaint properly form part of the Applicant's costs on a solicitor-client basis, and whether they should be deducted from the Settlement Fund Account.

49. The amount of the costs allowed in respect of the AHRC complaint has not been identified in the CRR, and therefore it is not presently possible to calculate the reduction that is required to the party-party sum determined by the Costs Referee ($10,742,056.50) to account for this issue. AGS has written to Shine and requested that inquiries be made of the Costs Referee as to the amount allowed in her assessment of party/party costs for the Applicant's costs of the AHRC complaint.[72]

Estimate of value of work between 1 November – 17 December 2024

50. As noted in paragraph 24 above, the Costs Referee's assessment of the Applicant's reasonable costs on a solicitor-client basis includes an amount of $874,832.20 in respect of 'Future Work' between 1 November and 17 December 2024.[73] The assessment in respect of that period is based on an estimate of the work to be undertaken, not the reasonable cost of the work actually undertaken. The Costs Referee's assessment of

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67 *Australian Human Rights Commission Amendment (Costs Protection) Act 2024*, Schedule 1, item 7.

68 Ibid

69 Section 46PSA of the AHRC Act (as it existed prior to 2 October 2024) permits the Court, when deciding whether to award costs in the proceedings, to have regard to offers made to settle the matter the subject of the complaint that have been rejected.

70 See eg *Ho v Regulator Australia Pty Ltd (No 2)* [2004] FMCA 402 at [6].

71 *Federal Court Rules 2011,* Schedule 1 (Dictionary).

72 Second Barker Affidavit, Annexure PCB-16.

73 CRR at [4], [223]-[237].

the Applicant's costs on a party-party basis includes an allowance for the whole of this amount.[74]

51. The Costs Assessor should assess the costs actually incurred for this period before the Commonwealth pays any amount from the $15 million for the Applicant's Agreed Costs. The Court should also not allow any deduction from the Settlement Fund Account for the estimated cost on a solicitor-client basis of the work undertaken between 1 November and 17 December 2024. Payment in respect of work during that period should await an assessment of the work actually undertaken, and either agreement by the Commonwealth (in relation to the Applicant's Agreed Costs component) or approval of the Court.

Conclusion regarding Applicant's costs to date

52. Subject to resolution of the issues outlined at [44] to [51] above, and any other issues raised by the *amicus curiae* or the Court, the Commonwealth accepts the Costs Referee's assessment of the first tranche of the Applicant's Agreed Costs, as set out in Part 2 of the CRR.

53. It is a matter for the Court whether to approve a deduction in respect of an amount for the Applicant's Actual Costs (being those costs beyond the Applicant's Agreed Costs, assessed on a party-party basis, that the Commonwealth has agreed to pay, up to the sum of $15 million). The matters outlined in paragraphs 27 to 43 and 50 above are relevant to that issue.

54. In relation to the appropriate form of order regarding payment of the Applicant's Agreed Costs, the orders proposed by Shine are not appropriate for the following reasons.

55. Paragraph 1 is not appropriate because:

    (a) the ATE insurance premium (in the event it is allowed) does not form part of the Applicant's Agreed Costs, and therefore should not be paid from the amount of up to $15 million allowed in respect of those costs;

    (b) the amounts specified in the proposed orders will have to be adjusted if the Commonwealth's submissions in relation to the costs of the AHRC complaint and the costs of the work between 1 November and 17 December 2024 are accepted;

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[74] CRR at [283]-[285].

(c) payments from the $15 million sum allowed in respect of the Applicant's Agreed Costs are not to be used for payment of the Applicant's Actual Costs (*cf* paragraph 1(b)(ii) of the proposed orders) – in the event the Court allows a deduction for the Applicant's Actual Costs, it must come out of the Settlement Fund Account (Settlement Deed, cl 2.16.1.d); and

(d) the Settlement Deed provides for the Commonwealth to pay the Applicant's Agreed Costs in accordance with cl 2.13, which involves payments in tranches, amongst other things, upon receipt of a report of the Costs Assessor. The mechanism provided in cl 2.13 of the Settlement Deed is appropriate and there is no basis for the Court to require payment of an amount into an interest-accruing account as proposed in paragraph 1(b)(iii) of the proposed orders.

56. Paragraph 2 is not appropriate because, as explained in paragraph 55(d) above, the Settlement Deed provides a mechanism for payment of the Applicants Agreed Costs, and payment into a Controlled Monies Account is inconsistent with that mechanism and unnecessary. Further, the mechanism proposed in paragraph 2 may not be appropriate in the event that some part of the $6 million allowed in respect of the Administrator's Costs is to be used to pay the costs of the outreach and registration process, as outlined in paragraph 69 below.

57. Paragraph 3 is not appropriate because it also proposes payment for part of the Applicant's Agreed Costs from a Controlled Monies Account, which is unnecessary. Further, the amount proposed in respect of the Applicant's Actual Costs should not be approved for the reasons outlined in paragraphs 27 to 43 and 50 above.

58. In relation to paragraph 4 of Shine's proposed orders, although the Commonwealth expresses no view as to the appropriateness of payments to Shine and the Funder being made in equal amounts at the same time, the sequence of payments proposed by the Applicant appears to include the minimum payment mechanism (see Annexure A to the Applicant's supplementary submissions), which for the reasons outlined in part C below, the Commonwealth does not support.

59. Further, the Commonwealth submits that the power in s 23 of the *Federal Court of Australia Act 1976* (Cth) should also support the making of any order regarding the disbursal of settlement monies, given the class action is also brought under rule 9.21 of the *Federal Court Rules 2011*.

60. In accordance with cl 2.13.6 of the Settlement Deed, the Court should make an order approving an amount in respect of the first tranche of the Applicant's Agreed Costs, and

the Commonwealth will then pay that sum in accordance with the Settlement Deed and any further order regarding the distribution of that amount between the Funder and Shine.

B.2. Costs of the Outreach and Registration Program

61. The Costs Referee's report does not address Shine's future costs for the planned outreach and registration program beyond 17 December 2024.[75] The costs of the outreach and registration program beyond 17 December 2024 will vary, depending on who is to conduct the program and how it is to be conducted. The Commonwealth makes the following general observations regarding that task.

62. The purpose of the program is to maximise the number of Group Members who register and are able to participate in the settlement as Eligible Claimants. However, there is a balance to be struck between designing a registration and outreach program that will maximise the ultimate number of Eligible Claimants, and ensuring that the program is conducted as efficiently and cost-effectively as possible so as to minimise the costs of the program. To the extent that the costs of the program exceed the balance of the $15 million agreed to be paid by the Commonwealth in respect of the Applicant's Agreed costs after deduction of the first tranche of the Applicant's party-party costs, the costs will be deducted from the Settlement Fund Account and therefore reduce the amount available for distribution to Eligible Claimants.

63. Shine contends that it cannot effectively conduct the outreach and registration program for less than $8 million.[76] That is a very significant amount. Even capping the cost of the outreach and registration program at $8 million will likely result in a deduction of around $4.75 million from the Settlement Fund Account, which is a significant reduction in the amount that would otherwise be available to pay to Eligible Claimants.[77]

64. There remain questions as to whether the proposed outreach and registration program can be adjusted in a manner that does not significantly compromise the efficacy of the program so as to reduce the costs. For example, there may be meaningful savings from only conducting outreach sessions at towns with populations of more than 100 or 200 people. Doing so would exclude 34 or 56 of the 114 locations currently proposed to be

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[75] CRR, [225]-[227]; Applicant's Submissions dated 2 December 2024, [6] (**Applicant's Submissions**).

[76] Applicant's Submissions, [17], [20.2]; Fourth Antzoulatos, [29]-[32].

[77] Applicant's Submissions, [20.2].

visited and would result in an estimated costs reduction of $407,841,59 or $952,562.06 respectively.[78]

65. The Commonwealth accepts the Applicant's position that, in some circumstances, it may be a false economy not to stop at a small community where it is on the way to a larger town.[79] However, viable alternatives – including the use of community organisations and the promotion of telephone and online registrations (using the streamlined process agreed between the parties[80]) which result in meaningful cost reductions – should be carefully considered. Provided all potential Eligible Claimants have a reasonable opportunity to register, there will be no injustice.[81]

66. The Commonwealth does not accept that the outreach and registration program must be conducted by "legally qualified persons and persons who are receiving their legal qualifications".[82] In *Street*, Murphy J (at [238]) took the view that registration work and class member communication could reasonably have been undertaken by call centre and data entry workers at substantially lower hourly rates.[83] It may be accepted that potential Eligible Claimants are likely to ask questions about the class action, the history of the proceedings and the settlement, however it is not apparent why it would only be lawyers with first-hand experience of the matter who would be able to answer such questions.[84] For instance, a script could be prepared for those facilitating sessions containing answers to frequently asked questions.

67. That said, the Settlement Deed provides for Shine to conduct the outreach and registration process, and it is appropriate that Shine maintains a level of oversight and control over the program. That may necessitate one or more experienced Shine staff attending in-person outreach sessions held across the Northern Territory, to lead and supervise other personnel conducting the outreach program. However, that does not necessarily mean that the Court must accept Shine's proposed arrangement for

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78 Fourth Antzoulatos, [32], [60]; see further AGS letter dated 22 November 2024, [2]-[4], and Shine letter dated 3 December 2024, [4(a)] found at Annexures PCB-14 and PCB-15 of the Second Barker Affidavit

79 Fourth Antzoulatos, [63].

80 As to which, see the AGS letter dated 29 November 2024, [5], found at Exhibit VA-14: Tab 2 to Fourth Antzoulatos.

81 *Cf* Fourth Antzoulatos, [33].

82 Fourth Antzoulatos, [14].

83 See also *Street* (at [25]) where his Honour stated: '…it might have been appropriate to engage local Indigenous representatives on weekly or monthly contracts rather than hourly rates; or to engage a claims administration service. It might have been appropriate to take a less "Rolls Royce" approach. Shine needed to give greater attention to whether there were cheaper or more efficient ways of achieving a similar outcome, and to keep a much tighter grip than it did on the costs associated with the Registration Process.'

84 *Cf* Fourth Antzoulatos, [14].

charging for that work. The Court may consider that it is appropriate that some aspects of the work undertaken by Shine should be conducted at cost (for example, based on the cost of engaging personnel rather than hourly rates depending on experience and qualification). Further, consistently with paragraphs 27 to 43 above, to the extent it is necessary for unqualified Law Clerks to undertake work in the outreach and registration processes, they should be charged at an hourly rate not exceeding $187.55 (GSTi), rather than the discounted hourly rate of $200 (GSTi) proposed by Shine.[85]

68. As a first priority, the Court should seek to ensure that the outreach and registration program reflects an appropriate balance between the need to ensure that as many Eligible Claimants as possible are able to participate in the settlement and the need to conduct the outreach and registration process as efficiently as possible so as to minimise costs.

69. If the cost of the outreach and registration process will exhaust the balance of the $15 million that the Commonwealth has agreed to pay in respect of the Applicant's party-party costs (after deduction from the $15 million of the party-party costs incurred to date, as approved by the Court), the Commonwealth would agree to part of the $6 million allocated under the Settlement Deed for the Administration Costs being used to pay Shine's costs, provided the Administration Costs will otherwise not exhaust the $6 million. The Commonwealth considers that Shine's role in undertaking the outreach and registration process under the Settlement Distribution Scheme may be regarded as part of the process of administering the Settlement Distribution Scheme, and overlaps to some extent with the Administrators' functions. Accordingly, the Commonwealth would be prepared to agree to appropriate orders which authorised the Administrators to treat some of Shine's outreach and registration work as part of the Administration Costs. Consistently with the Settlement Deed, this would necessarily require Court approval of these costs being treated as Administration Costs and approval of an increase in the Administrator's estimate of the Administration Costs (cl 2.15.2) and assessment by the Costs Assessor as to the reasonableness of those costs (cl 2.15.4). Plainly, the use of surplus funds from the Agreed Administration Costs Component for this purpose (with the Commonwealth's agreement) should not be subject to the Funder's commission.

C. SEQUENCE AND PRIORITY OF PAYMENTS

70. With respect to the sequence and priority of payments from the Settlement Fund Account, the Commonwealth contends that:

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[85] Fourth Antzoulatos, [30(a)].

(a) consistently with cl 2.11 of the Settlement Deed, living Eligible Claimants should receive an interim payment as a priority and as soon as practicable; and

(b) the quantum of interim payments to be paid to living Eligible Claimants should be determined by the Administrators.

71. The Applicant asks the Court to fix a minimum payment for all Eligible Claimants of $10,000.[86] Although it should not be overstated, there is *some* risk in that approach because in certain outlier scenarios, the number of Eligible Claimants may be too low or too high to fund a minimum payment in respect of all Eligible Claimants of $10,000 after deductions from the Settlement Fund Account.[87] Although that risk may be limited, it is appropriate that the task of determining the amount of interim payments be left to the Administrators (in accordance with the Settlement Deed).

Dated: 9 December 2024

Fiona McLeod SC

Zoe Maud SC

Joshua Ingrames

Sophie Molyneux

Counsel for the Respondent

Australian Government Solicitor

Solicitor for the Respondent

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86 Applicant's Submissions, [38].

87 The Commonwealth previously flagged this concern with respect to the proposed minimum payment of $10,000 in its supplementary submissions dated 5 November 2024, [2]-[5].

ANNEXURE A

16% Commission on the gross settlement (ATE reimbursement granted)

Eligible Claimants	Value of a 16% Gross Commission[88]	Funder's at risk outlay: budget of $10,520,758 plus ATE insurance premiums paid to date of $550,000[89]	Total claimed payments to the Funder (Commission + reimbursement of legal costs + reimbursement of ATE costs)[90]	Funder's return on investment
3000	$11,370,240.00	$11,070,758.00	$21,664,202.08	1.96
4000	$14,250,240.00	$11,070,758.00	$24,544,202.08	2.22
5000	$17,130,240.00	$11,070,758.00	$27,424,202.08	2.48
6000	$20,010,240.00	$11,070,758.00	$30,304,202.08	2.74
7000	$22,890,240.00	$11,070,758.00	$33,184,202.08	3.00
8000	$25,770,240.00	$11,070,758.00	$36,064,202.08	3.26
9000	$28,650,240.00	$11,070,758.00	$38,944,202.08	3.52
10000	$31,530,240.00	$11,070,758.00	$41,824,202.08	3.78

20% Commission on the net settlement (ATE reimbursement not granted)

Eligible Claimants	Value of a 20% Net Commission	Funder's at risk outlay: budget of $10,520,758 plus ATE insurance premiums paid to date of $550,000	Total claimed payments to the Funder (Commission + reimbursement of legal costs - less outstanding ATE fees)	Funder's return on investment
3000	$10,800,000.00	$11,070,758.00	$20,048,962.08	1.81
4000	$14,400,000.00	$11,070,758.00	$23,648,962.08	2.14
5000	$18,000,000.00	$11,070,758.00	$27,248,962.08	2.46
6000	$21,600,000.00	$11,070,758.00	$30,848,962.08	2.79
7000	$25,200,000.00	$11,070,758.00	$34,448,962.08	3.11
8000	$28,800,000.00	$11,070,758.00	$38,048,962.08	3.44

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88 Calculated on the same basis as in fn 27 above.

89 See fn 28 above.

90 Calculated on the same basis as in fn 29 above, but using 16% commission rate.

9000	$32,400,000.00	$11,070,758.00	$41,648,962.08	3.76
10000	$36,000,000.00	$11,070,758.00	$45,248,962.08	4.09