

NOTICE OF FILING

Details of Filing

Document Lodged:	Outline of Submissions
Court of Filing	FEDERAL COURT OF AUSTRALIA (FCA)
Date of Lodgment:	3/12/2024 7:09:05 PM AEDT
Date Accepted for Filing:	3/12/2024 7:09:12 PM AEDT
File Number:	VID312/2021
File Title:	MINNIE MCDONALD v COMMONWEALTH OF AUSTRALIA
Registry:	VICTORIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

This Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date of the filing of the document is determined pursuant to the Court's Rules.



VID 312 of 2021

Federal Court of Australia
District Registry: Victorian Registry
Division: General

Minnie McDonald

Applicant

and

Commonwealth of Australia

Respondent

FUNDER'S SUPPLEMENTARY SUBMISSIONS

Introduction

1. The Funder (as intervenor) files these supplementary submissions pursuant to the Orders of Her Honour Chief Justice Mortimer dated 20 November 2024. The Funder may seek to respond to any matters raised by the *amici curiae* to the extent that they impact on the position of the Funder.
2. Pursuant to the Orders dated 14 November 2024, the following matters are to be heard and determined on 17 December 2024:
 - a. the following proposed payments from the Settlement Fund Account:
 - i. the amount of the Applicant's Agreed Costs (pursuant to cl 2.13 of the Deed);
 - ii. the amount of the Applicant's Actual Costs to be approved;
 - iii. the amount to be paid to the Funder to be approved;
 - b. any question of priority of payment as between the Funder and Shine in respect of the payments referred to in (a) above.
 - c. the sequence of payments made from the Settlement Fund Account.
3. The Funder seeks orders that:
 - a. the Funder be paid:
 - i. a funding commission of 20% of the gross funds paid by the Commonwealth under the Deed; and
 - ii. reimbursement in the amount of \$1,045,000 paid by LLS for premiums for 'after the event' insurance.

4. The Funder is also entitled to reimbursement of the costs it has paid to date to Shine. Following approval of the amount of Applicant's Agreed Costs, the Funder will seek an order for reimbursement of \$9,743,962.08 from that sum;
5. In respect of payments to be made to the Funder, it will seek orders that:
 - a. it should receive those payments in priority to any amounts Shine is seeking for its future costs for undertaking the outreach program (Applicant's Future Costs); and
 - b. the sequence of payments from the Settlement Fund Account should broadly be as described in paragraphs [40] to [43] below.
6. The Funder has already made submissions dated 28 October 2024 (**PS**) and 4 November 2024 (**FRS**) and relies on those submissions. It makes the following short supplementary submissions, largely to assist the Court in understanding the implications of the recent decision of His Honour Justice Murphy in *Street v State of Western Australia* [2024] FCA 1368 (**Street**). The Funder also makes some brief submissions relating to sequencing of payments and a response to certain issues raised by the Costs Assessor.

Discussion of Street

7. *Street* was a representative proceeding brought in this Court in relation to the widespread non-payment and/or underpayment of wages to Aboriginal and Torres Strait Islander people who worked in Western Australia between 11 December 1936 and 9 June 1972. It is colloquially known as the "Western Australia Stolen Wages Class Action".
8. It has distinct similarities to this proceeding, the "Northern Territory Stolen Wages Class Action".
9. The Funder funded both proceedings on a very similar basis. Shine Lawyers have also acted for the Applicants in both proceedings. There are clearly parallels.
10. *Street* settled on the basis that an amount of up to \$165 million in compensation would be paid to group members and an amount of up to \$15.4 million in respect of costs would be paid by the State toward Mr Street's costs. It is also a process settlement with the total Settlement Fund based on numbers of Eligible Claimants who register, not based on a lump sum.
11. In *Street*, as here, the Funder sought orders from the Court for (a) reimbursement of its ATE insurance premium; and (b) a 20% funding commission of the gross settlement sum. It also sought (and received) reimbursement for amounts paid to Shine for the legal costs of the proceeding.

12. His Honour considered the appropriateness of the funding commission and ultimately found that it was appropriate for LLS to be reimbursed for its ATE insurance premium but that a 16% funding commission on the gross settlement sum was fair and reasonable in the circumstances of that case.
13. There are several important points to draw from *Street*.
14. *First*, His Honour held that it was appropriate for class members to separately meet the ATE costs.¹ They had the benefit of ATE insurance and it operated to reduce exposure to adverse costs which reduced the amount the Funder had at risk.² The same reasoning is applicable here.³
15. *Second*, His Honour rejected the submission of the State of Western Australia that it was only appropriate to approve a funding commission net of all deductions. Notably he found that the Funder did not agree to fund on that basis and that, to his knowledge, it was not a basis on which a funder has ever offered to fund an Australian class action.⁴ To approve a funding commission on that basis would have a tendency to discourage funding and reduce access to justice.⁵ The Commonwealth has made the same argument here. It should similarly be rejected.⁶
16. *Third*, His Honour accepted that a 20% funding commission was proportionate having regard to the size of the settlement.⁷ He also found that a 20% funding rate was at the low end of the market⁸ and it is doubtful that a better funding rate was available at the time.⁹ His Honour also accepted the evidence that Mr Street and class members were unlikely to have recovered compensation without the support LLS provided.¹⁰ Similar findings can be made here.¹¹
17. Ultimately, however he reduced the funding commission to 16%. While saying “[i]ntuitively, 16% seems too low”, which “gave me some cause for some reflection” he

¹ *Street* at [356].

² *Ibid.*

³ FRS [15], [29] and [31].

⁴ *Street* [357(d)].

⁵ *Ibid.*

⁶ FRS [25] and [32] – [36].

⁷ *Street* at [351].

⁸ *Street* at [362].

⁹ *Street* at [311].

¹⁰ *Street* at [311] and [329].

¹¹ FRS [6] – [7], [11] (relying on the Barker Affidavit at [11] – [13] and the Respondent’s Submissions at [169].

found that such a commission was “just” for the purposes of s 33V based on the particular circumstances of *Street*, including relevantly:

- a. the quantum of the settlement; and
- b. “the unusual operation of the funding arrangements which materially reduce the costs and risks the Funder took on.”¹²

18. Importantly, those particular circumstances, specifically the material reduction of the costs and risks LLS took on are different in the present case.

19. The primary basis on which Murphy J determined to reduce the funding commission from 20% to 16% was that, in *Street*, LLS had:

*[C]eased to fund the case about a year before trial (upon reaching the funding cap); thus it did not fund the case for trial even though the proposed settlement was reached only five days before trial. By October 2023 when the proposed settlement was reached, the total legal costs of the proceeding were approximately \$18.2m, and the Funder had paid less than \$10 million of that total. If its ATE Costs are included the Funder had paid approximately \$11m prior to the proposed settlement being reached. Overall Shine “funded” the case nearly 50 – 50 with the Funder, and yet the Funder seeks recovery of a funding commission as if it funded the whole of the case.*¹³

20. In *Street*, His Honour took the view that it was not fair or reasonable for LLS to contribute only 50% of the costs and the risk but seek 20% of the outcome.¹⁴ That issue simply does not arise in this case.

21. The Funder has funded the matter right through to settlement and continues to fund the proceeding to date. The Funder has paid \$9,743,962.08 to Shine.

22. This is a fundamental distinction between *Street* and this proceeding, and it was the primary criterion relied upon by His Honour to reduce the LLS’s commission in *Street*.

23. In arriving at 16% as a fair and reasonable commission rate, having regard to the primary consideration regarding LLS’s contribution to the overall funding of the proceeding in *Street*, His Honour focussed heavily on the return on investment (**ROI**) calculation. His Honour considered that at 16%, ROI to LLS would be 2.77 and that was appropriate.¹⁵

¹² *Street* at [29].

¹³ *Ibid*.

¹⁴ *Ibid* and [320].

¹⁵ *Street* at [28] and [362(g)].

24. There is a significant difficulty in using the ROI analysis in this proceeding and that is because there is far less certainty as to the ultimate return to be calculated. In *Pearson (No 2)*, Murphy J awarded a 20% CFO, amounting to an ROI of 4.0. *Pearson* was a less risky case than the present matter given the stronger trust claims in *Pearson*.
25. In *Street*, the registration process for the settlement was complete. For that reason, the parties could estimate the likely number of Eligible Claimants at around 8,750.¹⁶ On that basis, the Settlement Sum was \$159,775,000 comprised of \$144,375,000 in the Settlement Fund and \$15.4 million in Agreed Costs.
26. In this proceeding, the registration process has only just commenced and is far from complete. While estimates have been given, they are only based on the WA experience and not on actual registrations.¹⁷ The Eligible Claimants could range between 3,000 and 10,000 with the total Settlement Sum ranging from \$54 million to \$180 million, with the Costs Sums increasing the settlement range to between \$71.18 million and \$197.18 million.¹⁸
27. The ROI varies significantly depending on the ultimate figure achieved through registration.
28. His Honour in fact noted in *Street* that if the matter had settled for \$50 million, that would have been a very poor return for the Funder in relation to the cost and risk it took on.¹⁹ Here, at the lowest end²⁰, the Settlement Sum could be \$71+ million, a sum closer to the His Honour's "very poor return" scenario. Importantly, His Honour cited *Allen v G8 Education Ltd (No 4)* [2024] VSC 487 which referred to Australia's largest litigation funder, Omni Bridgeway, obtaining an ROI exceeding 4.0 (excluding finance costs) in 15% of their funded cases.²¹

¹⁶ *Street* at [358].

¹⁷ The applicant maintains an estimated 8,000 Eligible Claimants will register to participate in the settlement of the proceeding: Fourth Affidavit of Vicky Antzoulatos sworn on 2 December 2024 (**Fourth Antzoulatos Affidavit**) at paragraph [93].

¹⁸ Inclusive of the Applicant's Agreed Costs at \$15,000,000, \$1,800,000 (excl GST) (i.e. \$1,980,000 incl GST) for the Administrator and \$200,000 (incl GST) for the Costs Assessor approved by Orders 11 and 12 of the Orders made on 14 November 2024.

¹⁹ *Street* at [311].

²⁰ The Funder has discounted the possibility that registration will not exceed 1000 to 2000 Eligible Claimants on the basis of registrations to date, and so does not consider that columns 1 or 2 of VA-16 to the Fourth Antzoulatos Affidavit (at pg. 211) are likely outcomes.

²¹ *Street* at [362(g)].

29. Without certainty as to the return, an ROI calculation in this case has limited utility. That is where a percentage provides a better analysis of proportionality.

30. His Honour also accepted that the proceeding raised novel causes of action and had real risks. However, in his view, *Street* had a lower risk profile than *Pearson*, a stolen wages case which settled in Queensland²² and in any event:

Not much turns on this, because the reasonableness of the proposed funding commission in this case is not to be assessed by comparison with Pearson; it must be assessed based on the particular circumstances of the case.

31. For the reasons set out above at paragraphs [18] to [22], those “particular circumstances” do not apply.

32. His Honour also found that LLS was “focused on settlement”²³ and “did not intend to fund a trial”, which was a finding made on aspects of the confidential evidence of Mr Conrad in *Street* and that the Funding Budget had been set “well below the costs likely to be incurred in *Pearson* had that matter proceeded to trial” and that therefore the Funder’s risk was not as high as it sought to portray.²⁴

33. Here, there is clear evidence from Mr Conrad that this case was considered riskier than *Pearson*.²⁵ More importantly, the contemporaneous evidence discloses that when considering the appropriate funding rate, the Funder’s view was that even though *Pearson* had settled, this did not necessarily mean that the same outcome would occur here.²⁶ While LLS may have been “focussed” on settlement in *Street*, that was not a matter within its exclusive control, and ultimately, it was not a focus Murphy J criticised LLS for, it was merely a relevant factual integer which diminished LLS’s submission in *Street* that it would have funded a trial.²⁷

34. In this case it took 3 years for settlement to be achieved, it was never a certainty, and the Funder took on significant risk in funding the case up to settlement (and continues to take on risk by continuing to fund the outreach while still not knowing the return it will receive).

35. While the case may have settled, His Honour’s view that there was little risk of an adverse costs order cannot be adopted here as it would run counter to the Applicant and

²² *Street* at [336] – [337].

²³ *Street* at [340].

²⁴ *Street* at [340].

²⁵ PS at [34]; Conrad Affidavit at [66].

²⁶ [Conrad Affidavit at [88(b)].

²⁷ *Street* at [340].

the Commonwealth's evidence,²⁸ which the Court has already implicitly accepted in approving the settlement based on the extant significant risks associated with the proceeding running to a final hearing.

36. The Funder submits that this Court should follow the approach in *Street* in relation to (a) the reimbursement for ATE insurance premiums; and (b) the funding commission being a percentage of the gross settlement sum. It should not, however, follow the reasoning in *Street* to reduce the funding commission because the factual basis on which that particular determination was made is substantially different. Any such determination would lack a proper and principled basis.

Sequencing and Priority of payment

37. The Funder is discussing draft orders with the Applicant relating to the proposed sequence in which payments from the Settlement Sum will be made and whether there is any dispute regarding sequencing or priority.
38. The same contractual terms under the LFA apply in this proceeding as in *Street*.
39. Under the LFA, the Funder has priority over payments made to the Claimant and to Shine. This was accepted in relation to the reimbursement of the LLS's payments to fund the proceeding and for ATE by His Honour in *Street*.²⁹ The same position should be adopted here – that is, reimbursement to LLS of its funding and ATE costs should be paid first to LLS from the \$15 million Agreed Costs Component. LLS's Commission in *Street* was treated *pari passu* with Shine's entitlements to reimbursement of the costs it carried beyond the State's contribution to costs, on the basis that LLS and Shine had in practical terms funded the proceeding on a 50 – 50 split.³⁰ That consideration does not apply in this proceeding for the reasons already articulated.
40. In this proceeding, as in *Street*, the Funder accepts that it is appropriate for payments from the Commonwealth (which will be made in tranches) to be divided into two accounts: the first being a Minimum Payment Reserve Account from which there will be a first distribution to Eligible Claimants and the second a Deductions Account from which deductions are taken for (among others) the Funder's commission and for the Applicant's

²⁸ FRS at [15].

²⁹ *Street* at [374], [404].

³⁰ *Street* at [409].

Actual Costs. At this stage, given the registration process is not complete and the quantum of approved legal cost for outreach are unknown, the Funder still has reservations around the proposed minimum \$10,000 payment and whether that leaves sufficient funds for the necessary deductions.

41. The Funder proposes that deductions for the 20% funding commission be taken out of the Deductions Account and paid to the Funder in priority to Shine, in tranches, as soon as possible after those payments are made by the Commonwealth.
42. The Funder submits that this can occur by:
 - a. 20% of the \$54 million paid by the Commonwealth (being \$10.8 million) and 20% of the Applicant's Agreed Costs (if approved) (being \$3 million) being paid in the first tranche;
 - b. 20% of each tranche thereafter being paid to the Funder (for example, \$3.6 million for each further tranche of 1,000 Eligible Claimants as approved by the Administrator), with an amount being held over by the Administrator from each of these tranches to ensure equality of contribution to the additional sum referable to the 20% of the Applicant's Agreed Costs (\$3 million) which was paid by the first 3,000 Eligible Claimants; and
 - c. when registration has concluded and a final top up payment is made to group members, the Funder would take 20% calculated on the final approved sums paid to the Administrator and the Costs Assessor in respect of the Agreed Administration Costs Component and the Costs Assessor's Costs. Such a final sum would be contributed to equally by all group members.
43. As referred to in paragraph (42.c)) above, the calculation of funding commission on the Agreed Administration Costs Component and the Costs Assessor's Costs will need to await calculation and approval. The Funder is prepared to wait for payment of those parts of the commission until those costs are calculated. At this stage, that would be 20% of \$2.18 million but will rise as the costs of the amici curiae and further costs assessor's costs are incurred.
44. A top up payment can then be made to Eligible Claimants with the remainder of the funds.

45. Finally, in relation to the Applicant's Actual Costs for outreach, if there are concerns about those amounts being deducted from amounts that would otherwise go to Eligible Claimants, the Funder submits that to the extent that there are amounts within the allocation for Agreed Administration Costs Component and the Costs Assessor's Costs which are unused by the Administrator, the Costs Assessor and the *amici curiae*, those amounts could potentially be reallocated to payment of any future costs of outreach or the Applicant's Actual Costs. That is, the Commonwealth could pay the maximum amount under the Agreed Administration Costs Component and the Costs Assessor's Costs totalling \$7 million to reduce the impact on group members.

Costs Assessor's Report

46. The Funder notes that there are certain costs which the Costs Assessor has indicated were incurred for the benefit of the Funder³¹. The Funder disputes that characterisation and submits that those costs are for the benefit of the group as a whole. In *Street*, His Honour Murphy J allowed investigation costs prior to the commencement of the proceedings as approved costs.³² Further, to the extent that the Costs Assessor expresses an opinion as to who as between the Funder and Shine should bear the detriment of any reduction in allowable legal costs that is beyond the scope of the enquiry referred to the Costs Referee pursuant to orders the dated 16 and 24 September 2024.

47. The Funder also notes that the Costs Assessor's comments regarding GST in paragraph [250] are inaccurate.³³

Date: 3 December 2024

Fiona Forsyth KC

Ah Ket Chambers

Owen Nanlohy

Ah Ket Chambers

^r Report of Elizabeth Harris 28 November 2024 at paras [127], [200], [274], [275], Annexure A [26].

³² *Street* at [246]-[262]

³³ Affidavit of Stephen James Conrad affirmed 3 December 2024 at [14]-[18].