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MCDONALD v COMMONWEALTH (VID312/2021)

APPLICANT'S REPLY SUBMISSIONS ON SETTLEMENT APPLICATION

A. SCOPE OF REPLY

1. These submissions address the Commonwealth's submissions of 1 November 2024 (**Commonwealth Submissions**) only to the extent that these matters bear upon the fairness and reasonableness of the settlement as a whole, or the fairness and reasonableness of the Differentiation Order. These submissions are grouped by issue. Terms defined in the Applicant's submissions of 25 October 2024 (**Applicant's Submissions**) have their defined meaning in these reply submissions.

B. FAIRNESS AND REASONABLENESS BETWEEN THE PARTIES
(COMMONWEALTH SUBMISSIONS, [8]-[84])

2. The Commonwealth has made substantive submissions concerning the fairness and reasonableness of the settlement *inter partes*. The Court is entitled to have regard to those submissions as articulating the perspective of the Commonwealth. For their part, counsel for the Applicant have set out their candid views in a confidential opinion on the proposed settlement. Expressing particular agreement or disagreement with the Commonwealth's submissions in this respect could undermine the confidentiality and privilege of that opinion. It suffices to say that both the Applicant and Commonwealth agree that "*the Court can comfortably conclude that the proposed settlement is fair and reasonable in its sum*" as between the parties (Commonwealth Submissions, [82]).

C. DIFFERENTIATION BETWEEN ELIGIBLE CLAIMANTS
(COMMONWEALTH SUBMISSIONS, [90]-[133])

3. The Commonwealth proposes an alternative Differentiation Order to the Applicant.
4. The parties agree that the Differentiation Order: should seek to reflect the period of time worked by Eligible Claimants, with those who worked for a greater period during the Claim Period receiving a higher payment, and that the best proxy for this is date of birth;

and should not distinguish on the basis of gender even where that is (at least hypothetically) a basis for different damages amounts.

5. The parties have advanced different arguments on: whether the Differentiation Order should include discount to the claims of deceased Eligible Claimants; the extent of differentiation between Eligible Claimants who worked longer; and some key mechanical aspects of the Applicant's proposed approach (in particular, the concept of a Minimum Payment of \$10,000).
6. The Applicant is relatively neutral as the choice of Differentiation Order in concept. The parties have both attempted to frame a fair approach on common principles. As will be seen below, there is little difference in outcome in terms of money in hand for group members. However, there is a real point of difference as to the existence and purpose of the Applicant's proposed "Minimum Payment". That mechanism provides a significant process and fairness advantage. Put simply, it means more group members are likely get paid faster. The question of differentiation then only applies to the excess remaining for distribution. An alternative hybrid approach that captures the advantages of each proposal is likely to be possible, and may be the subject of address at the hearing.

C.1. Summary of alternative proposals

7. The Applicant proposes a Minimum Payment of \$10,000 in respect of the claims of all Eligible Claimants, with the division of the balance of the settlement remaining after deductions to be equally shared between the claims of Eligible Claimants born before 1930. The latter 'Top-Up Payment' is expected to be about \$9,295 on the assumptions already provided to the Court. There is a temporal aspect here – there is no reason why the Minimum Payment cannot be made by the Administrator immediately to living Eligible Group Members.
8. The Commonwealth's approach is to divide the cohort into four Sub-groups (pre-1943, post-1943, and the deceased part of both) and to apply stepped discounts against the oldest living cohort. While the high and low ends of this look much like the Applicant's numbers, the practical difference is to create an intermediate payment. The question of timing is more difficult. This arises because the ultimate group composition will not be

known until the Registration Process is completed, the identification of relative proportions means that the Sub-group payments can only be estimated at present. This means that the Administrator is supposed to work out how to make Interim Payments, and if so in what amounts. However, the Administrator is going to be a firm of accountants, and it is not clear they are well equipped to make that decision – as distinct from this Court directing what the Interim Payment is (ie, in the amount of the Minimum Payment the Applicant proposes).

9. It is convenient to set out the two approaches for ease of comparison. The figures provided at Commonwealth Submissions [132] have been corrected for an accidental error in calculation (that is agreed between the parties) in Table 1 below.

Table 1: Comparison of projected category payments

Applicant Proposal			Commonwealth Proposal		
Criteria	# of ECs	Payment	Criteria	# of ECs	Payment
DOB on or before 1.1.1930	2,000	\$19,295	DOB on or before 3.3.1943	400	\$16,881.85
DOB after 1.1.1930	6,000	\$10,000	DOB after 3.3.1943	2,400	\$13,505.48
			DOB on or before 3.3.1943 (deceased)	2,000	\$13,505.48
			DOB after 3.3.1943 (deceased)	3,200	\$10,129.11

10. It should not be thought from the above that individual people will receive those amounts as it does not take into account that descendant claimants will more often than not *share* in a proportion of the amount paid in respect of Eligible Claimants. We provide a guide below to what the two proposal mean in terms of ‘in hand’ distributions, in Table 2, below. In so doing, we assume for the purposes of this exercise that Group Members had children at the age of 18, on average; have one living sibling (so that any parent claim is halved); and that parents/spouses are also Eligible Claimants, as that will be the case for the vast majority of people:

Table 2: Hypothetical ‘in hand’ comparison

	Nature of GM claim	App. Proposal	Cth Proposal
1	Living Eligible Claimant: born 1940 , spouse deceased born 1940, parents deceased born 1922.	\$39,295	\$43,892
2	Living Eligible Claimant: born 1945 , spouse deceased born 1945, parents deceased born 1927.	\$39,295	\$37,139
3	Living Eligible Claimant: born 1950 , spouse deceased born 1950, parents deceased born 1932.	\$30,000	\$37,139
4	Living Eligible Claimant: born 1955 , spouse deceased born 1955, parents deceased born 1937.	\$30,000	\$37,139
5	Living Eligible Claimant: born 1960 , spouse living, parents deceased born 1942.	\$20,000	\$30,387
6	Descendant Eligible Claimant: born 1965 , parents deceased born 1947.	\$10,000	\$10,129

11. Further detailed comparisons are contained in Section C.3 below, but it is important to understand the significance and justice of the Applicant’s proposed Minimum Payment mechanism.

C.2. The importance of the Minimum Payment mechanism

12. This ‘process’ settlement does not involve the payment of a single amount. The Lump Sum is paid after appointment of the Administrator (cl 2.6); while further tranches are paid by the Commonwealth on an ongoing basis under cl 2.8 of the Settlement Deed. The Applicant’s Agreed Costs, Costs Assessor’s Costs, and Administration Costs are under a separate payment mechanism (cll 2.13 – 2.15). The Settlement Deed otherwise leaves the “the sequence and manner” of payments by the Administrator (to group members and for other deductions) to the Court (cl 2.16).
13. The Administrator may make Interim Payments to living Eligible Claimants, being part of their Eligible Claimant Payment from the Lump Sum. Interim payments may be made at the first available opportunity after any appeal rights have been exhausted or have

lapsed, and must be in accordance with the Settlement Deed, SDS and any Differentiation Order: SDS cl 2.11.1.

14. To make Interim Payments, the Administrator must have available in reserve for distribution an amount at least equivalent to the base payment per Eligible Claimant (probably with some margin). How much to hold in reserve is informed not only by *how much* comes out as deductions but *when* deductions come out. If deductions from the Settlement Fund Account – commission, costs, and other – were not progressively paid down and instead paid as a first priority, the amount available from the initial Lump Sum for Interim Payments would be radically less.
15. It follows that in order for the Court to appropriately set the amount of deductions for each tranche of settlement funds received by the Administrator, it needs to know in advance what the absolute minimum entitlement for Eligible Claimants is.
16. While the Applicant does have a desire to ensure that Eligible Claimants receive at least \$10,000, the *primary purpose* of the Minimum Payment is programming the sequence and manner of payments to be fair and reasonable to ensure that the Administrator has:
 - 16.1 clear direction not only on the total amount of deductions but when and in what proportion they are to be incrementally paid;
 - 16.2 enough funds available at all times to make at least a base payment with respect to each Eligible Claimant; and
 - 16.3 the ability to make base payments on a rolling basis (i.e. as funds are received with respect to those particular approved Eligible Claimants).
17. These are interrelated issues and not appropriate for the Administrator to ‘work out’ absent clear direction. The consequence of that outcome would be to remove the Court’s ability to sensibly program deductions (because it does not know how much Interim Payments or minimum payments should be) and to introduce potential delay and difficulty by placing these complex issues in the hands of the Administrator.

C.3. Detailed Comparison of alternative models

18. The arguments made by the Commonwealth in support of its alternative proposal are set out below, along with the Applicant's reply.

C.3.1. Who benefits from the 1 January 1930 cut-off (Commonwealth Submissions [118])

19. The first argument is that because the Applicant's "Category 1" criterion is being born on or before 1 January 1930, it "*would therefore result in larger payments being made mostly, if not entirely, to the family of Eligible Claimants and not living Eligible Claimants*" (Commonwealth Submissions, [118]).

20. It is true that most, if not all, Eligible Claimants who were born on or before 1 January 1930 will now be deceased. But the Commonwealth's extended reasoning does not follow. A living Eligible Claimant has parents. In almost all cases, those parents are deceased Eligible Claimants (i.e. they too lived and worked in the Northern Territory in the Claim Period). Because living Eligible Claimants are themselves older, it is their parents who will be the persons born before 1930. A 'typical' living Eligible Claimant does not have one claim: he or she has a personal claim *in addition* to up to two claims for parents (depending on the number of siblings).

21. Some worked examples are necessary to illustrate this proposition.

22. Group Member A was born in 1950. She is still alive and has no living siblings and a deceased spouse. Her parents were born before 1930.

22.1 In the Applicant's approach, Group Member A will receive a total of \$58,590 comprising:

- (i) \$10,000 for her own Category 2 claim;
- (ii) \$10,000 for the Category 2 claim of her deceased spouse;
- (iii) \$20,000 plus a Top-up Payment of up to \$38,590 (\$19,295 x 2) for the Category 1 claims of her deceased parents,

22.2 By contrast, in the Commonwealth's approach, Group Member A will receive a total of \$50,645.55:

- (i) \$13,505.48 for her own 'Sub-Group 2" claim;
- (ii) \$10,129.11 for the 'Sub-Group 4" claim of her deceased spouse; and
- (iii) \$27,010.96 ($\$13,505.48 \times 2$) for the "Sub-group 3" claims of her deceased parents.

23. Here is another example. Group Member B was born in 1955. She also is still alive and has no living siblings and a deceased spouse. Her parents were born *after* 1930 (but before 1943).

23.1 In the Applicant's approach, Group Member B will receive a total of \$40,000:

- (i) \$10,000 for her own Category 2 claim;
- (ii) \$10,000 for the Category 2 claim of her deceased spouse;
- (iii) \$20,000 ($\$10,000 \times 2$) for the Category 2 claims of her deceased parents,

23.2 By contrast, in the Commonwealth's approach, Group Member B will receive \$50,645.55 (ie, the same as Group Member A):

- (i) \$13,505.48 for her own 'Sub-Group 2" claim;
- (ii) \$10,129.11 for the 'Sub-Group 4" claim of her deceased spouse; and
- (iii) \$27,010.96 ($\$13,505.48 \times 2$) for the "Sub-group 3" claims of her deceased parents.

24. A final example is useful to show the difference (or lack of difference) for Eligible Descendant Claimants. Group Member C was born in 1970. She has one living sibling. Her parents were born after 1943.

24.1 In the Applicant's approach, Group Member C will receive \$20,000 ($\$10,000 \times 2$) for the Category 2 claims of her deceased parents, to be shared equally with her living sibling, for a total of \$10,000.

24.2 In the Commonwealth's approach, Group Member C will receive \$20,258.22 ($\$10,129.11 \times 2$) for the "Sub-group 4" claims of her deceased parents, to be shared equally with her living sibling, for a total of \$10,129.11.

25. The comparative table of in-hand returns set out in Section C.1 above (Table 2) shows a contrasting set of calculations using hypothetical 'typical' claims. Different scenarios and extending workings are provided in the tables in the **Annexure**.
26. Table 2 illustrates that the two models lead to very similar outcomes on either end of the bands of participation under typical conditions – very old Living Group Members (\$39,648 vs \$43,892) and Descendant Eligible Claimants (\$10,000 vs \$10,129). The extent of differentiation in the middle is addressed immediately below, but the point sought to be made is that the Commonwealth's submission at [118] is not correct. The Applicant's model does not lead to larger payments being made to the families of Eligible Claimants as opposed to living Eligible Claimants themselves.

C.3.2. *Uncertainty of differentiation (Commonwealth Submissions [119])*

27. The Commonwealth submits that the Applicant's model (in particular, the Top-up Payment) cannot identify the relative discount between claims because the amount is a function of the group demographics. By contrast, the Commonwealth's model 'locks in' the relative discount between its Sub-groups 1-4, so while the absolute value may change with group composition, the discount *inter se* will remain the same. (Although this runs the risk of resulting in meaningless differences in absolute terms in some scenarios.)
28. This proposition may be somewhat overstated where both parties accept that the registration information from *Street v WA* is a reliable indicator of group composition, but it is correct in identifying the flow-through of the different conceptual approaches to differentiation. It does not lead to inherent unfairness where it has been adopted for an important countervailing reason as in the Applicant's approach. However, a hybrid model that applied differentiation to the Top-up Reserve would resolve this issue.

C.3.3. *Excessive differentiation (Commonwealth Submissions, [120])*

29. The Commonwealth submits that the degree of unfairness that comes with the selection (in either model) of an arbitrary date should be met by having lesser discounts between categories. Its model steps the categories down by increments of 20%, while the difference between the Applicant's Categories 1 and 2 is c. 50% (on current projections).
30. However, there is a wrinkle in the Commonwealth's approach. This is because the date of birth cut off for participation is 12 November 1961. It is only at about this point and very shortly before it that it becomes plausible that a living Eligible Claimant would have parents who were born after 1943 (i.e. they would have been 18 when having their child). The result, as apparent from Table 2, is that in the Commonwealth's model, living Eligible Claimants born after 1943 but before 1961 will receive, in average circumstances, mostly the same total payment. By contrast, the Applicant's model implies three gradations of payment in the same period: \$39,648, \$30,000, and \$20,000.
31. This is not to say that – looked at in a holistic way – either one or the other outcome is unfair. The parties share a common desire to see larger payments being made to living Eligible Claimants. But using discounts of the kind the Commonwealth proposes is not incompatible with also fixing a Minimum Payment.

C.3.4. *Deceased claims (Commonwealth Submissions, [122]-[125])*

32. The Commonwealth proposes a discount to be applied to the claims of deceased Eligible Claimants. The Applicant has expressed a contrary view on that issue at paragraph 154 of counsels' confidential opinion. It is open to the Court to reach a conclusion on this issue it considers fair and reasonable in the interests of group members – there is no single correct answer.

D. JUSTICE OF THE REGISTRATION PROCESS

(AFFIDAVIT OF TULLI SETON DATED 4 NOVEMBER 2024 AND FURTHER AFFIDAVIT OF VICKY ANTZOULATOS, DATED 4 NOVEMBER 2024)

33. Our submissions in chief addressed the parameters of the Registration Process and its benefit to Group Members (see, eg, [38]-[41], [82.5]), and see also the confidential Counsel

Opinion at [29]-[30], [32.2], [316], [317] and [349]. We focused on the likely effectiveness of the Registration Process.

34. We did not address the importance of the Registration Process being carried out in proper, respectful and culturally safe manner by appropriately trained persons. For many claimants, their primary experience of the proceedings will be in telling their story (or those of their ancestors) to Shine staff taking registrations, or seeking to elicit information to enable effective registration. For some, those stories will not have been told before. The nature of the process is itself important, because it affords dignity and respect to claimants, and acknowledges their experience (often traumatic). The further affidavit of Ms Tulli Seton, and the evidence of Ms Antzoulatos as to the training undertaken of Shine staff who are proposed to continue this work ought give the Court comfort that the Registration Process will be carried out in an appropriate way, and that it in turn is fair and reasonable

E. REIMBURSEMENT PAYMENTS

(COMMONWEALTH SUBMISSIONS, [165]-[166A])

35. The reimbursement payments sought are those that are identified in order 8(e) of the Applicant's Interlocutory Application, being payments of \$30,000 to the Applicant, \$10,000 for each Sample Group Member, and \$5,000 for other witnesses: cf Applicant's Submissions at [73].
36. The Commonwealth makes no comment on the proposed reimbursement payment to the Applicant (Ms Minnie McDonald) and the Sample Group Members (Mr Daniel Forrester, the estate of Nora Sullivan, Mr Kenedy Ricky, Ms Veronia Dobson and Mr Jackie Anzac).
37. The Commonwealth only queries the size of the proposed reimbursement payment to witnesses, and not the appropriateness of some payment. The Commonwealth cites *Andrews v Australia and New Zealand Banking Group Limited* [2019] FCA 2216 at [32] in support of a proposition that in that case Middleton J approved "*payments of \$300 to witnesses who had given evidence by affidavit*" (Commonwealth Submissions fn 187). The cited passage in *Andrews* in fact referred to affidavit evidence supporting a payment to

the applicants in that case of the modest amount of \$300 each; up to \$900, where the total settlement was up to \$1.5 million. The persons who received the payment were not witnesses, but the applicants in the case. The closer analogue, as referred to in the Applicant's written submissions at [75] is *Smith v Commonwealth*, where the payments made to the steering committee members was \$120,000 distributed to 12 people (out of a total settlement of \$86 million).

38. The Applicant accepts it would be open to the Court to disagree with the nominated figure of \$5,000 to each of the witnesses who gave evidence at the preservation of evidence hearing. Some of the witnesses in the preservation hearing in this case travelled long distances to give oral evidence against the Commonwealth of a time in their past of which raised at worst deeply traumatic emotions and at best the mixed feeling of pride at working incredibly hard for years on Country and having little or nothing to show for it because of the legislation and attitudes prevailing in the Claim Period. Doing so helped other group members, particularly those who are deceased. It is respectfully submitted that a payment of \$300 might be seen as too low in those circumstances. The payments are likely to be covered by interest earned on the settlement sum prior to distribution, and hence will not diminish what others receive to any great degree.

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ANNEXURE – Comparison tables with extended workings

Table 3: No living siblings

Nature of GM claim	App. Proposal	Cth Proposal
Living Eligible Claimant: born 1940, spouse deceased born 1940, parents deceased born 1922	10,000 + 10,000 + 38,590 = \$58,590	16,882 + 13,505 + 27,011 = \$57,398
Living Eligible Claimant: born 1945, spouse deceased born 1945, parents deceased born 1927	10,000 + 10,000 + 38,590 = \$58,590	13,505 + 10,129 + 27,011 = \$50,564
Living Eligible Claimant: born 1950, spouse deceased born 1950, parents deceased born 1932	10,000 + 10,000 + 20,000 = \$40,000	13,505 + 10,129 + 27,011 = \$50,564
Living Eligible Claimant: born 1955, spouse deceased born 1955, parents deceased born 1937	10,000 + 10,000 + 20,000 = \$40,000	13,505 + 10,129 + 27,011 = \$50,564
Living Eligible Claimant: born 1960, spouse living, parents deceased born 1942	10,000 + 20,000 = \$30,000	13,505 + 27,011 = \$40,516
Descendant Eligible Claimant: born 1965, parents deceased born 1952	\$20,000	\$20,258

Table 4: One living sibling

Nature of GM claim	App. Proposal	Cth Proposal
Living Eligible Claimant: born 1940, spouse deceased born 1940, parents deceased born 1922	10,000 + 10,000 + 19,295 = \$39,295	16,882 + 13,505 + 13,505 = \$43,892
Living Eligible Claimant: born 1945, spouse deceased born 1945, parents deceased born 1927	10,000 + 10,000 + 19,295 = \$39,295	13,505 + 10,129 + 13,505 = \$37,139
Living Eligible Claimant: born 1950, spouse deceased born 1950, parents deceased born 1932	10,000 + 10,000 + 10,000 = \$30,000	13,505 + 10,129 + 13,505 = \$37,139
Living Eligible Claimant: born 1955, spouse deceased born 1955, parents deceased born 1937	10,000 + 10,000 + 10,000 = \$30,000	13,505 + 10,129 + 13,505 = \$37,139
Living Eligible Claimant: born 1960, spouse living, parents deceased born 1942	10,000 + 10,000 = \$20,000	13,505 + 13,505 = \$27,010
Descendant Eligible Claimant: born 1965, parents deceased born 1947	\$10,000	\$10,129

Table 5: Two living siblings

Nature of GM claim	App. Proposal	Cth Proposal
Living Eligible Claimant: born 1940, spouse deceased born 1940, parents deceased born 1922	10,000 + 10,000 + 12,863 = \$32,863	16,882 + 13,505 + 9,004 = \$39,391
Living Eligible Claimant: born 1945, spouse deceased born 1945, parents deceased born 1927	10,000 + 10,000 + 12,863 = \$32,863	13,505 + 10,129 + 9,004 = \$32,638
Living Eligible Claimant: born 1950, spouse deceased born 1950, parents deceased born 1932	10,000 + 10,000 + 6,667 = \$26,667	13,505 + 10,129 + 9,004 = \$32,638
Living Eligible Claimant: born 1955, spouse deceased born 1955, parents deceased born 1937	10,000 + 10,000 + 6,667 = \$26,667	13,505 + 10,129 + 9,004 = \$32,638
Living Eligible Claimant: born 1960, spouse living, parents deceased born 1942	10,000 + 6,667 = \$16,667	13,505 + 9,004 = \$22,509
Descendant Eligible Claimant: born 1965, parents deceased born 1952	\$6,667	\$6,753