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FEDERAL COURT OF AUSTRALIA
DISTRICT REGISTRY: VICTORIA
DIVISION: GENERAL

NO VID 312 OF 2021

MINNIE MCDONALD
Applicant

COMMONWEALTH OF AUSTRALIA
Respondent

RESPONDENT'S SUBMISSIONS ON SETTLEMENT APPLICATION

A. INTRODUCTION

1. The parties have agreed to settle the proceeding, subject to Court approval, on the terms set out in the Deed of Settlement dated 30 August 2024 (**Deed**). By interlocutory application dated 11 October 2024, the Applicant seeks approval of the settlement pursuant to ss 33V(1) and 33ZF of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**) on the terms set out in the Deed, the Settlement Distribution Scheme (Sch 1 to the Deed, as varied by the orders made 16 September 2024) and a differentiation order set out in paragraph 1(c) of the interlocutory application.

2. The ultimate question for the Court on this application is whether the proposed settlement would be fair and reasonable both as between the Applicant (on behalf of Group Members) and the Respondent, and as between the Group Members *inter se*. Answering those questions requires consideration of at least the following issues:

   (a) whether the amount of the Settlement Sum is fair and reasonable as between the parties, having regard to the merit of the pleaded causes of action and the cost and time involved in pursuing contested claims to judgment;

   (b) whether the proposed settlement is fair and reasonable *inter se*, which requires consideration of whether orders should be made to facilitate differentiation between Group Members in respect of the settlement amount paid, as proposed in paragraph 1(c) of the interlocutory application, or differentiation on a different basis or not at all;

   (c) whether to approve the proposed deductions from the Settlement Fund Account (as defined in the Deed) in respect of:

      (i) the Applicant's legal costs;

(ii) reimbursement payments to the Applicant, Sample Group Members and witnesses;

(iii) the commission to be paid to LLS Fund Services Pty Ltd as trustee for LLS Fund 1 (**Funder**) and an amount of $1,045,000 on account of after-the-event insurance costs; and

(iv) other costs, as set out in paragraph 8 of the interlocutory application.

3. For the reasons outlined below, the Court should approve the proposed settlement, and make the orders sought by the Applicant, subject to the following variations. Instead of paragraph 1(c) of the Applicant's proposed orders, the Court should make the differentiation order set out in paragraph 131 below. The Court should approve deductions from the Settlement Fund Account in respect of the Reimbursement Payments in amounts that it considers fair and reasonable, having regard to the matters outlined in part F below. Proposed payments in respect of the Funder's commission should be allowed in accordance with the approach outlined in paragraph 155 below.

4. In support of these submissions, the Commonwealth has filed an affidavit of Paul Christopher Barker, dated 1 November 2024, (**Barker Affidavit**) addressing the factors and matters referred to in the Federal Court's *Class Action Practice Note* (GPN_CA).

5. These submissions are prepared only for the purpose of assisting the Court in determining whether or not to approve the proposed settlement. Nothing said in these submissions should be understood as departing from the Commonwealth's position in relation to the claims, as set out in the Defence to the Further Amended Statement of Claim dated 24 May 2024.

6. The Commonwealth recognises that some of the language of the Ordinances[1] and other documents from the Claim Period is offensive. Where the Commonwealth uses that terminology in these submissions, it does so to ensure accuracy; no offence is intended.

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[1] The Commonwealth uses '**Ordinances**' to refer collectively to the Ordinances which are subject of this proceeding.

B. OVERVIEW OF PROPOSED SETTLEMENT

7. Subject to approval by the Court, the Commonwealth has agreed to pay up to $180M to Group Members, with a maximum payment of $18,000 per eligible Group Member[2] (to be distributed to the Group Member's spouse or children if the Group Member is deceased), $15M in legal costs, $6M in administration costs and $1M for the purposes of costs assessment. The critical terms of the Deed provide:

   (a) for the Commonwealth to make an initial payment (the Lump Sum) of $54,000,000 (on the basis of an assumed 3,000 Eligible Claimants) within 21 days of the appointment of the Administrator; (cl 2.6 and def'ns in cl 1.1)

   (b) for the Commonwealth to make further payment of a sum (the Per Person Sum) calculated by multiplying $18,000 by the number of Eligible Claimants as determined by the Administrator above 3,000 Eligible Claimants up to maximum of 10,000 total Eligible Claimants (or up to a maximum total Per Person Sum of $126,000.000); (cl 2.8 and def'ns in cl 1.1)

   (c) for the Commonwealth to make payments to be applied to meet the Applicant's legal costs (up to $15,000,000), the Administrator's costs (up to $6,000,000) and the Costs Assessor's Costs ($1,000,000); (cll 2.13, 2.14, 2.15)

   (d) for the Court to determine, as necessary, what further costs relating to the Applicant's legal costs, the Administrator's costs, or the Costs Assessor's costs may be met out of the Settlement Fund Account; (cl 2.16)

   (e) for payments to be made to Eligible Claimants from the Net Settlement Fund Account after the Appeal Expiry Date. (cll 2.10- 2.12, cl 2.16);

   (f) for the payments to the Eligible Claimants to be the same, subject to any Differentiation Order; (cl 2.10)

   (g) for the Applicant and Group Members (except those who opt out) to provide releases from each and every claim to the Commonwealth and relevant individuals; and (cl 2.17 and def'ns in cl 1.1)

   (h) for the Applicant to apply for the Claim to be dismissed. (cl 2.19)

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[2] Defined as an Eligible Claimant Payment in the Settlement Deed (cl.2.9), with the final amount to be paid in relation to each Eligible Claimant ultimately to be assessed by the Court appointed Administrator in accordance with the Settlement Distribution Scheme and any Differentiation Order and Common Fund Order made by this Court.

C. FAIRNESS AND REASONABLENESS BETWEEN THE PARTIES

8. The principles relevant to whether to approve the settlement under s 33V of the FCA Act are set out briefly in Part B of the Applicant's Submissions (**AS**). There is no dispute as to the applicable principles.

9. The Court has the benefit of a confidential opinion prepared by the Applicant's counsel dealing with the potential risks associated with the Applicant's case, and the fairness and reasonableness of the settlement more generally (AS [16] – [18]). Nonetheless, in the interests of transparency, and to provide further assistance to the Court in assessing whether the proposed settlement is fair and reasonable, the Respondent outlines below a number of issues with the Applicant's claims. Overall, the claims face significant difficulty and it is fair to characterise them as having low prospects.

10. At the heart of the Applicant's claim is the contention that, during the Claim Period, Group Members worked in the Northern Territory for private employers and/or at Aboriginal Institutions (in the latter case, often as children) but were not paid their minimum entitlements in accordance with the Ordinances and regulations in force at the time. It is therefore instructive to set out a brief overview of the central provisions of the legislative scheme.

C1. Overview of Statutory Scheme

11. During the Claim Period, Aboriginal and Torres Strait Islander peoples in the Northern Territory were subject to three ordinances which are central to this case.

    (a) From 1 June 1933 to 13 May 1957, the Aboriginals Ordinance (as amended from time-to-time)[3] was administered by the Director of Native Affairs, who was the legal guardian of Aboriginal people. The Aboriginals Ordinance prohibited employment of an Aboriginal person without a Licence, and regulations made under the Ordinance prescribed wage rates and conditions for Aboriginal people employed by a Licensee. It also allowed to Director to direct an employer to pay to him the wages of any Aboriginal person. Any amounts received by the Director were required to be paid into a trust account opened by him with the Commonwealth Savings Bank.

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[3] The first iteration of the Aboriginals Ordinance commenced on 13 June 1918. From 1 June 1933, being the commencement of the Claim Period, the Ordinance was amended to provide for – among other things – the prescription of wages and conditions of employment for Aboriginal persons employed under licences granted under the Ordinance (s 67(1)(ga). For the purpose of these submissions, it and its amendments are collectively referred to as the **Aboriginals Ordinance**. Where there is a reference to the Aboriginals Ordinance at a particular point in time, the relevant year is cited.

(b) From 13 May 1957 to 15 September 1964, the Welfare Ordinance (as amended from time-to-time)[4] was administered by the Director of Welfare, who was legal guardian of those declared as Wards. The Welfare Ordinance gave the Director powers over the property of Wards.

(c) From 1 October 1959 to 12 November 1971, the Employment Ordinance (as amended from time-to-time)[5] governed the employment of Wards and, up to 1962, prohibited employment of a Ward without a Licence. It also allowed the Director to direct an employer to pay to him the wages of any Ward employed by the employer – this was repealed by Ordinance 46 of 1964. Amounts paid to the Director on behalf of Wards was to be held in a trust account opened by the Director with the Commonwealth Savings Bank.

12. The Aboriginals Ordinance:

(a) was in effect including from 1 June 1933 to 13 May 1957;

(b) applied to all Aboriginal people;[6]

(c) provided for a Director of Native Affairs, appointed by the Minister, who was responsible for the administration and execution of the Aboriginals Ordinance;[7]

(d) provided that the Director was the legal guardian of Aboriginal people,[8] that the Director had duties relating to exercising a general supervision and care over all matters affecting the welfare of Aboriginal people,[9] and that the Director was entitled to "undertake the care, custody or control" of any Aboriginal person at any time if it was, in the Director's opinion, necessary or desirable in the interests of the Aboriginal person;[10]

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4 For the purpose of these submissions, it and its amendments are collectively referred to as the **Welfare Ordinance**. Where there is a reference to the Welfare Ordinance at a particular point in time, the relevant year is cited.

5 For the purpose of these submissions it and its amendments are collectively referred to as the **Employment Ordinance**. Where there is a reference to the Employment Ordinance at a particular point in time, the relevant year is cited.

6 "Aboriginal" was defined in s 3 of the Aboriginals Ordinance. The definition was amended by the *Aboriginals Ordinance (No 2) 1953* from 1 October 1953 such that the term "half-caste" was removed. See further Defence, [17]-[20].

7 Aboriginals Ordinance, s 4(1). The position of Director was originally referred to as the Chief Protector of Aboriginals, until it was amended by the *Aboriginals Ordinance 1939* which commenced from 5 April 1939. We have used the latter title of Director throughout these submissions for consistency with the pleadings and ease of reference.

8 Aboriginals Ordinance, s 7. The language of this provision changed over the Claim Period, most notably by the *Aboriginals Ordinance (No 2) 1953*, though the changes are not relevant for present purposes.

9 Aboriginals Ordinance, s 5(1)(f).

10 Aboriginals Ordinance, s 6(1).

(e) required employers to hold a Licence to employ Aboriginal people, and made it an offence to employ an Aboriginal person without a licence.[11] Licences could be granted or cancelled by statutory officers called Protectors[12];

(f) enabled regulations which prescribed wage rates and conditions of employment for Aboriginal people:[13] namely the Aboriginals Ordinance Regulations (which prescribed wages from 29 June 1933 to 13 May 1957) and the Aboriginals (Pastoral Industry) Regulations (which prescribed wages for those in the pastoral industry from 30 June 1949 to 13 May 1957);

(g) provided that the Director or any authorised Protector could direct an employer to pay to them (the Director or authorised Protector) such portion as was prescribed of the wages of any Aboriginal person employed or apprenticed to the employer, such funds to be then held by the Director in an account opened at the Commonwealth Savings Bank or spent in accordance with the ordinance;[14]

(h) provided for "Reserves" (areas declared to be a reserve for Aboriginal people[15]) and "Aboriginal Institutions" (any mission station, reformatory, orphanage, school, home or other institution for the benefit, care or protection of Aboriginal people declared to be an aboriginal institution[16]); and

(i) provided that the Director could cause an Aboriginal person to be removed to and kept at a Reserve or Aboriginal Institution, and that it was an offence to attempt to depart (subject to exceptions, including lawful employment).[17]

13. The Aboriginals Ordinance Regulations and the Aboriginals (Pastoral Industry) Regulations contained more detail regarding the payment of wages to Aboriginal people.

(a) The Aboriginals Ordinance Regulations:

(i) were in effect from 29 June 1933 to 13 May 1957;

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11 Aboriginals Ordinance, s 22.

12 Aboriginals Ordinance, ss 23, 24.

13 Aboriginals Ordinance, s 67(1)(ga); this power to make regulations "prescribing the wages and conditions of employment of aboriginals… employed under licences granted under this Ordinance" was inserted by the *Aboriginals Ordinance 1933* which commenced from 29 June 1933.

14 Aboriginals Ordinance, s 29A. Section 29A was inserted by the *Aboriginals Ordinance 1933* which commenced from 29 June 1933.

15 "Reserve" was defined in s 3 of the Aboriginals Ordinance. The definition was amended by the *Aboriginals Ordinance 1939*, though the change is not relevant for present purposes.

16 "Aboriginal Institution" was defined in s 3 of the Aboriginals Ordinance. The definition was amended by the *Aboriginals Ordinance (No 2) 1953* consistent with the term "half-caste" being removed from the definition of Aboriginal, though the change is not relevant for present purposes.

17 Aboriginals Ordinance, s 16.

(ii) prescribed wages of five shillings per week to be paid by a Licensee to every Aboriginal person employed in a country district,[18] and to every Aboriginal person employed in a town district;[19]

(iii) required a portion of such wages to be paid to the Director every four weeks to be held "in trust" by the Director for the Aboriginal employee;[20]

(iv) empowered the Director to exempt a Licensee from the obligation to pay wages to an Aboriginal person employed in a country district where the Licensee was maintaining the relatives and dependents of the Aboriginal person (referred to in the Further Amended Statement of Claim (**FASOC**) as the **Dependants Exception**);[21]

(v) prescribed (higher) wages for Aboriginal persons employed as drovers or drover's assistants;[22]

(vi) gave the Director power to direct a Licensee employing an Aboriginal person in a country district to pay the Aboriginal person such remuneration in kind as the Director specified, in lieu of any wages or a portion of any wages (referred to in the FASOC as the **Wages in Kind Exception**).[23]

(vii) required Licensees to provide sufficient food, clothing and tobacco to every Aboriginal person they employed in a country district[24] or in a town district;[25] and

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18 Aboriginals Ordinance Regulations, r 14.

19 Aboriginals Ordinance Regulations, r 13; though note r 13 made provision for a "female half-caste" to be paid at the rate of six shillings a week.

20 Aboriginals Ordinance regulations, rr 13(b), 14(b). Though note that from 17 October 1940, this prescription became a discretion of the Director with respect to Aboriginal people employed in town districts because of the amendment to r 13(b) brought about by r 1 of the *Aboriginals Ordinance Regulations 1940 (No 11)*.

21 Aboriginals Ordinance Regulations, r 14.

22 Aboriginals Ordinance Regulations, r 15; though note that r 16 provided that the provisions of r 14 would apply to drovers and drover's assistants in certain circumstances.

23 Aboriginals Ordinance Regulations, r 20.

24 Aboriginals Ordinance Regulations, r 14(c).

25 Aboriginals Ordinance Regulations, r 13(c).

(viii) required Licensees to provide free transport as required for the provision of medical attention to sick, injured or diseased Aboriginal persons that they employed in a country district,[26] or in a town district.[27]

(b) The Aboriginals (Pastoral Industry) Regulations:

(i) was in effect from 30 June 1949 to 13 May 1957;

(ii) provided that certain provisions of the Aboriginals Ordinance Regulations did not apply to the employment of Aboriginal people in the pastoral industry (which was defined to include "work of every description in, on, or in connexion with any station, pastoral lease, grazing licence…");[28]

(iii) set out in the Second Schedule the wages that were required to be paid by a Licensee to an Aboriginal employee;[29]

(iv) provided that a Licensee was to supply, free of charge, to the Aboriginal people they employed, and to their wives and children, food, clothing and other articles as prescribed in the Third Schedule;[30]

(v) required a Licensee employing Aboriginal people in droving operations to pay all moneys earned by those Aboriginal employees to an authorised Protector at least once a month, to be held by the Director "in trust" for the Aboriginal employees;[31] and

(vi) provided that where the Licensee and an authorised Protector agreed that an Aboriginal employee was not sufficiently competent to be paid the specified wage, the Licensee could pay such lesser rate as was agreed

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26 Aboriginals Ordinance Regulations, r 14(f).

27 Aboriginals Ordinance Regulations, r 13(f).

28 Aboriginals (Pastoral Industry) Regulations, rr 2, 3.

29 Aboriginals (Pastoral Industry) Regulations, r 5(1); Schedule 2 provided that males were to be paid as follows: during the first year if no experience in stock camps (12 shillings, 6 pence), after one year's experience (15 shillings), after two years' experience (17 shillings, 6 pence), after three years' experience (1 pound), drovers and drovers' assistants travelling with stock (1 pound, 15 shillings), drovers and drovers' assistants travelling with plant only (1 pound) and that females were to be paid as follows: wife of, living with, male employee (7 shillings, 6 pence), unmarried or not living with male employee (10 shillings).

30 Aboriginals (Pastoral Industry) Regulations, r 5(1)(e).

31 Aboriginals (Pastoral Industry) Regulations, r 5(1).

between the Licensee and the authorised protector (referred to in the FASOC as the **Slow Worker Exception**).[32]

14. On 13 May 1957, the Aboriginals Ordinance (as amended from time to time) was repealed by the *Welfare Ordinance 1953*.[33] From that date, the Welfare Ordinance prescribed matters relating to the treatment of people declared to be "Wards".[34] A second piece of legislation, the Employment Ordinance, commenced on 1 October 1959 and prescribed matters relating to the employment of Wards.[35] Because the Employment Ordinance did not commence until 1 October 1959, there was a period of more than two years following the repeal of the Aboriginals Ordinance when there was no ordinances in place in the Northern Territory governing the employment of Aboriginal people.

15. The Welfare Ordinance:

    (a) was in effect from 13 May 1957 to 15 September 1964;

    (b) applied to all persons who had been declared by the Northern Territory Administrator in Council to be a "Ward";[36]

    (c) provided for a Director of Welfare, appointed by the Minister, who was responsible for the administration of the Welfare Ordinance;[37]

    (d) provided (until 23 May 1962[38]) that the Director was the guardian of all Wards (except in respect of proceedings by a Ward against the Director or another officer),[39] that the Director had duties relating to promoting the social, economic and political advancement of Wards,[40] and (until 23 May 1962[41]) that the Director was

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32 Aboriginals (Pastoral Industry) Regulations, r 5(2).

33 *Welfare Ordinance 1953*, s 4. See further, Defence [7(c)].

34 *Welfare Ordinance 1953*, s 2; *Welfare Ordinance 1955*, s 2. See further, Defence [8].

35 *Wards' Employment Ordinance 1953-1959*, s 2, Note 2.

36 Welfare Ordinance, ss 6, 14. See further Defence [23] where it is noted that "by publication in the Northern Territory Gazette No 19B of 13 May 1957, the Administrator of the Northern Territory… declared about 15,439 persons to be wards" and where it is admitted that "most, if not all, the persons [declared] had been defined or dealt with as Aboriginals under the Aboriginals Ordinance".

37 Welfare Ordinance, s 7(1). Also defined as Director in these submissions.

38 Section 12 of the *Welfare Ordinance 1961* (which commenced on 23 May 1962) repealed s 24 of the Welfare Ordinance.

39 Welfare Ordinance, s 24.

40 Welfare Ordinance, s 8(a)(i).

41 Section 8 of the *Welfare Ordinance 1961* (which commenced on 23 May 1962) removed the existing s 17 of the Welfare Ordinance, replacing it with a new s 17 which provided for the Director or a welfare officer to apply to a court of summary jurisdiction for orders relating to the removal or detention of wards.

empowered to take a Ward into his custody or order that a Ward be removed to, and kept within, a Reserve or Institution;[42]

(e) provided (until 23 May 1962[43]) that it was an offence for a Ward to refuse to be kept within a Reserve or Institution where the Director had made such an order;[44] and

(f) provided (between 4 September 1957 and 23 May 1962[45]) that all property of a Ward (save for certain property governed by Part VA of the Welfare Ordinance) was to be held by the Director "as trustee for the [W]ard" and over which property the Director was to undertake the general care and management.[46]

16. The Employment Ordinance:

(a) was in effect from 1 October 1959 to 12 November 1971;

(b) applied to the employment of all Wards[47] until 9 February 1966, from which time, the ordinance did not affect the employment of a person where an award or determination or other law was in effect for the employment of that person;[48]

(c) until 15 February 1961,[49] provided that employers were required to have a Licence to employ Wards, and that it was an offence to employ a Ward without a Licence.[50] Licences could be granted or cancelled by statutory officers known as Welfare Officers;[51]

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42 Welfare Ordinance, s 17(1). Such institution being included in the definition of Aboriginal Institution for these submissions.

43 Section 10 of the *Welfare Ordinance 1961* (which commenced on 23 May 1962) repealed the the existing s 20 of the Welfare Ordinance.

44 Welfare Ordinance, s 20.

45 Section 25 of the Welfare Ordinance was introduced by s 3 of the *Welfare Ordinance 1957* (commencing on 4 September 1957). Section 13 of the *Welfare Ordinance 1961* (which commenced on 23 May 1962) repealed the existing ss 25-26 of the Welfare Ordinance and replaced it with new s 25 which provided that a person declared a ward was nonetheless "able to deal with his property in all respects as though no declaration had been made" and a new s 26 which provided that the Director could apply to a court of summary jurisdiction for a vesting order for the property of a ward if the Director considered it expedient.

46 Welfare Ordinance, s 25(1). The remaining provisions of Division 3 specified how the property of Wards was to be held and in what circumstances payments could be made.

47 Section 4 of the Employment Ordinance adopted the definition of "Ward" set out in the Welfare Ordinance.

48 *Wards' Employment Ordinance 1965*, s 2 (inserting a new s 3A into the Employment Ordinance).

49 Section 2 of the *Wards' Employment Ordinance 1960* (which commenced on 15 February 1961) removed the existing ss 32-37 of the Employment Ordinance and replaced it with new ss 32-36 establishing a scheme by which an employer had to give notice to the Director of any employment of a ward and pursuant to which the Director could direct a person not to employ any ward on the ground the person was not a fit and proper person to employ a ward.

50 Employment Ordinance, s 32.

51 Employment Ordinance, ss 33, 34.

(d) required Licensees (or employers after 15 February 1961) to employ Wards in accordance with prescribed conditions of employment (specified in regulations) and at the prescribed wage specified by the Administrator by notice in the Gazette;[52]

(e) provided that a Licensee (or employer after 15 February 1961) could employ a slow, aged or infirm Ward at a wage less than the prescribed wage as agreed between the Licensee and a Welfare Officer (also referred to in the FASOC as the **Slow Worker Exception**);[53] and

(f) provided (until 7 September 1964[54]) that the Director could direct an employer to pay a portion of the Ward's wages to the Director or an authorised welfare officer, which money was to be paid into a trust account held with the Commonwealth Savings Bank.[55]

17. The Welfare Ordinance and its regulations were repealed on 15 September 1964.[56] The Employment Ordinance and its regulations were repealed on 12 November 1971.[57] Thus, from 15 September 1964 to 12 November 1971, only the Employment Ordinance (of the three main Ordinances relied on by the Applicant) was operative.

C2. Fiduciary Claims

18. The Applicant alleges that the Commonwealth, or individuals exercising powers under the Ordinances,[58] owed certain fiduciary duties to Group Members. In the FASOC, the four suites of duties are referred to as the Work Duties,[59] the Ward Duties[60] and De Facto Ward Duties.[61]

19. It is alleged that the Commonwealth, or the Director or other statutory officeholders (for whom the Commonwealth was vicariously liable), breached the fiduciary duties,[62] including by:

(a) failing to exercise care and skill, including by failing to

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52 Employment Ordinance, s 38.

53 Employment Ordinance, s 38.

54 Section 5 of the *Wards' Employment Ordinance 1964* (which commenced on 7 September 1964) repealed the existing s 41 of the Employment Ordinance.

55 Employment Ordinance, s 41.

56 *Social Welfare Ordinance 1964*, s 4.

57 *Wards Employment Ordinance Repeal Ordinance 1971*, s 2.

58 Though it can be noted that this latter allegation is not sought as a declaration in the FAOA.

59 FASOC, [117]-[119].

60 FASOC, [132]-[135].

61 FASOC, [143A]-[143D].

62 See FASOC, [147]-[150] for Work Duties, [151]-[154] for Ward Duties, [154A]-[154D] for De Facto Ward Duties

(i) ensure payment of adequate or fair remuneration

(ii) supervise employment arrangements; and

(iii) pursue claims in respect of being allegedly paid no or inadequate remuneration

(b) failing to avoid conflicts of interest by:

(i) denying permission for those in Aboriginal Institutions to work outside the institutions for higher wages

(ii) in certain circumstances, making Dependents Exceptions (ie exempting the employer from paying wages where they were maintaining the employee's dependents), when the Commonwealth would otherwise have an alleged obligation to maintain the dependents of the worker

(c) failing to account for any benefit received in conflict of its interests and the interests of Group Members or received from or by use of its fiduciary position; and

(d) using the position as fiduciary to confer a benefit on itself.

20. It is unlikely that the fiduciary claims will succeed, for at least the following reasons.

21. **Relationships not fiduciary in nature.** Except insofar as the Commonwealth admits that the Director was in a fiduciary relationship with Aboriginal Wards for part of the Claim Period,[63] it is unlikely that the Applicant will establish the alleged fiduciary relationships. The alleged fiduciary relationships are founded on certain powers conferred on officeholders under the Ordinances. No powers were vested in the Commonwealth itself,[64] and the relevant powers under the Ordinances could not have created a fiduciary relationship between the Commonwealth and Group Members. Moreover, the essence of a fiduciary relationship is that one party exercises power on behalf of another and pledges themselves to act in the best interests of the other.[65]

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63 Defence, [30], [31], [38], [39], [132] and [133(a)].

64 Defence, [48], [49] and [133(a)(ii)].

65 *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at [71], approving the analysis in *Norberg v Wynrib* [1992] 2 SCR 226 at 272. See also *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41 at 96-97 (per Mason J), *Mabo v Queensland (No 2)* (1992) 175 CLR 1 at 200 (per Toohey J); and *Wik Peoples v Queensland* (1996) 187 CLR 1 at 95-96 (per Brennan CJ).

There was no opportunity for the Commonwealth to determine to act solely in the best interests of each Group Member in exercising any of the relevant powers, nor could Group Members have reasonably expected it to do so. The Commonwealth's role involved balancing multiple competing interests in the administration of the Northern Territory, and it is inherently unlikely that it would have directly owed fiduciary duties to Aboriginal people in relation to their employment conditions with private employees or as residents of Aboriginal Institutions.[66]

22. Although the relevant statutory powers were generally vested in individuals who may have been employed, or appointed, by the Commonwealth, they were not acting as servants or agents of the Commonwealth when undertaking their statutory appointments under the Ordinances, such that their acts can be taken as acts of the Commonwealth. In the case of Superintendents of Aboriginal Institutions that were operated by third parties, such as the Catholic Church, it is unlikely that the Superintendent would be found to be the Commonwealth's servant or agent. In any event, for all statutory office-holders, the relevant powers were independent discretions which required the formation of a particular state of satisfaction by an individual office-holder, or the formation of an opinion by that office-holder as to how the power should be exercised.[67] It is unlikely that office-holders with independent discretions would be found to be servants or agents of the Commonwealth.

23. It is also unlikely that the Applicant will succeed in establishing a fiduciary relationship between any of the relevant statutory office-holders and the Applicant and Group Members. Whether any of the relevant statutory office-holders was in a fiduciary relationship with any Group Member requires consideration of the specific statutory functions conferred on that office-holder at the relevant time, and the circumstances of their exercise. The Applicant's pleading aggregates powers that were vested in different officers or by successive pieces of legislation as the foundation for the allegation that various statutory office-holders (the Director, Protectors, Welfare Officers, Other Officers and/or Superintendents) had fiduciary relationships with Controlled Aboriginals or with

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66 The mere enactment of legislation to establish a scheme in which individual office-holders would exercise powers which could be exercised to benefit the interests of Group Members is not itself sufficient to create a fiduciary relationship: *Collard v The State of Western Australia* (2013) 47 WAR 1 at [1174], [1176].

67 See, relatedly, the analysis in *Cubillo v Commonwealth* (2001) 112 FCR 455, [288]-[294].

Aboriginal Wards.[68] When each office-holder's powers are examined individually and at specific points in time, it is unlikely that they will provide a foundation for fiduciary duties.

24. For example, it is alleged that a fiduciary relationship was formed between Controlled Aboriginals and a Superintendent in circumstances where the only statutory powers among those pleaded that were vested in a Superintendent at any one time were for the control and supervision of Inmates of an Aboriginal Institution[69] or, in a later period, to give orders and directions to an Aboriginal Ward on a Reserve or Aboriginal Institution and (in relation to a Superintendent of a Reserve) to arrest an Aboriginal Ward for non-compliance.[70] Setting aside the adverse character of these powers for the moment, the statutory relationship they establish is confined. Imposing the special obligations of a fiduciary onto the Superintendent's role would significantly expand the concept of fiduciary relationships beyond those with a core pledge of loyalty and trust. The relationship between a person with the command of a facility (such as the Superintendent) and the inmates of that facility is governed by the law of tort with its expectation of reasonableness in the discharge of a duty of care but not the law of fiduciaries.[71]

25. For at least these reasons, when the powers conferred on the relevant office-holders are properly analysed, it is unlikely that any fiduciary relationship will be found (other than on the part of the Director, in the circumstances admitted by the Commonwealth[72]).

26. **Novel prescriptive duties will not be recognised**. A number of the alleged duties involve positive obligations that are inconsistent with the proscriptive nature of fiduciary duties.[73] The distinction between prescriptive and proscriptive obligations, with fiduciary

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68 FASOC, [118] (re Controlled Aboriginals under the Aboriginals Ordinance), [134] (re Aboriginal Wards).

69 FASOC, [53] (as relied on in, for example, [117(b)(ii)] and [118(b)(ii)]).

70 FASOC, [64(c)] (as relied on in [117(b)(ii)] and [118(b)(ii)]).

71 *Cubillo v Commonwealth* (2001) 112 FCR 455, [466].

72 Defence, [117(a)(iv)], [133(a)].

73 See *Breen v Williams* (1996) 186 CLR 71 at 113 (Gaudron and McHugh JJ), 137-138 (Gummow J); *South Australia v Lampard-Trevorrow* (2010) 106 SASR 331 at [337] (Full Court). Insofar as some authorities suggest that fiduciary obligations include positive obligations, the obligations are correctly understood as the practical manifestation of the orthodox proscriptive obligations of a fiduciary. See eg *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89; and *Westpac Banking Corporation v Bell Group Ltd (in liq) (No 3)* (2012) 44 WAR 1. It is noted that the High Court granted special leave to appeal on the question of whether the affirmative duties of directors found to have been breached in *Bell* were fiduciary ([2013] HCATrans 49), however the case settled before the appeal was heard. See also discussion by Pritchard J in *Collard v Western Australia (No 4)* (2013) 47 WAR 1 at [1206] – [1209].

relationships being concerned only with the latter, is well established.[74] The distinction reflects the underlying focus of equity on exacting loyalty from fiduciaries, rather than broader obligations of the kind that are the concern of the law of torts and contract.[75]

27. Obligations such as those alleged in this case, to exercise "due care and skill in protecting the interests of Controlled Aboriginals in connection with their work",[76] to exercise "due care and skill in protecting the interests of Aboriginal Wards generally"[77] and to "adequately provide for, maintain and educate" Aboriginal Wards,[78] are prescriptive in nature and go well beyond what is necessary to ensure loyalty of a fiduciary.[79] It is unlikely that the Applicant will establish that duties of this kind were owed.

28. **Adverse powers under Ordinances point against fiduciary duties**. During a significant part of the Claim Period, the Director had power to exempt an Aboriginal person from payment of the prescribed minimum wage by making the Dependants Exception, the Slow Worker Exception, or the Wages in Kind Exception.[80] The exercise of these powers could only ever have been adverse to Group Members. Such powers are inherently inconsistent with the notion of fiduciary duties and provide no foundation for imputing a fiduciary relationship.[81] The same is true of other of the powers relied on by the Applicant,[82] including, for example, s 52 of the Aboriginals Ordinance, s 20 of the Welfare Ordinance and s 61 of the Welfare Ordinance 1961 which provided for offences and the power of arrest in the event of non-compliance by a Group Member with certain orders given by office-holders.

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74 *Breen v Williams* (1996) 186 CLR 71 at 83, 92-93, 113, 137-138; *Pilmer v Duke Group Ltd (in liq)* (2001) 207 CLR 165 at [74]; *Friend v Brooker* (2009) 239 CLR 129 at [84]; *Howard v Federal Commissioner of Taxation* (2014) 253 CLR 83 at [56].

75 *Breen v Williams* (1996) 186 CLR 71 at 92-93 (Dawson and Toohey JJ).

76 FASOC [119(a)] (Work Duties) and [143D(a)] (De Facto Ward Duties).

77 FASOC [135(b)] (Ward Duties), emphasis added.

78 FASOC [135(a)] (Ward Duties).

79 We have assumed for present purposes that the relevant relationships would be characterised as fiduciary, although that is denied except insofar as it is accepted that the Director was in a fiduciary relationship with certain Group Members during those periods that he was their legal guardian. Even in that circumstance, the duties alleged go beyond the scope of the Director's fiduciary obligations as guardian.

80 These powers were vested in the Director by rr 14(a), 16 and 20 of the Aboriginals Regulations, r 5(2) the Aboriginal Pastoral Regulations, and s 38(3)(a) of the Employment Ordinance. The powers are relied on in, for example, FASOC [117(a)], [117(b)(i)], [117(c)(i)], [118(b)(i)] and [118(c)(i)].

81 *Wik Peoples v Queensland* (1996) 187 CLR 1, 96-97 (Brennan CJ); cited with apparent approval in *Northern Territory v Griffiths* (2019) 269 CLR 1, [129]-[130] (Kiefel CJ, Bell, Keane, Nettle and Gordon JJ).

82 See, e.g., FASOC [117(b)(ii)-(iv), (c)(ii)-(iv)], [118(b)(ii)-(iv)] and the cross-references therein to FASOC [53]-[58], [62]-[64], [83-[89].

29. **Difficulty proving breach.** It is alleged that the Work Duties and Ward Duties required the Commonwealth to "pursue any claim [of relevant Group Members] arising from work undertaken for no or inadequate remuneration".[83] The Commonwealth's liability is alleged to arise from its failure to pursue such claims against private employers (on behalf of Station & Domestic Aboriginals) or Aboriginal Institutions (on behalf of Aboriginal Inmates). The Applicant and Group Members will have difficulty establishing these claims.

30. In relation to Group Members whose claims relate to work allegedly undertaken whilst residents of an Aboriginal Institution, the tasks (often matters such as cooking, cleaning, chopping firewood, and helping other children) undertaken pursuant to the Superintendent's broad discretionary powers to make orders for the control and supervision of the Institutions[84] was in the nature of chores[85] or preparation for life outside the institution,[86] and did not constitute remunerable work. Breach of any of the alleged duties is not likely to be established on such facts.

31. For those in private employment on stations, there is likely to be great difficulty in establishing that Group Members were not in fact paid other than in accordance with the Ordinances through cash payments, rations or one or other of the payment exceptions. It will similarly be difficult to show that the book-down system operated by many stations failed to provide the full value of wages being paid to individuals through various purchases made by those individuals at station stores.

32. Given the passage of time since the Claim Period, few documents have been located recording payment of wages to Aboriginal people by private employers (discussed further below). Those documents that have been located show that, at particular points in time, wages were being paid approximately in accordance with prescribed rates. Unsurprisingly, witnesses who gave evidence last year had limited recollections of the arrangements for paying them and providing rations and keep during the Claim Period.

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83 See eg FASOC, [147(c)] and [151(c)]. Although the Applicant has not framed the Work Duties or Ward Duties as directly as this in the FASOC (the Work Duties set out at [119] and the Ward Duties at [135] of the FASOC), this appears to be the necessary allegation for the purposes of seeking to establish the Commonwealth's alleged liability to the Applicant, relying on provisions such as: the Aboriginals Ordinance ss 43(1)(b), 57; Welfare Ordinance ss 25(1)(b), 28 (following the Welfare Ordinance 1961)".

84 Aboriginals Ordinance s 13(6), Welfare Ordinance s 17(13) (post 1962).

85 For example: Bessie Parsons, T 160-161, 163.22-.40; Barbara Tippolay, T 773, 786, Nora Sullivan, T799-800 801, 802.

86 For example: Barbara Tippolay, T 780.07-.10.

In those circumstances, the absence of records will make it very difficult for Group Members to establish that they had an entitlement to unpaid wages or keep that should have been recovered on their behalf by the Commonwealth or a relevant office-holder.

33. Similarly, it is likely to be difficult for Group Members to establish that the Commonwealth failed to avoid a conflict of interest by denying permission to Aboriginal Inmates to work outside Aboriginal Institutions.[87]

34. **Commonwealth not vicariously liable for any breach.** The Applicant alleges that the Commonwealth is vicariously liable for breach of fiduciary duty by the relevant officeholders.[88] Reliance on vicarious liability is problematic for two reasons. First, equity is unlikely to apply vicarious liability to find the Commonwealth liable for the wrongdoing of its employee.[89] Secondly, insofar as the powers relied on by the Applicant involved independent discretions requiring the formation of a particular state of satisfaction by an individual office-holder, or the formation of an opinion as to how the power should be exercised,[90] the operation of the independent discretion rule prevents the collapsing of the separation between the individual and the Commonwealth.

35. The matters outlined above illustrate some of the difficulties that the Applicant and Group Members will face in establishing their fiduciary claims.

C3. Trust Claims

36. It is alleged that the Commonwealth, or the Director, was the trustee under the Ordinances for various trusts for saved wages, lost wages, managed property and the property of wards. The Applicant says that the Commonwealth or the Director breached the duties as trustee by:[91]

(a) failing to exercise due care and skill

(b) spending the trust money of Group Members on things they were not liable for contrary to the terms of the trusts

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87 The evidence of witnesses at the preservation of evidence hearing in 2023 was that they were assisted in finding external employment: see for example: Maybelle Bourke T 721.15-18; Nora Sullivan T 811:6-19.

88 FASOC at [150], [154], [154D] [158].

89 *Lifeplan Australia Friendly Society Ltd v Woff* [2016] FCA 248 at [374] per Besenko J, and *Oliver Hume South East Queensland Pty Ltd v Investa Residential Group* (2017) 259 FCR 43 at [110] per Dowsett J.

90 See, relatedly, the analysis in *Cubillo v Commonwealth* (2001) 112 FCR 455 at [288]-[294].

91 FASOC, [155]-[158] and Applicant's Concise Statement dated 5 June 2024 at [21].

(c) failing to pay the trust money back to the Group Members or another beneficiary upon termination

(d) failing to "get in" the Lost or Saved Wages of Group Members to the trusts where the wages were required to or had been directed to be paid to the Director but were not paid

(e) failing to keep proper accounts and records, or render such accounts to allow Group Members or other beneficiaries to know their interest when required; and

(f) dealing with the trusts in such a way as to benefit from its position as trustee.

37. The Applicant seeks an account of the trusts, the payment of trust monies and equitable compensation for any loss suffered as a result of the alleged breaches of trust.[92]

38. The Applicant relies on provisions of the Ordinances as the basis for the creation of the alleged trusts. She says that provisions under the Aboriginals Ordinance and then under the Employment Ordinance obliging employers to forward to the Director all wages due to an employee who died during their employment created the Lost Wages Trust.[93] Provisions under the Aboriginals Ordinance and subsequently under the Employment Ordinance which empowered the Director to direct an employer to pay a portion of an employee's wages to the Director are alleged to have created the Saved Wages Trust.[94] Provisions under the Aboriginals Ordinance and then the Welfare Ordinance, pursuant to which the Director could undertake the management of an Aboriginal person's or a Ward's property, are said to have created the Management Trusts and the Ward Trusts.[95]

39. The breach of trust claims are likely to fail, including because:[96]

(a) no private trusts actionable in equity were created;

(b) in the event private trusts were created:

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92 FAOA [1]-[4].

93 FASOC [113]-[116], [120]-[121] referring to Aboriginals Ordinance, s 34 and Employment Ordinance, s 42(1) (until the repeal of that section by the Employment Ordinance 1964),

94 FASOC [108]-[112], [140]-[141] referring to Aboriginals Ordinance, s 29A and Employment Ordinance s 41 (until the repeal of that section by the Employment Ordinance 1964).

95 FASOC [124], [129], [134], [137], referring to Aboriginals Ordinance, s 43 and Welfare Ordinance, ss 25-28.

96 Defence, [155]-[158].

(i) they did not include the alleged terms or alleged trustee duties because such terms and duties were inconsistent with the Ordinances;

(ii) the Commonwealth was not the trustee of those trusts and is not liable for the actions of the Director who was exercising independent statutory powers and functions[97] when receiving and dealing with wages;

(iii) because of the passage of time and the limited documents that are available, it is unlikely that any individual trusts claims will be established.

40. Focussing on the Saved Wages Trust, even though the word "trust" is used in the provisions alleged to create the Saved Wages Trust,[98] it is unlikely that the obligations will be found to give rise to "a trust according to ordinary principles – or as it is sometimes called, a 'true trust'".[99] Rather, the obligations imposed on the Director are likely to be characterised as a governmental or political obligation.

41. If the Court accepted that the relevant provisions created the Saved Wages Trust as a "true trust", the likely outcome would nonetheless be that the cause of action lay only against the Director personally, not as a servant or agent of the Commonwealth. The provisions alleged to create the Saved Wages Trust empowered the Director to direct employers to pay wages to the Director.[100] The vesting of responsibility in the Director — for example, the responsibility to determine when such a direction was appropriate and, where funds were received, when funds were to be expended — are individual discretions and are indicative that the Director was to act in his individual capacity and not as a servant or agent of the Commonwealth. That is consistent with the majority's approach in *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation*.[101].

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97 The Applicant will have to overcome the same issues as discussed at paragraph [37] in relation to fiduciary duties, regarding to the application of the principle of vicarious liability in equity, for the alleged breaches of Director Trusts too.

98 FASOC, [140]-[141].

99 Registrar of Accident Compensation Tribunal v Federal Commissioner of Taxation (1993) 178 CLR 145, 162-163 citing *Kinloch v Secretary of State for India in Council (*1882) 7 App Cas 619, 630 (Lord O'Hagan).

100 FASOC, [140]-[141].

101 *Registrar of Accident Compensation Tribunal v Federal Commissioner of Taxation* (1993) 178 CLR 145, 163-164 and 170-171 (Mason CJ, Deane, Toohey, Gaudron JJ).

42. Further, the records available indicate that at 30 June 1964, all amounts held in any accounts for Group Members pursuant to s 29A of the Aboriginals Ordinance or s 41(1) of the Employment Ordinance had been paid to the relevant individuals, where they could be identified.[102]

43. Around that date, a payment of £5,467-0-2 ($10,934.02) was made into Commonwealth Consolidated Revenue Fund in respect of those wards who could not be located or who were deceased and instructions were given that an order for a Refund of Revenue was to be processed and a cheque drawn in favour of the relevant person if a claimant was identified at a later stage. Applying simple interest at Federal Court pre-judgment interest rates, this amount would be $87,581.47. Even if compound interest was applied (which the Commonwealth submits it should not be), applying the methodology employed by the Applicant's expert for calculation of present-day value, the present day value of this amount would be, at most, around $1.15 million.[103]

44. For the reasons briefly outlined, it is likely that the trust claims would fail. Even if the Court found that one or more trusts existed, and was prepared to make an order for account of that trust against public revenue, the quantum would be small.

C4. QUANTUM MERUIT AND RESTITUTION

45. Quantum meruit is relevant to the Applicant's claims in two ways. First, the Applicant claims that Group Members had claims against private employers for a quantum meruit, and the Commonwealth is liable for the failure to discharge fiduciary duties owed by either the Commonwealth or particular statutory officers to pursue the employers for those claims.[104] For the reasons outlined in section C2 above, the claims for breach of fiduciary duty are likely to fail.

46. The Applicant also pleads a claim for restitution on the basis of *quantum meruit* in respect of unpaid (or underpaid) work done by Group Members who were resident at Aboriginal Institutions during the Claim Period (the Applicant herself did not reside at an Aboriginal Institution). These direct claims for restitution are unlikely to succeed.

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102 NAA.5025.0001.0470 at .0529, 0539. See also NAA.3002.0001.0086 at .0168.

103 See Expert Report of Mr Joseph Allan Box, filed 4 May 2024, pages 64–73 and Annexures 9.1–9.3.

104 FASOC [170] – [174].

47. Unjust enrichment is not a free-standing cause of action, such that it can itself provide the basis for restitutionary relief.[105] The typical claim for *quantum meruit* is where a party provides services to another, at the request of that other party and in circumstances where the party providing the services had a reasonable expectation of remuneration, that is, the services were not being provided gratuitously and it would be unconscionable for the recipient to retain the benefit without payment.[106]

48. The claim for restitution in this case is unusual in a number of respects.

49. To the extent the Applicant says that work was undertaken by Aboriginal Inmates at the request or direction of the Superintendents of Aboriginal Institutions, those officers were exercising independent statutory powers and functions under the Ordinances, and their requests or directions were not requests by the Commonwealth.[107] Further, the Commonwealth denies that it received any benefit for any work undertaken at Aboriginal Institutions. Aboriginal Institutions were generally operated during the Claim Period by third parties, such as churches.[108] Receipt of a benefit by the defendant, in circumstances that make retention of that benefit unjust, is central to a claim in *quantum meruit.* It is very difficult to see how the Applicant could establish that element.

50. Further, if it can be shown that the relevant Ordinances authorised the Superintendent to direct Group Members to undertake the relevant work, then there can be no claim for restitution.

51. The Applicant alleges that, to the extent that Group Members worked while they were not at liberty to leave Aboriginal Institutions and while the Superintendent exercised substantial control over their liberty, it amounted to slavery within the meaning of the *Slavery Abolition Act 1833* (Imp) and any provision of the Ordinances authorising it was void and inoperative throughout the Claim Period by reason of the *Colonial Laws Validity Act 1865* (Imp).[109] Such alleged invalidity would make the work required unlawful and would, on the Applicant's apparent novel formulation, give rise to an obligation to make

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105 *Australian Financial Services and Leasing Pty Ltd v Hills Industries Ltd* (2014) 253 CLR 560 at [78] (per Hayne, Crennan, Kiefel, Bell and Keane JJ).

106 See *Lumbers v W Cook Builders Pty Ltd (in liq)* (2008) 232 CLR 635 at [79] (Gummow, Hayne, Crennan and Kiefel JJ); *Programmed Total Marine Services Pty Ltd v Hako Endeavour* (2014) 229 FCR 563 at [164] (Besanko J, Allsop CJ and Rares J agreeing); *Sunwater Ltd v Drake Coal Pty Ltd* [2017] 2 Qd R 109 at [1], [2], [14] – [15] and [41].

107 Defence, [48(c)], [49(c)] and [160].

108 See Barker Affidavit [44]–[46], with respect to the records sought and obtained under subpoena from such third parties.

109 FASOC, [166]-[168].

restitution (though it remains unclear why that would be an obligation on the Commonwealth).

52. It is unlikely that the Applicant will establish the alleged invalidity as a matter of law, setting aside the further issue of the need to prove the factual circumstances said to ground the circumstances of forced labour. First, following the *Statute of Westminster Adoption Act 1942* (Cth), all ordinances made pursuant to s 4U of the *Northern Territory Administration Act 1910* (Cth) (s 4U having been incorporated by amending legislation in 1947) could not be found to be invalid by virtue of being repugnant to imperial legislation. Accordingly, for a significant portion of the Claim Period, this alleged invalidity could not occur.

53. In any case, the effect of the *Slavery Abolition Act 1833* (Imp), relied on by the Applicant was to prohibit chattel slavery, being the trade of people as possessions, and accordingly it is not applicable to the alleged circumstances of forced labour.[110]

54. Further, even if the Applicant could establish invalidity and Group Members were able to make out on the evidence that there were unlawful requests made for unpaid or underpaid work in Aboriginal Institutions by the Commonwealth, mere unlawfulness has not been recognised as an unjust factor giving rise to a right to restitution in Australian law. *Woolwich Equitable Building Society v Inland Revenue Commissioners* [1993] AC 70 has not yet been applied or approved by the High Court.[111]

55. Similarly, to the extent that "directed" work was undertaken for the purposes of training for future employment (away from the relevant institution), and there was no remuneration paid, the Applicant would also need to prove that there was a reasonable expectation of remuneration for that work. The work said to have been undertaken in Aboriginal Institutions appears generally to have been in the nature of education and vocational training, or shared upkeep or "chores" within a shared living environment. The evidence heard at the preservation of evidence hearings indicates that some

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110 *Pearson v Queensland (No 2)* [2020] FCA 619, [165]. See further Kirby J's statements in *R v Tang* (2008) 237 CLR 1 at [81]: "That expression is to be understood in the Australian context where full ownership (in the sense of "chattel slavery") was unlawful under Imperial legislation dating back to colonial times and remains unlawful under the Code. 'Full ownership' of another human being (and thus 'chattel slavery') is, and has always been, expressly excluded as a possibility under Australian law."

111 See *Redland City Council v Kozik* [2024] HCA 7, [78] (Gageler CJ, Jagot J).

residents of Aboriginal Institutions did not expect to be remunerated for the tasks they undertook whilst a resident of an Aboriginal Institution.[112]

56. For at least these reasons, the restitutionary claims will face significant difficulties and are unlikely to succeed.

C5. *Racial Discrimination Act 1975*

57. The Applicant seeks a declaration that the Commonwealth has engaged in unlawful discrimination against the Applicant and Group Members and an order for damages by way of compensation pursuant to s 46PO(4) of the *Australian Human Rights Commission Act 1986* (Cth). It is alleged the Commonwealth breached s 9 of the *Racial Discrimination Act 1975* (Cth) (the **RDA**) by failing to put in place a reparation scheme for the Applicant and Group Members and requiring them to commence this proceeding.[113]

58. Section 9 of the RDA provides, in part:

> (1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.

59. The Applicant's claim is likely to fail on both limbs of the provision.[114]

60. Although a comparator is not strictly required by the RDA,[115] in order to show a distinction, exclusion, restriction or preference by the Commonwealth,[116] the Applicant must identify some alternative treatment by the Commonwealth which its alleged omission is to be measured against. This was recognised in *Wotton*, where the Court noted that there is inevitably *some* form of comparison involved in identifying a distinction for the purposes of s 9(1).[117]

61. The Applicant alleges that the existence of the reparations schemes in New South Wales, Queensland or Western Australia relating to legislative protective regimes with

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112 For example: Peter Parlow T418.14; Nora Sullivan T802.6-10; Veronica Dobson T133.29-35.

113 FASOC, [175]-[183].

114 That is, both the "conduct" and "outcome" based limbs – *Wotton v Queensland (No 5)* (2016) 352 ALR 146 at [530]. (***Wotton***)

115 *Baird v Queensland* (2006) 156 FCR 451, [62]-[63] (Allsop J).

116 *Racial Discrimination Act 1975* (Cth), s 9.

117 *Wotton*, [541]-[542], see further [534]-[545].

respect to Aboriginal and Torres Strait Islander people could establish a standard of behaviour that is expected by the community at large from the Commonwealth.[118] But these schemes have no relevance to the ordinary conduct of the Commonwealth or the circumstances in which the Commonwealth may implement a reparations scheme. The Applicant also seems to suggest that the existence of reparations schemes enacted by the Commonwealth with respect to other groups of people in other circumstances is indicative that the Aboriginal and Torres Strait Islander people who make up the Group Members in this case are disadvantaged.[119] However, these incidences again do not establish a norm of conduct. They reflect certain discrete and disparate circumstances in which schemes have been established by the Commonwealth to provide redress or compensation payments. The circumstances in which they were made cannot be established as equivalent to the Group Members.

62. Unlike the circumstances in *Baird* and *Wotton*, there is no generally applicable rule governing the circumstances that can be used as a comparator to establish the events alleged were a variation from the Commonwealth's standard approach. There are numerous groups to whom the Commonwealth might be said to have wronged but where it has not implemented a redress scheme relating to that. There is no basis to suggest that there is a general pattern of conduct to the effect, as the Applicant seems to imply, that where a wide-ranging group of people are affected by a wrong, a reparations scheme is the norm. Rather, it is the standard feature of the Australian legal system that wrongs (including those said to sound in Commonwealth liability) are pursued through legal action. The Applicant's assertion that the Commonwealth engaged in racial discrimination is very likely to fail on this basis.[120]

63. Further, to make out the allegation of unlawful racial discrimination, the Applicant must establish that the Commonwealth's conduct in not implementing a reparations scheme had the purpose or effect of impairing the recognition, enjoyment or exercise of the Group Members' rights[121] identified by the Applicant in paragraph 182 of the FASOC. The Group Members have no *right* to a reparations scheme and none of the alleged

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118 FASOC [175]-[176].

119 FASOC [177].

120 To the extent that the Applicant relies on the enactment of legislation establishing any reparations scheme, see also Defence 177(k).

121 *Racial Discrimination Act 1975* (Cth), s 9.

rights pleaded by the Applicant will be found (or could be found) to have been impaired by the Commonwealth's non-implementation of a reparations scheme.[122]

64. In considering the human rights and fundamental freedoms protected by s 10 of the RDA in *Maloney v The Queen* (2013) 252 CLR 168, Gageler J said:[123]

> …the reference to "rights" in s 10 of the RDA has the same meaning as "human rights and fundamental freedoms" in Art 1(1) of the Convention, of which the rights listed in Art 5 of the convention are particular examples. They are conveniently referred to as "human rights". Human rights are distinct in concept from specific legal rights protected or enforced under domestic law. They are "moral entitlement[s]".

65. It is therefore appropriate to conceptualise the prohibition on discriminatory conduct in s 9 as prohibiting any impairment on the more capacious concepts of equal participation in public life as articulated in the International Convention on the Elimination of All Forms of Racial Discrimination. It is not necessary to identify any legal entitlement that has been thwarted.

66. However, none of the rights or freedoms identified by the Applicant are impaired by the non-implementation of a reparations scheme in circumstances where the standard course remains that the Group Members have the right to pursue legal action in court against the Commonwealth. This is plain having regard to the rights relied on by the Applicant. The Applicant says that the Commonwealth's conduct breached or nullified various international obligations, as set out in FASOC [182]. In circumstances where the Group Members have not exhausted their avenues to legal redress (and have initiated a legal action) against the Commonwealth, there is no basis to say any of their rights or freedoms identified above have been impaired. They remain able to, for example, seek an effective remedy before the courts, to invoke the equal protection of the law, and to pursue remedies for their equal pay and remuneration.

67. For at least these reasons, the RDA claims are misconceived and highly likely to fail.

C6. Evidentiary Difficulties

68. The preservation of evidence hearings highlighted that the archive records contain very few documents relating to the Applicant and Sample Group Members. The Barker Affidavit sets out the extensive searches that the Commonwealth has undertaken for the

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122 FASOC, [183].

123 *Maloney v The Queen* (2013) 252 CLR 168, [300] (Gageler J).

purpose of providing discovery in the proceeding.[124] The Applicant has also undertaken discovery and the parties have issued numerous subpoenas to produce in attempts to obtain copies of relevant historical records.[125] Despite those efforts, only 10 records were identified containing reference to the Applicant.[126] These records included the Register of Wards, patrol officer reports, census reports and inspection reports from Georgina Downs Station, Argadargada Station and Ooratippra Station.[127] There are no documents showing, for example, whether any amount of the Applicant's wages were paid by the Applicant's employers to the Director, or whether the Director held any amounts for her. Unsurprisingly given that the Applicant's claims concern events that occurred more than 50 years ago, there are significant gaps in both the historic documentary record and the Applicant's memory.

69. The Barker Affidavit (at [62]-[118]) discusses some of the significant evidentiary difficulties that the Applicant and the Sample Group Members face in proving alleged facts relevant to their personal claims, by reason of the very limited documentation available and the lack of living lay witnesses available to give evidence supportive of their claims. The Barker Affidavit (at [32]-[61]) discusses limitations on the available documents and lack of lay witnesses more generally.

70. Where there are documents available relating to a Group Member who gave oral evidence, those documents at times contradicted the evidence given by the Group Member. For example, the documentary records suggest that the Applicant received cash payments for her wages, which was inconsistent with her oral evidence.[128] In some cases, when historical documents were shown to Group Members, the document has operated to change the Group Member's recollection,[129] or the Group Member accepted that due to the effluxion of time they could not now remember.[130] Given the passage of time, it is not surprising that Group Members might have difficulty recalling matters such as dates that they worked at particular places, and the arrangements for provision of wages and food.

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124 Barker Affidavit, [33]-[41].

125 Barker Affidavit, [42]-[46].

126 Barker Affidavit, [66].

127 Barker Affidavit, [66].

128 Barker Affidavit, [67]-[72]; eg T 9.05, 14.10.

129 Some examples include Billy Grant's time he believed he worked at Helen Springs Station: T 306.35 cf T 318.15 and T 320.19, and Marie Allen's time at an institution called Palmerston House: T 640.06 cf T 668.24-.29

130 Some examples include Jacky Anzac's memory of discussions after a strike at VRD T 580.19, and Masie Smith's time at Brunchilly Station T 491.21-.38,

71. To the extent that the Applicant seeks to fill the evidentiary gaps associated with the absence of Archive records and the failing memories by relying on expert historical evidence, she will encounter difficulties. The Applicant has filed a report of historian Dr Fiona Skyring, however there the significant questions regarding the admissibility of that report. The courts have generally approached such evidence of historians with caution, regarding the interpretation of historic data and documents and the process of inferential reasoning for making findings of fact in accordance with legal standards of proof as tasks for the court, not an expert.[131] Even if such evidence is admitted, it is unlikely to be given significant weight.

72. Given the extensive discovery and subpoena process that has already been undertaken, it is unlikely that further evidence of any significance will be uncovered that will substantially improve individual Group Members' prospects of establishing their claims.

73. Establishing that the Commonwealth is liable in respect of deceased Group Members will be particularly difficult. Such claims would have obvious evidentiary difficulties because of the absence of direct evidence from the person who is alleged to have worked during the Claim Period.

C7. Delay and Limitation Defences

74. As the Applicant acknowledges, most of the pleaded claims face "significant risk" of being barred by application of limitation periods (AS [30]).

75. Because of the extended period of time that elapsed before the Applicant commenced this claim, the Commonwealth does not have access to many records relevant to the defence of the proceeding. Further, all of the Directors, along with almost all of the former Superintendents of Aboriginal Institutions and other statutory officers from the Claim Period are now deceased, or are unlikely to be able to be found or their capacity to give reliable evidence is limited because of advanced age.[132] The unavailability of records and witnesses will very significantly impair the Commonwealth's capacity to defend the claim.[133]

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131 See, e.g., *Harrington-Smith v Western Australia* (2003) 130 FCR 424, [40]-[42]; *Wotton v Queensland (No 5)* (2016) 352 ALR 146, [23], [446]-[447]; *Cubillo v Commonwealth [No 2]* (2000) 103 FCR 1, [232].

132 Barker Affidavit, [47]-[61].

133 Barker Affidavit [122].

76. In the circumstances, there is a strong prospect that the Court would, even in the absence of a statutory limitation period, apply a statutory limitation period by analogy, or alternatively exercise the discretion to refuse relief based on the principle of *laches*. *Laches* is established where the institution of proceedings is so delayed that the respondent has altered its position in reasonable reliance on the applicant's acceptance of the status quo, or otherwise permitted a situation to arise which it would be unjust to disturb.[134] In this case, such injustice arises from the Commonwealth's loss of witnesses and documentary evidence.

77. The equitable defence of laches was upheld in *Cubillo v Commonwealth (No 2),* a case concerning a similar period in the Northern Territory.[135] Although in *Trevorrow v State of South Australia (No 5)*[136] the Court determined not to bar the plaintiff's equitable claims by analogy with statutory time limits or *laches*, that result reflected the fact that there was a 'great deal of particularity' available in documentary records concerning the plaintiff, the case concerned an individual's circumstances, and the State's own conduct was found to have contributed to the delay.[137] That is very different to the present case.

78. The limitations and *laches* defences are significant hurdles standing in the way of the Applicant's and Group Members' success.

C8. Conclusion

79. Having regard to the weakness of the claims of the Applicant and Group Members, the proposed settlement is fair and reasonable. The Commonwealth has agreed to pay a total sum of up to $202 million, which comprises up to $180 million to be distributed to Group Members, after deduction of certain amounts (including the Funder's commission), plus up to $22 million in respect of the Applicant's legal costs ($15 million), the Administrator's costs (up to $6 million) and the costs assessors costs (up to $1 million).

80. The amount that is ultimately paid to each Eligible Claimant will depend on a number of factors, including the total number of Eligible Claimants, the percentage that is approved in respect of the Funder's commission and the amount (if any) that is allowed in respect of the Applicant's legal costs above the amount that the Commonwealth has agreed to

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134 *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221.

135 *Cubillo v Commonwealth (No 2)* (2000) 103 FCR 1, [1432]-[1434] (O'Loughlin J). (See generally [1420]-[1434])

136 (2007) 98 SASR 136.

137 *Trevorrow v State of South Australia (No 5)* (2007) 98 SASR 136, [960]-[963] (Gray J).

pay ($15 million). On any realistic estimate of these variables, the amount of the Settlement Sum is fair and reasonable.

81. The Commonwealth agrees with the Applicant's assessment (AS [26.2]) that it is reasonable to expect similar registration numbers in this matter as in *Street*. To supplement the Applicant's analysis, Australian Bureau of Statistics data from the 1971 census shows the closely comparable size of the Aboriginal and Torres Strait Islander population in Western Australia and the Northern Territory around the end of the Claim Period, with the Northern Territory population slightly larger than the West Australian population.[138]

	Western Australia	**Northern Territory**
Total	Aboriginal: 21,903 Torres Strait Islander: 276 Total: 22,179	Aboriginal: 23,253 Torres Strait Islander: 128 Total: 23,381
Aged 10–64*	13380	14965
Employed*	4534	5805

*State and Territory level breakdowns of these statistics are not available for Torres Strait Islanders, so these figures only relate to the Aboriginal population.

82. Even allowing for the maximum potential deductions from the Settlement Sum (including the full amount sought by the Funder), if the total number of Eligible Claimants is in the range expected by the Applicant of 6,000 – 8,000, the average per person payment to Eligible Claimants would be in the range $11,631.67 to $12,323.75 (AS [93] and [95]). Having regard to the significant risk of an adverse outcome if the matter proceeded to judgment, the Court can comfortably conclude that the proposed settlement is fair and reasonable in its sum.

83. Further, as the Applicant contends (AS [31] – [33]), the proposed class closure orders and the terms of the releases that all Group Members would be bound by are standard features of proceedings such as this, and are fair and reasonable.

84. For these reasons, the Court can be satisfied that the proposed settlement is fair and reasonable as between the parties.

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[138] Data drawn from the 1971 Census of Population and Housing, Bulletin No 9 – The Aboriginal Population. Barker Affidavit, Annexure PCB-3.

D. FAIRNESS AND REASONABLENESS *INTER SE* GROUP MEMBERS

85. The Commonwealth addresses two matters relevant to the assessment of the fairness and reasonableness of the proposed settlement as between the Group Members. First, whether all Group Members will be eligible to participate in the settlement, and secondly, whether there should be differentiation between the Eligible Claimants in relation to the value of their claims.

D1. Eligibility to participate

86. The FASOC defines Group Members to include not only Aboriginal persons who worked in the Northern Territory during the Claim Period, but also[139]:

    a. legal personal representatives of Deceased Group Members who have the capacity to claim on behalf of their estate;

    b. persons who are beneficiaries of a Deceased Group Member and who are able to claim on behalf of their estate;[140] or

    c. persons with a right (equitable or otherwise) in respect of the administration, or property forming part, of the estate of the Deceased Group Member.[141]

87. As the Applicant observes, the Scheme seeks to broadly reflect the intestacy rules that apply in the Northern Territory (AS [43] – [45]). In part that is done by extending eligibility for the Scheme to Eligible Descendant Claimants. Relevantly, Eligible Descendant Claimant is defined to include only:

    a. a spouse of a deceased Eligible Claimant and,

    b. if there is no spouse, the child or children of a deceased Eligible Claimant.

88. The effect of this definition is that some individuals who may be a Group Member by reason of being a person described in paragraph a to c above may not be eligible to participate in the settlement, because they do not meet the definition of Eligible Descendent Claimant. An example would be the grandchild of a deceased Group Member who might satisfy one of a to c above, but who cannot participate in the

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139 FASOC, [2]. It is assumed there would have needed to be some priorities allowed in circumstances where there were competing interests between Group Members – which may have needed to be resolved before certain Group Member's claims could be resolved and distributed without court approval.

140 Presumably by becoming the legal personal representative if one has not already been appointed.

141 Which would include beneficiaries, or, relevantly for this class, those who may have a right to property of an intestate Aboriginal under appropriate customs and traditions (and Aboriginal law).

settlement because they are not an Eligible Descendent Claimant. There may be unfairness to such people, because they are included in the settlement by reason of falling within the definition of Group Member and will therefore be bound by the releases provided by the Settlement Deed, but are not eligible to receive a payment under the settlement.

89. Nonetheless, the Commonwealth considers that the proposed settlement is fair and reasonable despite this potential unfairness. As the Applicant notes (AS [45]), extension of the settlement to descendants beyond a spouse or child of a deceased Eligible Claimant would potentially increase the cost of administration, given the potential for complex issues regarding the entitlements of descendants to arise. Such issues may also slow the administration of the scheme, potentially increasing the time required to process claims of all Eligible Claimants (except those eligible for an Interim Payment). Overall, the potential unfairness to some Group Members who are not eligible to participate but will release the Commonwealth from future claims is outweighed by the benefit overall of the efficient administration of the scheme. Further, the parties have sought to minimise the potential for descendants to be excluded from the settlement by adopting broader definitions of "spouse" and "child", so as to reflect the manner of distribution of an estate under the *Administration and Probate Act 1969* (NT) where an intestate is survived by two spouses.[142]

D2. Differentiation between Eligible Claimants

90. Under clause 2.3.1.d of the Settlement Deed, the Applicant agreed to apply for a 'Differentiation Order', defined to mean:

> an order made by the Court under sections 23 and/or 33V of the FCA Act or otherwise that the Eligible Claimant Payments paid to, or in respect of, Eligible Claimants or any subgroups of Eligible Claimants be the same or different (such order may take the form of approving an annexure to the Scheme that is agreed by the Parties)

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[142] See s 67A and Schedule 6 Part III of the Administration and Probate Act. Schedule 6 Part III provides for a separate manner of distribution where the intestate is survived by both a spouse and a de facto partner. In those circumstances, provided that:

- the de facto partner of the intestate lived with the intestate for a continuous period of not less than 2 years immediately preceding the intestate's death, and the intestate did not at any time during that period live with the person to whom he or she was married, or
- the intestate is also survived by issue of the intestate and the de facto partner,

then the de facto will be treated as the spouse and distribution of the estate in the ordinary way under Part 1 of Schedule 6 will apply. Under the *Administration and Probate Act 1969* (NT), "spouse" includes a person married according to the customs and traditions of the particular community of Aboriginals or Torres Strait Islanders with which either person to the relationship identifies – see the definition of 'spouse' in s 19A of the *Interpretation Act 1978* (NT).

91. The parties agree that there should be no differentiation based on gender, and they should otherwise be at liberty to make submissions on the issue of differentiation, to be determined by the Court.[143]

92. The Applicant seeks a Differentiation Order to the effect that:[144]

    (a) each Eligible Claimant is to receive a minimum payment (the amount of which is to be determined by the Court), or where Eligible Descendant Claimant/s are claiming on behalf of a single Eligible Claimant, equal shares of the aforementioned amount (**Minimum Payment**); and

    (b) the balance of the Net Settlement Fund Amount remaining after the expiry of the Registration Date and after making the Minimum Payment and any approved deductions is to be distributed equally between each Eligible Claimant born on or before a date to be approved by the Court, or where Eligible Descendant Claimant/s are claiming on behalf of a single Eligible Claimant, in equal shares of such entitlement, in addition to the Minimum Payment (**Top-Up Payment**).

93. The Applicant's Submissions indicate that she presses for the Minimum Payment to be fixed in the sum of $10,000, and for the date of birth in (b) above to be 1 January 1930.

94. In considering the *inter se* fairness of the Settlement Distribution Scheme, the "arrangement should be framed to achieve a broadly fair division of the proceedings, treating like group members alike, as cost-effectively as possible".[145] Accepting that there are differences between the value of the claims of Group Members, the relevant question is "whether the model is within the bounds of fairness and reasonableness in its attempts to balance what are, unavoidably, conflicts between the interests of the different claimants".[146] It is not necessary to show "scientific exactitude" and it is relevant to ask "whether the costs of a more perfect assessment procedure would erode the notional benefit of a more exact distribution".[147]

95. The Commonwealth submits that the amount payable to Group Members:

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143 Settlement Deed, cl 2.3.2.

144 Interlocutory Application dated 18 October 2024, paragraph 1(c).

145 ***Camilleri*** *v The Trust Company (Nominees) Limited* [2015] FCA 1468, at [5](e), citing *Mercieca v SPI Electricity Pty Ltd* [2012] VSC 204 at [37]–[39].

146 *Camilleri*, at [40]–[41].

147 *Pearson* at [223], quoting *Camilleri* at [43].

(a) Should not vary according to the Group Member's gender.

(b) Should seek to reflect the period of time worked by Group Members, with those who worked for a greater period during the Claim Period receiving a higher payment.

(c) Should reflect a discount for the claims of deceased Group Members, reflecting the greater evidentiary challenges associated with proving a case without direct evidence from the person who undertook the work.

96. We outline each of those considerations further in turn.

D3. No gender-based differentiation

97. The Applicant and the Commonwealth agree that there should not be differentiation in the settlement distribution based on the gender of the Eligible Claimants. That is so notwithstanding that the laws and industrial norms during the Claim Period valued the work of women less than that of men, and the claims of male Group Members would accordingly be expected to generally be higher than that of female Group Members.[148]

98. The wage rates fixed under the *Aboriginals Ordinance* and then the *Wards Employment Ordinance* were, for the most part, lower for women than for men.[149] The *Cattle Station (Northern Territory) Award 1951* (**CSI Award**), which may have applied to some Group Members from after 1 December 1968,[150] did not set different rates for men and women.[151] However, the CSI Award did not apply to 'domestic servants'.[152] As a result, its higher wages did not apply to roles more likely to be occupied by female than male employees.

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148 The wage rates applicable at various points during the Claim Period are set out in Table 1 of the Annexure to these submissions.

149 The wage rates are pleaded and admitted in FASOC [78(a)] and Schedule 1, [87] and Schedules 2 and 3; Defence [78], [87]; and Reply [51].

150 *Cattle Station Industry (Northern Territory) Award 1951* (1966) 113 CAR 651. This decision amended the 'scope' clause of the word, so that it no longer stated the award did not apply to 'aboriginals'. It remained that the award only applied to 'in respect of the employment by [relevant employers] of members of the North Australian Workers Union'. It is unknown if any of the Group Members were members of the North Australian Workers Union.

151 See *North Australian Workers' Union v Alcoota Pastoral Co Ltd & Ors; Bovril Australian Estates Ltd & Ors v The North Australian Workers' Union* (1951) 71 CAR 319.

152 Ibid, clause 6. This exclusion was not removed when the exclusion of Aboriginal employees was removed: *Cattle Station Industry (Northern Territory) Award 1951* (1966) 113 CAR 651, 671.

99. However, there are three aspects of the Applicant's claim in respect of which the differentiation between the value of claims of male Group Members compared to female Group Members is likely to be less stark.

100. First, for the early parts of the Claim Period, pay rates for men and women were equal, or marginally higher in some particular cases for "half-caste" women. However, pay rates overall in this period were very low (around 5 shillings per week). Significant gender-based pay discrimination in favour of male Group Members commenced with the introduction of the *Aboriginal (Pastoral Industry) Regulations* in 1949.

101. Second, in addition to wages, the Applicant and Group Members seek damages in respect of the value of non-wage remuneration or "keep" (such as food, accommodation and sometimes other things) that they contend their employers failed to provide.[153] These obligations did not differ according to the gender of the employee, except that male employees who were married and/or had dependents were entitled to "keep" in respect of their families as well as themselves.[154] For this aspect of the claims, the value of the claims of male Group Members would only be more than those of women if they were able to claim in respect of "keep" entitlements of their wife or children.

102. The alleged loss based on "keep" may have formed a significant part of the overall claims. It is unclear how the monetary value of any loss associated with any non-provision of "keep" would have been valued. The CSI Award, which did not apply to Aboriginal workers until 1968, attributed a monetary value to "keep" which in 1952 was fixed at half the basic (non-Indigenous) wage (then £7 per week), plus £0.3.4,[155] amounting to £3.13.4 per week.[156] At that same time in 1952, the prescribed wage under the *Aboriginal (Pastoral Industry) Regulations* for a male Aboriginal stock worker with 3 years' experience was £1 per week. That rate would not increase until 1959, and then

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153 FASOC [145(b)(ii)] and [146(b)(ii)].

154 The relevant provisions of the Ordinances are summarised in Table 2 of the Annexure to these submissions. The obligations were broadly the same for male or female employees in respect of keep for the employee themselves. However, keep obligations extended to the employee's family and differed on gendered lines when the employee was married and/or had dependents. The employer of a married man was also required to provide keep in relation to their employee's wife and children. There was no equivalent provision requiring the employer of a married woman to provide keep in relation to their employee's husband and children.

155 *North Australian Workers' Union v Alcoota Pastoral Co Ltd & Ors; Bovril Australian Estates Ltd & Ors v The North Australian Workers' Union; The Cattle Station Industry (Northern Territory) Award 1951* (1952) 74 CAR 510, 513 (clause 6C).

156 There is an issue as to whether the value of "keep" under the CSI Award would be an accurate proxy for the value of "keep" under the ordinances, because there were some differences between the respective keep obligations.

only to £2 per week.[157] If Group Members were found to be entitled to damages in respect of the value of "keep" under the CSI Award, the value of that part of the claim would have been significant compared to the alleged unpaid wages component.

103. Third, there is also no reason to consider that any amounts of general damages the Group Members might have recovered if the RDA claim was successful would be different for men and women.[158] That said, the RDA claim is very weak, so it is difficult to attribute much if any value to this aspect.

104. In *Pearson*, the Court approved a 20% discount on payments to female Group Members. Justice Murphy said (at [228]):

> This factor recognises an unfortunate historical reality; that women were paid less than men during the claim period. The idea of discriminating between claimants on the basis of gender is unattractive to say the least, but the reality is that, if successful at trial, the Stolen Wages claims of Aboriginal and Islander women were likely to achieve damages awards which were substantially lower in quantum than the awards for Aboriginal and Islander men. It is axiomatic that to achieve fairness between class members the compensation payable should broadly reflect the value of class members' claims. I do not lightly take this view but having regard to the requirement for fairness *inter se* there is no principled alternative to these discounts, and I consider them to be appropriate.

105. It is open to the Court to reach a different conclusion in this case.

106. First, the applicant in *Pearson* did not seek to recover an amount in respect of alleged deficiencies in non-wage remuneration or "keep" entitlements. As outlined above, if successful, this aspect of the claim would not necessarily have varied in value between men and women as starkly as the claim in respect of unpaid wages.

107. Secondly, in this case, the parties agree that the claims of female Group Members should not be discounted based on gender, whereas in *Pearson*, the parties reached the opposite position. Provided the Court is satisfied that the approach taken by the Applicant and her legal representatives is "within the range of reasonableness", it is not the Court's task to go behind or second guess that decision.[159]

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157 The prescribed rate for a male Aboriginal employee in the pastoral industry under the *Wards Employment Ordinance* under a Gazette notice issued on 16 September 1959.

158 See [226] of *Pearson* regarding the equivalent RDA claims in that matter.

159 *Camilleri*, at [5(c)].

108. Thirdly, assuming that the Court accepts that an average payment of $18,000 (less deductions) for male Group Members is fair and reasonable, paying female Group Members the same amount on average does not impact the assessment of the fairness of the outcome for male Group Members. A settlement may be fair and reasonable *inter se* notwithstanding that some group members receive a windfall.[160]

109. Finally, the assessment of whether the settlement is 'fair and reasonable' is broad enough to permit consideration of policy matters. Any lower value of the claims of female Group Members is due to historical gender-based discrimination; it is the direct result of laws and industrial norms that valued the work of women less than that of men. The law today seeks to avoid discrimination in the workforce based on gender.[161] In weighing what is 'fair and reasonable', it is open to the Court to take into account the desirability of avoiding the continuation of such unfairness.

D4. Differentiation based on period of time worked

110. Compensation in respect of unpaid wages and non-wage entitlements comprises most of Group Members' claims. It follows that the value of Group Members claims will vary according to the period of time that they worked. The Commonwealth agrees with the Applicant that the Settlement Distribution Scheme should differentiate between Group Members based on the length of time during the Claim Period that they worked.

111. It would be impractical and disproportionately expensive to determine individual settlement payments based on the actual period of employment of each Group Member. The Commonwealth supports the Applicant's proposed approach of using Eligible Claimant's date of birth to estimate the portion of the Claim Period that they worked.

112. Assuming that Group Members entered the workforce around 10 years of age,[162] the following table illustrates the relationship between date of birth and the percentage of the Claim Period that a person was of working age:

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160 See, for instance, *Duval-Comrie v Commonwealth* [2016] FCA 1523 at [49]-[51].

161 See the *Sex Discrimination Act 1984* s 14; and the *Fair Work Act* ss 134(1)(ab), 153, 194(a), 195(1) and 351. See also the *Convention on the Elimination of All Forms of Discrimination against Women*.

162 Which is consistent with the premise of Criteria 3 in the Settlement Distribution Scheme. In using this assumption throughout these submissions, the Commonwealth should not be taken to accept that any particular Group Member in fact commenced work at 10 years old.

	Date of birth	Date entering the workforce	Percentage of the claim Period above working age
1	1 June 1923	1 June 1933	100%
2	17 April 1933	17 April 1943	75%
3	2 August 1936	2 August 1946	66%
4	3 March 1943	3 March 1953	50%
5	3 October 1949	3 October 1959	33%
6	18 January 1953	18 January 1963	25%

113. Eligible Claimants born before 3 March 1943 would have been of working age for at least half of the Claim Period. Although distinguishing between Eligible Claimants based on whether they were born before or after a particular date is arbitrary to a degree, it is reasonable to divide the class according to those who were of working age for more than 50% of the Claim Period. A modest discount to the claims of Eligible Claimants who were of working age for less than half of the Claim Period is reasonable. It would give some recognition to the likelihood that those who worked for a longer period within the Claim Period would have had more valuable claims, whilst not being overly burdensome for the Administrator to implement.

114. In *Pearson*, the Court approved a 3-tier system based on age whereby:[163]

(a) payments to group members who were above working age for at least 66% of the claim period were not discounted

(b) payments to group members who were above working age for at least 33% of the claim period were subject to a 10% discount, and

(c) payments to group members who were above working age for less than 33% of the claim period were subject to a 20% discount.

115. Although there is no one correct approach, the model in *Pearson* arguably introduces additional complexity for minimal benefit.

116. The Applicant proposes that Eligible Claimants born before 1930 receive a higher total payment by way of a 'Top-Up Payment' in addition to the $10,000 'Minimum Payment' to be paid to all Eligible Claimants. Group Members born before 1 January 1930 would

[163] *Pearson* at [230].

have been of working age for at least 82% of the Claim Period. On the Applicant's model, the size of the Top-Up Payment would vary depending on the total number of Eligible Claimants and the age distribution of the cohort. Assuming a group size between 6,000 to 8,000, and adopting the Applicant's estimate that 25% of the class would be born on or before 1 January 1930, the Applicant's modelling estimates a Top-Up Payment ranging between $6,526 – $9,295.[164] That equates to a '"discount" on the claims of those born after 1 January 1930 – a cohort that the Applicant estimates to be around 75% of the class – of 39–48%.

117. Three matters are raised for the Court's consideration.

118. First, the Applicant's differentiation model would result in higher payments being made in respect of the claims of only very old members of the class, most of whom would no longer be alive. It is to be noted that only one of the witnesses who gave evidence at the preservation of evidence hearing might have been born before 1930 (and the evidence as to his date of birth was very uncertain).[165] The Applicant's model would therefore result in larger payments being made mostly, if not entirely, to the family of Eligible Claimants and not living Eligible Claimants. For the reasons outlined in D5 below, fairness favours discounting the claims made on behalf of deceased Eligible Claimants, not increasing the value of those claims.

119. Secondly, the Applicant's approach means that the extent of differentiation is presently uncertain, which reduces the Court's capacity to be confident that *inter se* fairness will be achieved. The proportion of Eligible Claimants born before 1930 is currently unknown. The Applicant's approach could lead to more or less significant differentiation if the final proportion of Eligible Claimants born before 1930 is lower or higher than anticipated, because the pool of funds available for the Top-Up Payments will be divided between a smaller or larger number of people. This can be seen in the following table, which maintains the assumptions from the Applicant's 'Option #1 @8,000 BUFFERED',[166] and adjusts the percentage of Eligible Claimants qualifying for a Top-Up Payment.

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164 Exhibit VA-3:Tab 22 to the Affidavit of Vicky Antzoulatos sworn 25 October 2024.

165 T 260.25 to 260.45; T 280.15 to 280.25.

166 Exhibit VA-3:Tab 22 to the Affidavit of Vicky Antzoulatos sworn 25 October 2024.

Percentage qualifying for a Top-Up Payment	Number qualifying for a Top-Up Payment	Value of Top-Up Payment	Effective Discount for Eligible Claimants born after 1 January 1930
35%	2,800	$6,639.29	39.90%
30%	2,400	$7,745.83	43.65%
25%	2,000	$9,295.00	48.17%
20%	1,600	$11,618.75	53.74%
15%	1,400	$15,491.67	60.77%

120. Thirdly, the extent of differentiation is arguably excessive. Distinguishing between Eligible Claimants based on which side of a particular date they were born is inevitably arbitrary, and will result in a degree of unfairness in some cases. A model that produces an effective discount in the range set out above exacerbates the inevitable unfairness associated with the binary division of the class by reference to a single date. Although not perfect, a fairer result would be achieved by selecting a date that divides the class according to whether they worked more or less than half of the Claim Period, and discounts the lower value claims by 20%, or at least no more than 30%.

121. To the extent that the Applicant's approach is driven by a desire to ensure a Minimum Payment of $10,000 to all Eligible Claimants, that does not justify the extent of unfairness arising from the selection of 1 January 1930 as the relevant date for eligibility for a higher payment. It was not part of the agreement between the parties that there would be a minimum payment to all Eligible Claimants of $10,000.[167] Depending on the final number of Eligible Claimants, and the Court's decision in relation to the amount of deductions allowed (in particular, the rate of commission allowed to the Funder), it may well be that all Eligible Claimants do receive at least $10,000. However, concern to

[167] The Settlement Notice approved by the Court on 16 September 2024 did not state that all eligible Group Members would receive a minimum payment of $10,000, although it did note: "Although we are not sure, we hope that at least $10,000 will end up being paid to each Aboriginal or Torres Strait Islander person who worked in the Northern Territory between 1 June 1933 and 12 November 1971 for little or no wages (or to their surviving spouse or shared between their surviving children). See Annexure VA3 to the Affidavit of Vicky Antzoulatos sworn 25 October 2024 (p297).

ensure that outcome should not drive a differentiation model that will produce results that are unfair in other respects.

D5. Deceased claims

122. The definition of Group Member includes "any legal personal representative or beneficiary of the estate of" a deceased Group Member. Given the Claim Period, it can be assumed that a large portion of the class are representatives of deceased Group Members.

123. The claims of representatives of deceased Group Members would have faced additional evidentiary challenges because of the absence of direct evidence from the person who is alleged to have worked during the Claim Period. It is unlikely such claims could establish:

    (a) details of the individual's work history, including periods worked, hours and days worked within those periods, and sufficient details about their employer, industry and in some cases the nature of the work[168] to establish the correct pay rate and other entitlements;

    (b) what wages were and were not paid at the time;

    (c) if they were paid any wages in credit under a 'book-down' system, how that system operated, whether it resulted in the payment of the full value of the individual's wages, and whether they received any payment for un-used credit, for example at the cessation of their employment; and

    (d) details of the non-wage remuneration (eg, accommodation, food, clothing) provided by their employer to allow for an assessment of the extent of any deficiency by their employer in complying with alleged non-wage remuneration obligations.

124. Although all Group Members would have had some difficulty in proving these matters because of the impact of the passage of time on memory and the very limited documentary material now available, the issues would have been greater for those seeking to prove the claims of deceased Group Members. Justice Murphy said of the equivalent evidentiary issues for deceased Group Members in *Pearson*: [169]

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168 For example, different pay rates applied drovers compared to other pastoral workers, and drover pay rates differed depending on whether they were travelling with or without stock (see eg Schedules 1, 2 and 3 of the FASOC). In the limited circumstances where the CSI Award may have applied (see footnote 150 above), details of the work may be necessary to determine the correct pay rate and entitlements to apply.

169 *Pearson* at [13(c)]. See also [117], [135], [141] and [168].

> [T]he majority of claims are on behalf of deceased estates. The paucity of records and the fact that in such cases there can be no direct evidence from the person who undertook the work as to the wages earned, whether pocket money was paid, and the extent of any withdrawals from the savings accounts or orders placed in the settlement store, means that the difficulties of establishing many such claims are likely to be extreme.

125. In *Pearson*, a 30% discount was applied to the claims of deceased group members, after other forms of differentiation.[170] A similar approach should be adopted in this case. The Commonwealth suggests that a discount of 20% on the claims of Deceased Eligible Claimants is fair and reasonable.

D6. Commonwealth's Proposed Differentiation Order

126. The Applicant has indicated that she will provide an alternative form of order to those sought in the Interlocutory Application, which will incorporate the Distribution Model and instructions for the Administrator regarding its application, together with a specification of the Differentiation Order: AS [55]. The Respondent will address the details of that proposal at the hearing. The following observations are made in respect of the Applicant's general approach.

127. First, the 'Minimum Payment' seeks to fix a minimum distribution in respect of *all* Eligible Claimants in advance of knowing the total number of Eligible Claimants and therefore the quantum of the Net Settlement Fund Amount. The Settlement Deed contemplates advance payments — the Interim Payments provided for by clause 2.11 — being made only to a relatively small sub-set of the Eligible Claimants, being those who were alive at the time they registered their claim (the 'Effective Date'). This mechanism was to ensure that those living Eligible Claimants could be paid in respect of their claim for their own work as soon as possible, noting the advanced age of the cohort.

128. The Settlement Deed contemplates that these payments would be set by the Administrator, with the benefit of the information available at the time they are made. Clause 2.11.2 provides:

> Such interim payments may only be made if they are less than the minimum Eligible Claimant Payments that can reasonably be anticipated by the Administrator having regard to the number, or likely number, of Eligible Claimants and the likely maximum net amount of the Lump Sum (and any interest earnt thereon) after any deductions are made, or may be made, in accordance with clause 2.16.

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[170] *Pearson* at [234] – [235].

129. It may well eventuate that the Interim Payments amount can be set by the Administrator at or above $10,000. However, given the present uncertainty regarding the quantum of the Net Settlement Fund Amount, it is preferable that the amount be set by the Administrator, taking into account the information available at the time as to registration numbers and the likely number of Eligible Claimants (and therefore the likely Net Settlement Fund Amount.

130. Secondly, as outlined in part D4 above, under the Applicant's model, the Minimum Payment and Top-Up Payment are the mechanisms employed to effect differentiation between the class. However, this model creates significant uncertainty as to the fairness of the settlement *inter se*.

131. Having regard to these considerations, the Commonwealth proposes the following Distribution Order.

    1. The Eligible Claimant Payment for clause 49 of the Settlement Distribution Scheme will be determined in accordance with that clause and the Differentiation Order as set out below.

    2. The Eligible Claimants will be divided into the following sub-Groups:

        a. where the Eligible Claimant was living as at the **Effective Date** (as defined in clause 2(i) of the Settlement Distribution Scheme), and was born on before 3 March 1943 (**Sub-Group 1**)

        b. where the Eligible Claimant was living as at the Effective Date and was born after 3 March 1943 (**Sub-Group 2**)

        c. where the Eligible Claimant was deceased as at the Effective Date, and was born before 3 March 1943 (**Sub-Group 3**)

        d. where the Eligible Claimant was deceased as at the Effective Date, and was born after 3 March 1943 (**Sub-Group 4**)

    3. The Administrator shall ensure that the total Eligible Claimant Payment for each Eligible Claimant (inclusive of any Interim Payment) will be such that:

        a. the Eligible Claimant Payment for each Eligible Claimant within a Sub-Group will be the same as the Eligible Claimant Payment for each other Eligible Claimant within that Sub-Group, and

        b. the Eligible Claimant Payment for an Eligible Claimant in Sub-Group 2 and Sub-Group 3 will be 80% of the Eligible Claimant Payment for an Eligible Claimant in Sub-Group 1, and

        c. the Eligible Claimant Payment for an Eligible Claimant in Sub-Group 4 will be 60% of the Eligible Claimant Payment for an Eligible Claimant in Sub-Group 1.

132. There are a number of factors that are presently unknown which would affect the quantum of settlement payments resulting from application of this proposed differentiation order (as opposed to their value relative to each other). These are: (i) the final number of Eligible Claimants; (ii) the deductions from the Settlement Sum; and (iii) the proportions of Eligible Claimants in the four Sub-Groups. Accepting those uncertainties, the following is an estimate of the likely final in-hand payments, using the equivalent assumptions to the Applicant's 'Option #1 @8,000 BUFFERED',[171] with assumptions regarding the possible number of Eligible Claimants that may fall into each Sub-Group.

	Assumed number of Eligible Claimants	**Payment**
Sub-Group 1	400	$18,123.16
Sub-Group 2	2,400	$14,498.53
Sub-Group 3	2,000	$14,498.53
Sub-Group 4	3,200	$10,873.90

133. Although the payment amounts may vary depending on the ultimate number of Eligible Claimants and the amount of the deductions, and so the precise payment amounts in the table above are unlikely to eventuate, they give a sense of the likely differentiation between Sub-Groups that would result from the Commonwealth's proposed differentiation model. It is submitted that this represents a fairer distribution between Eligible Claimants than the model proposed by the Applicant.

E. DEDUCTIONS FOR FUNDER'S COMMISSION AND INSURANCE

134. Under the Settlement Deed, the moneys in the Settlement Fund Account are to be paid as specified in clause 2.16, in the manner and sequence determined by the Court. Clause 2.16.1.d contemplates that the Court may order that an amount be paid from the Settlement Fund Account in respect of any commission or other funding costs of the Funder. The parties agreed that the Applicant, the Commonwealth and any affected parties would be at liberty to make submissions as to the payments under clauses 2.16.1.a–d that should be ordered.

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[171] Exhibit VA-3:Tab 22 to the Affidavit of Vicky Antzoulatos affirmed 25 October 2024 (p714).

E1. Relevant Principles

135. In ***Money Max*** *Int Pty Ltd (Trustee) v QBE Insurance Group Limited* (2016) 245 FCR 191 at [72], the Full Court observed that there is good reason for the Court to exercise oversight of litigation funding charges to class members. The Court identified the following matters as potentially relevant to whether to approve a funding commission rate (at [80]):

(a) The funding commission rate agreed by sophisticated class members and the number of such class members who agreed, which can be said to show acceptance of a particular rate by astute class members.

(b) The extent to which class members were informed when agreeing to the funding commission rate.

(c) A comparison of the funding commission with funding commissions in other Part IVA proceedings and/or what is available or common in the market.

(d) The litigation risks of providing funding in the proceeding. This is a critical factor and the assessment must avoid the risk of hindsight bias and recognise that the funder took on those risks at the commencement of the proceeding.

(e) The quantum of adverse costs exposure that the funder assumed. This is another important factor and the assessment must recognise that the funder assumed that risk at the commencement of the proceeding.

(f) The legal costs expended and to be expended, and the security for costs provided by the funder.

(g) The amount of any settlement or judgment. This could be of particular significance when a very large or very small settlement or judgment is obtained. The aggregate commission received will be a product of the commission rate and the amount of settlement or judgment. It will be important to ensure that the aggregate commission received is proportionate to the amount sought and recovered in the proceeding and the risks assumed by the funder.

(h) Any substantial objections made by class members in relation to any litigation funding charges.

(i) Class members' likely recovery "in hand" under any pre-existing funding arrangements.

E2. Funder's Claim

136. The Funder seeks a 20% funding commission on the gross funds to be paid by the Commonwealth pursuant to the Settlement Deed, and also seeks to recover the sum of $1,045,000, being the costs of an "after the event" (**ATE**) insurance policy that it took

out in respect of this proceeding. The issues for the Court in relation to the deductions sought by the Funder are whether the rate of 20% is appropriate, whether the rate should be applied to the gross settlement amount, or the net amount and whether it should be reimbursed for the cost of the ATE insurance policy.

137. The following table sets out estimates of the amount that may be paid to the Funder if its claim is allowed in full, depending on the final number of Eligible Claimants, and assuming that the Commonwealth is required to pay the full amounts that it has agreed to pay in respect of the Administration Costs (up to $6 million), Applicant's legal costs (up to $15 million) and the Cost Assessor's Costs (up to $1 million). The table shows the return on the amount spent to date by the Funder on the proceeding ($10,127,577, comprising $9,082,576.98[172] paid to date to Shine plus the cost of the ATE insurance policy).

Eligible Claimants	**Funder's Commission and ATE costs deduction**	**Percentage return on the Funder's total outlay**	**Total payments to the Funder, including recovery of funded legal costs**	**Percentage return on the Funder's total outlay**
5,000	$23,445,000.00	203%	$33,245,000.00	281%
6,000	$27,045,000.00	234%	$36,845,000.00	312%
7,000	$30,645,000.00	265%	$40,445,000.00	343%
8,000	$34,245,000.00	296%	$44,045,000.00	375%
9,000	$37,845,000.00	327%	$47,645,000.00	406%
10,000	$41,445,000.00	358%	$51,245,000.00	437%

138. It is useful to make a number of observations about the Funder's claim, by reference to the factors identified in *Money Max.*

The class members

139. The Applicant and a further 9 Group Members entered litigation funding agreements with the Funder. The Funder further relies on the notification and disclosure of the funding commission rate to Group Members (Funder's Submissions (**FS**) [36]–[43]), and absence of objections from the Group Members (FS [63]).

140. Given the early stage of the registration process, and the characteristics of the Group Members, the Court should not place any particular weight on the absence of objections

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[172] Affidavit of Vicky Antzoulatos sworn 25 October 2024, [142].

from Group Members to the amount sought by the Funder. Group Members are unlikely to have experience in litigation of this kind, and are not likely to be well placed to assess whether the commission sought is fair and reasonable. In the circumstances of this case, judicial oversight of the Funder's commission is particularly important.

Comparison of the funding commission to other Part IVA proceedings

141. A recently updated survey of funding commissions in post-*Money Max* settlement approvals shows a decreasing trend in both median and aggregate funding commissions in settlement approvals.[173] Depending on methodology, the decrease ranges from 23.9% to 21.1% (aggregate) or from 23.9% to 22.25%.

142. Beyond the percentage amount, the Court should also have regard to the overall value of the funding commission. If the Funder receives a 20% commission on the Lump Sum and Per-Person Payments only, it would receive between $10.8 and $36 million (assuming there are between 3,000 and 10,000 Eligible Claimants — the range contemplated by the proposed settlement). Even the lower end of this range would represent a significant amount and the upper end would be larger than all but three of the 57 funding commissions approved in a recent survey.[174]

143. The very large size of the proposed commission in dollar terms is acknowledged by the Funder (FS [57]). Whether a commission of that magnitude is proportionate to the value of the investment and risk assumed by the Funder is a key consideration in the assessment of whether to allow the amount sought.

Risk of funding the proceeding

144. As outlined in part C above, there were significant legal and factual risks with the claims made in this proceeding. The risk taken on by the Funder should be reflected in the amount of the funding commission. However, the risk in this case is moderated to some extent by the following considerations.

145. First, in assessing the merit of the potential proceeding and the risk in funding it, the Funder had the benefit of its previous experience in funding the *Pearson* class action. There are factual and legal differences between the two proceedings, however there are

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173 Vince Morabito, 'Empirical perspectives on twenty-one years of funded class actions in Australia', April 2023 (Annexure PCB-1 to the Barker Affidavit).

174 Vince Morabito, 'Empirical perspectives on twenty-one years of funded class actions in Australia', April 2023 (Annexure PCB-1 to the Barker Affidavit).

sufficient similarities in the nature of the claims and the parties to enable the Funder to make an informed assessment of the risks of this proceeding. Further, the funding agreement with the Applicant was entered into after settlement of the *Pearson* matter had been approved by the Court, including approval of a significant funding commission. This chronology is relevant to assessment of the degree of risk assumed by the Funder.

146. Secondly, the Funder was insured against the risk of an adverse costs order up to an amount $5 million, which moderated its potential exposure to such an order.

147. Thirdly, given that the Commonwealth is the only respondent, issues that might arise in other large representative proceedings regarding the capacity of the respondent to pay a significant judgment amount was not an issue in this case.

Legal costs, costs exposure and security for costs

148. As already noted, the Funder took on the risk of an adverse cost order, but mitigated that risk to an extent by taking out the ATE insurance policy. By contrast, in *Pearson*, the Funder did not have ATE insurance, a factor on which Murphy J placed significant weight in concluding that a 20% funding commission was reasonable in that matter.[175]

149. The Funder agreed to fund $10,520,758 of Shine's professional costs and disbursements. The risk in respect of further legal expenses beyond that amount were carried by Shine, not the Funder. While the Funder says that if the claim had proceeded to trial Shine may have requested further funding, it remains the position that at the time of settlement, the Funder had not agreed to fund additional expenses. Further, the "risk" that it would provide further funding for the proceeding in response to a request from Shine (FS [30.b]) was within the Funder's control; they had no obligation to agree to such a request.

150. The Applicant's projections are that the final number of Eligible Claimants will be in the range of 6,000 to 8,000. If the Funder receives 20% of the per-person payments, this would result in a funding commission in the range of $21.6 to $28.8 million. Compared to the Funder's outlay, this a return of between 1.9 and 2.5 times what the Funder invested in the proceeding. Taking into account the fact that the Funder will be reimbursed for the legal costs that it has paid to Shine, the Funder's return would be between 2.7 and 3.3 of the investment. Other cases have suggested that funders would

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175 *Pearson* at [271].

typically expect a 3x return on investment, although the rate sought may be as low as 1x return.[176]

Amount of the settlement and the 'in hand' payments

151. The settlement is based on a per-person payment, with the result that the amount of the overall settlement, and therefore the amount of any commission calculated as a percentage of that amount, will increase with the number of Eligible Claimants. There are two scenarios or outcomes which the Court should be mindful of:

152. First, if the number of Eligible Claimants is very low, the other costs of the settlement (particularly, any deductions for the Applicant's legal costs above $15 million and/or party-and-party costs, which the Applicant says may be up to $10 million) will be borne by a small number of Eligible Claimants. This will be exacerbated if the Funder's commission is a factor of the gross settlement amount, and even more so if the claim in respect of the cost of the ATE insurance policy is allowed. This is illustrated by the table below. Confining the Funder's commission to the per-person amount will ensure that the funding costs scale directly with the settlement fund available to bear those costs.

Eligible Claimants	**Funder's claimed commission (including ATE costs deduction)**	**Commonwealth Position (other than 'capping' the funding commission)**	**Additional average payment under Commonwealth position to Claimants compared to the Funder's claim**
3,000	$16,245,000.00	$10.8 million	$1,815.00
5,000	$23,445,000.00	$18 million	$1,089.00
7,500	$32,445,000.00	$27 million	$726.00
10,000	$41,445,000.00	$36 million	$544.50

153. The second scenario is if the registrations reach or approach 10,000. In that circumstance, even if the commission is limited to a percentage of the per person amount, the Funder would receive a funding commission of $36 million (unless the Court imposes a cap). That is a very significant amount, and at the very high end of the range of funding commission amounts approved in other cases.[177] This supports consideration of an upper cap on the Funder's commission in the range of 6,000–8,000 Eligible Claimants, outlined below.

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176 *Evans v Davantage Group Pty Ltd (No 3)* [2021] FCA 70 at [60] (Beach J).

177 Vince Morabito, 'Empirical perspectives on twenty-one years of funded class actions in Australia', April 2023 (Annexure PCB-1 to the Barker Affidavit).

The requirement for litigation funding

154. The Commonwealth accepts that this is a proceeding which was unlikely to have been brought without litigation funding.

E3. Commonwealth's position

155. The Commonwealth submits that:

(a) The Funder's commission should be confined to a percentage of the per-person payments (ie $18,000 per Eligible Claimant), rather than a percentage of the gross settlement payment.

(b) The Funder should not be permitted a deduction in respect of the costs of the ATE insurance premium.

(c) The Court should consider capping the Funder's commission if the number of Eligible Claimants (and therefore the total Settlement Sum) is in the upper range of possible outcomes, to avoid the Funder recovering an excessive commission in comparison to its outlay in funding the proceeding.

156. Each of these matters is addressed briefly.

E4. Commission to apply to net settlement payment

157. If the Court accepts that the commission rate of 20% is fair and reasonable, it should nonetheless limit the amount payable to the Funder by making the commission referable to the net settlement sum, not the gross settlement sum. At a rate of 20%, that would reduce the commission by $4.4 million, being 20% of the $22 million that the Commonwealth has agreed to pay in respect of costs. Assuming that the number of Eligible Claimants is ultimately in the expected range of 6,000 – 8,000, the Funder will recover a reasonable commission whilst reducing the risk that it is disproportionate to the total settlement sum, in the event that the number of Eligible Claimants falls outside of the estimated range.

E5. Reimbursement of ATE insurance premium

158. The authorities adopt slightly different approaches in respect of claims by funders for an additional deduction for the expenses of ATE insurance.

159. A number of decisions of this Court have identified the inconsistency in a funder relying on their assumed risk as the basis for a significant funding commission, whilst also seeking to recover their costs of defraying that risk. According to Lee J, such costs are "costs of the funder performing its central obligation". How the funder manages those

risks is a matter for it but "is not a cost that ought be passed on separately to group members".[178] Justice Bromberg similarly observed that the funder "cannot charge for both taking the risk and defraying the risk", which would be to double-dip.[179] Justice Murphy has said that there is "no good reason" to permit a funder to charge separately for these expenses.[180] Very recently, McElwaine J concluded that it would not be fair and reasonable to compensate a funder for "a cost of defraying a component of the very risk which it contracted to accept".[181]

160. By contrast, in *Williamson v Sydney Olympic Part Authority* [2022] NSWSC 1618, Black J did not identify any difficulty with granting both a funding commission and deduction for ATE insurance costs. His Honour considered the issue was the total amount of the deduction, which might be addressed by reducing either.[182] That approach has been followed in several other decisions.[183]

161. The Court should follow the approach explained in cases such as *Perera*, and not grant the Funder a deduction for the cost of the ATE insurance policy in addition to the funding commission. That approach is preferable in principle, and is consistent with the approach taken in *Pearson*, where the funder recovered a 20% funding commission, but did not seek any additional deduction for its funding costs.[184] Moreover, if registrations for the settlement are low, the cost of the ATE insurance premium would form a significant portion of the smaller settlement sum borne across a small group of Eligible Claimants. At the other end of the spectrum of possible outcomes, if registrations are high, the Funder will recover a funding commission of up to $36 million (if only on the per person amounts, but up to $41 million if on gross), which as outlined above, is a very significant return on investment. The Funder should not be entitled to increase its profit margin further by recovering the cost of the ATE insurance policy.

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178 *Asirifi-Otchere v Swan Insurance (Aust) Pty Ltd* (2020) 385 ALR 625 at [31]-[32], quoting his Honour's earlier comments in ***Perera*** *v GetSwift Limited* (2018) 263 FCR 1, [194]–[195].

179 *Bradshaw v BSA Ltd (No 2)* [2022] FCA 1440, [161].

180 *Ghee v BT Funds Management Ltd* [2023] FCA 1553, [151]. See also his Honour's earlier comments in *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Ltd (No 3)* [2018] FCA 1842, [202]-[203] and *Court v Spotless Group Holdings Limited* [2020] FCA 1730, [96].

181 *Equity Financial Planners Pty Ltd v AMP Financial Planning Pty Ltd* [2024] FCA 1036, [155].

182 At [83].

183 See, eg, *Eckardt v Sims Ltd* [2022] FCA 1609, [40]; *Iddles v Fonterra Aust Pty Ltd* [2023] VSC 566, [133]; *Ingram v Ardent Leisure Ltd* [2024] FCA 836 [85]–[92]; *Fordham v Commonwealth Bank of Australia* [2023] FCA 1106 [93]–[98].

184 *Pearson* at [271].

E5. Cap on commission

162. The Court should cap the Funder's commission so that it applies to a maximum settlement sum of between $108,000,000 to $144,000,000, representing the total Per-Person amount payable in respect of 6,000-8,000 Eligible Claimants. That is, the Funder would receive a funding commission of 20% of the per-person payment ($18,000) for each Eligible Claimant, up to a maximum of 6,000-8,000 Eligible Claimants, being a commission in the range $21,600,000 to $28,800,000. Capping the commission in that range is appropriate having regard to the very high aggregate commission the Funder would receive at the upper end of settlement outcomes, the relative return on the amount invested in the matter and the Funder's reduced risk exposure by reason of the ATE insurance policy. If the Court considers that a higher or lower funding commission is appropriate, it could adjust the cap accordingly.

163. It is appropriate that a funder's commission is proportionate to the investment made and risk undertaken. In *Blairgowrie Trading Ltd v Allco Finance Group (in liq) (No 3)*, Beach J said:[185]

> … if the gross or net settlement sum had been substantially higher, I would have set a lower percentage rate so that the amount paid to the funder would have remained proportionate to the investment and risk undertaken by the funder. In other words, I would have applied a sliding scale. Clearly, to permit of a 30% rate on a net settlement sum of $30 million does not of itself justify rates of that magnitude applied to settlement sums of, say, $100 million or $300 million. I venture to suggest that a 30% rate would be difficult to justify on a net settlement sum above $50 million.

164. Because the amount of the settlement sum is presently unknown, a cap on the Funder's commission will ensure that, in the event that the number of Eligible Claimants is higher than expected, the Funder does not recover a commission that is disproportionate to its outlay and the risk assumed in this proceeding.

F. REIMBURSEMENT PAYMENTS

165. The Commonwealth agrees with the Applicant (AS [74]–[75]) that modest payments to the Applicant and the Sample Group Members are appropriate and consistent with authority.[186] The Commonwealth has no concern regarding the amount of the proposed reimbursement payments for the Applicant and Sample Group Members.

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185 (2017) 343 ALR 476 at [160].

186 See eg *Caason Investments Pty Ltd v Cao (No. 2)* [2018] FCA 527 at [176].

166. Whether the reimbursement payments proposed for the witnesses are appropriate requires consideration of whether the proposed payment "sufficiently discriminate[s] between time and expenditure which related to the organisation and preparation of the [witnesses'] own cases, on the one hand, and time and expenditure which had a truly representative purpose, on the other hand". The Commonwealth acknowledges that in understanding and assessing the Applicant's claim, it was assisted by the oral evidence of the witnesses at the preservation of evidence hearing. However, it is unclear whether all of their time and effort could be regarded as having had a "truly representative purpose".

93. The reimbursement payment proposed for each witness in this case is $5,000. That is a relatively large amount compared to that approved in other cases,[187] and having regard to the expected quantum of settlement payments to Eligible Claimants. The Court may consider that a lesser amount is appropriate.

G. OTHER CONSIDERATIONS UNDER GPN-CA

167. For completeness, the Commonwealth briefly addresses the factors identified in [15.5] of the Class Actions Practice Note, to the extent they have not already been addressed.

168. **Stage of the proceedings.**[188] At the time of the conditional settlement, the pleadings had closed following a second set of substantial amendments to the Statement of Claim. The parties had engaged in extensive discovery, and numerous subpoenas had been issued. The Applicant had filed her expert evidence and the Applicant and each of the Sample Group Members (along with others) had given oral evidence at the preservation of evidence hearings held in the Northern Territory in July 2023. The Commonwealth had not yet filed its evidence, however the issues in dispute were clearly crystallised on the pleadings. The Court can be satisfied that the settlement was reached in circumstances where an informed assessment was able to be made of the merit of the claims of the Applicant and Group Members.

169. **Complexity and likely duration of the litigation.**[189] The case is legally and factually complex. It has already been on foot for three years, and if it proceeded to trial, would be expected to take at least another year before determination of the claims of the

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187 See eg *Andrews v Australia and New Zealand Banking Group Limited* [2019] FCA 2216 at [32], where Middleton J approved payments of $300 to witnesses who had given evidence by affidavit.

188 See Barker Affidavit [14]–[24].

189 See Barker Affidavit [8]-[13], [25]–[31].

Applicant and Sample Group Members and the common questions. If successful, and subject to any appeals, it would be yet further time until the claims of remaining Group Members would be determined. Early resolution of the claims by settlement is a significant factor weighing in favour of approval in this case, having regard to the advanced age of many Group Members.

170. **Reaction of the class to the settlement.** At the time of filing these submissions, the Commonwealth is not aware of any objections from Group Members to the settlement.

171. **Ability of the respondent to withstand a greater judgment.** There is no issue as to whether the Commonwealth could withstand a greater judgment. This is a neutral consideration.

H. CHOICE OF ADMINISTRATOR

172. The choice of administrator is a matter for the Court. The three options that have been identified by the Applicant's solicitors are all qualified and generally suitable for the role. However, the Commonwealth makes the following observations relevant to the selection.

173. First, the parties agree that cost and past experience are important considerations in the selection of administrator (AS [65]). of the Applicant's submissions. Of the three options, the estimate of costs of Deloitte and Grant Thornton were significantly lower than McGrath Nicol.

174. Secondly, it would be preferable that whoever is appointed to administer the *Street* scheme not also be appointed to administer this scheme. The size and complexity of the administration process is such that undertaking the role as administrator of two similar schemes simultaneously has potential to create resource and capacity issues, and risking inefficiency and increased cost and delay.

175. Finally, it is noted that both Deloitte and Grant Thornton propose similar time frames for the commencement of payments to living Eligible Claimants. Given the complexity of the administration process, it is uncertain whether the estimate of time to commence payments proposed by McGrath Nicol is realistic.

176. Accordingly, the Commonwealth's preference is that either Grant Thornton or Deloitte be appointed as Administrator, provided that they are not also appointed as administrator in the *Street* proceedings.

I. CONCLUSION

177. For the reasons outlined, the Court should approve the proposed settlement, and make orders as outlined in paragraph 3 above.

Dated: 1 November 2024

Fiona McLeod SC

Zoe Maud SC

Joshua Ingrames

Sophie Molyneux

Counsel for the Respondent

Australian Government Solicitor

Solicitor for the Respondent

ANEXURE —WAGE RATES AND CONDITIONS DURING CLAIM PERIOD

Note:

1. The following instruments are not included or addressed in the table below:
    a. the *Apprentices (Half-Castes) Regulations 1930*
    b. any industrial awards that may have applied during the Claim Period.
2. The terminology of the Ordinances and their associated Regulations are adopted in the table below, but such terminology is not endorsed.
3. A reference to the 'Director' includes the 'Chief Protector', where applicable.

Table 1 — Wage Rates

	Ordinance / Regulation / Award	Period of Operation	Applicable Work and Wage Rate
1.	*Regulations under the Aboriginals Ordinance 1918* (Gazetted 29 May 1919)	From commencement of Claim Period to 29 June 1933	**Aboriginal or 'half-caste' in Town district:** 5 shillings per week, with 2 shillings per week payable to the Director or Protector in trust. **Aboriginals in Country district:** 5 shillings per week. If requested in writing by the Protector, pay to the Protector a proportion of such wages to be held in trust (such proportion not less than 10 shilling per month).
2.	*Regulations under the Aboriginals Ordinance 1918-1933* (Gazetted 29 June 1933)	29 June 1933 to 17 October 1940	**Town district:** 5 shillings per week, or 6 shilling per week for a female 'half-caste' with 8 shillings per month, or 6 shillings per month for a female 'half-caste' payable to the Director (reg 13, Form 3). **Country district**: 5 shillings per week with 1 pound every 4 weeks (i.e., the full amount of the prescribed wage) payable to the Director (reg 14, Form 4). **Country district (drovers' and drovers' assistants)**: 24 shillings per week if travelling with stock 16 shillings per week if travelling with plant only (reg 15). The Director may, at his discretion, order some or all of the wage be paid to him.

	Ordinance / Regulation / Award	Period of Operation	Applicable Work and Wage Rate	
3.	*Regulations under the Aboriginals Ordinance 1918-1933* (as modified by the Amendments of the Aboriginals Regulations, 1940, No. 11)	17 October 1940 to 13 May 1957 (subject to the commencement of the *Aboriginal (Pastoral Industry) Regulations*, below)	**Town district:** 5 shillings per week, or 6 shilling per week for a female 'half-caste'. If required by the Director, licensee to pay to the Director every 4 weeks, in trust for the employee, such part of the wages (if any) specified by the Director and to pay the balance (if any) to the employee (reg 13, Form 3). Otherwise, wages as above.	
4.	*Aboriginal (Pastoral Industry) Regulations* Note: these Regulations only applied to persons working in the pastoral industry.	30 June 1949 to 13 May 1957	**Males in stock camps (minimum rate per week)**: 0-1 years' experience: 12 shillings, 6 pence 1-2 years' experience: 15 shillings 2-3 years' experience: 17 shillings, 6 pence 3+ years' experience: 1 pound (Second Schedule) **Male Drovers and Drovers' Assistants (minimum rate per week):** While travelling with stock: 1 pound, 15 shillings While travelling with plant only: 1 pound (Second Schedule)	**Females, 'wife of, living with, male employee' (minimum rate per week)**: 7 shillings, 6 pence per week. (Second Schedule) **Females 'unmarried or not living with male employee'(minimum rate per week):** 10 shillings per week (Second Schedule)
5.	*Wards Employment Ordinance 1953-1959*	1 October 1959 to 12 November 1971	Rates of pay prescribed under notices issued from time to time pursuant to s 38(2)(b) of the *Wards Employment Ordinance*.	
6.	Gazette dated 16 September 1959 (notice pursuant to s 38(2)(b) of	16 September 1959 to 18 December 1962	**Weekly adult wage payable:** **Industry** — **Male rate** — **Female rate** Agricultural industry — £2 — £1	

	Ordinance / Regulation / Award	Period of Operation	Applicable Work and Wage Rate		
	the *Wards Employment Ordinance 1953 – 1959*)		Building Industry Domestic industry Droving (with plant and stock) Droving (with plant only) Fishing Mining (surface work) Mining (underground) Municipal Pastoral industry Pearling Timber Transport Other	£5 £2 £10 £5 £4 £2 £6 £3-10-0 £2 £4 £2 £2 £2	n/a £1 n/a n/a £1 n/a n/a n/a £1 n/a n/a n/a £1
			Juniors Rates (male and female), % of appropriate adult rate specified for industry/calling: Under 17: 40%, At 17: 60%, At 18: 80%, At 19: 100%		
7.	Gazette dated 19 December 1962 (notice pursuant to s 38(2)(b) of the *Wards Employment Ordinance 1953 – 1960*)	19 December 1962 to 13 February 1966	**Weekly wage payable:**		
			Industry Agricultural industry Building Industry Domestic industry Droving (with plant and stock) Droving (with plant only) Fishing Mining (surface work) Mining (underground) Municipal Pastoral industry Pearling Timber	**Male rate** £2-8-3 £5-17-3 £2-8-3 £11-12-3 £5-17-3 £4-14-3 £2-8-3 £7-0-3 £4-2-9 £2-8-3 £4-14-3 £2-8-3	**Female rate** £1-5-3 n/a £1-5-3 n/a n/a £1-5-3 n/a n/a n/a £1-5-3 n/a n/a

<table>
<tr><th></th><th>Ordinance / Regulation / Award</th><th>Period of Operation</th><th>Applicable Work and Wage Rate</th></tr>
<tr><td></td><td></td><td></td><td>
<table>
<tr><td>Transport</td><td>£2-8-3</td><td>n/a</td></tr>
<tr><td>Other</td><td>£2-8-3</td><td>£1-5-3</td></tr>
</table>

Casual hourly rate: 1/40th of 5/4th of the applicable weekly wage

Juniors Rates (male and female), % of appropriate adult rate specified for industry/calling: Under 17: 40%, At 17: 60%, At 18: 80%, At 19: 100%
</td></tr>
<tr><td>8.</td><td>Gazette dated 2 February 1966 (notice pursuant to s 38(2)(b) of the Wards Employment Ordinance 1953 – 1965)</td><td>14 February 1966 to 31 October 1966</td><td>
This notice <u>amended</u> the weekly wages specified in Gazette 19 December 1962 (immediately above) as follows:

Weekly Wage Payable:

<table>
<tr><th>Industry</th><th>Male rate</th><th>Female rate</th></tr>
<tr><td>Agricultural industry</td><td>$4.83</td><td>$2.53</td></tr>
<tr><td>Building Industry</td><td>$11.73</td><td>n/a</td></tr>
<tr><td>Domestic industry</td><td>$4.83</td><td>$2.53</td></tr>
<tr><td>Droving (with plant and stock)</td><td>$23.23</td><td>n/a</td></tr>
<tr><td>Droving (with plant only)</td><td>$11.73</td><td>n/a</td></tr>
<tr><td>Fishing</td><td>$9.43</td><td>$2.53</td></tr>
<tr><td>Mining (surface work)</td><td>$4.83</td><td>n/a</td></tr>
<tr><td>Mining (underground)</td><td>$14.03</td><td>n/a</td></tr>
<tr><td>Municipal</td><td>$8.28</td><td>n/a</td></tr>
<tr><td>Pastoral industry</td><td>$4.83</td><td>$2.83</td></tr>
<tr><td>Pearling</td><td>$9.43</td><td>n/a</td></tr>
<tr><td>Timber</td><td>$4.83</td><td>n/a</td></tr>
<tr><td>Transport</td><td>$4.83</td><td>n/a</td></tr>
<tr><td>Other</td><td>$4.83</td><td>$2.53</td></tr>
</table>

Casual hourly rate: 1/40th of 5/4th of the applicable weekly wage

Juniors Rates (male and female), % of appropriate adult rate specified for industry/calling: Under 17: 40%, At 17: 60%, At 18: 80%, At 19: 100%
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<tr><th></th><th>Ordinance / Regulation / Award</th><th>Period of Operation</th><th>Applicable Work and Wage Rate</th></tr>
<tr><td></td><td></td><td></td><td></td></tr>
<tr><td>9.</td><td>Gazette dated 21 October 1966 (notice pursuant to s 38(2)(b) of the Wards Employment Ordinance 1953 – 1965)</td><td>1 November 1966 to 30 November 1967</td><td>Weekly wage payable:

Industry | Male rate | Female rate
Agricultural industry | $6.90 | $4.35
Building Industry | $14.65 | n/a
Domestic industry | $6.90 | $4.35
Droving (with plant and stock) | $27.50 | n/a
Droving (with plant only) | $14.50 | n/a
Fishing | $12.05 | $4.35
Mining (surface work) | $6.90 | n/a
Mining (underground) | $17.20 | n/a
Municipal | $10.80 | n/a
Pastoral industry | $14.50 | $4.35
Pearling | $12.05 | n/a
Timber | $6.90 | n/a
Transport | $6.90 | n/a
Other | $6.90 | $4.35

Casual hourly rate: 1/40th of 5/4th of the applicable weekly wage

Juniors Rates (male and female), % of appropriate adult rate specified for industry/calling: Under 17: 40%, At 17: 60%, At 18: 80%, At 19: 100%</td></tr>
<tr><td>10.</td><td>Gazette (No. 57) dated 29 November 1967 (notice pursuant to s 38(2)(b) of the Wards Employment Ordinance 1953 – 1965)</td><td>1 December 1967 to 31 December 1967</td><td>Weekly wage payable:

Industry | Male rate | Female rate
Agricultural industry | $6.90 | $4.35
Building Industry | $14.65 | n/a
Domestic industry | $6.90 | $4.35
Droving (with plant and stock) | $27.50 | n/a</td></tr>
</table>

	Ordinance / Regulation / Award	Period of Operation	Applicable Work and Wage Rate		
	Gazette (No. 58) 30 November 1967 (notice pursuant to s 38(2)(b) of the *Wards Employment Ordinance 1953 – 1965*) NB: Both Gazettes contained notices applying the same weekly wages from 1 December 1967		Droving (with plant only) Fishing Mining (surface work) Mining (underground) Municipal Pastoral industry Pearling Timber Transport Other **Casual hourly rate:** 1/40th of 5/4th of the applicable weekly wage **Juniors Rates (male and female), % of appropriate adult rate specified for industry/calling**: Under 17: 40%, At 17: 60%, At 18: 80%, At 19: 100%	$14.50 $12.05 $6.90 $17.20 $10.80 $23.80 (without dependent children) $25.78 (with dependent children) $12.05 $6.90 $6.90 $6.90	n/a $4.35 n/a n/a n/a $4.35 n/a n/a n/a $4.35
11.	Gazette 20 December 1967 (notice pursuant to s 38(2)(b) of the *Wards Employment Ordinance 1953 – 1965*)	1 January 1968 – 12 November 1971 (end of Claim Period), subject to the possible application of the *Cattle Station Industry (Norther Territory) Award* to some Group Members from 1 December 1968.	**Weekly wage payable:** **Industry** Agricultural industry Building Industry Domestic industry Droving (with plant and stock) Droving (with plant only) Fishing Mining (surface work) Mining (underground) Municipal Pastoral and Buffalo industry	**Male rate** $7.20 $15.25 $7.20 $28.60 $15.10 $12.55 $7.20 $17.90 $11.25 $23.80 (without dependent children) $25.78 (with dependent children)	**Female rate** $4.60 n/a $4.60 n/a n/a $4.60 n/a n/a n/a $4.60

	Ordinance / Regulation / Award	Period of Operation	Applicable Work and Wage Rate		
			Pearling	$12.55	n/a
			Sawmilling	$15.25 (Bench-man) $11.25 (Mill hand) $7.20 (Mill assistant)	n/a
			Timber	$7.20	n/a
			Transport	$7.20	n/a
			Other	$7.20	$4.60
			Casual hourly rate: 1/40th of 5/4th of the applicable weekly wage **Juniors Rates (male and female), % of appropriate adult rate specified for industry/calling**: Under 17: 40%, At 17: 60%, At 18: 80%, At 19: 100%		

Table 2 — Other terms and conditions (including 'keep')

	Ordinance / Regulation / Award	Other Allowances/Requirements (eg keep, or clothing allowance)
1.	*Regulations under the Aboriginals Ordinance 1918* (Gazetted 29 May 1919) From commencement of Claim Period to 29 June 1933	**Food, clothing and tobacco** Town Districts: Employers to agree to keep employees "clothed and fed to the satisfaction of the Protector" and supply tobacco. Country Districts: All applicants for a Country license undertake to provide food, clothing and tobacco to both permanent and temporary employees. **Accommodation**

	Ordinance / Regulation / Award	Other Allowances/Requirements (eg keep, or clothing allowance)
		Town Districts: Aboriginals employed within Town Districts of Darwin and Parap deemed to be domiciled in within the reserve known as the Aboriginal Compound, Darwin (reg 14). Aboriginals employed with a Town District, other than Darwin or Parap, shall live on premises provided by their employers or in any reserve that may be set apart for their use (reg 15). Country Districts: Reg 13(e): On every station, mine, run or other holding, employers required to set apart some portion as a **native camp**. Reg 13(g): On any station, mine, rune or other holding, employers to provide **rainproof shelters** for aboriginal employees.
2.	*Regulations under the Aboriginals Ordinance 1918-1933* (Aboriginals Regulations) (Gazetted 29 June 1933) 29 June 1933 to 17 October 1940	**Food, clothing and tobacco** Reg 13(c): Town District licence holders shall keep employees in food and clothing and supply tobacco (although no tobacco for female 'half-castes'). Reg 14(c): Country District licence holders (excl. some employers of drovers and drovers' assistants) shall keep employees in food and clothing and supply tobacco to the satisfaction of a Protector. Reg 15(2)(ii): Employers of drovers and drovers' assistants shall provide food to the employee to the satisfaction of a Protector. Reg 16: where reg 16 applied to drovers and drover's assistants employers are required to provide food and clothing and supply tobacco to the satisfaction of a Protector **Accommodation** Reg 29: Employees in town districts (other than Darwin Centre) shall live with employer or in any reserve set apart for their use. Reg 28(2): On every station, mine, run or other holding, the owner shall set apart a portion as a native camp. Reg 28(4): The owner or manager or any station, mine, run or other holding shall provide employees with rain-proof shelters.
3.	*Aboriginal (Pastoral Industry) Regulations*	**Food, clothing, tobacco other articles** Reg 5(1)(e): Licensees shall supply free of charge to employees and their wives and children **food, clothing and other articles in accordance with Sch 3**:

	Ordinance / Regulation / Award	Other Allowances/Requirements (eg keep, or clothing allowance)
	30 June 1949 to 13 May 1957 Note: these Regulations only applied to persons working in the pastoral industry.	- *Male employees*: food at least equal to entitlement of station employees under any NT award and 4 oz tobacco each week. - *One wife only (if also employed)*: food as above, clothing per annum 6 dresses, 6 yards calico, 1 sweater, 4 towels, 4 handkerchiefs and other articles of soap, matches and 2 oz tobacco (weekly), and 4 combs, 2 mirrors, 1 pair of scissors, 1 blanket, 1 swagcover, 1 mosquito net, needles and thread. - *One wife only (if not employed)*: food as specified for male employees or weekly provisions of 14lbs beef, 7lbs flour, 1 lb sugar, 3 oz tea, 1 lb jam or syrup, baking powder, 2 lbs potatoes or rice, 1 lbs onions or peas. Clothing per annum of 4 dresses, 6 yards calico, 1 sweater, 4 towels, 4 handkerchiefs. Other articles of soap, matches and 2 oz tobacco (weekly) and 4 combs, 1 mirror, 1 blanket, 1 pair scissors, 1 swagcover, 1 mosquito net, needles and thread. - *One child only of male employee*: food as specified for male employees or weekly provisions of 7 lbs. beef, 4lbs flour, 1 lb sugar, 2 oz tea, 1 lb jam, Baking powder, 1 lb potatoes or rice, 1 lb onions or peas. Clothing per annum of 4 shirts, 4 trousers and 1 sweater. Other articles soap (weekly) and 1 blanket, 1 swagcover and 2 towels. - *Female employees*: food as specified for male employees. Clothing per annum and other articles as specified for "one wife only (if also employed)". **Medical supplies** to be kept for employees, their wives and children - reg 5(1)(h) **Accommodation and other buildings** Reg 9(4): Owners of any station, pastoral lease, grazing licence or other holding shall provide accommodation buildings and articles free of charge to the employee and dependants as set out at Sch 4: *Accommodation:* - Accommodation for male workers and immediate family dependants to be provided at homestead and permanent out-stations. - Separate accommodation for each married male employee (size of 12 feet by 12 feet and may be built in groups of two) and immediate family (wife and children) and separate barrack room for each unmarried employee (size of 6 feet by 8 feet). - All accommodation is to of simple form, from classes of material readily available, floors of either concrete, stone slabs or wood; roof to be of iron or weatherproof thatching; minimum height of 9 feet and with a lean-to veranda 6 feet wide. *Messroom*

	Ordinance / Regulation / Award	Other Allowances/Requirements (eg keep, or clothing allowance)
		- Building to be erected of suitable material readily available, floors of impervious material, breakwind on one side, partition to segregate sexes, tables topped with iron or zinc, benches for seating, and one pannikin, plate, knife, form and spoon for each worker and dependant wife child. *Ablutions* - Showers to be erected where water supplies available and suitable natural bathing facilities not available. - Suitable native ablution arrangements where water supplies not available. *Sanitation* - Army burning type separate closets for males and females. *Laundry* - Provided according to availability of water. Laundry troughs and copper, and improvised facilities e.g. drums cut in half regarded as suitable. *Firewood* - Sufficient firewood to be provided.
4.	*Regulations under the Wards' Employment Ordinance 1953-1959 (Regulations 1959, No. 4)* 17 September 1959 to 31 October 1966	**Food, clothing and tobacco** Reg 24(1): Licensee required to pay to each ward employed a clothing allowance of fifteen shillings per week Reg 24(2): Subject to succeeding provisions of reg 24 (discussed below), licensee required to supply, without charge: (a) to each ward employed, food, tobacco and "other articles" in respect of each completed week of employment; and (b) to one wife (if not a ward employed by the licensee), and one child of each ward employed by licensee (if they reside with the ward on the licensee's property), clothing and, in respect of each completed week of employment of the ward, food, tobacco and other articles, in accordance with the several scales contained in the Second Schedule to the Regulations. Buildings for use of ward: Reg 25: subject to any subsequent Regs, licensee required to provide buildings including: (3) individual housing unit that conforms with specifications in Part 1 of Fourth Schedule to the Regulations for use by married male ward and his family (4) a barrack type building that conforms with specifications in Part II of the Fourth Schedule to the Regulations, a building for messing that conforms with specifications in Part III of the Fourth Schedule to the Regulations, a kitchen that conforms

	Ordinance / Regulation / Award	Other Allowances/Requirements (eg keep, or clothing allowance)
		with specifications in Part IV of the Fourth Schedule to the Regulations (and is equipped as per Part IV)- all for use of wards other than married males whose families reside with them on the property. (5) an ablution building equipped in accordance with Part V of the Fourth Schedule to the Regulations, a lavatory building equipped in accordance with Part VI of the Fourth Schedule to the Regulations and a laundry building equipped in accordance with Part VII of the Fourth Schedule to the Regulations – for use by all wards. (6) separate barrack type buildings, ablution buildings and lavatory buildings required where males and females reside (r 25(6)(a)-(c)). Other: Reg 18(1): 2 weeks paid recreation leave each completed period of 12 months' continuous employment. Reg 19: 1 week paid sick leave in any 12-month period of continuous employment (or more generous entitlement if provided for in an award or industrial agreement that was applicable in the industry or calling) Reg 27(1): Licensee required to provide adequate supply of potable water Reg 28(1): Licensee required to provide adequate supply of firewood for use by wards residing on property. **Special conditions applicable in the Pastoral Industry** Reg 35: Licensee who employs a ward in a mustering camp, in a droving camp, or on droving operations shall provide food and camping equipment of same standards and quantities as provided for in the Cattle Station Industry (Northern Territory Award) (whilst ward is away from usual residence).
5.	*Regulations under the Wards' Employment Ordinance 1953-1965 (Regulations 1966, No. 15)* 1 November 1966 to 12 November 1971 (end of Claim Period)	**Food, clothing and other articles** Reg 18(1): Subject to following provisions of Regs, employer required to supply, without charge: (a) To each ward employed, food, and "other articles"; and (b) To the wife (not being a ward employed by the employer), and a child of each ward employed by employer (if they reside with the ward on the employer's property), food, clothing and other articles, in accordance with the several scales contained in the First Schedule to the regulations - see scales.

	Ordinance / Regulation / Award	Other Allowances/Requirements (eg keep, or clothing allowance)
		Reg 18(2): An employer was not required to supply clothing and other articles to wife and child (as prescribed) if the ward was paid an allowance of: (a) $1 per week in respect of the wife of the ward and (b) $0.50 per week in respect of a child of the ward. NB: Employer not required to supply food, clothing and other articles, or equivalent allowance for more than one wife or more than one child (reg 18(3)). Also, if special circumstances exist, Director may exempt an employer from the whole or part of the requirements of this regulation or authorise supply of alternative food, clothing or other articles (reg 18(5)(a) and (b)). **Buildings for use of ward** Reg 20(6): subject to sub-regs 20(7) and (8), employer was required to provide an individual housing unit that conformed with specifications in Part 1 of Third Schedule to the Regulations for use by married ward and his family if they reside with him on the property (which included floor area (excluding verandah) of 60 sq feet for each person to be accommodated plus 60 sq feet for the kitchen). The employer could be exempted from the requirement to provide sixty square feet of floor area for the kitchen in the housing units if: • meals were provided by the employer for the ward and his family from a single kitchen, and • a welfare officer was satisfied that the wards and family members were incapable of using kitchen facilities to prepare their own meals (reg 20(7)). Reg 20(8): employer was required to provide for use of wards (other than married males whose families resided with them on the property): • a barrack type building that conformed with specifications in Part 2 of the Third Schedule to the Regulations • a building for messing that conformed with specifications in Part 3 of the Third Schedule to the Regulations, and • a kitchen that conformed with specifications in Part 4 of the Third Schedule to the Regulations (and was equipped as per Part 4). Director could exempt an employer from providing the building for messing and/or the kitchen if satisfied that suitable alternative messing and/or cooking facilities were provided (reg 20(9)). Reg 20(10): employer required to provide (for use by all wards):

	Ordinance / Regulation / Award	Other Allowances/Requirements (eg keep, or clothing allowance)
		• ablution facilities equipped in accordance with Part 5 of the Third Schedule to the Regulations • lavatory facilities equipped in accordance with Part 6 of the Third Schedule to the Regulations, and • Laundry facilities equipped in accordance with Part 7 of the Third Schedule to the Regulations. See specifications in Third Schedule to the Regulations. Separate facilities for males and females: Per Reg 20(11)(a) and (b), employer required to provide separate barrack type buildings, ablution facilities and lavatory facilities for males and females. Note: • where buildings and facilities provided before commencement of the *Wards Employment Regulations 1966* were, in the opinion of the Director, substantially in accordance with the above, those buildings were deemed to satisfy requirements of reg 20 • employer could apply for time (after commencement of these regulations) to provide the buildings and facilities **Other** Reg 23(1): Employer required to provide adequate supply of potable water Reg 24(1): Employer required to provide adequate supply of firewood for use by wards residing on property. Reg 25: Employer who employs a ward in a mustering camp, in a droving, or on droving operations shall provide **food and camping equipment** of same standards and quantities as provided for in the Cattle Station Industry (Northern Territory Award) (whilst ward is away from usual residence). Regs 12, 13 & 14: where an award or industrial agreement provided for: • ordinary working hours • overtime • annual leave • sick leave for persons employed in an industry, those provisions applied to wards employed in that industry.

	Ordinance / Regulation / Award	Other Allowances/Requirements (eg keep, or clothing allowance)
		Where there was no award or industrial agreement provided for the conditions of employment of persons in an industry, the Director could determine conditions under which a ward was employed in that industry (reg 28).