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Details of Filing

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Important Information

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Form 34
Rule 16.33

No. **QUD 535 of 2013**

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

Lex Wotton and Others
Applicants

State of Queensland and Another
Respondents

REPLY

To Defence to Third Further Amended Statement of Claim

Adopting the terms defined in the Third Further Amended Statement of Claim (***3FASC***) and in the Respondents' Defence to Third Further Amended Statement of Claim dated 10 September 2015 (***Defence***), the Applicants respond to the Defence as follows:

1. The Applicants join issue with each of the allegations in the Defence, save to the extent that they constitute admissions or are explicitly addressed below.

2. The Applicants **admit** the allegations in **paragraph 4** of the Defence, but say that:

   a. the 93.5% referred to in paragraph 4(a) of the Defence represents the number of persons who indicated that they were Indigenous as a proportion of the total population of Palm Island and does not account for the persons who did not indicate whether or not they were Indigenous;

   b. the number of persons who indicated that they were indigenous as a proportion of the persons who indicated whether or not they were Indigenous was 96.5%; and,

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c. accordingly, the most accurate estimate of the proportion of the population of Palm Island that was Indigenous was 96.5%;

d. the number provided in paragraph 4(b) of the Defence has a similar flaw in its analysis.

3. In reply to **sub-paragraph 8(b)** of the Defence, the Applicants:

a. deny that Mulrunji was creating a public nuisance when he was arrested, or at any time on 19 November 2004; and

b. say that, in any event, Mulrunji's arrest was arbitrary and without reasonable cause and was contrary to the principle of arrest as a means of last resort because:

i. the behaviour for which Mulrunji was arrested was commonplace and unremarkable on Palm Island; and

ii. at the time of his arrest, Mulrunji posed no risk to any person or property.

4. In reply to **paragraph 24** of the Defence, the Applicants:

a. admit the allegations in sub-paragraph 24(a);

b. do not know and cannot admit to the allegations in sub-paragraph 24(b) as they are vague and unspecific and do not identify which provisions of the OPM were amended to reflect the RCIADIC recommendations or when they were so amended;

c. do not know and cannot admit that in November 2004 all QPS officers were aware of the contents of the OPM, as pleaded in sub-paragraph 24(c);

d. admit the allegations in sub-paragraph 24(d);

e. do not know and cannot admit to the allegations in sub-paragraph 24(e) as they do not know what is meant by "in a general way"; and

f. say that:

i. QPS officers stationed on Palm Island, a predominantly Aboriginal community, officers in charge of watchhouses in which those persons were detained, and the senior officers to whom those officers reported, ought to have been aware of the report and the recommendations made therein; and

ii. if such officers were not aware of matters relevant to Aboriginal persons they policed on a daily basis, then they were not able to, and did not comply with the Policy in s. 6.4 OPM referred to in 3FASC:[44.a-b], as the report of the RCIADIC specifically addressed the cultural needs of Aboriginal persons in custody.

5. In reply to the allegations in **paragraph 25** of the Defence, the Applicants:

a. deny the allegations in sub-paragraph 25(a), and say that:

i. PSAA s 2.3(g) referred to the "reasonable expectations of the community" (3FASC:[6.d.vii]);

ii. PSAA s 2.4(2) required QPS members to "act in partnership with the community at large" (3FASC:[6.e]);

iii. OPM s 6.4 referred to "cultural needs which exist within the community" and s 6.4.7, headed "Community involvement – responsibilities of officer in charge", referred to "specific cultural and ethnic demographic characteristics of their area of responsibility and the needs thereby created" (3FASC:[44]);

iv. OPM s 2.5.1(v) (3FASC:[63.a]) referred to "the needs and expectations of the community";

v. OPM s 2.5.3 referred to "how the Service is perceived by the community" (3FASC:[64]);

vi. Code of Conduct s 7 referred to "Scrutiny by the community" (3FASC:[75]);

vii. PGFPC s 3.1 referred to the "benefit of the community" and the "best interests of the community" (3FASC:[78]);

viii. Code of Conduct s 3.9 referred to the "common good of the community" (3FASC:[82]);

ix. Code of Conduct s 10.1 referred to the "best interests of the community" (3FASC:[88]), as did s 10.14 (3FASC:[96]);

x. accordingly, the Respondents cannot seriously maintain that it is embarrassing to plead that the community of Palm Island had needs, expectations, perceptions, interests, or other states of mind or knowledge and, in fact, the Second Respondent and its employees had a multitude of objects and obligations which

were referable to the needs, expectations, perceptions, interests, or other states of mind or knowledge of the community;

b. say that, in any event, 3FASC:[32] refers to "the community of Palm Island, *including the Applicants, Group Members and Sub-Group*", who were homogenous in a number of ways, relevantly including in their geographical location or residence, and their reliance upon the QPS to provide policing services on Palm Island;

c. say that the Applicants refer to "the community of Palm Island, including the Applicants, Group Members and Sub-Group" in the context of the

d. say that the admission in paragraph 25(b) and the statement in subparagraph (c) are inconsistent with the denial in paragraph 25(f) of 3FASC:[32] in its entirety and, accordingly, paragraph 25(f) is embarrassing, is contrary to rule 16.06 of the *Federal Court Rules* 2011 (Cth) (***FCR***), and ought to be struck out, and the Respondents have admitted 3FASC:[32] at least in part;

e. otherwise join issue with that paragraph.

6. In reply to the allegations in **paragraph 28** of the Defence, the Applicants:

a. deny that the provisions referred to are not relevant to any claim for relief made in the proceeding;

b. say that the provisions relate to the "general care, treatment and supervision of the deceased immediately before the death in line with Service policy, orders and procedures", which was required to be investigated pursuant to s.16.24.3 of the OPM and is elsewhere referred to in the 3FASC, including in paragraphs 42(b), 49(a), 111 and 129(a); and

c. otherwise join issue with that paragraph.

7. In reply to the allegations in **paragraph 30** of the Defence, the Applicants:

a. deny that the provisions referred to are not relevant to any claim for relief made in the proceeding;

b. say that the provisions relate to the "general care, treatment and supervision of the deceased immediately before the death in line with Service policy, orders and procedures", which was required to be investigated pursuant to s.16.24.3 of the OPM and is elsewhere referred to in the 3FASC, including in paragraphs 42(b), 49(a), 111 and 129(a); and

c. otherwise join issue with that paragraph.

8. In reply to the allegations in **paragraph 31** of the Defence, the Applicants:

a. deny the allegations in paragraphs 31(a)-(c);

b. refer to 3FASC:[42.b] and say that where the Cultural Advisory Unit was notified of the death in custody, s.16.24.1 OPM required that the notification should include the information outlined in parts (i) to (xiii) of s.16.24.3; and

c. otherwise join issue with that paragraph.

9. In reply to the allegations in **paragraphs 33, 35 and 36** of the Defence, the Applicants deny that the provisions referred to are not relevant to any claim for relief made in the proceeding, and say that they are relevant to the response of the QPS to all Major Incidents, including the death in custody of Mulrunji.

10. In reply to the allegations in **paragraph 38** of the Defence, the Applicants:

a. subject to the below, admit the allegations in sub-paragraphs 38(c), (d), (e), (f), (g);

b. admit that "conduct obligations" within the meaning of the PSE Act which are statutory obligations under s. 18 PSE Act are referred to in Chapter 10 of the Code of Conduct;

c. say that Code of Conduct s 10.1 (3FASC:[88]) sets out a "conduct obligation" and states: "all members of the Service have responsibilities towards the government of the day and are to: (i) ensure political neutrality in all policing decisions and implement Government policy ... impartially".

d. repeat and rely upon 3FASC:[71];

e. say that the "ethics obligations" as set out in ss 7 to 11 of the PSE Act:

i. are a statement of Government Policy, as recognised by s.5(1) PSE Act which states: "In recognition of the ethics principles, ethics obligations are to apply to public officials";

ii. apply to all public officials, including the Second Respondent and all QPS members (s. 6 PSE Act); and

iii. are a law.

f. say that, by reason of the "conduct obligation" in s. 10.1 of the Code of Conduct (3FASC:[88]), "Members [we]re to act in good faith, in accordance with both the spirit and the letter of the law and in the best interests of the community of Queensland" and accordingly, were required to act in accordance with both the spirit of the "ethics obligations" in sections 7 to 11 of the PSE Act, and with those obligations themselves;

g. say that, in the premises, a failure to comply with or act in the spirit of the "ethics obligations" was a breach of s. 10.1 of the Code of Conduct, a breach of s.18 PSE Act, and a failure to comply with a direction of the Second Respondent issued pursuant to s.4.9 PSAA (as pleaded in 3FASC[6.g] and [70] and referred to in Code of Conduct s 3), and was a ground for disciplinary action under *Police Service (Discipline) Regulations* 1990 s 9;

h. say that QPS members were required to act and be seen to act properly and in accordance with the terms of the Code of Conduct pursuant to s. 10.8 of the Code of Conduct, and, accordingly, were required to follow all sections of the Code of Conduct, including those sections that did not contain "conduct obligations", and a failure to do so was a breach of PSE Act s 18; and

i. otherwise join issue with that paragraph.

11. Subject to the below, **admit** the allegations in **sub-paragraph 41(b)** of the Defence, and say that:

a. insofar as section 2 of the Code of Conduct contains a lawful direction, instruction or order, all QPS members were bound to obey the lawful direction, instruction or order pursuant to the "conduct obligation" in section 10.5 Code of Conduct as set out in 3FASC:[89];

b. section 2 of the Code of Conduct contained lawful directions issued by the Second Respondent pursuant to section 4.9(1) PSAA (as pleaded in 3FASC:[6.g] and [70]);

c. accordingly, all QPS officers were required by s. 10.5 Code of Conduct and s.4.9(2) PSAA to follow the directions or instructions, and a failure to do so was a breach of s. 18 PSE Act; and

d. Members were required to act and be seen to act properly and in accordance with the terms of the Code of Conduct pursuant to s. 10.8 of the Code of Conduct, and, accordingly, were required to follow s. 2 of the Code of Conduct despite the fact that it did not explicitly contain

any "conduct obligations", and a failure to do so was a breach of s. 18 PSE Act.

12. Subject to the below, the Applicants **admit** the allegations in **sub-paragraph 42(b)** of the Defence, and say that:

    a. insofar as section 7 of the Code of Conduct contained a lawful direction, instruction or order, all QPS members were bound to obey the lawful direction, instruction or order pursuant to the "conduct obligation" in section 10.5 Code of Conduct as set out in 3FASC:[89];

    b. section 7 of the Code of Conduct contained lawful directions issued by the Second Respondent pursuant to section 4.9(1) PSAA (as pleaded in 3FASC:[6.g] and [70]);

    c. accordingly, all QPS officers were required by s. 10.5 Code of Conduct and s.4.9(2) PSAA to follow the directions or instructions, and a failure to do so was a breach of s. 18 PSE Act; and

    d. Members were required to act and be seen to act properly and in accordance with the terms of the Code of Conduct pursuant to s. 10.8 of the Code of Conduct, and, accordingly, were required to follow s. 7 of the Code of Conduct despite the fact that it did not explicitly contain any "conduct obligations", and a failure to do so was a breach of s. 18 PSE Act.

13. Subject to the below, the Applicants **admit** the allegations **in paragraph 44** and:

    a. repeat and rely upon the matters pleaded above in reply to paragraph 38 of the Defence; and

    b. say that s. 9.1 Code of Conduct and s.7(1) of the PSE Act were legally enforceable, and/or applied to QPS officers by reason of those matters.

14. The Applicants **admit** the allegations in **paragraph 45** of the Defence and say that:

    a. the PGFPC was a corporate policy (as referred to in sections 1 and 5 of the PGFPC), and contained Service standards;

    b. accordingly, s. 10.14 of the Code of Conduct (which contained "conduct obligations" within the meaning of the PSE Act), required that, in the performance of official duties, members must act in the way referred to in s.10.14(iii) with respect to Service standards and s. 10.14(iv) with respect to corporate policies (3FASC:[96]);

c. a failure by QPS officers to perform any duties associated with their position in a manner that met all Service standards was therefore a breach of s. 10.14 of the Code of Conduct; and

d. a failure to set and maintain standards of leadership that were consistent with corporate policies and to be seen at all times to act in support of those corporate policies was therefore a breach of s. 10.14 of the Code of Conduct.

15. The Applicants **admit** the allegations in **paragraph 46** of the Defence and repeat and rely on the matters pleaded in reply to paragraph 45 of the Defence.

16. The Applicants **admit** the allegations in **paragraph 47** of the Defence and:

a. repeat and rely upon the matters pleaded above in reply to paragraph 38 of the Defence; and

b. say that s. 9.2 Code of Conduct and s. 8 PSE Act were legally enforceable, and/or applied to QPS officers by reason of those matters.

17. The Applicants **admit** the allegations in **paragraph 48** of the Defence and repeat and rely on the matters pleaded in reply to paragraph 45 of the Defence.

18. The Applicants **admit** the allegations in **paragraph 51** of the Defence and repeat and rely on the matters pleaded in reply to paragraph 45 of the Defence.

19. The Applicants **admit** the allegations in **paragraph 52** of the Defence and:

a. repeat and rely upon the matters pleaded above in reply to paragraph 38 of the Defence; and

b. say that s.9.4 Code of Conduct and s.10 PSE Act were legally enforceable, and/or applied to QPS officers by reason of those matters.

20. The Applicants **admit** the allegations in **paragraph 53** of the Defence and repeat and rely on the matters pleaded in reply to paragraph 45 of the Defence.

21. The Applicants **admit** the allegations in **paragraph 54** of the Defence and:

a. repeat and rely upon the matters pleaded above in reply to paragraph 38 of the Defence; and

b. say that s. 10 Code of Conduct was legally enforceable, and/or applied to QPS officers by reason of those matters.

22. The Applicants **admit** the allegations in **paragraph 56** of the Defence and say that:

a. section 10.5 of the Code of Conduct stated: "Members in satisfying their obligations under this section are to comply with the provisions on lawful directions as outlined in s. 17.2: 'Procedural Guidelines for Professional Conduct' of the Human Resource Management Manual";

b. section 4.1 of the PGFPC was a provision on lawful directions within the meaning of the previous sub-paragraph;

c. accordingly, a failure to comply with the provisions of s.4.1 PGFPC was a breach of s.10.5 of the Code of Conduct, which contains "conduct obligations" within the meaning of s.18 of the PSE Act;

d. the PGFPC was both a corporate policy (as referred to in sections 1 and 5 of the PGFPC), and contained Service standards;

e. accordingly, s. 10.14 of the Code of Conduct (which contained "conduct obligations" within the meaning of the PSE Act), required that, in the performance of official duties, members must have acted in the way referred to in s.10.14(iii) with respect to Service standards and s. 10.14 with respect to corporate policies (iv) (as set out in 3FASC:[96]);

f. a failure to perform any duties associated with their position in a manner that met all Service standards was therefore a breach of s. 10.14 of the Code of Conduct;

g. a failure to set and maintain standards of leadership that were consistent with corporate policies and be seen at all times to act in support of those corporate policies was therefore a breach of s. 10.14 of the Code of Conduct.

23. As to **paragraph 57**, the Applicants **deny** that the word "objectively" has been omitted after the word "integrity" and say that the word "objectivity" was omitted after the word "integrity" in a transcription error and ought to be inserted into 3FASC:[90.a].

24. The Applicants **admit** the allegations in **paragraph 58** of the Defence and:

a. repeat and rely upon the matters pleaded above in reply to paragraph 38 of the Defence; and

b. say that s.17.1 Appendix A of the Code of Conduct was legally enforceable, and/or applied to QPS Officers by reason of those matters.

25. The Applicants **admit** the allegations in **paragraph 59** of the Defence and:

a. repeat and rely upon the matters pleaded above in reply to paragraph 38 of the Defence; and

b. say that s 4.4 of the PGFPC was legally enforceable, and/or applied to QPS Officers by reason of those matters.

26. In reply to the allegations in **paragraph 61** of the Defence, the Applicants:

a. deny the allegation in sub-paragraph 61(b);

b. say that the definition of the term "Natural Justice" was imported into section 10.15 Code of Conduct (3FASC:[97]), which is a "conduct obligation"; and

c. otherwise join issue with that paragraph.

27. In reply to the allegations in **paragraph 64** of the Defence, the Applicants:

a. admit that the Coroner's Guidelines applied to coroners;

b. deny that the Coroner's Guidelines did not apply to police officers;

c. say that:

i. the investigation of the death by a Coroner was required by legislation;

ii. the Coroner's Guidelines were required to deal with the investigations of deaths in custody and did so; and

iii. the Coroner's Guidelines were required to be followed by all Coroners to the greatest practicable extent;

d. say that, accordingly, when investigating deaths and following the Coroner's Guidelines, Coroners were performing functions or exercising a power;

e. say that the provision in the Coroner's Guidelines providing for the specific QPS unit that was to investigate deaths in custody and the bodies that were to oversee such investigations was a reasonable and lawful request or direction of a coroner within the meaning of s.8.4.1 OPM;

f. say further that that provision would have been superfluous and redundant were the QPS in no way subject to its terms;

g. say that the duty to assist Coroners in the performance of a function or exercise of a power included a duty to investigate deaths in custody in a manner that was consistent with the Coroner's Guidelines;

h. accordingly, say that QPS officers had a duty or obligation to ensure that the Coroner's Guidelines were adhered to;

i. say further that the Coroner's Guidelines were, in any event, a statement of government policy and it is material to the Applicants' case that the QPS neglected to adhere to government policy;

j. say that, pursuant to the Code of Conduct, QPS members were required to:

i. act in good faith, in accordance with both the spirit and the letter of the law and in the best interests of the community of Queensland (s.10.1, 3FASC:[88]);

ii. obey any direction instruction or order given by any member or person authorised by law to do so (s.10.5, 3FASC:[89]);

iii. act and be seen to act properly and in accordance with both the spirit and the letter of the law and the terms of this Code of Conduct (s.10.8, 3FASC:[94]);

iv. perform any duties associated with their position in a manner that bears the closest public scrutiny and meets all legislative, Government and Service Standards (s.10.14, 3FASC:[96]);

k. say that by reason of the Code of Conduct provisions referred to above, QPS members were required to adhere to the Coroner's Guidelines;

l. say that there was provision within the OPM which would have enabled the Homicide Investigation Unit to have investigated the death of Mulrunji;

m. repeat and rely upon the matters pleaded in 3FASC:[99]-[102]; and

n. otherwise join issue with that paragraph.

28. In reply to the allegations in **paragraph 65** of the Defence, the Applicants:

a. repeat and rely on the matters pleaded in reply to paragraph 64 of the Defence;

b. otherwise rely upon the matters pleaded in 3FASC: [99] to [101];and

c. otherwise join issue with that paragraph.

29. Subject to the below, the Applicants **admit** the allegations in **paragraph 68** of the Defence and say that:

a. 3FASC:[106.b] incorrectly refers to DI Webber, and in place thereof ought to refer to Inspector Williams;

b. the obligation referred to in 3FASC:[106.b] is the Policy in s.1.17 OPM referred to in 3FASC:[57.b.ii-iii];

c. the obligation of the Superintendent of the ESC is not alleged to have been breached in any way, and did not arise on the facts alleged in the 3FASC.

30. In reply to the allegations in **paragraph 70** of the Defence, the Applicants:

a. say that QPS officers were subject to the obligations in:

i. 3FASC:[108.b-h], by reason of the matters referred to in 3FASC:[74] and/or [75]; and/or

ii. 3FASC:[108.i.i] by reason of the matters pleaded above in reply to paragraphs 44, 47, 49, and 52 of the Defence;

b. say that the obligations denied by the Respondents are otherwise embodied within obligations in 3FASC:[108.a] and [108.i.ii], which have been admitted; and

c. otherwise join issue with that paragraph.

31. In reply to the allegations in **paragraph 73** of the Defence, the Applicants:

a. admit sub-paragraph 73(b), insofar as it is not inconsistent with the allegations in the 3FASC and in this Reply;

b. say that:

i. pursuant to the law, including the "ethics obligations" in the PSE Act, as restated in the Code of Conduct, and the PSAA, and all other laws applying to QPS Officers, that QPS Officers had the obligations as described;

ii. the Code of Conduct and Procedural Guidelines for Professional Conduct referred to in 3FASC:[70]-[97] and [109]-[114] governed

the conduct of all QPS Officers and required them to act in the ways stated therein; and

iii. all QPS Officers were to act and be seen to act properly and in accordance with both the spirit and the letter of the law and the terms of the Code of Conduct (s. 10.8 Code of Conduct); and

c. otherwise join issue with that paragraph.

32. In reply to the allegations in **paragraph 77** of the Defence, the Applicants:

a. **object** to the allegation that "DS Robinson was appointed to assist with the investigation because of his extensive local knowledge of Palm Island and its residents" and say that it is embarrassing and should be struck out because:

i. it pleads a condition of mind (the knowledge of DS Robinson) and does not state particulars of the facts on which the Respondents rely (FCR 16.43); and

ii. it pleads a bald conclusion (that DS Robinson was appointed to assist with the investigation because of his knowledge, and that his knowledge was "extensive") without stating the material facts on which the Respondents rely that are necessary to give the Applicants fair notice of the case to be made against them at trial (FCR 16.02(1)(d));

b. alternatively:

i. do not know and cannot admit or deny the extent of DS Robinson's knowledge; and

ii. do not know, and cannot admit or deny whether DS Robinson was appointed to assist with the investigation because of his extensive local knowledge of Palm Island and its residents;

c. say that DS Robinson was not the only QPS Officer who had local knowledge of Palm Island and its residents;

d. say that DS Robinson's involvement in the investigation was not limited to assisting with matters which required local knowledge of Palm Island and its residents, and included an active role in the investigation, such as taking statements from witnesses and asking questions when witnesses were being interviewed; and

e. otherwise join issue with that paragraph.

33. In reply to **paragraph 80** of the Defence, the Applicants:

a. admit the allegations in sub-paragraph 80(c);

b. deny the allegations in sub-paragraph 80(b) and believe them to be untrue because:

i. the designation "first response officer" in respect of a particular incident plainly does not refer to an officer who was involved in the incident or who was a witness to the incident, and so SS Hurley could not have been the "first response officer";

ii. SS Hurley could not be the first response officer because to do so would have breached ss. 10.6, 10.8, and 10.14 of the Code of Conduct (3FASC:[91], [94] and [96]);

c. say that, in any event, that:

i. if SS Hurley was the first response officer, he was required to perform his duties in that capacity in a way that did not breach the Code of Conduct, and conflict with other Orders and Policies, such as the Orders in 1.17 of the OPM, as referred to in 3FASC:[54] at (viii) and [55] at (v), and the Policy in 1.17 of the OPM referred to in 3FASC:[53]; and

ii. SS Hurley was able to make an immediate assessment of the situation and inquire into the circumstances surrounding the incident without discussing matters with Sergeant Leafe and PLO Bengaroo, by reason of the fact that he had been the arresting officer, the officer in charge of the watchhouse, and present in the Police Station at all material times; and

d. otherwise join issue with that paragraph.

34. The Applicants **admit** the allegation in **sub-paragraph 82(c)** of the Defence, but say that, in the exceptional circumstances of a death occurring in police custody on Palm Island, officers who had not been rostered on duty out to have been placed on duty.

35. The Applicants **admit** the allegations in **sub-paragraph 82(b)** of the Defence and say that, at the time SS Hurley drove DI Weber and DSS Kitching from Palm Island airport to the Palm Island police station, the investigation team the investigation team ought reasonably have been aware that it was not appropriate for them to be driven by SS Hurley because they were aware that:

a. SS Hurley had arrested Mulrunji;

b. Mulrunji had punched SS Hurley and they had then engaged in a physical struggle;

c. Mulrunji had been dragged into the cell by SS Hurley and Sergeant Leafe; and

d. Mulrunji had later been found dead in that cell by SS Hurley.

Particulars

Document 249, pages 8-9.

36. In reply to the allegations in **paragraph 97** of the Defence, the Applicants:

a. admit the allegations in sub-paragraph 97(c);

b. deny the allegations in sub-paragraph 97(b) and (d) and believe them to be untrue because SS Hurley was not best placed to provide information to investigators at the arrest scene as PLO Bengaroo was also present when SS Hurley arrested Mulrunji and was therefore equally well placed to provide information; and

c. say that at the time the QPS officers attended the scene of the arrest, Roy Bramwell had already made the allegations that SS Hurley had assaulted Mulrunji in two interviews, and in a written statement, but rather than interview SS Hurley at the Police Station in response to those allegations immediately, as they ought to have done, the investigating officers took SS Hurley to the scene of the arrest.

37. The Applicants **admit** the allegations in **sub-paragraph 98(b)** of the Defence.

38. The Applicants **object** to **sub-paragraph 103(c)** of the Defence because the Respondents have failed to identify what, if any, relevance the allegation has to any matter in issue between the parties and, accordingly, the allegation fails to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading and ought to be struck out under FCR 16.02(2)(e). Alternatively, the Applicants admit that 22 November 2004 was the first business day after 19 November 2004 and otherwise join issue with that sub-paragraph.

39. In reply to the allegations in **sub-paragraph 104(b)** of the Defence, the Applicants:

a. **object** to the allegations and say that they ought to be struck out as they plead a condition of mind and do not state particulars of the facts on which the Respondents rely (FCR 16.43);

b. alternatively:

i. do not know and cannot admit what DSS Kitching's intention was; and

ii. say that, in any event, DSS Kitching's intention was not relevant to any matter in issue between the parties and, accordingly, the allegation fails to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading and ought to be struck out under FCR 16.02(2)(e).

40. In reply to the allegations in **paragraph 116** of the Defence, the Applicants:

a. do not know and cannot admit or deny the allegations in sub-paragraphs 116(b) and (c); and

b. otherwise join issue with that paragraph.

41. The Applicants do not know and **cannot admit** or deny the allegation in **sub-paragraph 117(b)** of the Defence, but say that advice from the CAU is not necessarily advice from a CCLO.

42. In reply to the allegations in **paragraph 122** of the Defence, the Applicants:

a. deny the allegations in sub-paragraph 122(e) and believe them to be untrue because Inspector Strohfeldt could have made his own arrangements to travel to Palm Island prior to the Investigation team, but chose not to do so;

b. **object** to the allegations in sub-paragraph 122(i) and say that they ought to be struck out because they plead a bald conclusion without stating the material facts on which the Respondents rely that are necessary to give the Applicants fair notice of the case to be made against them at trial (FCR 16.02(1)(d));

c. alternatively, deny the allegations in sub-paragraph 122(i) or, alternatively, say that it was possible for SS Hurley to perform duties associated with the investigative process or other duties at the scene to a lesser extent than he in fact did (*cf*, 3FASC:[256]);

d. otherwise join issue with that paragraph.

43. In reply to **paragraph 124** of the Defence, the Applicants deny the allegation in paragraph 124(e) and otherwise join issue with that paragraph.

44. In reply to **sub-paragraph 125(c)** of the Defence, the Applicants adopt the admission and say further that the 3FASC at [201] contains an error, in that it omits to refer to the following words at the end of the paragraph:

> and at paragraph 56.b at sub-paragraph (iv), that he ensure that members directly involved in the incident or who are witnesses to the incident are interviewed as soon as practicable.

45. In reply to **paragraph 127** of the Defence, the Applicants:

    a. do not know and cannot admit or deny the allegations in sub-paragraphs 127(c) and (d);

    b. say that DI Webber and DSS Kitching were required to investigate the death in accordance with the OPM, and not just the circumstances of the fall and the removal from the van;

    c. say that Constable Steadman had been present in the police station after Mulrunji's death had been discovered and was visibly present in the cell on the surveillance footage which was viewed by the Investigation Team; and

    d. otherwise join issue with that paragraph.

46. In reply to **paragraph 128** of the Defence, the Applicants say that say that 3FASC:[204] has omitted to refer to the Order in s. 1.17 OPM.

47. In reply to the allegation in **paragraph 131** of the Defence, the Applicants rely upon the matters referred to in 3FASC:[209]-[211].

48. In reply to **paragraph 137** of the Defence, the Applicants:

    a. deny the allegations in sub-paragraph 137(a) and believe them to be untrue because the scene of the death was the watchhouse cell, and there is no evidence to suggest that PLO Bengaroo ever entered the cell or otherwise had any responsibility for Mulrunji's care whilst he was in the cell;

    b. in the alternative, maintain the allegation in 3FASC:[215] in the event that PLO Bengaroo was present at the scene of the death, and rely upon those other matters referred to therein; and

    c. otherwise join issue with the that paragraph.

49. In reply to **paragraph 138(a)** of the Defence, the Applicants admit the allegation and say that the reference to paragraphs 143 and 146 was an error, and ought to have referred to paragraphs 3FASC:[138] and [139].

50. The Applicants **deny** the allegation in **sub-paragraph 140(b)** of the Defence and believe it to be untrue because the cause of death was in fact known on 23 November 2004 as:

a. Dr Guy Lampe conducted an autopsy of Mulrunji in the presence of DSS Kitching on that date:

b. DSS Kitching took possession of the Autopsy Certificate issued by Dr Lampe before DSS Kitching left the Cairns Morgue where the autopsy took place;

c. the Autopsy Certificate issued by Dr Lampe at that time stated that the cause of death was intra-abdominal haemorrhage, ruptured liver and portal vein and, at that time, also indicated at paragraph 1(c) that the cause of death was a fall;

d. DSS Kitching then advised Acting Assistant Commissioner Wall and DI Webber of the results of the autopsy, and faxed a copy of the Autopsy Certificate to Acting Assistant Commissioner Wall;

e. on the morning of 24 November 2004, DSS Kitching received a telephone call from Dr Lampe who requested that DSS Kitching not lodge the Autopsy Certificate issued in Cairns as he was to make inquiries with the State Coroner to change the Autopsy certificate by having the word "fall" deleted from section 1(c) of the Autopsy certificate;

f. during the abovementioned telephone call Dr Lampe represented to DSS Kitching that his superiors considered that by having the word "fall" on the Autopsy certificate it may appear that the pathologist was assisting police with a cover up with respect to the death of Mulrunji;

g. at about 1.00 pm on 24 November 2004, DSS Kitching received a further call from Dr Lampe who advised that the State Coroner was happy for the Autopsy Certificate to be changed;

h. Dr Lampe also provided DSS Kitching with a further briefing in relation to his findings from the post mortem and faxed a copy of the new Autopsy certificate to the Townsville CIB;

i. accordingly, DSS Kitching, Acting Assistant Commissioner Wall and DI Webber were all aware of the cause of death of Mulrunji on 23 November 2004.

51. As to **paragraphs 145(c), 164 and 165** of the Defence, the Applicants say that the reference to "Reasonable Investigation Duty" in 3FASC[223], [243] and [244.n] is an error, and ought to have said "Reasonable Diligence Duty", but that this was a typographical error, the meaning was evident from the context, and the Respondents could have but did not seek to clarify the meaning of "Reasonable Investigation Duty".

52. The Applicants **object** to **paragraph 152(c)** of the Defence and say that it should be struck out because the Applicants do not know what is meant by the term "administrative tasks" or how the characterisation of the tasks performed by DS Robinson as "administrative" is relevant to any matter in issue between the parties and, accordingly, the paragraph fails to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading (FCR 16.02(2)(e)) and fails to state the material facts on which the Respondents rely that are necessary to give the Applicants fair notice of the case to be made against them at trial (FCR 16.02(1)(d)). Alternatively, the Applicants do not know and cannot admit the allegation.

53. In reply to **paragraph 167** of the Defence, the Applicants:

a. admit the allegations in sub-paragraph 167(d) and say that this ordinarily occurs but did not occur in the course of the events pleaded in the 3FASC;

b. **object** to sub-paragraphs (a) and (e) because:

i. they are vague and evasive and they fail to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading (FCR 16.02(2)(e));

ii. the Respondents have admitted vicarious liability for the actions of QPS Officers and so the these allegations should be struck out pursuant to FCR 16.06 to the extent that they are inconsistent with that admission;

c. alternatively, do not know and are unable to admit or deny the matters in sub-paragraphs 167(a) and (e);

d. otherwise join issue with that paragraph.

54. In reply to **paragraph 175** of the Defence, the Applicants:

a. do not know and cannot admit to the allegations in sub-paragraphs (c) and (e);

b. with respect to sub-paragraph (b), admit that SS Hurley was interviewed by the QPS investigators on both 19 and 20 November 2004 but do not know and cannot admit to the balance of the paragraph;

c. say that, that if SS Hurley was required to be readily available for further interview on Palm Island by QPS investigators, he was not required to work in an operational capacity or otherwise perform any operational duties;

d. say that, if SS Hurley had a rostered day off on 21 November 2004, it could have been taken otherwise than on Palm Island;

e. say that the Investigation Team, except DS Robinson had departed Palm Island by 21 November 2004 and there was no reason for SS Hurley to remain on Palm Island after that date except to perform operational duties;

f. say that SS Hurley was rostered to perform duties on Monday 22 November 2004, and did perform duties on that day such as participating in the arrest of a community member;

g. admit sub-paragraph 175(e), but say that the Applicants do not know, and the Respondents have not pleaded, at what time on 22 November 2004 SS Whyte took over from SS Hurley, but that it was most likely in the afternoon when SS Hurley departed Palm Island;

h. otherwise join issue with that paragraph.

55. In Reply to **paragraph 178** of the Defence, the Applicants:

a. admit sub-paragraph 178(b);

b. do not know and are unable to admit or deny sub-paragraph 178(c);

c. in reply to sub-paragraph 178(d), admit that the First Applicant made demands to that effect over the course of that week, but do not now recall and cannot now admit or deny that he made any such demands at the relevant meeting;

d. do not know and therefore cannot admit or deny the matters in sub-paragraph 178(f);

e. admit sub-paragraph 178(g) and say that approximately 200 to 300 Palm Island community members attended the meeting;

f. do not know and are unable to admit or deny paragraphs 178(h) and (i).

56. As to **paragraph 262(c)** of the Defence, the Applicants do not know whether the matters alleged therein occurred and are unable to admit or deny the allegation.

57. As to **paragraph 180** of the Defence, the Applicants:

a. do not know and are unable to admit or deny what Acting Assistant Commission Wall's state of mind was when he directed police officers

to take their weapons to their sleeping quarters, and are therefore unable to admit or deny sub-paragraph 180(b);

b. do not know and are unable to admit whether the matters in sub-paragraph 180(c) occurred, save with respect to the matter raised in the further and better particulars provided in respect of 180(c)(ii) about an alleged interview with the First Applicant by Inspector Richardson on 25 November 2004. In response to that allegation, the Applicants' deny that Inspector Richardson interviewed the First Applicant on that date about the alleged threats to firebomb the police station and police barracks, but say that a discussion did occur on the previous date, at which either Inspector Richardson or SS Whyte advised the First Applicant of alleged threats to firebomb the police station.

58. The Applicants **deny** the allegation in **sub-paragraph 184(b)** of the Defence, and believe it to be untrue because the cause of death was in fact known on 23 November 2004 for the reasons stated above in reply to sub-paragraph 140(b) of the Defence

59. In reply to **paragraphs 187(c) and (d)** of the Defence, the Applicants:

a. do not know and cannot admit or deny sub-paragraph 187(c);

b. say that if the alleged telephone conversation took place, and advice referred to in the Defence was provided to Inspector Richardson, then:

i. Inspector Richardson ought to have realised either at that time or prior to the community meeting taking place that the Mall was being set up for a meeting, that persons were gathering in the vicinity of the Mall, and that it appeared that a meeting was going to take place, as this was visible from the police station; and

ii. Inspector Richardson ought to have appreciated that the alleged advice from Ms Denise Geia was equivocal as to whether she thought a meeting was going to be held or not, and that it was not reasonable to form "the impression that Palm Island residents would not commit any acts of violence or otherwise cause trouble on 26 November 2004" based on Ms Geia's alleged advice;

c. **object** to sub-paragraph 187(d) and say that it should be struck out as it pleads a condition of mind and does not state particulars of the facts on which the Respondents rely (FCR 16.43); and

d. otherwise join issue with that paragraph.

60. In reply to **paragraph 188** of the Defence, the Applicants:

a. admit sub-paragraph 188(c)(i);

b. deny sub-paragraph 188(c)(ii) of the defence and believe it to be untrue because Mayor Kyle advised that:

i. there was an accident somewhere around the cell at about 10.40;

ii. there was a fall;

iii. the doctor explained that there was a compressive force on Mulrunji's body where four ribs were broken and that caused a rupture in his liver and that caused a lot of bleeding; and

iv. at about 11.23 Mulrunji was found

c. deny sub-paragraph 188(c)(iii) of the defence and believe it to be untrue because Mayor Kyle said that the CMC would be conducting an investigation;

d. otherwise join issue with that paragraph.

61. In reply to **paragraph 190** of the Defence, the Applicants:

a. say the protest occurred both during and after the meeting;

b. save for admitting that the protest occurred during the meeting and after the meeting, deny sub-paragraph 190(b) of the Defence in so far as it is inconsistent with the allegations in 3FASC[273];

c. deny sub-paragraph 190(c) because it does not accurately describe what occurred at the meeting or what was said;

d. as to sub-paragraph 190(d), the Applicants:

i. admit that following the community meeting a number of persons from the community of Palm Island moved to the vicinity of the Police Station and some were armed with rocks;

ii. deny that the First Applicant led persons from the community to the Police Station;

iii. say by the time the First Applicant arrived at the Police Station, some persons from the community were yelling at the police,

whilst the vast majority of persons in the vicinity were dispersed around as onlookers;

iv. say that the First Applicant told the police officers gathered at the station, that the community was upset as Mulrunji had been murdered and that they needed to leave the Island, whereupon SS Whyte told him that the CMC were looking into it and it had nothing to do with the police;

v. say that SS Whyte then walked away back into the Police Station;

vi. say that the persons outside the police station left the vicinity and moved back to the Mall area;

vii. say that a number of members of the community again went to the Police Station;

viii. say that the First Applicant remained behind, but eventually followed, a crowd of between 50 to 100 members of the community and went to the Police Barracks;

ix. say that SS Whyte called out to speak to the First Applicant;

x. say that at that time, Mr Wotton stated that the community had heard the results of the autopsy report and wanted the police to leave the Island within an hour and that he would escort the police so that they were not harmed;

xi. say that the First Applicant was told that the QPS Officers would leave Palm Island;

xii. say that that the First Applicant attempted to persuade the crowd to go home;

xiii. admit that:

A. rocks were thrown at the police station;

B. the police station, courthouse and police residence were set on fire;

C. a police vehicle was set on fire;

D. some persons yelled threats and obscenities;

E. many persons were angry, and appeared to believe that SS Hurley had killed Mulrunji;

F. police officers moved from the Police compound to the Palm Island hospital and a crowd of community members were dispersed outside the hospital;

G. the persons standing outside the hospital gradually dispersed from that location; and

xiv. say that the First Applicant did say that Police should leave the Island within one hour, but say that the First Applicant cannot recall which officer that was said to;

e. otherwise deny sub-paragraph 190(d) and say that it does not accurately describe what occurred following the meeting.

f. in response to sub-paragraph 190(e), the Applicants do not know and cannot admit or deny the allegations contained therein;

g. **object** to sub-paragraph 190(f) and say that it ought to be struck out because it pleads a bald conclusion without stating the material facts on which the Respondents rely that are necessary to give the Applicants fair notice of the case to be made against them at trial (FCR 16.02(1)(d));

h. **object** to paragraph 190(g) and say that it ought to be struck out because it pleads a condition of mind and does not state particulars of the facts on which the Respondents rely (FCR 16.43);

i. alternatively, do not know and cannot admit to sub-paragraphs 190(f)-(g); and

j. otherwise join issue with that paragraph.

62. In response to **paragraph 191** of the Defence, the Applicants:

a. deny sub-paragraph 191(b);

b. do not know what the Respondents mean by "gradually over a period of time" and are therefore not able to admit or deny the allegation in sub-paragraph 191(c);

c. do not know and therefore cannot admit or deny paragraph 191(d).

63. In reply to **paragraph 194** of the Defence, the Applicants:

a. do not know and are unable to admit or deny the matters in sub-paragraph 194(a);

b. do not know whether the allegations in sub-paragraph 194(d) of the Defence occurred and are therefore unable to admit or deny those allegations;

c. say that if a meeting was organised with the Council as alleged, it was not organised until the day after the emergency situation had been purportedly declared and the delay in making contact with the Palm Island Council was a further example of the way in which QPS Officers failed to provide policing services to the Applicants and Group Members to the same standard as they would have provided them to other communities in Queensland.

64. The Applicants **admit** the allegations in **sub-paragraphs 195(a) and (b)** of the Defence but say that no accident had occurred, and that DI Webber had not received any report in respect of an accident, and repeat and rely upon the matters pleaded in 3FASC:[276] to [278] and [297] to [299].

65. In reply to the allegations in **sub-paragraphs 199(e) and (f)** of the Defence, the Applicants:

a. admit sub-paragraph 119(e) as a general proposition, but say that it did not apply to the entry and search of the homes of the Applicants and Group Members;

b. deny the allegations in sub-paragraph 199(f) and say with respect to the entry and search of the home of the First and Third Applicants, that the First Applicant was arrested in the front yard of the property and no person inside the dwelling was arrested, and that the arrests otherwise were not caused by the entry and search of the dwellings as the persons to be arrested had been determined prior to those entries and searches.

66. In reply to the allegations in **sub-paragraphs 203(c)-(d)** of the Defence, the Applicants:

a. say that neither the home of the First and Third Applicants nor the home of the Third Applicant was entered into with permission; and

b. otherwise join issue with the allegations.

67. The Applicants **object** to **sub-paragraph 203(e)** of the Defence because it pleads a bald conclusion without stating the material facts on which the Respondents rely that are necessary to give the Applicants fair notice of the case to be made

against them at trial (FCR 16.02(1)(d)) and accordingly is embarrassing and should be struck out. Alternatively, the Applicants do not know and cannot admit the allegation.

68. The Applicants **object** to the allegation in **sub-paragraph 203(h)** of the Defence and say that it ought to be struck out because:

a. it pleads a bald conclusion without stating the material facts on which the Respondents rely that are necessary to give the Applicants fair notice of the case to be made against them at trial (FCR 16.02(1)(d));

b. in particular, it makes a serious allegation of criminal misconduct against the First Applicant, which ought to be, and is not, pleaded properly and with precision; and

c. it pleads a condition of mind (the motivation for tasering the First Applicant) and does not state particulars of the facts on which the Respondents rely (FCR 16.43).

Alternatively, the Applicants deny that the First Applicant was, at any time, resisting arrest, and otherwise do not know and cannot admit to the truth or falsity of the allegations as they do not know the case that is being put against them.

69. In reply to the allegations in **sub-paragraph 205(c)** of the Defence, the Applicants:

a. **object** to **sub-paragraph (iv)** and say that it is embarrassing and ought to be struck out because:

i. the Respondents have pleaded that a QPS rifle "was reported missing" without pleading who reported it missing or to whom it was reported and, accordingly, have failed to give the Applicants fair notice of the case to be made against them at trial (FCR 16.02(1)(d)); and

ii. it pleads a bald conclusion (that the rifle "could not be located") without stating the material facts on which the Respondents rely that are necessary to give the Applicants fair notice of the case to be made against them at trial (FCR 16.02(1)(d));

b. **object** to **sub-paragraph (v)** and say that it is embarrassing and ought to be struck out because:

i. it pleads that "there were concerns" without identifying what the concerns were or who was concerned; and

ii. it pleads that "it was unknown what further action might be planned by residents of Palm Island" without identifying who this was unknown by or the relevance of it being unknown; and, accordingly

iii. it fails to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading (FCR 16.02(2)(e)) and fails to state the material facts on which the Respondents rely that are necessary to give the Applicants fair notice of the case to be made against them at trial (FCR 16.02(1)(d)); and

c. otherwise do not know and cannot admit to the matters considered by DI Webber; and

d. say that, in any event, the existence or non-existence of a "high risk situation" and the matters pleaded in sub-paragraphs (i)-(v) are irrelevant to the existence or non-existence of an "emergency situation" within the meaning of the PSPA.

70. The Applicants **object** to **sub-paragraph 206(d)** of the Defence and say that it is embarrassing and ought to be struck out because it pleads a bald conclusion (that the bus was returned "as soon as possible") without stating the material facts on which the Respondents rely that are necessary to give the Applicants fair notice of the case to be made against them at trial (such as when and under what circumstances the bus was in fact returned) (FCR 16.02(1)(d)). Alternatively, the Applicants deny the allegations in the sub-paragraph and believe them to be untrue because:

a. it was possible for the QPS to have not commandeered the school bus; and

b. it was possible for the QPS to have returned the school bus at any time; and,

c. accordingly, the bus was not returned "as soon as possible".

71. In reply to the allegations in **sub-paragraph 206(f)** of the Defence, the Applicants:

a. **object** to the allegations to the extent that they do not constitute admissions, and say that they ought to be struck out because the allegations that the damage to property was "minor", and that the force used to enter and search dwellings was "reasonably necessary" are bald conclusions and the Respondents have failed to state the material facts on

which the Respondents rely that are necessary to give the Applicants fair notice of the case to be made against them at trial (FCR 16.02(1)(d)); or

b. alternatively, deny the allegations.

72. In reply to the allegations in **sub-paragraph 206(h)** of the Defence, the Applicants:

a. **object** to the allegations and say that they ought to be struck out because:

i. in pleading that the QPS "established a visible presence throughout the island by police officers patrolling the island" and the reasons for which this was done, the Respondents have pleaded a condition of mind (i.e. the motivation behind those actions) without stating particulars of the facts on which the Respondents rely (FCR 16.43);

ii. the allegation that the visible presence was established "to perform the functions under s.2.3 of the PSAA" is a bald conclusion and the Respondents have failed to state the material facts on which the Respondents rely that are necessary to give the Applicants fair notice of the case to be made against them at trial (FCR 16.02(1)(d)); or

b. alternatively, deny the allegations and believe them to be untrue because:

i. the spectacle of fully armed and uniformed SERT and PSRT officers patrolling civilian streets is not reasonably capable of being "reassuring" to the residents of Palm Island; and

ii. such a spectacle is itself a disruption of peace and good order because it is an extraordinary and intimidating use of those QPS units.

73. In reply to the allegations in **sub-paragraph 214(h)** of the Defence, the Applicants:

a. say that the Applicants requested further and better particulars of the relevance of the allegations and were told by the respondents that they "are relevant to the matters in issue on the pleadings regarding the duration of the emergency situation on Palm Island", which is circular and is itself a conclusion requiring particulars;

b. accordingly, **object** to the sub-paragraph in its entirety as it fails to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading and ought to be struck out under FCR 16.02(2)(e); or

c. alternatively:

i. admit that the First Applicant was at the petrol station at some time on 26 November 2004 in possession of tools, which may have included a pick;

ii. say that the First Applicant was a plumber and had been repairing a broken pipe in the vicinity of the petrol station;

iii. in reply to sub-paragraph (iii), say that the Applicants requested further and better particulars of whether it is alleged that the First Applicant was unlawfully present in the yard at the back of the Palm Island petrol station or was under any obligation to leave that location when told to leave by SS Dini, and were told by the Respondents that the First Applicant "was obliged to leave the yard at the back of the Palm Island petrol station when asked to leave by SS Dini", but have not been told the basis for the existence of any such obligation and, accordingly, the Respondents have failed to state the material facts on which the Respondents rely that are necessary to give the Applicants fair notice of the case to be made against them at trial (FCR 16.02(1)(d)) and the sub-paragraph should be struck out; and

iv. otherwise join issue with that sub-paragraph.

74. The Applicants **object** to the allegations in **sub-paragraph 219(c)** of the Defence and say that it ought to be struck out because:

a. it pleads a condition of mind (that DI Webber was "satisfied" that it was necessary to enter and search premises) and does not state particulars of the facts on which the Respondents rely (FCR 16.43);

b. it pleads a bald conclusion (that DI Webber was so satisfied "on reasonable grounds") without stating the material facts on which the Respondents rely that are necessary to give the Applicants fair notice of the case to be made against them at trial (such as the "reasonable grounds") (FCR 16.02(1)(d)); and

c. it is irrelevant whether DI Webber was satisfied on reasonable grounds that it was necessary to enter and search the dwellings as he did not en-

ter or search any dwelling and, accordingly, the sub-paragraph fails to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading (FCR 16.02(2)(e)).

75. In reply to the allegations in **paragraph 200** of the Defence, the Applicants:

a. **object** to sub-paragraph 220(b) and say that it ought to be struck out because:

i. it pleads a condition of mind ("reasonably suspected") and does not state particulars of the facts on which the Respondents rely (FCR 16.43); and

ii. it pleads a bald conclusion (that the suspicions were reasonable) without stating the material facts on which the Respondents rely that are necessary to give the Applicants fair notice of the case to be made against them at trial (FCR 16.02(1)(d));

b. **object** to sub-paragraph 220(c) and say that it ought to be struck out because it pleads a bald conclusion (that the police officers had lawful authority under PPRA s 19) without stating the material facts on which the Respondents rely that are necessary to give the Applicants fair notice of the case to be made against them at trial (FCR 16.02(1)(d)); and

c. otherwise join issue with that paragraph.

76. The Applicants **object** to **sub-paragraph 225(c)** of the Defence and say that it ought to be struck out because:

a. it pleads a bald conclusion (that the community of Palm Island was "in need of protection form the unlawful disruption of peace and good order") without stating the material facts on which the Respondents rely that are necessary to give the Applicants fair notice of the case to be made against them at trial (FCR 16.02(1)(d)); and

b. it fails to disclose a reasonable cause of action or defence or other case appropriate to the nature of the pleading (FCR 16.02(2)(e)).

77. The Applicants **deny** the allegations in **sub-paragraph 228(c) to (f)** of the Defence; or say alternatively that, by reason of s.18 *Racial Discrimination Act 1975* (Cth), the acts were nevertheless based on race, colour, descent or national or ethnic origin.

78. The Applicants **deny** the allegation in **sub-paragraph 236(c)** of the Defence, the Applicants say that particulars of the Group Members' damages claims will be provided after the determination of the common issues in this proceeding.

79. In reply to the allegations in **sub-paragraph 241(a)** of the Defence, the Applicants:

a. deny that "managerial guidance" is disciplinary action within the meaning of that term as pleaded by the Applicants, and say that "disciplinary action" as pleaded by the Applicants has its plain and ordinary meaning and therefore refers to the commencement of proceedings against an Officer for misconduct or official misconduct, which did not occur;

b. say that "managerial guidance" was a "managerial resolution" within the meaning of s 18.2 of the HRM;

c. say that under HRM s 18.2.3.1, the record of a complaint for which a managerial resolution had been completed would not appear adversely on the subject member's personal file or be disclosed in the integrity vetting process for promotions, transfers or reviews;

d. say that, in any event, managerial resolution was an inappropriate disciplinary measure, as a result of (HRM s 18.2.3.2):

i. the likelihood of achieving identified improvement(s) in the conduct in question;

Particulars

(i) At the time that the managerial guidance was given, it had been seven years since the conduct in question and, accordingly, the likelihood of achieving identified improvements was very low.

(ii) The fact of the managerial guidance was not reported publicly and, accordingly, the managerial guidance would not have served as a deterrent to other officers.

ii. all the circumstances giving rise to the complaint, including the nature and seriousness of the allegations;

Particulars

The circumstances giving rise to the complaint (as outlined in the 3FASC) were of substantial public interest and the allegations were serious and included, inter alia, that the officers had colluded to pervert the course of justice.

iii. any implications for the Service;

Particulars

Given the high profile nature of the matter and the existence, in 2001, of the complaint against the QPS in the AHRC which preceded these proceedings, the implications for the Service of the measures taken were substantial.

iv. any impact of the complaint on the work place and community;

Particulars

Given the high profile nature of the matter, the impact on the community was substantial.

v. the timing of implementation.

Particulars

At the time that the managerial guidance was given, it had been seven years since the conduct in question and, accordingly, it was unlikely to achieve anything positive.

e. say further that managerial resolution was an inadequate disciplinary measure and that the breaches of discipline for which managerial resolution was given were sufficiently serious to warrant disciplinary proceedings for misconduct.

80. In reply to the allegations in **paragraph 249** of the Defence, the Applicants:

a. admit that the CMC did not appeal against the findings of Deputy Commissioner Rynders;

b. say that the CMC repeatedly expressed strong disagreement with DC Rynders' decision;

Particulars

(i) Document 350.

(ii) CMC media release headed "QPS takes no disciplinary action against Palm Island officers", dated 15 March 201.

c. say that the CMC had no right of appeal, or alternatively, the then Chairperson of the CMC considered that it had no right of appeal.

Date: 16 September 2015

Signed by Stewart A Levitt
Levitt Robinson Solicitors
Solicitors for the Applicants
By his employed solicitor, Daniel Meyerowitz-Katz

This pleading was prepared by Daniel Meyerowitz-Katz of Levitt Robinson and Shaneen Pointing of Counsel.

Certificate of lawyer

I Stewart A Levitt certify to the Court that, in relation to the reply filed on behalf of the Applicants, the factual and legal material available to me at present provides a proper basis for:

(a) each allegation in the pleading; and

(b) each denial in the pleading; and

(c) each non admission in the pleading.

Date: 16 September 2015

Signed by Stewart A Levitt
Levitt Robinson Solicitors
Solicitors for the Applicants
By his employed solicitor, Daniel Meyerowitz-Katz

Schedule

Federal Court of Australia No: **(P)QUD535/2013**

District Registry: Queensland

Division: General

Second Applicant:	**AGNES WOTTON**
Third Applicant:	**CECILIA ANNE WOTTON**
Second Respondent:	**COMMISSIONER OF THE POLICE SERVICE**