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Details of Filing

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Important Information

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

Lex Wotton and Others (Applicants)
State of Queensland and Another (Respondents)
No. **QUD 535 of 2015**

APPLICANTS' OPENING SUBMISSIONS

1. The Applicants bring these proceedings as representative parties on behalf of the Aboriginal and Torres Strait Islander residents of Palm Island. The claims arise out of the Queensland Police Service (***QPS***) response to a death in police custody on Palm Island in November 2004. The Applicants' case can be summed up in five key points:
   a. *First*, the investigation into the death in custody was inadequate and the manner in which it was conducted created the perception of inadequacy;
   b. *Secondly*, the police failed to address the needs or concerns of the community after the death had occurred, and the "Riot", whilst regrettable, was a reaction to the inadequacy of the conduct of the police;
   c. *Thirdly*, the response to the "Riot" was excessive and arbitrary. It was a "show of force", calculated not to restore law and order, but to intimidate the local population into submission;
   d. *Fourthly*, these events could only have occurred on a place like Palm Island, and must be viewed in light of the nature of the community and of its history;
   e. *Fifthly*, the lack of accountability demonstrated by the police aggravated the Applicants' damages or, in layperson's terms, "rubbed salt on their wounds".
2. The Applicants allege multitude breaches by the police of various laws and regulations. What was ultimately breached, however, was the fundamental common law duty owed by the police to the people of Palm Island, as it was owed to all residents of Queensland. As Lord Denning MR found in *R v Metropolitan Police Commissioner; Ex parte Blackburn* [1968] 2 QB 118, 136 (and was broadly reflected in what the 3FASC refers to as the "Prescribed Responsibility" of the Commissioner of Police): "*I hold it to be the duty of … every chief constable, to enforce the law of the land. He must take steps so to post his men that crimes may be detected; and that honest citizens may go about their affairs in peace. He must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought. … The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.*"
3. The Applicants' case is that, in November 2004, on Palm Island, the Commissioner of the Queensland Police Service failed to perform that duty—honest citizens were not able to go about their affairs in peace, and the police force ceased to be the enforcers of the law and the protectors of the community, and instead became a threat to the very system that they were tasked with enforcing.

A. The community

4. It is the Applicants' submission that a proper analysis of the events the subject of these proceedings cannot be achieved without having regard to the nature and history of the Palm Island community. This has been outlined in some detail in parts "A" and "B" of the Applicants' Response to the Respondents' Request for Further and Better Particulars filed on 1 September 2015. In summary:
   a. The residents of Palm Island are and were overwhelmingly Aboriginal, and Palm Island has historically been, was in 2004, and remains, a place of substantial deprivation.
   b. Palm Island was established as an "Aboriginal reserve" by the State of Queensland and was controlled in accordance with the discriminatory and draconian laws to which such "reserves" were subject. Palm Island in particular was established as a quasi-penal colony to which Aboriginal people were forcibly deported as punishment.
   c. Palm Islanders have historically been subjected to forced labour, deprived of food, accommodation and healthcare, denied their most basic human rights, and had every aspect of their lives closely controlled by government officials. In 2004, those conditions were within living memory.

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d. Historically, the relationship between the police and the residents of Palm Island has been extremely poor. Further, Palm Island had extraordinarily high levels of incarceration, particularly for summary offences. Accordingly, the community on Palm Island tended to be suspicious of the police. In particular, there was a suspicion about the police in the community on Palm Island in relation to Aboriginal deaths in custody.

5. The Applicants have pleaded that these were issues which the police were under an obligation to consider when providing policing services to the residents of Palm Island: 3FASC,[188].

B. Factual overview

6. On the morning of 19 November 2004, an Aboriginal man now known as "Mulrunji" was arrested (in the Applicants' submission, wrongfully: Reply,[3]) by Senior Sergeant Christopher Hurley on Dee Street, Palm Island for a disparaging comment drunkenly made to Police Liaison Officer Lloyd Bengaroo. A number of people, including police officers and residents of Palm Island, witnessed a physical "struggle" or "scuffle" between Hurley and Mulrunji as Mulrunji was taken out of a police "paddy wagon" and fell through the door of the police station. A few seconds later, Mulrunji was lying limp on the floor. An hour later, he was found dead in Cell 2 of the Palm Island watchhouse, having sustained a black eye, four broken ribs, and a liver that had ruptured almost in two. Whilst Hurley was subsequently acquitted of manslaughter, according to the findings in Mulrunji's Inquest, there is no doubt that he was the cause of Mulrunji's death: *Hurley v Clements* [2009] QCA 167; DCM Hine, Findings of Inquest, 14 May 2010.

7. Shortly after the death was discovered, a team of police investigators, led by Detective Inspector Warren Webber and Detective Senior Sergeant Raymond Kitching, flew to Palm Island. Accompanying them and playing a significant role in the crucial first few hours of the investigation was Detective Sergeant Darren Robinson, the second most senior police officer on Palm Island (Hurley being the most senior), who was well known to the community on Palm Island and, in particular, was known to be a friend of Hurley's. Robinson participated in interviews with and took statements from people who knew that he was a friend of Hurley's and that he would be around on Palm Island after the other investigators had gone. That night, Robinson prepared a barbecue for Webber and Kitching, which was eaten in Hurley's company at Hurley's residence, washed down with some beers.

8. Over the ensuing week, the police on Palm Island became increasingly aware of unrest within the community as a result of general suspicion that Mulrunji's death was not an accident and that the investigation was a "cover-up". The community's agitation manifested itself both in peaceful public meetings and in violent outbursts, such as rocks being thrown at the police station. In response, the number of police officers and firefighters on the island were increased, and a direction was issued to allow all police on the island to carry firearms with them at all times. What did not occur in response was any genuine attempt by the police or the government to diffuse the tension in the community, to express regret at Mulrunji's death, or to reassure the community that appropriate investigation and action was being taken.

9. A preliminary autopsy of Mulrunji was conducted on 23 November 2004. At about 12pm on 26 November 2004, the preliminary report of the autopsy was read out at a community meeting on Palm Island by Mayor Erykah Kyle. The revelation that Mulrunji had died from internal bleeding after a "fall" in which he had also sustained four broken ribs, along with strong suspicion of a police coverup, sparked the uprising which has since become known as the "Palm Island Riot", during which members of the community burnt down the police station, the court house, and SS Hurley's residence.

10. At approximately 1.45pm on 26 November 2004, DI Webber declared an "emergency situation" on Palm Island, pursuant to *Public Safety Preservation Act* 1986 (Qld) s 5. The emergency situation was not revoked until the morning of 28 November 2004, although even on the Queensland Police Service (***QPS***)'s own version of events, the situation on Palm Island was "calm" that night: QPS *Media Advisory* issued 26 November 2004 at 8.10pm. The following day, the emergency situation was used as a pretence for the QPS "SERT" team and Darren Robinson to enter into a number of homes, including the homes of all three Applicants, without consent and without warrant, and to make a number of arrests, including of Lex Wotton, also without warrant.

11. In the years since November 2004, multiple reviews and inquiries have been conducted. The independent reviews consistently found that the police involved in the investigation into Mulrunji's death had engaged in misconduct, but the QPS internal reviews consistently found that no disciplinary measures were needed. This exacerbated the perception that justice was not being done and, on the Applicants' submission, aggravated the damages suffered by the Applicants.

C. Legal principles

12. In order to establish a breach of s 9 of the *Racial Discrimination Act* 1975 (Cth) (***RDA***), the Applicants must (a) identify acts (which include omissions to act: RDA s 3) of the Respondents; and show that each act: (b) involved a distinction, exclusion, restriction or preference, based on race, colour, descent or national or ethnic origin; and (b) had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of a human right or fundamental freedom of the Applicants: *Shurat Hadin v Lynch (No 2)* [2014] FCA 413, [33]-[34].

13. Each of the words "distinction", "exclusion", "restriction" and "preference" "implies differential treatment of at least one person as compared to the treatment of at least one other": *Baird v Queensland* (2006) 156 FCR 451, [114]; *Australian Medical Council v Wilson* (1996) 68 FCR 46, 48, although a directly comparable situation is not required: *Baird*,[63]. To establish that a distinction was "based on the race" of the Applicants, it is not necessary to show that the race was a *cause* of the distinction, merely that the distinction *applied by reference to*, or had a *sufficient connection with* the race of the applicant: *Obieta v NSW Department of Education and Training* [2007] FCA 86, [201]. It is not a defence to s 9(1) that discriminatory acts were done for seemingly "proper" motives: *Macedonian Teachers' Association of Victoria Inc v HREOC* (1998) 91 FCR 8, 33-34.

14. The "human right and fundamental freedoms" breaches of which may establish a breach of s 9(1) include the rights under the *Convention on the Elimination of All Forms of Racial Discrimination* and "may include those included in other international instruments to which Australia is a party": *Obieta,*[214].

D. Death in custody

15. Part I of the 3FASC alleges that a breach of RDA s 9(1) arises out of a number of acts of QPS officers over the course of the investigation into Mulrunji's death, defined collectively as the "QPS Failures". Part H of the 3FASC alleges that the QPS Failures involved multiple contraventions of, or failures to comply with, the QPS Operational Procedures Manual (***OPM***) and Human Resource Management Manual (***HRM***). The effect of the QPS Failures is alleged to have been a wholly inadequate investigation into the death, which amounted to a failure to provide to the Applicants and Group Members the same standards of policing services as are ordinarily provided in Queensland.

16. For the Applicants' purposes, it ultimately was the *appearance* of inadequacy that was the fundamental flaw in the investigation. It reasonably appeared that the investigation had been perfunctory, that SS Hurley had been investigated by his "mates", and that he had had therefore been cleared of any wrongdoing and was walking around freely, despite having caused Mulrunji's death. This contrasted distressingly with the perceived propensity of the police to incarcerate Aboriginal people on Palm Island. Accordingly, the Applicants' case culminates with the allegation that, through committing the acts comprising the QPS Failures, the QPS "*breached the Prescribed Responsibility, breached section 10.14 of the Code of Conduct and, or alternatively, acted so as to create the appearance of a poorly conducted investigation*": 3FASC,[248].

17. In *Elettronica Sicula SpA* (Judgment) [1989] ICJ Rep 15, [128], the ICJ said that: "*Arbitrariness is not so much something opposed to a rule of law, as something opposed to the rule of law. ... It is a wilful disregard of due process of law, an act which shocks, or at least surprises, a sense of juridical propriety."* In the Applicants' submission, "arbitrariness", in that sense, is an apt description of Mulrunji's treatment by SS Hurley. The Applicants will show that Mulrunji did not do anything remarkable in order to end up dying of severe internal bleeding on the bare concrete floor of Cell 2 of the Palm Island watchhouse. He was drunk on the street of a community where drinking on the street was commonplace. He allegedly made disparaging remarks to a police officer in a community with little respect for the authorities. As the Respondents do not propose to call SS Hurley, why exactly he arrested Mulrunji will remain unclear. What is clear, however, is that the arrest at least appeared to be entirely arbitrary.

18. The purpose of anti-discrimination legislation can be stated as "*to ensure that each person is treated as an individual and not assumed to be like other members of the group*": *European Roma Rights Centre v Immigration Officer at Prague Airport* [2005] 1 All ER 527, [82]. The impact on the Applicants and on the entire community of the investigation was that it showed them that, to the persons supposedly charged with their "protection", Aboriginal people on Palm Island could be punished arbitrarily without consequence to their punishers. As Deane J stated in *Donaldson v Broomby* (1982) 60 FLR 124, 126: "*Arrest is the deprivation of freedom. The ultimate instrument of arrest is force. The customary companions of arrest are ignominy and fear. A police power of arbitrary arrest is a negation of any true right to personal liberty. A police practice of arbitrary arrest is a hallmark of tyranny."* Mulrunji's fate, in view of the historical treatment by the authorities of the people on Palm Island, was indicative of systemic discrimination within the police, which caused the Applicants to fear for their own safety and for the safety of their loved ones—any one of whom could have been arrested on a whim with the same fate as Mulrunji. The Applicants allege that the investigation was so inadequate as to have breached their rights to equality before the law, to security of person, to access policing services, and to go about their affairs in peace and under the protection of the police. The Applicants also say that these events could not have occurred anywhere in Queensland except for in a remote and disenfranchised Aboriginal community like theirs.

E. The "Riot" and the response

19. In Part J of the 3FASC, the Applicants describe the conduct of the police on Palm Island between 19 and 26 November 2004, and allege that it was antagonistic and inappropriate, and that rather than addressing the community's concerns, the police simply bolstered their forces and bunkered down. It was in this context that the "Riot" occurred—after the community had been shown nothing except a perfunctory and tainted investigation of police by police, which found no wrongdoing on the part of the police.

20. Part J also describes the police response to the "Riot", whereby an emergency situation was declared, and the island was physically cut off from the rest of Australia and placed under a regime of quasi-martial law, including "riot squad" (***PSRT***) and "counter-terrorism" (***SERT***) police officers marching through the streets in full uniform, and going house to house arresting people in front of their children—a spectacle that would be quite unimaginable in, for example, a residential suburb of Brisbane. Yet this was all done without the Palm Island community or even the local council being advised that an emergency situation had been declared, what that entailed, and for how long it was expected to remain in place.

21. As Part K of the 3FASC alleges, the emergency situation allowed the police to bypass all of the usual checks and balances on police behaviour. For example, when entering a person's home to arrest them as part of a carefully planned and executed police operation, such as the operation on Palm Island on 27 November 2004, the ordinary protocol would be for the police to first obtain a warrant to enter the property and a warrant for the person's arrest. As Deane J further stated in *Donaldson*, 126: *"It is plainly of critical importance to the existence and protection of personal liberty under the law that the circumstances in which a police officer may, without judicial warrant, arrest or detain an individual should be strictly confined, plainly stated and readily ascertainable."* On Palm Island on 27 November 2004, however, the police used the pretence of the "emergency situation" to excuse themselves from obtaining warrants. This meant that there was no evidence compiled and presented to a judge to ensure the validity of the entry and arrest, and the entire exercise thereby becomes less transparent and more questionable, regardless of some of the arrests resulting in convictions (and others not).

22. Other actions of the QPS during and immediately after the emergency situation also contributed to the appearance of quasi-martial law, such as the commandeering of the Catholic school's bus, and the fact that all transport to and from the island was cut off unless it had the blessing of the police.

23. The Respondents have pleaded that the visible police presence was created in order to "*reassure residents that the police were present on the island*" and "*to protect the community from unlawful disruption of peace and good order*" (Defence:[206(h)], see also [225(c)]). The suggestion of residents of Palm Island being at once intimidated and "protected" by the authorities invokes the island's sorry history. Also familiar is the Respondents' attempts to demonise the Palm Island community, including a focus on the local residents' supposed possession of "sticks and spears" or "bladed weapons" and other implements,

and the use of the SERT team to raid the Sub-Group's houses, in circumstances where SERT officers are trained to presume that people present a threat until proven otherwise.

24. The Applicants define the above acts and omissions as cumulatively forming the "Further Failures". As in the claim concerning the QPS Failures, the Applicants' claim is not necessarily contingent on the conduct of the police being shown to have been unlawful in an administrative law sense, but rather that, because of the nature of the community on Palm Island, the ordinary rules were simply not followed and the community was not policed as it otherwise would have been. On this basis, the Applicants allege a breach of RDA s 9(1).

F. Institutional and systemic discrimination claims

25. The Applicants make two alternative claims of systemic and institutional discrimination—one in relation to the investigation into the death: 3FASC,[251]-[252], and the other in relation to the events leading up to and during the emergency declaration: 3FASC,[314]-[315]. The effect of both claims is that the Applicants and Group Members were known by the police to be particularly vulnerable, as Aboriginal residents of Palm Island, to deficiencies in relation to the investigations of deaths in custody, and to overly harsh and unsympathetic policing measures. For example, the Queensland Regional Report of the Royal Commission into Aboriginal Deaths in Custody (***RCIADIC***) at 3.1.3 criticised the apparent police practice "*to treat General Instructions as guidelines only and to be followed at the individual officer's discretion or judgement*", as well as the repeated ignoring by police officers investigating deaths in custody of the question of whether police policies had been complied with. Similarly, RCIADIC recommendations 60 and 61 respectively warn of the need for the police to eliminate "*violent or rough treatment … of Aboriginal persons including women and young people*" and the need to ensure that there is "*no avoidable use of [para-military] units in circumstances affecting Aboriginal communities*".

26. Accordingly, if it is found that the police procedures in place in November 2004 allowed for the QPS Failures or the Further Failures to take place, notwithstanding that the Commissioner of Police must have known that such events were likely, then the Applicants allege that the failure of the Commissioner to put in place procedures that would have prevented such events from occurring was an omission to act based on the race of the Applicants and Group Members. In the same way as "*reckless indifference to consequences is as blameworthy as deliberately seeking such consequences*": *Three Rivers v Bank of England* [2000] 3 All ER 1, 9f (Lord Steyn), the Applicants submit that reckless indifference to the existing police procedures failing the Applicants and Group Members is as blameworthy as deliberately designing the policies in order to have the effect that they had.

G. Aggravated or exemplary damages

27. The final aspect of the Applicants' claim, in Part M of the 3FASC, is that, *first*, the conduct of the police described above was so egregious as to warrant an example being made of them and, *secondly*, the conduct of the police after November 2004 aggravated the damages of the Applicants. There have, since November 2004, been five separate investigations into the initial police investigation into the death in custody (not including any criminal proceedings). Of these, the three that were independent of the police (the two Coronial Inquests and the Crime and Misconduct Commission report) made findings of serious misconduct, and the two that were conducted by the police (the "Palm Island Review" and the Report by Deputy Commissioner Rynders) found almost no wrongdoing by any police officer. Further, two of the principal antagonists—Warren Webber and Darren Robinson—were awarded medals in relation to their conduct on Palm Island. Events such as these exacerbated the hopelessness and despair felt by the Applicants as, for the people of Palm Island, justice was not only delayed, but repeatedly denied.

18 September 2015

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