

## NOTICE OF FILING

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### Details of Filing

Document Lodged:	Outline of Submissions
File Number:	QUD535/2013
File Title:	Lex Wotton & Ors v State of Queensland & Anor
Registry:	QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA



Dated: 18/09/2015 4:24:20 PM AEST

A handwritten signature in blue ink, reading 'Warwick Soden'.

Registrar

### Important Information

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

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**RESPONDENTS' OUTLINE OF SUBMISSIONS FILED PURSUANT TO  
PARAGRAPH 25 OF ORDER OF 25 AUGUST 2015**

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

No. QUD 535 of 2013

**Lex Wotton and Ors**  
Applicants

**State of Queensland and Anor**  
Respondents

1. The respondents will submit that the application should be dismissed with costs.
2. The applicants allege that acts by QPS officers were done in breach of s.9(1) of the *Racial Discrimination Act 1975* (the RDA) and therefore constituted unlawful discrimination within the meaning of the *Australian Human Rights Commission Act 1986* (the AHRCA).
3. The applicants must prove on the balance of probabilities:-
  - (a) that the various acts relied on were done by the QPS officers identified;
  - (b) each act:-
    - (i) involved a distinction, exclusion, restriction or preference;
    - (ii) based on race, colour, descent or national or ethnic origin;
  - (c) each act:-
    - (i) had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing of a right;
    - (ii) which right was a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.<sup>1</sup>

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<sup>1</sup> *Iliafi v The Church of Jesus Christ of Latter-day Saints Australia* (2014) 221 FCR 86 at 101-102 [44]

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<b>Filed on behalf of</b>	State of Queensland and Anor (Respondents)
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4. The acts relied on by the applicants are pleaded in paragraph 244 and 309 of the 3<sup>rd</sup> Further Amended Statement of Claim (3<sup>rd</sup> FASC). They fall into 2 broad categories:-
  - (a) acts between 19 and 24 November 2004 relating to the investigation into Mulrunji's death (the QPS Failures as they are called in paragraph 244 of the 3<sup>rd</sup> FASC);
  - (b) events from 22 November 2004 relating principally to the response to the riot on 26 November 2004 (the Further Failures as they are called in paragraph 309 of the 3<sup>rd</sup> FASC).
5. The circumstances relied on as showing that each act involved a distinction, exclusion, restriction or preference based on the race of the applicants and group members are pleaded in paragraphs 245-250 and 310-313 of the 3<sup>rd</sup> FASC. In broad terms, the applicants allege that the acts were done on Palm Island which is a predominantly Aboriginal community, the acts involved a failure to provide police services to the same standard as those services were provided to other communities and therefore the acts involved differential treatment of the applicants and other indigenous members of the community based on their race.
6. The rights relied on are pleaded in paragraphs 253 and 316 of the 3<sup>rd</sup> FASC. Some are no longer pressed. Some are untenable. For the remainder, the applicants have not shown that the acts had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise on an equal footing by the applicants and group members of those rights.
7. While many of the facts pleaded about the acts complained of are not in dispute, there remain significant areas of factual dispute. It is not proposed in this outline to canvass those factual disputes, but rather to concentrate on elements (b) and (c) in paragraph 3 above.

### **Distinction**

8. This concept is central to the definition of "racial discrimination" in Article 1(1) of the ICERD. It requires proof of differential treatment. The applicants claim that they and group members were treated differently because the standard of police services provided to them was below the standard of police services provided to non-Aboriginal communities in Queensland.
9. The applicants' approach is flawed at three levels. First, many of the services complained of were not services provided to them and group members generally but rather were provided to particular individuals. Second, the standard of services alleged to be provided

elsewhere in Queensland is a utopian and unrealistic standard which does not admit any possibility of human mistake or error of judgment.

10. The applicants seek to establish a social context by reference to which the distinction they contend for may be established. The third flaw in their approach is that they do not seek to relate that context to the particular acts complained of.<sup>2</sup>

### **Based on Race**

11. Those flaws are carried forward into this aspect of the applicants' case. They contend that the acts involving a distinction were based on their race and the race of the group members.<sup>3</sup> There is no direct evidence that any of the acts were done by reference to race.<sup>4</sup> Nor can that be inferred.

### **Purpose of Effect of Impairing a Human Right**

12. Some of the rights on which the applicants rely are not rights in the relevant sense. Article 26 of the ICCPR is concerned with obligations imposed on States in relation to their legislation and the operation of that legislation.<sup>5</sup> It expresses an objective to which the ICERD and the RDA are addressed, and that objective cannot itself be a right for the purposes of s.9 of the RDA.<sup>6</sup>
13. Likewise, there is no human right to equality before the law. It adds nothing to the terms of Article 26. Nor is there any right to go about one's affairs in peace under the protection of the police service under the common law, whatever that may mean.
14. The Article 5(a) right to equal treatment before all organs administering justice is not engaged in this case. That is a right to be treated by a tribunal or other adjudicative body equally without regard to race.<sup>7</sup> The applicants do not allege any conduct which is capable of affecting this right of the applicants or group members.
15. The Article 5(b) right is not engaged in relation to the QPS Failures. None of those acts is capable of impairing the right of the applicants and group members to security of person and protection by the State against violence or bodily harm.

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<sup>2</sup> See *Quebec v Bombardier Inc* [2015] SCC 39 at [88].

<sup>3</sup> In some cases the applicants allege a distinction based on the race of Mulrunji or Bengaroo: see paragraph 250 of 3<sup>rd</sup> FASC.

<sup>4</sup> See *Macedonian Teachers' Association of Victoria Inc v HREOC* (1998) 91 FCR 8 at 30.

<sup>5</sup> *Maloney v The Queen* (2013) 252 CLR 168 at 230 [159]-[160] and 250-251 [220]-[222] and *Aurukun Shire Council v CEO Office of Liquor Gaming and Racing* [2012] 1 Qd R 1 at 98 [241].

<sup>6</sup> *Maloney* at 230 [160] and *Aurukun* at 65 [139] and 67 [147].

<sup>7</sup> *Maloney* at 227 [151] and see also at 190 [35] and [36], 248 [215], 275 [287] and 295 [336].

16. The Article 5(e)(iv) right to social services is not engaged. QPS services are not a social service within the meaning of this Article.<sup>8</sup>
17. The Article 5(f) right of access to any service intended for use by the general public is not engaged. The right of access to QPS Services by the applicants and group members has not been impaired.
18. The other rights pleaded by the applicants are potentially in play. The applicants will not establish that the purpose or effect of any act was to impair those rights.

### **Alternative Case**

19. The applicants plead in paragraphs 251-253 and 314-315 of the 3<sup>rd</sup> FASC an alternative case that the establishment by the second respondent (Commissioner of Police) of QPS Policies, Orders and Procedures was an act involving a distinction based on the race of the applicants and group members which impaired rights. This alternative case is advanced on the basis that it is found that the acts relied on were in accordance with all laws and QPS Policies, Orders and Procedures.
20. The establishment of those Policies, Orders and Procedures is the making of a law which is outside the scope of s.9. Some Policies etc. are special measures under s.8 and are outside the scope of s.9. Otherwise, the alternative case fails because the Policies etc. do not involve a distinction based on race, and did not have the purpose or effect of impairing any of the rights in issue.

### **Damages**

21. If it is found that some acts were done in breach of s.9, the only evidence of loss or damage suffered is evidence of loss in the form of psychological effect on the applicants. Damages should be assessed after any findings of breach are published, and after receiving submissions based on those findings.

Mark Hinson QC  
Scott McLeod  
Steven Forrest  
Counsel for the Respondents  
18 September 2015

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<sup>8</sup> *Veterans Affairs v P* (1998) 79 FCR 594 at 600-601.

**Schedule**

No. QUD 535 of 2013

Federal Court of Australia

District Registry: Queensland

Division: General

Second Applicant: **Agnes Wotton**

Third Applicant: **Cecilia Anne Wotton**

Second Respondent: **Commissioner of Police**