

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 6/05/2016 5:09:44 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

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



Dated: 9/05/2016 9:46:25 AM AEST

A handwritten signature in blue ink that reads '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.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Lex Wotton and Others

Applicants

State of Queensland and Another

Respondents

RESPONDENTS' SUMMARY OF KEY SUBMISSIONS

Construction of Section 9(1)

1. There are four elements of s.9(1):-
 - (a) the doing of an act (or failing to do an act);
 - (b) the act involves a distinction;
 - (c) the act involving that distinction was based on race;
 - (d) that act (involving a distinction based on race) had the purpose or effect of impairing the enjoyment on an equal footing of a human right.
2. There is general agreement that the acts relied on by the applicants are acts for the purpose of s.9. Not all acts involving a distinction based on race are unlawful, and are only unlawful if they have the necessary purpose or effect on particular rights.
3. Section 9(1) does not require a direct comparison to be made to demonstrate discrimination. The applicants' case is pleaded on the basis of a comparison of policing standards. The words "on an equal footing" direct attention to the footing on which rights are enjoyed generally and requires some comparison.
4. The distinction relied on by the applicants is a lesser standard of policing services by reason of noncompliance with or breach of the OPM, Code of Conduct and other laws relating to the provision of policing services. That distinction is based on an impossible and utopian standard of policing, which assumes that all police officers,

Filed on behalf of the Respondents

unlike other people, do not make mistakes or errors of judgment. The applicants' test for identifying a distinction is too onerous and should not be accepted.

5. For an act to involve a distinction based on race, race must be a material factor in the performance of the act.
6. The applicants identify the race of various persons, either themselves, the group members or sub-group members or particular individuals, as relevant to particular acts. In some instances it is difficult to see how an act alleged to have been done on the basis of an individual's race (eg. not taking PLO Bengaroo to the arrest scene) has had any relevant purpose or effect on rights of the applicants.
7. The rights relied on by the applicants differ according to different acts or categories of acts. Articles 5(a) and 5(f) of the ICERD and Article 26 of the ICCPR are common to all acts. The respondents submit that those rights are not engaged on the facts of this case (Articles 5(a) and 5(f)) or do not exist as an autonomous right (Article 26).

QPS Failures

8. These acts, relating to the investigation, did not involve a distinction based on race. Mistakes were made in the investigation. It does not follow that the acts involved a distinction in the form of a different (and lower) standard of policing services. Race was not a material factor in the doing of those acts, which were based on mistakes or errors of judgment in conducting an investigation at short notice in a remote location with limited resources, which investigation was expected to be conducted expeditiously.
9. Any acts involving a distinction based on race did not have a relevant purpose or effect on the rights relied on. Those rights were not engaged. If they were, there was no impairment of the enjoyment on an equal footing of those rights, because the standard of policing services enjoyed equally by all persons is not the standard of perfection propounded by the applicants.

Further Failures – 22-25 November

10. These Further Failures are in substance failures to provide culturally sensitive policing services to the applicants and group members. The same distinction, a different standard of policing, is relied on. The applicants' case is lacking in particularity in terms of what was not done, relying on vague concepts such as "special considerations", "special measures" or "strategic planning".

11. There was engagement between the police and the community. The failures to do something more which is unspecified and vague, did not involve a distinction based on race. The rights relied on by the applicants are again Articles 5(a), 5(f) and 26. The acts relied on had no relevant purpose or effect on those rights, which were not engaged.

Further Failures – 26 November and After

12. The acts relied on relate to the declaration and revocation of the emergency situation, the “raids”, and a miscellany of other conduct. These acts did not involve a distinction based on race. They were done in performance of the QPS functions relating to the restoration and maintenance of peace and good order, protecting the community from the unlawful disruption of peace and good order, and detecting offenders and bringing them to justice. The QPS was responding to a serious outbreak of civil unrest.
13. If acts were done which were not in strict accordance with, or which reflected a misunderstanding of, the law, they were acts done to carry out the QPS functions referred to, and race was not a material factor in the performance of those acts.
14. The Article 5(a), 5(f) and 26 rights relied on by the applicants and group members were not engaged. If the applicants’ enjoyment on an equal footing of any of the Article 5(b), 7, 9 and 17 rights was impaired, that was not because of any act involving a distinction based on race having that purpose or effect.

Mark Hinson QC

Scott McLeod

Steven Forrest

Counsel for the Respondents
6 May 2016