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Details of Filing

Document Lodged:	Outline of Submissions
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File Title:	Lex Wotton & Ors v State of Queensland & Anor
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A handwritten signature in blue ink that reads 'Warwick Soden'.

Registrar

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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

APPLICANTS' CLOSING SUBMISSIONS

SUMMARY DOCUMENT

*Prepared pursuant to the directions
made by Mortimer J on 27 April 2016*

A. Key submissions on the construction of RDA s 9

1. As there is no dispute that the Applicants and Group Members share a common race as Aboriginal or Torres Strait Islander persons,¹ in order to prove a breach of s 9 of the RDA by the QPS, the Applicants must: (a) identify an act done by a QPS officer, which involved (b) a distinction, exclusion, restriction or preference (*distinction*) (c) based on race, and (d) nullified or impaired (*impaired*) the recognition, enjoyment or exercise on an equal footing (*enjoyment*) of a (e) human right or fundamental freedom (*right*).² The starting point for identification of rights is the list in Art 5 of the CERD, which is not exhaustive.³ Section 9 extends to the protection of other rights recognised under international human rights law.⁴ The Applicants rely on the rights: (a) to equality before and equal protection of the law (*equality right*);⁵ (b) to equal treatment before organs administering justice (*administration right*);⁶ (c) to access public services (*services right*);⁷ (d) to enjoyment of property without unlawful interference (*property right*);⁸ (e) not to be subjected to unlawful interference with privacy, family or home (*home right*);⁹ (f) to liberty and security of person (*liberty right*);¹⁰ and (g) not to be subjected to inhuman or degrading treatment (*treatment right*).¹¹
2. A “distinction” is “based on race” where there is a sufficient but not necessarily causal connection between the impugned conduct and the race of the Applicants.¹² An act can be a distinction based on race regardless of its motive or intention.¹³
3. In terms of relief, the Applicants seek: declarations;¹⁴ general,¹⁵ aggravated¹⁶ and exemplary¹⁷ damages; and an order requiring an apology from the Respondents.¹⁸

B. Application of s 9 to the evidence, in light of the pleadings

4. The acts relied on by the Applicants to establish breaches of s 9 can be divided thematically into the four categories set out below. The Applicants’ case with respect to distinctions based on race rests in large part on the unique cultural needs and expectations of the Palm Island community¹⁹ and on various failures by the police to follow laws and procedures that were ordinarily adhered to.²⁰ Those issues are common to all four claims.²¹

Investigation into Mulrunji’s death claim

5. *Acts*: The following acts breached s 9: interactions between the investigating officers and

¹ Applicant’s Submissions (**AS**): 53-57.

² AS: 12, 37-38, 63-66.

³ AS: 39-41.

⁴ AS: 42-52.

⁵ Art 26 of the ICCPR and customary international law, including a subsidiary right to equal protection by law enforcement agencies; see, AS: 278-298; Applicants’ Submissions in Reply (**ASR**): 4-6.

⁶ Art 5(a) of the CERD; see, AS: 299-302.

⁷ Art 5(f) of the CERD; see, AS: 303-309; ASR: 7-12.

⁸ A customary or general international law right; see, AS: 618-623, see also at 494-495.

⁹ Art 17 of the ICCPR; see, AS: 624-628.

¹⁰ Art 5(b) of the CERD and Art 9 of the ICCPR; see, AS: 639-646, see also at 451-459.

¹¹ Art 7 of the ICCPR; see, AS: 650-652.

¹² AS: 67-77.

¹³ AS: 71-73, 104-106; ASR: 16.

¹⁴ AHRCA s 46PO(4)(a); AS: 662-664; ASR: 112-115.

¹⁵ AHRCA s 46PO(4)(d); AS: 666-687, 713-719; ASR: 116, 134-135.

¹⁶ AHRCA s 46PO(4)(d); AS: 688-694, 720-723; ASR: 117-124, 125-133.

¹⁷ AHRCA s 46PO(4); AS: 695-712, 724-726; ASR: 133.

¹⁸ AHRCA s 46PO(b); AS: 727-731.

¹⁹ AS: 78-93, 255; AS, Annexure: Disputed Facts at 19-43; ASR: 21-31.

²⁰ AS: 94-111, 257; ASR: 32-33, 65-66.

²¹ AS: 267, 271-272, 595, 604.

SS Hurley;²² DS Robinson's involvement;²³ failures in oversight by senior officers;²⁴ the treatment of Aboriginal witnesses, particularly PLO Bengaroo;²⁵ failures to assist the pathologist conducting the autopsy;²⁶ and failures to meet or consider the cultural needs of the community.²⁷

6. *Distinction*: A distinction is alleged on four grounds: (a) the compromise of the impartiality of the investigation;²⁸ (b) evidence of non-Aboriginal witnesses being preferred to that of Aboriginal witnesses;²⁹ (c) departures from police procedures or obligations which compromised the integrity of the investigation;³⁰ and (d) failures to meet the cultural needs of the community.³¹
7. *Racial basis*: The preference for evidence of non-Aboriginal witnesses and the failure to meet the cultural needs of the community are self-evidently based on race.³² With respect to the compromise of the integrity and impartiality of the investigation, the acts viewed in aggregate reveal a pattern of systemic errors which, in all the circumstances, can be inferred to have occurred on the basis of race.³³
8. *Rights*: The investigation was a service provided to the community on Palm Island. The failure to provide that service to the Applicants to the same standard as it would ordinarily have been provided impaired the Applicants' enjoyment of the equality,³⁴ administration,³⁵ and the services³⁶ rights.

Intervening week claim

9. *Acts*: The following acts breached s 9: the failure to suspend SS Hurley from duty;³⁷ failures to take culturally appropriate policing measures;³⁸ failures to liaise with the community and address its concerns;³⁹ deployment of police without adequate cross-cultural skills;⁴⁰ and failures regarding the autopsy report.⁴¹
10. *Distinction*: A distinction is alleged on two bases: (a) departures from or breaches of procedures;⁴² and (b) failures to meet the cultural needs of the community.⁴³
11. *Racial basis*: The relevant distinctions derived from a prejudiced view regarding Aboriginal Palm Islanders⁴⁴ and a derogatory attitude towards the community's concerns.⁴⁵
12. *Rights*: Police services were provided on Palm Island at a lower standard than they would

²² AS: 254(a)-(m), see also at 115, 130, 139, 159.

²³ AS: 254(n)-(p), see also at 166.

²⁴ AS: 254(q)-(v), see also at 173, 178, 187, 194.

²⁵ AS: 254(w)-(z), see also at 198, 206.

²⁶ AS: 254(aa)-(dd), see also at 218, 222, 225, 228.

²⁷ AS: 254(ee)-(ii), see also at 239, 242, 245, 250.

²⁸ AS: 259-260, see also at 86, 117, 126-128, 135, 139, 154-155, 170, 171, 183, 193, 202, 231, 234; ASR: 58.

²⁹ AS: 261-264, see also at 140-150, 153-155, 170, 197-212; ASR: 59-60, see also at 41-50.

³⁰ AS: 265-267, see also at 96, 127-128, 136, 164, 170, 179-183, 194, 234; ASR: 61-62, see also at 38-40, 44-47, 48-49, 51-54.

³¹ AS: 268-271, see also at 78-93; 236-252; ASR:

³² AS: 272.

³³ AS: 272-276; ASR: 17-20, 65-69.

³⁴ AS: 293-298

³⁵ AS: 299-302.

³⁶ AS: 303-309; ASR: 7-13.

³⁷ AS: 584(a), see also at 314.

³⁸ AS: 584(b)-(c), (f)-(g), see also at 343(b), 354(f)-(g), (i).

³⁹ AS: 583(d), (i)-(m), see also at 354(b)-(e), (h), (j).

⁴⁰ AS: 584(e), (h), see also at 343(a), 350.

⁴¹ AS: 584(n)-(p), see also at 364.

⁴² AS: 595, 597, see also at 98-108 see further at 345-348, 371-375; see also, ASR: 14-20.

⁴³ AS: 596, see also at 78-93, 268-271, see further at 315-331, 335-341, 349, 351-352, 355-370; ASR: 71-73.

⁴⁴ AS: 604(a), (d)(i)-(ii), see also at 157-164, 272-276, 315-326, 328, 330-331, 345-348; ASR: 71-72.

⁴⁵ AS: 604(e), see also at 330-331, 335-341, 351-352, 355-358, 362, 365-370.

ordinarily have been provided. This impaired the enjoyment by the Applicants of the equality,⁴⁶ administration⁴⁷ and services⁴⁸ rights.

Emergency situation claim

13. *Acts*: The following acts breached s 9: the declaration and revocation of the emergency situation;⁴⁹ the restriction of transport to and from the island;⁵⁰ and the presence and behaviour of the police.⁵¹
14. *Distinction*: A distinction is alleged on three grounds: (a) breaches of laws and police procedures;⁵² (b) failures to meet the cultural needs of the community;⁵³ and (c) the unique circumstances.⁵⁴
15. *Racial basis*: There is clear evidence that the relevant acts were based on race.⁵⁵
16. *Rights*: Police services were provided on Palm Island at a lower standard than they would ordinarily have been provided. This impaired the enjoyment by the Applicants of the equality,⁵⁶ administration⁵⁷ and services⁵⁸ rights.

SERT claim

17. *Acts*: The following acts breached s 9: the SERT Action Plan and methodology;⁵⁹ the arrests by SERT;⁶⁰ and the entries and searches by SERT of homes.⁶¹
18. *Distinction*: A distinction is alleged on four grounds: (a) breaches of laws and procedures;⁶² (b) failures to meet the cultural needs of the community;⁶³ (c) the unique circumstances;⁶⁴ (d) the SERT methodology was peculiar to the operation.⁶⁵
19. *Racial basis*: There is clear evidence that the SERT methodology was based on race.⁶⁶
20. *Rights*: The entries and searches of the Applicants' homes by SERT and the SERT methodology impaired the Applicants' enjoyment of the property,⁶⁷ home,⁶⁸ equality and administration⁶⁹ rights. The arrests of the First and Third Applicants impaired their enjoyment of the liberty⁷⁰ and treatment⁷¹ rights.

⁴⁶ AS: 609-610.

⁴⁷ AS: 613-614.

⁴⁸ AS: 609-610.

⁴⁹ AS: 586(a)-(f), see also at 392, 405, 426, 545. Note: includes various incidental acts.

⁵⁰ AS: 586(i)-(l), see also at 524, 557(c).

⁵¹ AS: 586(g)-(h), see also at 557(d)-(e).

⁵² AS: 595, see also at 98-108, see further at 391-403, 406-412, 423, 427-429, 432-433, 541-543, 547-552, 582; ASR: 87-88, 107, see also at 14-20.

⁵³ AS: 596, see also at 78-82, 91-93, see further at 576-581.

⁵⁴ AS: 599-601, see also at 558.

⁵⁵ AS: 604(b), (c), (d)(vii)-(viii), (f), see also at 422, 437-438, 450, 529-533, 535-540, 551, 576-581.

⁵⁶ AS: 611-612.

⁵⁷ AS: 613-614.

⁵⁸ AS: 611-612.

⁵⁹ AS: 588(a), 590(o)-(p), see also at 461(c), 557(a)-(b).

⁶⁰ AS: 588(b)-(c), 590(a)-(f), see also at 489, 517.

⁶¹ AS: 590(g)-(n), see also at 461(a)-(b), (d)-(e), 472, 554.

⁶² AS: 595, see also at 98-108, see further at 463-468, 470, 473, 488, 500-502, 507-512, 513-515, 522, 555, 58; ASR: 91-98, 100-103.

⁶³ AS: 596, see also at 78-82, 91-93, see further at 576-581.

⁶⁴ AS: 599-601, see also at 558-559.

⁶⁵ AS: 602-603, see also at 561, 566-567; ASR: 104.

⁶⁶ AS: 422, 437-438, 449-450, 509-512, 520, 558-582.

⁶⁷ AS: 623, see also at 489-515, 559-565.

⁶⁸ AS: 629-637, see also at 516-522, 559-565.

⁶⁹ AS: 656-658.

⁷⁰ AS: 647-648, see also at 462-470, 559-565, 570-575.

⁷¹ AS: 653-655, see also at 469, 473-488, 566-569,