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Federal Court of Australia No. **QUD 535 of 2013**
District Registry: Queensland
Division: General Division

Lex Wotton and Others
Applicants

State of Queensland and Another
Respondents

APPLICANTS' CLOSING SUBMISSIONS

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A. Overview

1. The Applicants have brought these proceedings as representative parties under part IVA of the *Federal Court of Australia Act* 1976 (Cth) on behalf of Aboriginal and Torres Strait Islander people living on Palm Island. The claims arise out of the police response to the death in police custody of a person now known as Mulrunji, which occurred on Palm Island on 19 November 2004.

2. This claim is brought under section 46PO of the *Australian Human Rights Commission Act* 1986 (Cth). The Applicants allege various breaches by the Respondents of section 9 of the *Racial Discrimination Act*1975 (Cth) (***RDA***). The Applicants seek declaratory relief, pecuniary compensation and an apology from the Respondents for the impugned conduct.

3. These submissions are structured as follows:

    a. Part A is this overview.

    b. Part B contains a brief discussion of the representative nature of this proceeding.

    c. Part C contains an analysis of some important issues which provide background and context to the Applicants' claim, including:

        i. the operation of section 9 of the RDA;

        ii. Aboriginal deaths in custody and the cultural needs and expectations of the Palm Island community; and

        iii. the functions and duties of the police at law.

    d. Part D contains the Applicants' submissions in relation to the matters pleaded in support of the first claim for breach of section 9 of the RDA, which concerns the investigation into Mulrunji's death.

    e. Part E contains the Applicants' submissions in relation to why the matters submitted in Part D constituted a breach of section 9 of the RDA.

    f. Part F contains the Applicants' submissions in relation to the matters pleaded in support of the second claim for breach of section 9 of the RDA, which concerns the policing on Palm Island between 22 and 25 November 2004.

g. Part G contains the Applicants' submissions in relation to the matters pleaded in support of the third claim for breach of section 9 of the RDA, which concerns the police response to the events on Palm Island on 26 November 2004.

h. Part H contains the Applicants' submissions in relation to why the matters submitted in Parts F and G constituted breaches of section 9 of the RDA.

i. Part I contains the Applicants' submissions on remedies.

B. Representative proceedings

4. These proceedings were properly commenced as representative proceedings under Part IVA of the *Federal Court Act* 1976 (Cth). The purpose of Part IVA is to enable the pursuit and efficient resolution of a claim on behalf of a group, where it was not economically viable for group members to pursue the claim individually.[1]

5. As representative parties, the Applicants have commenced this claim for and on behalf of the Group Members, including the Sub-Group. However, the starting point for the Court is the consideration of the individual claims of the Applicants. Where an issue arises in relation to the Applicants' claims which coincide with the claims of the Group Members or of the Sub-Group, that issue should be determined as a common question, such that the determination is binding on the group members and the Respondent.[2] In *Bright v Femcare Ltd*, Lindgren J observed that the purpose of common questions was "to elicit the identity of questions, the answering of which in the representative party's claim can be expected also to perform the useful purpose of answering them in the claims of the represented parties".[3]

6. Having heard the Applicants' case, the Court will now determine the Applicants' claim for relief, as well as the issues of fact and law common to the claims of the Applicants and those of the Group Members, and will describe or otherwise identify the Group Members who will be affected by the decision.[4] However, the Court will not now finally determine all of the claims of all of the Group Members. Rather, following judgment, the Applicants will seek directions in respect of the remaining Group Member claims that have not been determined.[5] As Lindgren J said in *Bright v Femcare Ltd*:

> ordinarily one would expect that, in an attempt to give effect to the legislative intention, a means will be sought, by case management techniques, to enable a representative proceeding to continue to the stage of resolution of the substantial common is-

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[1] *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 at [20] (Gleeson CJ, Mchugh, Gummow, Kirby And Callinan JJ).

[2] Section 33ZB(b) of the *Federal Court Act* 1976.

[3] (2002) 195 ALR 574; [2002] FCAFC 243 at [14].

[4] Section 33ZB(a) of the *Federal Court Act* 1976.

[5] *Merck Sharp & Dohme (Australia) Pty Ltd v Peterson* [2009] FCAFC 26 at [7] (Moore, Sundberg and Tracey JJ).

> sues on the basis that after that stage is completed, an order under s 33N or directions under s 33Q will be made.[6]

7. Depending on the findings made by the Court, the following directions may be sought in respect of an individual claim that has not been determined:

   a. under section 33Q of the *Federal Court Act* 1976 for the establishment of a subgroup and to appoint another class member as the representative party in relation to those issues; and/or

   b. under section 33R of the *Federal Court Act* 1976 to permit the class member to appear in relation to those issues;

   c. under section 33S of the *Federal Court Act* 1976 for the commencement of separate proceedings (either individual proceedings if the alternative claim relates only to the particular class member or another representative proceeding if the alternative claims are common to a number of class members);

   d. the extent to which findings of fact made in the judgment that don't concern the common questions can be used or relied on by group members in the individual claims.

8. Finally, it is noted that, the Court must be cautious in its determination of the Applicants' claim not to prejudice the claims of individual Group Members. As French J observed in *Zhang v Minister for Immigration, Local Government & Ethnic Affairs*:

> In a case in which the group members have not raised individual claims but have been defined into the group on their related circumstances and the common issue, it is necessary that care be taken to ensure that claims based on individual circumstances of which the Court knows nothing are not prejudiced.[7]

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[6] (2002) 195 ALR 574; [2002] FCAFC 243 at 580 [18].

[7] (1993) 45 FCR 384 at 405.

C. Background and contextual matters

C.1. Section 9(1) of the RDA

9. Section 9(1) of the RDA makes it unlawful for a person to do any act that constitutes racial discrimination.

10. The broad prohibition on what is commonly referred to as "direct discrimination" is based on the definition of "racial discrimination" contained in Article 1(a) of the International Convention on Elimination of all Forms of Racial Discrimination (**CERD**).[8] The legislative intention stated in the Second Reading Speech of the *Racial Discrimination Bill* 1975 was that "the Bill will guarantee equality before the law without distinction as to race".[9] For the purposes of the CERD, "the term 'racial discrimination' shall mean", according to Article 1(1):

> any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life.

11. That the terms of the RDA are expressly derived from the CERD must necessarily influence the way the Act is interpreted and applied. As Brennan J explained in *Koowarta v Bjelke-Petersen*:

> When Parliament chooses to implement a treaty by a statute which uses the same words as the treaty, it is reasonable to assume that Parliament intended to import into municipal law a provision having the same effect as the corresponding provision in the treaty…[10]

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[8] Article 1(a) of CERD provides: "In this Convention, the term 'racial discrimination' shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, or human rights and fundamental freedoms in the political, economic, social, cultural or any other field of public life."

[9] Commonwealth, *Parliamentary Debates*, Senate, 15 April 1975, 999 (Hon Mr J J McClelland, Minister for Manufacturing Industry).

[10] (1982) 153 CLR 182 at 264-265 (Brennan J).

C.1.1 Elements of section 9(1)

12. For the Applicants to establish their claim, they must:

    a. demonstrate the group shares a race, colour, descent or national or ethnic origin;

    b. identify an act[11] done by a person[12];

    c. demonstrate that the act:

        i. involved a distinction, exclusion, restriction or preference; which was

        ii. based on race, colour, descent or national or ethnic origin; and

    d. demonstrate that the act:

        i. had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of a right;

        ii. that right being any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life.[13]

13. The inter-related elements of section 9(1) were stated in a slightly different (albeit consistent way) in *Bropho v State of Western Australia*, by Nicholson J as:

> the unlawfulness is created by (1) any act (2) involving a distinction, exclusion, restriction or preference (3) 'based on' race, colour, descent or national or ethnic origin (4) which has the purpose or effect (5) of nullifying or impairing (6) the recognition, enjoyment or exercise, on an equal footing (7) of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life. [14]

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[11] Or omission to act - see section 3 of the RDA.

[12] "Person" includes "a body politic or corporate as well as an individual": s 22(1)(a) *Acts Interpretation Act* 1901 (Cth).

[13] *Iliafi v The Church of Jesus Christ of Latter-day Saints Australia* (2014) 221 FCR 86 at 114-115 [101] (Kenny J).

[14] [2007] FCA 519 at [281] (Nicholson J).

C.1.2 Proving the elements of section 9(1)

14. The Courts have long established that discrimination legislation should be regarded as beneficial and remedial legislation and should be given a liberal construction.[15]

15. The RDA is intended to give effect to Australia's obligations under CERD. This means that, when determining the meaning of the provisions contained in the RDA, the Court must have regard to the manner in which the treaties are construed in international law.[16]

16. Black CJ stated in *Australian Medical Council v Wilson*:

> As its short title indicates, the principal object of the Act is the elimination of racial discrimination and some other like forms of discrimination. The Act gives effect to the International Convention on the Elimination of all Forms of Racial Discrimination…… On the contrary, the policy of the Act points to a broad operation and this is of particular significance in legislation of this character: see *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359 per Mason CJ and Gaudron J (with whom Deane J agreed) and at 394 per Dawson and Toohey JJ.[17]

17. In breaking down the elements of section 9(1) of the RDA, it is necessary to look at the words used and what their meaning is. In *Gerhardy v Brown*, Gibbs CJ said:

> The words of the Convention, and those of the Racial Discrimination Act which are taken from the Convention, are vague and elastic and in applying them one is likely to get more assistance from the realities of life than from books of jurisprudence. [18]

18. The Full Federal Court has found that to achieve this broad purpose "required broad and elastic terminology".[19] Allsop J (with Spender and Edmonds JJ agreeing) noted:

> it is important to treat the terms of s9(1) as comprising a composite group of concepts directed to the nature of the act in question, what the act involved, whether the act

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[15] See, for example, *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8 at 29 (Weinberg J).

[16] *Iliafi v The Church of Jesus Christ of Latter-day Saints Australia* (2014) 221 FCR 86 at 104 [56] (Kenny J).

[17] (1996) 68 FCR 26 at 48 (Black CJ).

[18] (1985) 159 CLR 70 at 86 (Gibbs CJ).

[19] *Baird v Queensland* (2006) 156 FCR 451 at 468 [62] (Allsop J); see also *Applicant A v Minister for Immigration and Ethnic Affairs* (1997) 190 CLR 225 at 230 (Brennan CJ), 240 (Dawson J), 251-56 (McHugh J) and 277 (Gummow J) and *Morrison v Peacock* (2002) 210 CLR 274 at 279 [16] (Gleeson CJ, McHugh, Gummow, Kirby and Hayne JJ).

> involved a distinction etc based on race and whether it had the relevant purpose or effect.[20]

19. Allsop J went on to note:

> A broad interpretation of s 9(1) apt to encompass all kinds of acts of racial discrimination is to be preferred in furtherance of the purpose of eliminating racial discrimination in all its forms and manifestations: cf Lerner N, The *UN Convention on the Elimination of all Forms of Racial Discrimination*, (Sijthoff & Noordhoff, Alphen aan den Rijn, 1980) p 28. Further, it is important to treat the terms of s 9(1) as comprising a composite group of concepts directed to the nature of the act in question, what the act involved, whether the act involved a distinction etc based on race and whether it had the relevant purpose or effect: see Schwelb, E "The International Convention on the Elimination of all forms of Racial Discrimination" (1966) 15 *International and Comparative Law Quarterly* 996 at 1001. [21]

20. It is submitted that the correct approach to interpreting the RDA is a holistic, broad and beneficial approach in accordance with the fundamental purpose of the Convention,[22] to encompass all kinds of acts of racial discrimination in furtherance of the purpose of eliminating racial discrimination in all its forms and manifestations.[23]

C.1.3 Burden and Standard of Proof and Inferences

21. The Applicants accept that they have the burden of proof.

22. The standard of proof that is required to establish unlawful conduct under section 9(1) of the RDA is the standard of proof stipulated by section 140(1) and (2) of the *Evidence Act* 1995 (Cth).

23. In *Qantas Airways Ltd v Gama*, Branson J[24] (agreeing with French and Jacobson JJ[25]), observed that the correct approach to the standard of proof in a civil proceeding under section 140 of the Evidence Act is as follows:

> Adopting the language of the High Court in *Neat Holdings*, that the strength of the evidence necessary to establish a fact in issue on the balance of probabilities will vary

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[20] (2006) 156 FCR 451 at 468 [61] (Allsop J).

[21] (2006) 156 FCR 451 at 468 [61] (Allsop J).

[22] (2006) 156 FCR 451 at 468 [60] (Allsop J).

[23] (2006) 156 FCR 451at 468 [60] (Allsop J).

[24] (2008) 167 FCR 537 at 576 [139].

[25] (2008) 167 FCR 537 at 571 [110].

> according to the nature of what is sought to be proved – and, I would add, the circumstances in which it is sought to be proved.

24. Section 140(2) contains three requirements that the Court must take into account. The relationship of those requirements in discrimination cases (as opposed to other civil claims) has been specifically addressed by the Court. Branson J in *Qantas Airways Ltd v Gama*[26] observed that a case founded on section 46PO of the *HREOC* involves an allegation of unlawful discrimination, and for a number of reasons "moral opprobrium may, but does not necessarily attach to an allegation of discriminatory conduct".

25. The requirement that such legislation be regarded as beneficial and remedial legislation[27] is relevant to the second requirement of section 140(2) of the *Evidence Act*. As stated by Branson J in *Qantas v Gama*:

> …. s 9(1) of the *Racial Discrimination Act* is concerned with acts involving a "distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin". That is, it is not concerned to proscribe only conduct motivated by an intention or purpose to discriminate. Moreover, s 9(1) reaches to conduct 'based on' the factors identified by the subsection and not merely to conduct undertaken 'by reason of' those factors (*Macedonian Teachers' case* partic. at p 40). Each of these factors tends to diminish the opprobrium likely otherwise to attach to a finding that an act was unlawful by reason of s 9(1) of the *Racial Discrimination Act.* Together they tend to diminish the gravity of such a finding. 28

26. The final requirement in section 140(2) of the *Evidence Act* is to take into account the gravity of the matter.[29] However, this does not increase the standard of proof beyond the balance of probabilities as stated by French and Jacobson JJ in *Qantas v Gama*:

> The so-called Briginshaw test does not create any third standard of proof between the civil and the criminal. The standard of proof remains the same, that is proof on the balance of probabilities.[30]

27. In addition to the requirements stated in section 140(2) of the *Evidence Act*, it is also open to the Court to take into account other matters. These matters include the in-

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[26] (2008) 167 FCR 537 at 575 [133] (French and Jacobson JJ agreed generally at 571 [110]).

[27] (2008) 167 FCR 537 at 575-576 [134] (French and Jacobson JJ agreed generally at 571 [110]); see also *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission* (1998) 91 FCR 8 at 29 (Weinberg J).

[28] (2008) 167 FCR 537 at 575-576 [134] (French and Jacobson JJ agreed generally at 571 [110]).

[29] *Vata-Meyer v Commonwealth of Australia* [2015] FCAFC 139 at [31] (North, Collier and Katzmann JJ); see also *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 at 571 [110]

[30] *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 at 571 [110]

herent likelihood or unlikelihood of the alleged matter occurring and the failure of a party to bring relevant evidence that is within its power to produce.[31] These additional matters may require the drawing of inferences from facts proven.

28. Where direct proof is not available, it is sufficient if, on the primary facts proven, the circumstances appearing in evidence justify the drawing of an inference that it is reasonably probable that the alleged state of affairs existed.[32] As Lord Wright put it in a frequently cited passage in *Caswell v Powell Duffryn Associated Collieries Ltd*:

> Inference must be carefully distinguished from conjecture or speculation. There can be no inference unless there are objective facts from which to infer the other facts which it is sought to establish. In some case the other facts can be inferred with as much practical certainty, as if they had been actually observed. In other cases the inference does not go beyond reasonable probability. But if there are no positive proved facts from which the inference can be made, the method of inference fails and what is left is mere speculation or conjecture. [33]

29. The test is whether, on the basis of the primary facts, it is reasonable to draw the inference.[34]

30. While the Court cannot simply choose between guesses, where the facts proved form a reasonable basis for a definite conclusion, of which the trier of fact may be reasonably satisfied, (as opposed to a mere possible explanation of the known facts) an inference may be drawn.[35]

31. This approach was confirmed by Kitto J in *Jones v Dunkel*:

> One does not pass from the realm of conjecture into the realm of inference until some fact is found which positively suggests, that is to say provides a reason, special to the particular case under consideration, for thinking it likely that in that actual case a specific event happened or a specific state of affairs existed. [36]

32. The specific need to draw inferences in respect of discrimination cases and the relationship with the required standard of proof was considered in *Sharma v Legal Aid (Qld)* where the Full Federal Court held:

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[31] *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 at 576 [138] (Branson J).

[32] *Carr v Baker* (1936) 36 SR (NSW) 301 at 306 (Jordan CJ).

[33] [1940] AC 152 at 169-170.

[34] See, for example, *Layton v Vines* (1952) 85 CLR 352 at 358.

[35] *Jones v Dunkel* (1959) 101 CLR 298 at 305 (Dixon CJ).

[36] *Jones v Dunkel* (1959) 101 CLR 298 at 306 (Kitto J).

> It may be accepted that it is unusual to find direct evidence of racial discrimination, and the outcome of a case will usually depend on what inferences it is proper to draw from the primary facts found: *Glasgow City Council v Zafar* [1998] 2 All ER 953, 958. There may be cases in which the motivation may be subconscious. There may be cases in which the proper inference to be drawn from the evidence is that, whether or not the employer realised it at the time or not, race was the reason it acted as it did*: Nagarajan v London Regional Transport* [1999] 3 WLR 425, 433… In a case depending on circumstantial evidence, it is well established that the trier of fact must consider "the weight which is to be given to the united force of all the circumstances put together". One should not put a piece of circumstantial evidence out of consideration merely because an inference does not arise from it alone... It is the cumulative effect of the circumstances which is important provided, of course, that the circumstances relied upon are established as facts.[37]

33. When considering whether an inference should be drawn, the Court may also consider a party's election not to call evidence that could dispute an adverse inference being drawn against that party. Such an election enables the Court to draw an inference that the evidence would not have helped that party's case. As stated by Windeyer J in *Jones v Dunkel*:

> Where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference. [38]

34. When drawing inferences of discrimination, section 140(2) of the *Evidence Act* is understood to incorporate the common law rule that evidence should be weighed according to the proof which it was in the power of one party to produce and the other party to contradict.39

35. The effect of section 18 of the RDA is that the Applicants do not have to establish that race was the only reason for the act, or even a dominant or substantial reason. It is sufficient if it were one of the reasons.[40]

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[37] (2002) 115 IR 91 at 98 [40]-[41].

[38] *Jones v Dunkel* (1959) 101 CLR 298 at 321 (Windeyer J).

[39] *Medtel Pty Ltd v Courtney* (2003) 130 FCR 182 at 208 [76] (Branson J); see also *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 at 576 [138] (Branson J).

[40] *Obieta v NSW Department of Education and Training and Ors* [2007] FCA 86 at [219] (Cowdroy J).

C.1.4 Requirement of comparator

36. Section 9(1) does not require a direct comparison to be available to demonstrate discrimination.[41]

C.1.5 Identification of human right or fundamental freedom

37. Under section 9(1), it is necessary to establish the relevant human right which has been impaired because of race.[42]

38. Section 9(2) of the RDA states:

> A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of public life includes any right of a kind referred to in Article 5 of the Convention.[43]

39. As noted above, as the Act is derived from an international treaty, it must be interpreted in its international legal context. As Brennan J recognised in *Gerhardy*, "international law may spell out with more precision the contents of human rights and fundamental freedoms".[44] Accordingly, in interpreting CERD, the Courts have found that other documents such as the General Recommendations of the United Nations Committee on the Elimination of Racial Discrimination, a body established under Article 8 of the CERD, provide guidance as to the meaning and effect of the words contained in the Articles.[45]

40. Article 5 of the CERD enumerates a number of rights, some of which the Applicants rely on in these proceedings and are discussed below. The Committee on the Elimination of Racial Discrimination's *General Recommendation No 20*[46] provides guidance as to the meaning and effect of Article 5 at international law. In that General Recom-

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[41] *Baird v Queensland* (2006) 156 FCR 45 at 469 [63] (Allsop J).

[42] *Obieta v NSW Department of Education and Training and Ors* [2007] FCA 86 at [213] (Cowdroy J).

[43] "Convention" is defined in section 3 of the RDA as: "the International Convention on the Elimination of All Forms of Racial Discrimination that was opened for signature on 21 December 1965 and entered into force on 2 January 1969, being the Convention a copy of the English text of which is set out in the Schedule."

[44] *Gerhardy v Brown* (1985) 159 CLR 70 at 126 (Brennan J); see also, *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476 at 492 [29] (Gleeson CJ).

[45] *Iliafi v The Church of Jesus Christ of the Latter-Day Saints Australia* (2014) 221 FCR 86 at 105-106 [62]-[64].

[46] UN Doc CERD/48/Misc. 6/Rev. 2 (8 March 1996).

mendation, the Committee relevantly notes that the rights and freedoms mentioned in Article 5 "do not constitute an exhaustive list". The Committee noted:

> At the head of these rights and freedoms are those deriving from the *Charter of the United Nations* and the *Universal Declaration of Human Rights*, as recalled in the preamble to the Convention. Most of these rights have been elaborated in the Covenants. All States parties are therefore obliged to acknowledge and protect the enjoyment of human rights, but *the manner in which these obligations are translated into the legal orders of States parties may differ*. … The rights and freedoms referred to in article 5 of the Convention *and any similar rights* shall be protected by a State party. (emphasis added)

41. The Courts in Australia have likewise held that Article 5 is not an exhaustive list of the human rights and fundamental freedoms protected by the RDA.[47]

(a) Nature of human rights and fundamental freedoms

42. In Australian courts, a broad approach has been taken in identifying the rights and freedoms protected by section 9 of the RDA. In *Gerhardy v Brown,* Mason J held:

> The expression 'human rights' is commonly used to denote the claim of each and every person to the enjoyment of rights and freedoms generally acknowledged as fundamental to his or her existence as a human being and as a free individual in society ... As a concept, human rights and fundamental freedoms are fundamentally different from specific or special rights in our domestic law which are enforceable by action in the courts against other individuals or against the State, the content of which is more precisely defined and understood. [48]

43. Similarly, Brennan J stated:

> The term connotes the rights and freedoms which must be recognized and observed, and which a person must be able to enjoy and exercise, if he is to live as he was born - 'free and equal in dignity and rights', as the *Universal Declaration of Human Rights* proclaims ... The conception of human rights and fundamental freedoms in the Convention definition of racial discrimination describes that complex of rights and freedoms the enjoyment of which permits each member of a society equally with all other members of that society to live in full dignity, to engage freely in any public activity and to enjoy the public benefits of that society.[49]

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[47] *Gerhardy v Brown* (1985) 159 CLR 70 at 85 (Gibbs CJ), 101 (Mason J), 126 (Brennan J); *Secretary, Department of Veterans' Affairs v P* (1998) 79 FCR 594 at 596 (Drummond J). The ICERD Committee has also indicated that the list of rights set out in Article 5 should not be taken by States as being an exhaustive list: *General Recommendation XX (Article 5)*, UN Doc HRI/GEN/1/Rev.5, 188-189 [1].

[48] (1985) 159 CLR 70 at 101-102 (Mason J).

[49] (1985) 159 CLR 70 at 125-126 (Brennan J).

44. The High Court also considered the meaning of "right" in *Mabo v Queensland*, with Deane J stating:

> The word 'right' is used in s10(1) in the same broad sense in which it is used in the International Convention, that is to say, as a moral entitlement to be treated in accordance with the standards dictated by the fundamental notions of human dignity and essential equality which underlie the international recognition of human rights: cf. the preamble to the International Convention. [50]

45. A human right is not necessarily a legal right enforceable under local or national law.[51] Writing extra-judicially, French CJ has explained the distinction between an enforceable legal right and a "human right" as follows:

> It is also important to recognise, as Peter Bailey points out in his recent book on human rights in Australia, that common law "rights" have varied meanings. In their application to interpersonal relationships, expressed in the law of tort or contract or in respect of property rights, they are justiciable and may be said to have "a binding effect". But "rights", to movement, assembly or religion, for example, are more in the nature of "freedoms". They cannot be enforced, save to the extent that their infringement may constitute an actionable wrong such as an interference with property rights or a tort.[52]

(b) Sources of rights

46. It follows from the above that the rights and freedoms protected under section 9 of the RDA include not only those rights expressly set out in Article 5 of the CERD, but also "any similar rights",[53] including but not limited to those derived from the UN Charter and the UDHR, as elaborated in the ICCPR and the ICESCR. The Applicants note that it is appropriate to construe the international obligations more liberally than domestic statutes and this has been recognised by Australian Courts.[54]

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[50] (1988) 166 CLR 186 at 229 (Deane J).

[51] *Mabo v Queensland* (1988) 166 CLR 186 at 217 (Brennan, Toohey and Gaudron JJ).

[52] Chief Justice RS French, 'The Common Law and the Protection of Human Rights' (paper to the Anglo Australasian Lawyers Society, 4 September 2009, Sydney) at [8].

[53] UN Doc CERD/48/Misc. 6/Rev. 2 (8 March 1996).

[54] *Pilkington (Australia) Ltd v Minister for Justice and Customs* (2002) 127 FCR 92 at 100 [26] (Mansfield, Conti and Allsop JJ).

47. A right under international law must derive from one of the four sources of international law embodied in Article 38(1) of the *Statute of the International Court of Justice* (***ICJ Statute***),[55] which include:

> (a) international conventions, whether general or particular, establishing rules expressly recognised by the contesting states;
>
> (b) international custom, as evidence of a general practice accepted as law;
>
> (c) the general principles of law recognized by civilised nations;
>
> (d) subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

48. In respect of Article 38(1)(a), an "international convention", also commonly known as a "treaty", can be defined as "an international agreement concluded between States in written form and governed by international law".[56] A treaty is distinct from a contract as it is an agreement between sovereign states governed by public international law and not by "the municipal law of some country".[57]

49. In the *Diallo* case, Judge Cancado-Trinidade of the ICJ set out the following principles in respect of the interpretation of human rights treaties:

> human rights treaties … are distinct from treaties of the classic type which incorporate restrictively reciprocal concessions and compromises; human rights treaties, in turn, prescribe obligations of an essentially objective character, implemented collectively, and are endowed with mechanisms of supervision of their own. … The converging case law to this effect has generated the common understanding, in the regional systems of human rights protection, that human rights treaties, moreover, are endowed with a special nature (as distinguished from multilateral treaties of the traditional type); that human rights treaties have a normative character and that their terms are to be autonomously interpreted; that in their application one ought to ensure an effective protection (*effet utile*) of the guaranteed rights; and that permissible restrictions (limitations and derogations) to the exercise of guaranteed rights are to be restrictively interpreted. …
>
> [The European and Inter-American Courts of Human Rights] have propounded the autonomous interpretation of provisions of human rights treaties, by reference to the respective domestic legal systems. …

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[55] *Ure v The Commonwealth of Australia* [2016] FCAFC 8 at [14] (Perram, Robertson and Moshinsky JJ).

[56] *Vienna Convention on the Law of Treaties*, 1969, 1155 UNTS 331 (entered into force on 27 January 1980), Article 2(1)(a).

[57] *Payment of Various Serbian Loans Issued in France (France v Yugoslavia)* [1929] PCIJ Ser A No 20 at [86].

> In the present domain of protection, international law has been made use of in order to improve and strengthen — and never to weaken or undermine — the safeguard of recognized human right.[58]

50. In respect of Article 38(1)(b), in order for a law to amount to customary international law it must satisfy two conditions. First, there must be a "settled practice" amongst states, meaning that the practice must be "extensive and virtually uniform".[59] Secondly, there must be "*opinio juris*", meaning that the practice must "be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it", and must not be merely "habitual" or motivated by "courtesy, convenience or tradition".[60]

51. Article 38(1)(c) authorises the ICJ to apply laws meeting three conditions. First, they must be "unwritten norms of a wide-ranging character"; secondly, they must be "recognised in the municipal laws of States"; and thirdly, they must be "transposable at the international level".[61]

52. The reference in Article 38(1)(d) to "means for the determination of rules of law" indicates that the materials referred to in the Article are not themselves sources of law, but rather are materials that provide guidance in assessing the existence of a law under one of the other three Articles.[62]

C.1.6 Shared "race, colour, descent or national or ethnic origin"

53. The Applicants must have a shared race, colour, descent or national or ethnic origin. These terms are not defined in the RDA.

54. The Courts have generally taken the view that "race" when described in discrimination legislation is a broad term.[63]

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[58] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 729 (Separate Opinion of Judge Cancado-Trinidade) at 755-758 [82]-[89].

[59] *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands) (Judgment)* [1969] ICJ Rep 3 at [74].

[60] *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands) (Judgment)* [1969] ICJ Rep 3 at [77].

[61] *Ure v The Commonwealth of Australia* [2016] FCAFC 8 at [128] (Perram, Robertson and Moshinsky JJ).

[62] *Ure v The Commonwealth of Australia* [2016] FCAFC 8 at [124]-[127] (Perram, Robertson and Moshinsky JJ).

[63] See, for example, *Ealing London Borough Council v Race Relations Board* [1982] AC 342 at 362 (Lord Simon) and *Australian Medical Council v Wilson* (1996) 68 FCR 46 at 75G (Sackville J).

55. Similarly, the term "ethnic origin" has been interpreted broadly. In *Mandla v Dowell Lee*,[64] the House of Lords held that for a group to constitute an ethnic group for the purposes of the English race discrimination legislation, the following characteristics are essential:

a. a shared history, or which the group was conscious as distinguishing it from other groups, and the memory of which it keeps alive; and

b. a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance.

56. Their Lordships further held that the following characteristics will be relevant, but not essential, to a finding that group constitutes an "ethnic group":

a. a common geographical origin or descent from a small number of common ancestors;

b. a common language, not necessarily peculiar to the group;

c. a common literature peculiar to the group;

d. a common religion different from that of neighbouring groups or the general community surrounding it; and

e. being a minority or an oppressed or a dominant group within a larger community.[65]

57. It is agreed that the Applicants all identify as Aboriginal persons or Torres Strait Islanders.[66] Those terms are defined in the RDA.

C.1.7 "Act" done by a "person"

58. The expression "act" is not defined in either the RDA or the CERD. However, section 3(3) of the RDA states that "refusing or failing to do an act shall be deemed to be the doing of an act and a reference to an act includes a reference to such a refusal or failure".

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[64] [1983] 2 AC 548 (Fraser, Edmund-Davis, Roskill, Brandon and Templeman JJ).

[65] [1983] 2 AC 548 at 562 (Lord Fraser of Tullybelton).

[66] ASF: 4.

59. The *Macquarie Dictionary*[67] defines the word "act" as:

> 1. anything done or performed; a doing; deed. 2. The process of doing…

60. There is no requirement that the act be intentional. This is not an element of section 9(1) of the RDA.[68]

61. By section 6 of the RDA, that Act binds the Crown in right of the Commonwealth and of each State and by section 22(a) of the *Acts Interpretation Act* 1901 (Cth) as amended unless the contrary intention appears "person" in any Act shall include a body politic or corporate as well as an individual.

62. The Respondents are each a "person" under this definition.

C.1.8 Meaning of 'distinction, exclusion, restriction or preference'

63. The terms "distinction", "exclusion", "restriction" and "preference" are not defined in the RDA.

64. There is an absence of any significant judicial consideration on the meaning of these terms. It appears the Courts have approached this element on the basis that these terms should be construed to have their ordinary meaning.69

65. The *Macquarie Dictionary*[70] defines these words as:

a. "distinction:

> 1. A marking off or distinguishing as different.
>
> 2. The recognising or noting of differences; discrimination.
>
> 3. A discrimination made between things as different.
>
> 4. The condition of being different; a difference.
>
> 5. A distinguishing characteristic.

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[67] Sixth Edition, October 2013.

[68] *Vata-Meyer v Commonwealth of Australia* [2015] FCAFC 139 at [27] (North, Collier and Katzmann JJ).

[69] See for example the approach by Sackville J in *Australian Medical Council v Wilson* (1996) 68 FCR 46 at 76 (Sackville J).

[70] Sixth Edition, October 2013.

6. A distinguishing or treating with special attention or favour.

7. A mark of special favour.

b. "exclusion":

1. The act of excluding.

2. The state of being excluded.

3. Physiol. A keeping apart; the blocking of an entrance.

c. "restriction":

1. Something that restricts; a restrictive condition or regulation; a limitation.

2. The act of restricting.

3. The state of being restricted.

d. "preference":

1. The act of preferring; estimation of one thing above another; prior favour or choice.

2. The state of being preferred.

3. That which is preferred; the object of prior favour or choice.

4. A practical advantage given to one over others…..'

66. The determination of whether there has been a "distinction", "exclusion", "restriction" or "preference" must be determined objectively based on an assessment of the evidence.[71]

C.1.9 Meaning of the phrase "based on"

67. Unlawful discrimination as defined by section 9(1) of the RDA requires that the particular "distinction", "exclusion", "restriction" or "preference" was "based on" the Applicants' "race, colour, descent or national or ethnic origin".

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[71] *Obieta v NSW Department of Education and Training and Ors* [2007] FCA 86 at [209] (Cowdroy J).

68. It is not a requirement that the only reason or even the substantive reason for the act is motivated by race or other of the related grounds. It is sufficient if race (or another ground) is simply one of the reasons for doing the unlawful act.[72]

69. The expression "based on" has been the subject of some judicial determinations.

70. The expression was considered by the South Australian Full Court in *Aboriginal Legal Rights Movement v State of South Australia (No. 1),*[73] in a case about the appointment of the Hindmarsh Island Royal Commission, where Doyle CJ (with the concurrence of Bollen J) said:

> I am of the opinion that the appointment of the Royal Commissioner is not made unlawful by s 9 of the *Racial Discrimination Act*. In my opinion that section is not attracted unless an act (the relevant act being the appointment of the Royal Commissioner) is done which in fact produced a distinction on the base of race (which has occurred here because the inquiry is into and affects Aboriginal beliefs only) and the existence of that racial distinction is the basis of the relevant act in the sense that the act occurred by reason of or by reference to the racial distinction. This does not mean that the inquiry is one as to motive. The inquiry is into whether the racial distinction is a material factor in the making of the relevant decision or the performing of the relevant act.[74]

71. In *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission,*[75] Weinberg J considered the phrase "based on" and held:

a. the expression 'based on' can be distinguished from other constructions used elsewhere in Federal anti-discrimination legislation (such as 'by reason of' or 'on the ground of') as the words 'based on' encompass a broader meaning of 'by reference to' and are not limited to 'by reason of';[76]

b. that the words 'based on' required a test of 'sufficient connection' with race rather than a 'causal nexus';[77]

c. a close relationship is required, between the designated characteristic and the impugned conduct, which is not necessarily causal;[78]

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[72] Section 18 of the RDA.

[73] (1995) 64 SASR 551 at 553 (Doyle CJ).

[74] (1995) 64 SASR 551 at 553 (Doyle CJ).

[75] (1998) 91 FCR 8 (Weinberg J).

[76] (1998) 91 FCR 8 at 30 (Weinberg J).

[77] (1998) 91 FCR 8 at 33 (Weinberg J).

d. the phrase is not confined to circumstances where there is an improper motive.

72. This approach was endorsed by the Full Federal Court in *Bropho v Western Australia*[79] and was most recently followed by Griffith J in *Maiocchi v Royal Australian & New Zealand College of Psychiatrists (No. 4)*.[80]

73. Sackville J (with Black CJ agreeing) held in *Australian Medical Council v Wilson*[81] following a review of Australian authorities in relation to other discrimination statutes that:

> The preponderance of opinion favours the view that s9(1) does not require an intention or motive to engage in what can be described as discriminatory conduct.

C.1.10 Equal footing

74. To breach s 9(1) of the RDA, a requirement must have the purpose or effect of impairing the recognition, enjoyment or exercise "on an equal footing" by people of the same race of any relevant human right or fundamental freedom.

75. A similar requirement is found in section 9(1A)(c) and so case law that gives consideration to this provision is also relevant.[82]

76. In *Australian Medical Council v Wilson*, Black CJ[83] and Sackville J[84] (Heerey J dissenting[85]) held that while the phrase calls for a comparison between two groups, it was

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[78] (1998) 91 FCR 8 at 33 (Weinberg J); see also *Baird & Ors v Queensland* (No.1) (2005) 224 ALR 541; *Commonwealth v McEvoy & Anor* (1999) 94 FCR 341.

[79] (2008) 169 FCR 59 at 79-80 [68]-[72] (Ryan, Moore and Tamberlin JJ).

[80] [2016] FCA 33 at [339]- [340].

[81] (1996) 68 FCR 46 at 74 (Sackville J).

[82] (1996) 68 FCR 46 at 48 (Black CJ).

[83] (1996) 68 FCR 46 at 47 (Black CJ).

[84] (1996) 68 FCR 46 at 80-82 (Sackville J).

[85] (1996) 68 FCR 46 at 63 (Heerey J). His Honour stated that the "two groups compared have to be subject to the *same* term, condition or requirement".

not necessary for the groups that are compared to have been subject to the same requirement.[86] Sackville J stated:

> In my opinion, the language used in s 9(1A)(c) is satisfied if the effect of a requirement to comply with a particular condition is to impair the exercise of a human right by persons of the same group as the complainant, on an equal footing with members of other groups, regardless of whether or not those other groups are required to comply with the same condition. Of course, the usual case of alleged discrimination involves the disparate impact of a particular requirement or condition upon two or more groups, each of which is identified by reference to race, colour, descent or national or ethnic origin. But there may well be cases in which members of a group are impaired in the exercise of a human right precisely because they must comply with a condition to which members of other groups are not subject.[87]

77. Black CJ stated:

> As its short title indicates, the principal object of the Act is the elimination of racial discrimination and some other like forms of discrimination. The Act gives effect to the International Convention on the Elimination of all Forms of Racial Discrimination. In this context the concept used in s9(1) and in s9(1A) of **impairing the enjoyment of a right on an equal footing must be taken to be a broad one that involves looking at the footing upon which rights are enjoyed by those sections of the community at large who do not suffer from the racial discrimination and the other like types of discrimination that the Act aims to eliminate**. The language used in s9 does not point to any narrower operation, in my view, and nor does the evident policy of the Act.[88]

C.2. Aboriginal deaths in custody and the community

C.2.1 Community needs and expectations

78. Paragraph 32 of the 3FASC pleads a number of allegations in relation to the needs and expectations of the community on Palm Island, including the Applicants and the Group Members, in relation to Aboriginal deaths in custody and in relation to the provision of policing services. The Respondents have pleaded that paragraph 32 of the 3FASC is embarrassing because:

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[86] Note that the terms of s 9(1A) of the RDA differ to the terms of other discrimination legislation which require a comparison of the ability of different groups to comply with the relevant requirement or condition: see for example s 6(1) of the DDA.

[87] (1996) 68 FCR 46 at 81 (Sackville J).

[88] (1996) 68 FCR 46 at (Black CJ), emphasis added.

> it alleges knowledge or a state of mind or expectations of a group of people described as the community of Palm Island, which group of people is not homogenous in terms of age, education, knowledge, intellectual ability or interest in the matters referred to in paragraph 32.[89]

In the Applicants' submission, that contention cannot be sustained.

79. The concept of community needs and expectations is far from alien to the law. For example, in succession law, a determination of whether an "adequate provision" has been made for an applicant's "proper maintenance, education or advancement in life" under section 59 of the *Succession Act* 2006 (NSW) is "guided and assisted by considering … perceived prevailing community standards of what is right and appropriate".[90] In environment and planning law, a "community need" is "a relative concept, 'not connoting present urgency' but rather relating to the 'general well-being of the community'".[91] In criminal law, when determining a person's sentence, the Court takes into account "the legitimate interest of the general community".[92] Accordingly, irrespective of the heterogeneity of its members, a community of people can have needs and expectations which are recognised by the Court.

80. In relation to the QPS in particular, the Applicants note that section 2.3(g) of the *Police Service Administration Act* 1990 (Qld) (***PSAA***) requires that the services provided by the QPS are provided as "required of officers under any Act or law or the reasonable expectations of the community; or reasonably sought of officers by members of the community". Further, section 2.3(b) of the PSAA prescribes the function of "the protection of all communities in the State, and all members thereof from unlawful disruption of peace and good order … and from commission of offences against the law generally". In the Applicants' submission, it follows that the function of the QPS is to provide services to the "communities of Queensland", of which the community on Palm Island is one.

81. Further, in paragraph 5(a) of the Reply, the Applicants have highlighted a number of police functions and obligations which are referable to the "community". In particular, the Applicants note that:

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[89] Defence: 25(a).

[90] *Andrew v Andrew* (2012) 81 NSWLR 656 at 661 [16] (Allsop P).

[91] *Kangaroo Point Residents Association Inc v Brisbane City Council* [2015] QPELR 203 at 227 [105] (Dorney DCJ).

[92] *Munda v Western Australia* (2013) 249 CLR 600 at 620 [55] (French CJ, Hayne, Crennan, Kiefel, Gageler and Keane JJ).

a. there was a Policy in section 6.4 of the OPM that "Officers should always consider cultural needs which exist within the community";[93]

b. section 2.5.1 of the OPM included a Policy that "To ensure investigations are conducted in a professional manner, members should cooperate … to achieve desirable outcomes which reflect the needs and expectations of the community";[94] and

c. many provisions of the QPS Code of Conduct were focussed on meeting community expectations.[95]

82. It follows that, in any proper evaluation of police conduct, the consideration of community needs and expectations is ineluctable. In the Applicants' submission, not only can the Court make a determination in respect of the needs and expectations of the community on Palm Island, doing so is necessary in order to adequately consider the conduct of police on the island during the relevant period.

C.2.2 Royal Commission report

83. In respect of community needs and expectations, the Applicants rely in many respects on matters in relation to the RCIADIC. The parties have broadly agreed on the nature and scope of the RCIADIC,[96] but its significance is in dispute.

(a) Police knowledge of Royal Commission report

84. The Applicants have pleaded that the content of the RCIADIC report and its recommendations were known or ought reasonably have been known by each of SS Hurley, DS Robinson, Insp Richardson and SS Whyte in particular, and in general by the superior officers of those officers, by senior officers stationed in communities with significant populations of Aboriginal persons and by officers of the rank Inspector or higher.[97]

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[93] ASF: 39(a).

[94] ASF: 54.

[95] See, ASF: 63, 65, 93, 104(viii).

[96] ASF: 26-32.

[97] 3FASC: 31.

85. Each of DI Webber,[98] DSS Kitching,[99] SS Whyte[100] and SS Dini[101] agreed that they had at least read the RCIADIC report in part, prior to November 2004. Accordingly, the Applicants submit that the allegations in paragraph 31 of the 3FASC have been established at least with respect to those officers, who were the only relevant officers to give evidence in these proceedings. The Applicants also note that the QPS conducted a review of policing on remote Aboriginal and Torres Strait Islander communities in 1994,[102] which was commissioned pursuant to the recommendations of the RCIADIC report.[103] It follows that the QPS as an institution was placing a great deal of focus on the RCIADIC Report at that time. The Applicants submit that the Court should infer from these matters that the Report and its contents would have, or ought to have, been known by officers of the types referred to in paragraph 31 of the 3FASC.

(b) Community knowledge of Royal Commission report

86. The Applicants have pleaded that in November 2004 the community on Palm Island, including the Applicants and the Group Members, were aware of the existence of the RCIADIC report and the general nature of its contents and recommendations,[104] and that they were, by reason of the circumstances in which Mulrunji died and the nature of their community, prone to forming a suspicion both that the death in custody of Mulrunji was caused or contributed to by SS Hurley and that a fair and impartial investigation would not occur.[105] It is further pleaded that the Applicants and Group Members were concerned to ensure that public officials and police officers paid appropriate regard to the RCIADIC report and its recommendations, where relevant to investigation of deaths in custody and the care of Aboriginal persons in police custody.[106]

87. In relation to the RCIADIC report, the Applicants emphasise in particular the observations of the Royal Commissioner, as included in Annexure A to the 3FASC, that:

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[98] T963.47-964.1.

[99] T1166.25-32.

[100] T1547.29-42.

[101] T825.14-17.

[102] Exhibit A107.

[103] Exhibit A107, p2 at 1.6-1.7.

[104] 3FASC: 32(a).

[105] 3FASC: 32(b).

[106] 3FASC: 32(d).

> Deaths in custody are particularly distressing for families and friends, and engender suspicion and doubt in their minds and also in the minds of members of the public. The deceased person has been in the custody and care of the State, not accessible in the general sense, his or her life controlled and ordered by functionaries of the State, out of sight and of normal contact. Deaths in such circumstances breeds anguish and suspicion equally. Time may heal some of the anguish, but the suspicion can be allayed only by the most open and thorough going laying of the facts on the table.[107] …
>
> As has been said earlier, there was a widely held suspicion amongst Aboriginal people, and others, that at the very least a number of the deaths were caused by foul play in the sense of the deliberate infliction of harm by custodians. This has turned out not to be the case. But it needs to be understood that this perception was not at all unreasonable for at least three quite separate reasons: firstly, custody by its nature being away from the public gaze and out of the range of family and friends, the circumstances are such as to easily lead to suspicion and doubt; secondly, the deep distrust grounded in history that Aboriginal people have for police and prison systems; and thirdly, the post-death investigations and the treatment of families were in not a few cases such as to raise suspicion rather than allay it.[108]

88. Both Mr Wotton[109] and William Blackman Snr[110] gave evidence that, on hearing of Mulrunji's death, they immediately expected that the police would cover it up—in Mr Blackman's case, because of the "history of Aboriginal people". Mr Wotton also gave evidence that he actively reviewed the RCIADIC report after Mulrunji's death to ensure that the police were following the recommendations[111] and that he spoke at the public meeting on Tuesday 23 November 2004 about the RCIADIC recommendations in relation to Mulrunji's death.[112] Mrs Agnes Wotton gave evidence that she had done some work in relation to the RCIADIC in her capacity as a member of the Aboriginal and Torres Strait Islander Commission and that she was concerned after Mulrunji's death because she knew that "black deaths in custody" had occurred in a lot of other communities.[113]

89. Ms Andrea Sailor gave evidence that she was particularly affected by Mulrunji's death in custody as she had a brother who had died in custody.[114] The footage of the community meeting on Tuesday 23 November 2004 depicts several community

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[107] 3FASC: Annexure A, 1.2.4.

[108] 3FASC: Annexure A, 3.1.2.

[109] T556.24-26.

[110] T181.33-45.

[111] T591.4-13; T701.20-27.

[112] T592.2-10.

[113] T153.9-23; T158.14-20.

[114] T84.24-27; see also, DI Webber's evidence at T906.12-18 and T1015.10-20.

members expressing their discontent at the failure of the police to adhere to the RCI-ADIC report's recommendations,[115] including Ms Sailor's mother, Mayor Erykah Kyle, who also spoke about the trauma that her family had gone through as a result of her son dying in custody.[116]

90. Accordingly, the Applicants submit that the evidence establishes the allegations in paragraph 32 of the 3FASC regarding community awareness of the RCIACID report have been made out.

C.2.3 Cultural needs peculiar to the community

91. The Applicants have pleaded in paragraph 32(c) of the 3FASC that the Applicants and Group Members had cultural needs peculiar to their community, by reason of the community being predominantly Aboriginal, against the background of the circumstances in which the Aboriginal community came to inhabit Palm Island and the treatment of the community by public officials since that time.

92. The Applicants have subsequently provided extensive particulars of the history and cultural needs of the community. In establishing that history, the Applicants rely primarily on the report prepared by Dr Rosalind Kidd and its annexures.[117] In establishing the cultural needs of the community, the Applicants rely primarily on the reports prepared by Dr Diana Eades[118] and Professor Jon Altman,[119] as well as their lay evidence, as elsewhere referenced.

93. The Applicants do not propose to restate the expert reports in great detail in these submissions. The Applicants rely on the detailed material in Annexure A to these submissions in establishing that the particulars of the history of the community and of the cultural needs of the community have been made out.

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[115] Exhibit A7, Title01.mkv at 11:10. 13:45, 14:30.

[116] Exhibit A7, Title01.mkv at 17:15.

[117] Exhibit A2.

[118] Exhibit A6.

[119] Exhibit A3.

C.3. Police duties in the conduct of an investigation

C.3.1 Duties at common law

94. The parties agree that in 2004, residents of Queensland were entitled to expect that the QPS would uphold the law.[120] It is well established that the police have a general duty to enforce the law, subject to a broad discretion.[121] The application of that duty in relation to the investigation of a complaint made to the police was considered by Emmett J in *O'Malley v Keelty, Australian Federal Police Commissioner*:[122]

> Where a member of the Australian Federal Police receives a complaint from a member of the public, the member of the Australian Federal Police would certainly discharge his or her duty to enforce the law if he or she gives due and proper consideration to the question of whether, and in what way, an initial inquiry into the complaint should be made, and then acts appropriately upon the view formed …
>
> [T]he Commissioner of Police is not beyond the law. If the police fail in the duties, however ephemeral it may be to describe them, a citizen is entitled to assistance in ensuring that the police do their duty. For example, if there was evidence of a dishonest refusal to investigate on the part of an investigating officer, or if the evidence suggests that an honest police officer acting reasonably could not properly come to the view that the matter was not capable of investigation there may be, and I emphasise **may** be, a basis upon which the Court could interfere.[123]

95. Similarly, in *Zalewski v Turcarolo*,[124] Hansen J held that a police officer was liable for breach of such a duty because he had acted "impetuously without due inquiry and reflection in disregard of police instructions".[125]

96. The Applicants submit that these principles are applicable to a police investigation into a death in police custody. It is on this basis that the Applicants have pleaded an Integrity Duty and a Reasonable Diligence Duty, respectively to "preserve the integrity of the investigation and evidence obtained, collected or produced in the course of the investigation" and to "conduct the investigation with reasonable diligence, and take all steps and make all decisions that would reasonably be expected of QPS

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[120] ASF: 246.

[121] See, eg, *R v Metropolitan Police Commissioner; Ex parte Blackburn* [1968] 2 QB 118 at 136 (Lord Denning MR).

[122] [2004] FCA 1688 (Emmett J).

[123] [2004] FCA 1688 at [6]-[8] (Emmett J), references omitted, original emphasis.

[124] [1995] 2 VR 562 (Hansen J).

[125] [1995] 2 VR 562 at 578-579 (Hansen J).

officers".[126] Relevantly, a number of police obligations and procedures appear calculated to require that the Integrity Duty[127] and the Reasonable Diligence Duty[128] are adhered to.

97. In the Applicants' submission, a failure of a police officer to adhere to those duties would constitute the conduct of that officer's duties with a lack of due inquiry and would, accordingly, be in breach of the officer's duties under the general law.

C.3.2 Duties under the OPM

98. The provisions of the OPM that are applicable to investigations in general and to deaths in custody in particular have been extensively set out in the ASF.[129] To avoid unnecessary repetition, the Applicants do not propose to restate those provisions in these submissions, save to the extent that the context requires.

99. Whilst the wording of the provisions of the OPM is not in dispute, and neither, in general, is the applicability, there is a dispute as to whether various provisions of the OPM which the Applicants allege have been breached were capable of being breached. It is agreed that the OPM contained "Orders", "Policies" and "Procedures.[130] The Applicants have pleaded[131] that in November 2004, the QPS ordinarily complied with Orders, Policies and Procedures. Whilst it is not in dispute that Orders were required to be complied with, the pleaded position of the Respondents in a number of instances appears to be that various Policies and Procedures were not binding on QPS officers and therefore could not have been breached.[132] It is therefore necessary to address the issue in these submissions. It is also noted that the Respondents have both denied[133] and admitted with qualification[134] most of the allegations in paragraph 246 of the 3FASC. The qualifications to the Respondents' admissions in relation to paragraph 246 of the 3FASC are as follows:

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[126] 3FASC: 115.

[127] See ASF: 97, 120, 123.

[128] See ASF: 86, 89, 102, 104, 119.

[129] ASF: 36-54, 107-126.

[130] ASF: 34-35.

[131] 3FASC: 246(a)-(b).

[132] See, eg, Defence: 75(b), 126(b).

[133] Defence: 167(a).

[134] Defence: 167(c).

a. because the QPS is a large organisation consisting of individuals it is inevitable that in the performance of the functions of the QPS honest mistakes and errors of judgment will be made from time to time;[135]

b. QPS officers provided services which attempted to meet the cultural needs and ethnic demographic characteristic and needs of all communities;[136]

c. it is impossible to provide to communities policing services which will always meet such needs and characteristics because in some instances there is an inevitable tension between the laws applied in providing police services and such needs and characteristics.[137]

100. The Applicants have objected to the denial of paragraph 246 of the 3FASC, on the basis that it is inconsistent with the Respondents' admissions.[138] Further, the Respondents have admitted vicarious liability[139] and so the denials and qualifications in paragraph 167 of the Defence cannot be maintained to the extent that they are inconsistent with that admission. The definition of a "Policy" in the OPM was:

> a policy outlines the Service attitude regarding a specific subject and must be complied with under ordinary circumstances. Policy may only be departed from if there are good and sufficient reason(s) for doing so. Members may be required to justify their decision to depart from policy.

101. In the Applicants' submission, an obvious corollary to the requirement that a Policy "must be complied with under ordinary circumstances" is that a Policy may only be departed from in extraordinary circumstances, that is, where circumstances exist which are not ordinary and which justify a particular departure from the Policy.

102. The definition of "Procedure" in the OPM relevantly included "a procedure outlines generally how an objective is achieved or a task performed, consistent with policies and orders." It follows that where a Procedure is complied with, Policies and Orders would also have been complied with. A question arises as to the consequences of non-compliance with a Procedure.

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[135] Defence: 167(b).

[136] Defence: 167(d).

[137] Defence: 167(e).

[138] Reply: 53.

[139] ASF: 356-362.

103. It is acknowledged that there is no expressly stated obligation to comply with Procedures. However, the Applicants submit that such an obligation must exist to some extent, at least insofar as the Procedure concerns police conduct.[140] The OPM is a statement of directions issued by the Commissioner pursuant to section 4.9(1) of the PSAA.[141] In the Applicants' submission, if the Commissioner has issued a direction that a particular Procedure outlines generally how a task is to be performed in compliance with Orders and Policies, it should be assumed that the Procedure will ordinarily be complied with. Alternatively, the terms of a Procedure ought at least to inform the interpretation of the Policies and Orders to which that Procedure relates. If neither approach is adopted, Procedures would be superfluous and without effect, and the Applicants submit that the Court must not assume that the Commissioner intended to issue superfluous directions to the members of the QPS.[142]

104. Further, the Applicants' allegations of breaches of Policies and Procedures must be viewed in the context of the Applicants' overall claim. This is not a case for an administrative law remedy such as *certiorari* or *mandamus*. It is a case alleging the police committed acts of unlawful racial discrimination. Whilst the Applicants have pleaded a number of allegations which rise to the level of jurisdictional error in relation to decisions made by police officers, it is not necessary for each allegation of a breach of a Policy or a Procedure to be an administrative law error. For the purpose of the Applicants' case, it is necessary only to show that the conduct of the police officers in question amounted to a distinction, exclusion, restriction or preference based on the race of the Applicants and Group Members.

105. To the extent that the Respondents seek to rely on an allegation that a particular act was an "honest mistake" or an "error of judgment", that allegation is irrelevant to the Applicants' claim. In *Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission*,[143] Weinberg J held that:

> should [not] be construed in such a way as to confine its proscription of racial discrimination to circumstances where there is an element of improper motive in the "distinction" etc. … Section 9(1), upon its proper construction, entitles individuals or groups not to be singled out for identification by government departments or agencies by reference to their descent or ethnic origin, at least where other individuals or

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[140] Note that the definition of "Procedure" states that a Procedure "may outline actions which are generally undertaken by persons or organisations external to the Service."

[141] ASF: 9(g).

[142] *Cf*, ASF: 95.

[143] (1998) 91 FCR 8 (Weinberg J).

> groups are not so treated. The Commissioner's finding that the directive was "based on a desire to preserve peace and harmony" may well have been unexceptionable. For present purposes I am prepared to assume that it was correct. However, that finding is irrelevant if it be established that the distinction imposed by the directive in the treatment of the Macedonian language was "based on" (in the sense of made "by reference to") the ethnic origin or descent of those who spoke that language.[144]

106. Accordingly, in the Applicants' submission, that a particular police officer chose to do or not to do a particular act because of an "honest mistake" or "error of judgment" has no bearing on whether that act breached section 9 of the RDA.

107. In respect of the qualifications pleaded in paragraphs 167(d)-(e) of the Defence, whilst the Applicants do not cavil with those qualifications as general propositions, it is not clear to the Applicants how or why those qualifications are relevant to the Respondents' Defence. The Respondents have not pleaded that it was impossible to provide the Palm Island community with services that met its cultural needs and characteristics because of a tension between those needs and characteristics and the laws applied in providing police services.

108. For the above reasons, the Applicants submit that the Court should presume that Policies and Procedures are complied with in ordinary cases and, where a Policy or a Procedure has not been complied with, absent a compelling explanation for such non-compliance, the failure to comply with the Policy or the Procedure at least adds weight to the Applicants' argument that the relevant act constituted a "distinction, exclusion, restriction or preference" which was "based on the race" of the Applicants within the meaning of section 9 of the RDA.

C.3.3 Impartiality and natural justice

109. The Impartiality Duty, as pleaded,[145] includes the obligation in section 1.17 of the OPM to "expeditiously conduct an impartial investigation", and the obligations in sections 10.6(a) and 10.14(ix) of the Code of Conduct, which respectively require QPS members to "perform their duties in such a manner that public confidence and trust in the integrity and impartiality of the Queensland Police Service is preserved", and to "perform their duties impartially and in the best interests of the community of Queensland, without fear or favour". It is agreed that the investigation team was subject to those obligations.[146] Paragraph 108 of the 3FASC also refers to a number of

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[144] (1998) 91 FCR 8 at 39-40 (Weinberg J).

[145] 3FASC: 108.

[146] Defence: 70; ASF: 117.

other police obligations. However, the Applicants do not press those allegations as the duties previously mentioned are the subject of agreed facts and are sufficient to establish the Applicants' claims.

110. An investigation is a fact-finding process. The Applicants submit that the partiality of the police service in the conduct of an investigation will have been compromised where a fair minded lay observer might reasonably apprehend that a police officer involved in the investigation "might not bring an impartial mind to the relevant decisions in the investigation",[147] or that the findings of the investigation might not be made "as the result of a neutral evaluation of the merits".[148]

111. This test is derived from the fundamental principle of natural justice, requiring not only that justice is done, but that it is seen to be done.[149] The principles of natural justice or procedural fairness are applicable to administrative decision makers such as police officers[150] and are expressly incorporated into the QPS Code of Conduct.[151] The question is largely a factual one, but must be considered in the legal, statutory and factual contexts of the investigation.[152] How the principle is applied in respect of a particular decision will "depend upon the nature of the decision and its statutory context, what is involved in making the decision and the identity of the decision-maker".[153] The fair minded lay observer does not make snap judgments, is taken to be reasonable, knows commonplace things, is neither complacent nor unduly sensitive or suspicious and has knowledge of all the circumstances of the case.[154]

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[147] *Beckett v New South Wales* [2015] NSWSC 1017 at [597] (Harrison J); *Ebner v Official Trustee* (2000) 205 CLR 337 at 344 [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[148] *Isbester v Knox City Council* (2015) 147 ALD 93 at 140 [58] (Gageler J).

[149] *Ebner v Official Trustee* (2000) 205 CLR 337 at 343-344 [3]-[5] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[150] *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Rainbird v Bonde* [2016] TASSC 10 at [30] (Blow CJ).

[151] ASF: 105-106.

[152] *Isbester v Knox City Council* (2015) 147 ALD 93 at 97 [20] (Kiefel, Bell, Keane and Nettle JJ).

[153] *Isbester v Knox City Council* (2015) 147 ALD 93 at 98 [23] (Kiefel, Bell, Keane and Nettle JJ).

[154] Royal Commission into Trade Union Governance and Corruption, *Reasons for Ruling on Disqualification Applications* (31 August 2015) at [40].

D. QPS Failures of 19 to 24 November 2004

D.1. Compromise of integrity of investigation

112. For the reasons set out below, the Applicants submit that the police investigation into Mulrunji's death was severely compromised in its integrity.

D.1.1 Drive from the airport with SS Hurley

113. It is agreed between the parties that, after the investigation team landed on Palm Island, SS Hurley drove DI Webber and DSS Kitching from the airport to the police station.[155] During that drive, there was a discussion that was not electronically recorded[156] and was not recorded in any other way, such as in a notebook during the journey or in a later statement.

114. The Applicants plead[157] that the decision of DI Webber to allow SS Hurley to collect the investigation team from the airport gave rise to an actual or apparent conflict of interest in the conduct of the investigation, created a reasonable apprehension of bias and was a breach of the Impartiality Duty, the Integrity Duty and/or the Reasonable Diligence Duty. The Respondents have denied these allegations.[158]

115. The Applicants have pleaded that the following acts or omissions to act were "acts" for the purpose of section 9 of the RDA:

a. the failure to treat SS Hurley as a suspect;[159]

b. the failure to electronically record the conversation in the police vehicle on the way from the airport;[160]

c. SS Hurley collecting the investigation team from the airport;[161]

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[155] ASF: 139.

[156] ASF: 220.

[157] 3FASC: 230(a).

[158] Defence: 151.

[159] 3FASC: 244(k).

[160] 3FASC: 244(k).

d. the failure of the QPS to suspend SS Hurley from duty;[162] and

e. the fact of SS Hurley continuing to perform operational duties, including in relation to the investigative process.[163]

(a) Other transport options

116. It is agreed between the parties that Const Ben Tonges and Const Kristopher Steadman were present on Palm Island on 19 November 2004 and attended the police station after the death of Mulrunji and neither was asked or directed to transport the investigation team from the airport.[164] The Respondents plead in paragraphs 81 and 82 of the Defence that PLO Bengaroo was the only police officer other than SS Hurley and Sgt Leafe who was rostered to perform duty at the time that the investigation team arrived on Palm Island at about 2.55pm on 19 November 2004 and that there was no taxi service or public transport that could have transported the investigation team to the airport.

117. In the Applicants' submission, there were other transport options available to the investigation team than travelling with SS Hurley. The duty roster indicates that Consts Steadman and Tonges were rostered to commence duty at 4pm that day.[165] In the circumstances, it would not have been unreasonable to direct them to commence duty 90 minutes early in order to pick up the investigation team. In any event, the reason for the investigation team being driven by SS Hurley was not the lack of other options. DI Webber conceded that other transport options were not explored.[166] Accordingly, the decision of the investigation team to be driven to the police station by SS Hurley cannot be said to have resulted from a lack of other options. It is clear that it in fact resulted from a failure of the investigation team to consider their obligations to ensure the appearance of impartiality in the conduct of the investigation.

(b) Discussions during the drive

118. The Applicants allege in paragraph 129 of the 3FASC that during the drive from the airport there was a discussion about how the investigation would be conducted. DI

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[161] 3FASC: 244(m)(iii).

[162] 3FASC: 244(v).

[163] 3FASC: 244(v), (n)(iii).

[164] ASF: 136-137.

[165] Exhibit A22.

[166] T964.15-30; T966.4-20.

Webber gave evidence that the discussion that took place during the drive from the airport concerned the necessity for the Tactical Crime Squad officers to take over policing duties on Palm Island, as well as whether there might be any unrest or ill will in the community once the news of the death became widespread.[167] DSS Kitching stated that the discussion was "not about the death, but what about what was going to transpire".[168]

119. In the Applicants' submission, DSS Kitching's reference to "what was going to transpire", whilst vague, most likely relates to some aspect of operational policing duties on the island in view of the death. That would be consistent with DI Webber's account. The Applicants further submit that a conversation of that type would in fact be a "discussion about how the investigation would be conducted" and the allegation in paragraph 129 of the 3FASC has been established.

(c) Knowledge that SS Hurley was the arresting officer

120. The Applicants have pleaded that, at the time the investigation team was driven to the police station by SS Hurley, DI Webber and DSS Kitching knew or reasonably apprehended that SS Hurley would be a "person of interest" in the investigation.[169] The Respondents have pleaded that the investigation team was not then aware of the allegation made later that SS Hurley had assaulted Mulrunji.[170] In the Applicants' submission, the evidence establishes that DI Webber and DSS Kitching had sufficient knowledge of SS Hurley's role in the investigation that they ought not to have allowed him to drive them to the police station.

121. DI Webber's evidence in relation to the extent of his knowledge about what had happened on Palm Island prior to departing Townsville was that he knew no more than that a male Aboriginal person was deceased and was located in a cell at the Palm Island police station.[171] DSS Kitching's evidence in that regard was that he knew "very little at all",[172] although he was told that it was an Aboriginal death in custody prior to leaving Townsville.[173] For the following reasons, the Applicants

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[167] T905.19-25.

[168] T1184.21.

[169] 3FASC: 129(b).

[170] Defence: 83(b).

[171] T903.24-28; T944.1-6; T959.22-960.31.

[172] T1184.8-9; T1185.12-13.

[173] T1183.10-13.

submit that this evidence must be rejected, and the Court should find that when they departed Townsville, DI Webber and DSS Kitching both knew that SS Hurley had been the officer who arrested Mulrunji, that he needed to be interviewed in relation to the investigation and that they ought to have known better than to get into the car with him.

122. It is agreed between the parties that the following chain of notifications occurred on 19 November 2004 regarding Mulrunji's death in custody:

a. at about 11.30am, SS Hurley called the Townsville District Police Communications Centre and advised SS Jenkins of the death in custody;[174]

b. at about 11.30am, SS Hurley telephoned Insp Strohfeldt and advised him of the death in custody;[175]

c. at about 11.33am SS Frank Jenkins telephoned Insp Strohfeldt and advised him of the death in custody;[176]

d. at about 11.45am, SS Hurley telephoned DS Robinson, who was in Townsville, and advised him of the death in custody;[177]

e. between about 11.40am and 12pm, Insp Strohfeldt notified DI Webber of Mulrunji's death;[178]

f. between about 11.40am and 12pm, DI Webber appointed DSS Kitching as the primary investigator in the investigation into Mulrunji's death;[179]

g. some time shortly thereafter, DI Webber also appointed DS Robinson to assist with the investigation.[180]

123. DI Webber gave evidence that after being contacted by Insp Strohfeldt, he contacted a number of other persons to advise them of what had occurred, including Chief Superintendent Howell, Acting Assistant Commissioner Wall, the Coroner's office and

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[174] ASF:21.

[175] ASF:22.

[176] ASF: 23.

[177] ASF: 24(a)-(c).

[178] ASF: 127.

[179] ASF: 128.

[180] ASF: 129.

Insp Kachel, the Professional Practices Manager in the Northern Region.[181] DI Webber also gave evidence that officers from the Tactical Crime Squad accompanied his team to Palm Island in order to conduct routine policing operations, as the officers at Palm Island "had been involved in the arrest and would need to be interviewed and questioned in relation to the incident".[182]

124. It follows that by the time the investigation team departed Townsville:

a. DI Webber had discussed the death in custody with Insp Strohfeldt, who had spoken to SS Hurley personally;

b. after speaking to Insp Strohfeldt, DI Webber had considered that he had sufficient information about the death in custody to brief his superior officers;

c. DS Robinson, who was with DI Webber and DSS Kitching, had spoken to SS Hurley personally regarding the death in custody; and

d. the investigation team knew that police officers on Palm Island had been involved in the arrest and would need to be interviewed and that the Tactical Crime Squad had been brought in to take over policing duties on Palm Island for that reason.

125. In the Applicants' submission, in those circumstances, it is highly improbable that DI Webber and DSS Kitching had not received information that SS Hurley was the arresting officer and would need to be interviewed. It is evident from the "significant event message" or "SIGEV" produced by SS Jenkins at 1.40 pm that he knew SS Hurley to be the arresting officer.[183] Whilst both DI Webber and DSS Kitching claimed not to have seen the SIGEV prior to their departure,[184] the Applicants submit that it is unlikely that this information had not found its way to either of them before that time. Further, some consideration had evidently been given to the fact that police officers had been involved in the incident and needed to be interviewed and it is unlikely that the investigating officers were not aware that this included the Officer in Charge of the police station. It is also noted that DSS Kitching commenced the investigation by interviewing SS Hurley[185] and that DI Webber gave evidence that he did

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[181] T902.3-7; T929.24-26; T944.30-945.26.

[182] T903.1-10.

[183] Exhibit R32.

[184] T959.13-960.7; T1183.42-1184.3.

[185] ASF: 142.

not consider that it was appropriate for SS Hurley to notify Mulrunji's next of kin of the death as he had been involved in the incident.[186] The proposition that the investigating officers were not aware that the officers who needed to be interviewed included the officer in charge of the police station cannot be sustained.

126. In any event, the knowledge of SS Hurley's involvement in Mulrunji's arrest and death in custody did not prevent the investigation team from having dinner with him on the night of 19 November 2004 or being driven by him to Dee Street the following day. The Applicants submit that it is implausible to argue that the knowledge of SS Hurley's involvement or lack thereof had any bearing on the behaviour of the investigation team. Rather, it is clear that they simply were not concerned with the appearance of impartiality.

(d) Compromise of integrity of investigation

127. In the Applicants' submission, it was manifestly inappropriate for the investigation team to be seen in public being driven through the community by the officer who had arrested Mulrunji and to be in a vehicle with that officer discussing details of the death in circumstances where they knew that they would shortly be conducting a formal interview with him as a part of the investigation. A fair minded lay observer would reasonably assume that the investigating officers were not bringing an impartial mind to the investigation.

128. Both DI Webber and DSS Kitching conceded that SS Hurley drove them from the airport in uniform and visibly on duty[187] and that the decision to drive in the vehicle with SS Hurley created a perception of bias and a lack of impartiality, but both also maintained that this did not occur to them at the time.[188] In the Applicants' submission, if the impropriety did not occur to either officer at the time, it is clear that the integrity of the investigation was not a priority for either officer. The allegation that DI Webber breached the Impartiality Duty should be accepted. In respect of the Reasonable Diligence Duty, the Applicants submit that an honest and reasonable investigating officer in those circumstances would reasonably be expected not to get into a vehicle with a person whom they knew was about to be the subject of an interview in the investigation. Similarly, in respect of the Integrity Duty, the Applicants submit that the integrity of the evidence taken from SS Hurley would have been compro-

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[186] T1014.5-15.

[187] ASF: 963.2-10; T1186.28-37.

[188] T962.18-22; T1184.40-1186.16.

mised in circumstances where the investigating officers had had discussions with him regarding the death in custody prior to the commencement of the recorded interview. The allegations in paragraph 230(a) of the 3FASC have been made out.

D.1.2 Dinner with SS Hurley

129. The parties agree that at about 10.30 pm on 19 November 2004, DI Webber, DSS Kitching and DS Robinson ate a meal, prepared by DS Robinson, with SS Hurley at SS Hurley's residence, during which meal they consumed a modest amount of beer.[189] It has also been agreed that this compromised the appearance of partiality of the investigation.[190] The Applicants have further pleaded that the decision to eat the meal and consume alcohol at SS Hurley's residence constituted a breach of the Impartiality Duty, the Integrity Duty and the Reasonable Diligence Duty.[191]

130. In relation to the dinner at SS Hurley's house, the Applicants have pleaded that the following acts or omissions to act are "acts" for the purpose of s 9 of the RDA:

a. the failure to treat SS Hurley as a suspect;[192]

b. the failure to electronically record the conversation that took place during the dinner at SS Hurley's house;[193] and

c. the fact of the dinner at SS Hurley's house taking place and alcohol being consumed.[194]

131. It is agreed that, prior to about 10 pm on 19 November 2004, each of the members of the investigation team knew or reasonably ought to have known that SS Hurley was the QPS officer most closely associated with Mulrunji's arrest and subsequent death in custody as:[195]

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[189] ASF: 147.

[190] ASF: 230.

[191] 3FASC: 229.

[192] 3FASC: 244(k).

[193] 3FASC: 244(k).

[194] 3FASC: 244(m)(ii).

[195] ASF: 211.

a. SS Hurley was the most senior officer on Palm Island at the time of the arrest and death of Mulrunji and the officer in charge of the watchhouse at the time of death;

b. whilst both SS Hurley and PLO Bengaroo had been present at the arrest of Mulrunji, SS Hurley was the arresting officer;

c. SS Hurley had been the officer who took Mulrunji from the police van into the Police Station;

d. SS Hurley had been present at the Palm Island Police Station when Mulrunji is believed to have died, and was the officer who reported Mulrunji's death;

e. SS Hurley was the only QPS officer or member who had been present both at the scene of the arrest and the scene of the death (not agreed);[196]

f. Mulrunji sustained a small injury above his right eyebrow during the period between being arrested and prior to being placed in the cell;

g. prior to Mulrunji's death in custody, Mulrunji and SS Hurley had been involved in a struggle.

132. On the afternoon and evening of 19 November 2004, DSS Kitching and DS Robinson conducted interviews with SS Hurley,[197] PLO Bengaroo[198] and Sgt Leafe.[199] Each of the three officers had said that Mulrunji had punched SS Hurley whilst being removed from the back of the police wagon, that SS Hurley had struggled through the door with Mulrunji and then Mulrunji had been lying limp on the ground.[200] In the Form 1, which was completed that evening by DSS Kitching and then reviewed by DI Webber,[201] DSS Kitching had written:

> HURLEY stated that he arrested the deceased in Dee Street, Palm Island. At that time the deceased was aggressive and abusive towards police and was physically placed in the rear of a caged police vehicle. HURLEY states that upon arrival at the police

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[196] 3FASC: 215(e). Note that this allegation is not the subject of agreed facts. See: Defence, 137(a)-(b); Reply: 48(a).

[197] Exhibits A198 and A26.

[198] Exhibits A199 and A27.

[199] Exhibit A30.

[200] T1200.15-1202.5.

[201] ASF: 166-169.

> station he opened the door on the cage of the police vehicle and at that time the deceased became aggressive and punched HURLEY in the side of the face. HURLEY then physically restrained the deceased and struggled with him to the rear door of the police station where they both fell to the ground. Another police officer Sergeant Michael LEAFE then assisted Senior Sergeant HURLEY place the deceased into the watchhouse cell by dragging him with both arms.[202]

133. It follows that, on the evening of 19 November 2004, DS Robinson, DSS Kitching and DI Webber knew that there had been an altercation between SS Hurley and Mulrunji immediately prior to the death, at least to the extent that Mulrunji had been aggressive towards SS Hurley and there had been some sort of prolonged physical struggle between the two individuals. DSS Kitching and DI Webber were present on Palm Island in order to investigate the circumstances of Mulrunji's death. In the Applicants' submission, it would have been abundantly clear on the evening of 19 November 2004 that SS Hurley was a central subject of that investigation.

134. It is in that context that the decision of the investigating officers to eat a meal at SS Hurley's house must be viewed. The evidence indicates that DS Robinson contacted DSS Kitching and DI Webber that evening at around 9.30 pm or 10 pm and offered them a meal that he had cooked.[203] The three officers then departed the police station and, on the way, DS Robinson advised DI Webber and DSS Kitching that the meal was at SS Hurley's house.[204]

135. DSS Kitching's evidence was that there was "minor talk" at the dinner, but that the investigation was not discussed.[205] DI Webber's evidence was that there was a conversation during the meal which primarily concerned football memorabilia which SS Hurley had displayed on his wall.[206] In the Applicants' submission, it is highly improbable that the officers did not discuss the investigation at any stage in the course of the meal. In any event, both DI Webber and DSS Kitching accepted that they probably could have eaten the meal elsewhere, but that it did not occur to them to explore other options.[207] The issue of concern is not necessarily whether they in fact discussed the investigation with SS Hurley, but that they consciously allowed themselves to be in a position where they could have done so. In the Applicants' submis-

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[202] Exhibit A17, pp8-9.

[203] T1024.19-35; T1218.10-15.

[204] T1024.32-35; T1218.18-20.

[205] T1219.25-30.

[206] T909.40-45.

[207] T1025.38-1026.10; T1221.35-40.

sion, a fair minded lay observer would reasonably assume that the investigating officers were not bringing an impartial mind to the investigation. The allegation that the investigation team breached the Impartiality Duty should be accepted.

136. In respect of the Reasonable Diligence Duty, the Applicants submit that an honest and reasonable investigating officer in those circumstances would reasonably be expected not to have dinner with SS Hurley's level of involvement in the investigation. Similarly, in respect of the Integrity Duty, the Applicants submit that the integrity of the evidence taken from SS Hurley the following day would have been compromised in circumstances where the investigating officers had discussions with him over dinner that evening. The allegations in paragraph 229 of the 3FASC have been made out.

D.1.3 Failure to treat SS Hurley as a suspect

137. It is agreed that, prior to the visit with SS Hurley to the site of Mulrunji's arrest at Dee Street on 20 November 2004, each of the members of the investigation team and Insp Williams knew or reasonably ought to have known:

a. that SS Hurley was the QPS officer most closely associated with Mulrunji's arrest and subsequent death in custody, because:[208]

i. SS Hurley was the most senior officer on Palm Island at the time of the arrest and death of Mulrunji and the officer in charge of the watchhouse at the time of death;

ii. whilst both SS Hurley and PLO Bengaroo had been present at the arrest of Mulrunji, SS Hurley was the arresting officer;

iii. SS Hurley had been the officer who took Mulrunji from the police van into the Police Station;

iv. SS Hurley had been present at the Palm Island Police Station when Mulrunji is believed to have died and was the officer who reported Mulrunji's death;

v. Mulrunji sustained a small injury above his right eyebrow during the period between being arrested and prior to being placed in the cell;

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[208] ASF: 211.

vi. prior to Mulrunji's death in custody, Mulrunji and SS Hurley had been involved in a struggle; and

b. about the allegations that SS Hurley had assaulted Mulrunji in the police station made by Roy Bramwell in his interview with DSS Kitching and DS Robinson and in his video re-enactment with DI Webber and Insp Williams.[209]

138. On that basis and the basis of the Presumption Duty[210] and recommendation 35(a) of the RCIADIC,[211] the Applicants have pleaded that SS Hurley ought to have been treated by the investigation team as a suspect in a homicide or an assault.[212] It is agreed that DI Webber, DSS Kitching and DS Robinson did not do so.[213]

139. The Applicants have pleaded that the following acts or omissions to act were "acts" for the purpose of section 9 of the RDA:

a. the failure to treat SS Hurley as a suspect;[214]

b. the failure to electronically record the conversation in the police vehicle *en route* to the site of the arrest;[215]

c. the fact of the investigation team being driven to the site of the arrest by SS Hurley;[216]

d. the fact of the investigation team attending the site of the arrest with SS Hurley without being accompanied by PLO Bengaroo;[217]

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[209] ASF: 212.

[210] The Procedure in section 16.24.3 of the OPM that a commissioned officer responsible for an investigation into a death in custody should "not presume suicide or natural death regardless of whether it may appear likely"—3FASC: 117.

[211] That police standing orders or instructions should provide specific directions as to the conduct of investigations into the circumstances of a death in custody requiring that investigations should be approached on the basis that the death may be a homicide, and suicide should never be presumed—see Annexure A to the 3FASC.

[212] 3FASC: 218.

[213] ASF: 222.

[214] 3FASC: 244(k).

[215] 3FASC: 244(k).

[216] 3FASC: 244(m)(iii).

[217] 3FASC: 244(m)(iii).

e. the failure of the QPS to suspend SS Hurley from duty;[218] and

f. the fact of SS Hurley continuing to perform operational duties, including in relation to the investigative process.[219]

(a) First Bramwell interview

140. The first interview with Roy Bramwell was conducted at 8.15 am on 20 November 2004. In that interview, Mr Bramwell said to DSS Kitching and DS Robinson, clearly and unequivocally:

> Chris started punchin' him just in the hall there, Chris started punchin' him. "You want more Mr Doomadgee?" He went like that. "You want more Mr Doomadgee hey that's enough for ya?" Just kept on going like that. Chris. Ah I just sat down and (ui) I seen Mr Doomadgee's legs sticking out.[220]
>
> … And Chris started punchin' him. I seen Chris goin' at—I seen Chris goin' at him like that, you know.[221]

141. Then, in response to DSS Kitching's question as to how Mr Bramwell could see SS Hurley, Mr Bramwell stated:

> Well he tall, he tall you know. I just seen the elbow comin' down like that you know. Must have punched him pretty hard didn't he. Well he a sober man, and he was a drunken man.[222]

142. Kitto J explained the requirements of a "reasonable suspicion" in *Queensland Bacon Pty Ltd v Rees*[223] as follows:

> A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as Chambers' Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.[224]

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[218] 3FASC: 244(v).

[219] 3FASC: 244(v), (n)(iii).

[220] Exhibit A200 at 06:10; inaccurately transcribed at Exhibit A32, p7.250-253.

[221] Exhibit A200 at 07:00; inaccurately transcribed at Exhibit A32, p8.276.

[222] Exhibit A200 at 07:04; inaccurately transcribed at Exhibit A32, p8.282-283.

[223] (1966) 115 CLR 266.

[224] (1966) 115 CLR 266 at 303 (Kitto J).

143. DSS Kitching conceded that he had come into possession of knowledge of serious allegations of assault, but his evidence was that he did not view SS Hurley as a suspect at that time.[225] In the Applicants' submission, the allegations made by Mr Bramwell in his first interview plainly constituted sufficient cause to create a positive feeling of actual apprehension in the minds of DSS Kitching and DS Robinson that SS Hurley had assaulted Mulrunji.[226] Accordingly, the Applicants submit that, in the event that DSS Kitching and DS Robinson did not then suspect SS Hurley of committing an assault, they had knowledge of matters which would have created such a suspicion in the minds of honest and reasonable police investigators and they must have been wilfully shutting their eyes to those matters.[227]

144. Tellingly, the statement then taken by DS Robinson from Mr Bramwell says:

> From where I was sitting I could see Cameron's feet and I could hear Chris saying "you want more Mr DOOMADGEE, you want more". I could not see what Chris was doing, I could see his elbow going up and down into the air.[228]

145. DS Robinson had heard Mr Bramwell state twice that SS Hurley was punching Mulrunji. In the Applicants' submission, the failure to include that claim in the statement indicates that DS Robinson at least had knowingly and wilfully dismissed Mr Bramwell's allegations, even at that early stage. DS Robinson was not called to give evidence to explain himself and so it must be inferred that his evidence would not have assisted the Respondents.

146. In respect of DSS Kitching's evidence that he took Mr Bramwell's allegations seriously, the Applicants submit that this is belied by his subsequent conduct. The Applicants have pleaded that, after Mr Bramwell made those allegations, the investigating officers did not, as they ought to have, immediately obtain a response from SS Hurley.[229] Prior to the interview with Mr Bramwell, DSS Kitching and DS Robinson had conducted interviews on the previous evening with SS Hurley,[230] PLO Bengaroo[231]

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[225] T1196.45-1197.36.

[226] *Queensland Bacon Pty Ltd v Rees* (1966) 115 CLR 266 at 303 (Kitto J).

[227] *Cf, Farah Constructions Pty Ltd v Say-Dee Pty Ltd* (2007) 230 CLR 89 at 163 (Gleeson CJ, Gummow, Callinan, Heydon and Crennan JJ); *Australian Securities and Investments Commission v ActiveSuper Pty Ltd (in liq)* (2015) 105 ACSR 116 at 185-186 [397]-[404] (White J).

[228] Exhibit A191, p473.

[229] Reply: 36(c).

[230] Exhibits A198 and A26.

[231] Exhibits A199 and A27.

and Sgt Leafe,[232] who were the three other people in a position to see the incident that Mr Bramwell described. In those interviews, each of the three officers had said that Mulrunji had punched SS Hurley whilst being removed from the back of the police wagon, that SS Hurley had struggled through the door with Mulrunji and that Mulrunji had then been lying limp on the ground.[233]

147. In the Applicants' submission, an honest and reasonable police officer in possession of that information listening to Mr Bramwell's allegations would have realised that the various versions were not inconsistent and Mr Bramwell's allegations were, at that stage, entirely unchallenged. Accordingly, the most pressing matter in the investigation at that point ought to have been an investigation of the potential assault. It is evident, however, that the next investigative step in fact taken by DSS Kitching after the interview with Mr Bramwell was to attend the Kidner household to locate witnesses to the arrest of Mulrunji and then to conduct an interview with Gerald Kidner about that arrest.[234]

(b) Second Bramwell interview

148. It is agreed that Insp Williams arrived on Palm Island at about 10.30 am and was then briefed by DI Webber, DSS Kitching and DS Robinson.[235] At 10.52 am a video re-enactment was conducted with Mr Bramwell by DI Webber and Insp Williams.[236] DI Webber conceded that the video re-enactments were Insp Williams's idea.[237] DSS Kitching gave evidence that he was present during Mr Bramwell's re-enactment,[238] which is corroborated by Insp Williams's query to "Joe" (presumably Joe Kitching) at the end of the re-enactment as to whether he had any questions for Mr Bramwell.[239]

149. In the course of Mr Bramwell's re-enactment, Mr Bramwell was made to repeat his allegations regarding SS Hurley multiple times and in great detail.[240] It follows that, at that time, each of the members of the investigation team and Insp Williams was in

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[232] Exhibit A30.

[233] T1200.15-1202.5.

[234] Exhibit A38; T1231.27-1232.5.

[235] ASF:151-152.

[236] ASF:153.

[237] T982.6-10.

[238] T1208.13-16.

[239] Exhibit A192 at 09:35; Exhibit A33, p11.395.

[240] Exhibits A192 and A33.

possession of knowledge of Mr Bramwell's allegations and that Mr Bramwell's version of events was unchallenged and was broadly consistent with the versions of events provided by SS Hurley, PLO Bengaroo and Sgt Leafe. In the Applicants' submission, each of those officers had knowledge of matters which would have caused an honest and reasonable police officer to suspect that SS Hurley had committed an assault. If no such suspicion was formed, it is submitted that they must have been wilfully shutting their eyes to those matters.

150. The Applicants further submit that, on the face of the video re-enactments, DI Webber and Insp Williams were applying a great deal more scrutiny to Mr Bramwell's version of events than to any of the police witnesses. In the course of the re-enactment with Mr Bramwell, DI Webber and Insp Williams asked Mr Bramwell whether he was sober or had been drinking,[241] whether he was ok[242] and whether his memory was good.[243] No questions like that were asked of any of the other witnesses who were videoed.[244] Insp Williams suggested to Mr Bramwell that it may have been that SS Hurley was picking Mulrunji up and not punching Mulrunji.[245] Conversely, that SS Hurley was punching Mulrunji was not put to any of the other three witnesses. On a more basic level, Mr Bramwell is more often interrupted, questioned and asked to repeat himself than the three police witnesses. The Applicants submit that an inference can be drawn that DI Webber and Insp Williams at best were dismissive of the allegations Mr Bramwell was making and at worst were outright attempting to discredit them.

(c) Trip to Dee Street

151. In the event that SS Hurley had been suspected of committing an assault and was being questioned in relation to those events, he would have become a "relevant person" for the purpose of section 246 of the *Police Powers and Responsibilities Act* 2000 (Qld) (***PPRA***) and all questioning of him ought to have been electronically recorded.[246]

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[241] Exhibit A33, pp9.312 and 317.

[242] Exhibit A33, pp9.321.

[243] Exhibit A33, pp9.325.

[244] *Cf*, T998.44-999.17.

[245] Exhibit A33, p7.242.

[246] ASF: 217-219; 3FASC: 219-234.

152. It was in the above context that, at about 11.20 am, the investigating officers inexplicably determined to take SS Hurley to the scene of Mulrunji's arrest at Dee Street.[247] The evidence indicates that SS Hurley, wearing police uniform, drove a marked police vehicle containing DI Webber, DSS Kitching, Insp Williams and Const Tibbey to Dee Street and pointed out to the other officers where certain events had occurred, in order for the locations to be photographed by Const Tibbey.[248] The officers then returned to the police station and DI Webber and Insp Williams commenced a video recorded re-enactment with SS Hurley at about 11.53 am.[249]

153. It follows that, for at least about 30 minutes after they had all become aware of the serious allegations made by Mr Bramwell and before SS Hurley had provided a contradictory version of events, the investigating officers were having conversations with SS Hurley, some of which concerned Mulrunji's arrest, and none of which were recorded. SS Hurley was asked to give his version of events straight afterwards.

154. Both DI Webber and DSS Kitching conceded that they could have arranged for SS Hurley to meet them at Dee Street in plain clothes instead of driving them there[250] which, in the Applicants' submission, would at least have contributed somewhat to an appearance of impartiality. Both DI Webber and DSS Kitching conceded that, instead of SS Hurley, they could have taken PLO Bengaroo[251] who, unlike SS Hurley, had the benefit of not having just been accused of assaulting Mulrunji. It is also noted that before they left on the Saturday, DSS Kitching and Insp Williams interviewed SS Hurley "for the purpose of having a version recorded relating to the watch-house custody register" and not about the assault allegations.[252]

155. The trip to Dee Street was the third instance in 24 hours in which DI Webber and DSS Kitching had unrecorded conversations with SS Hurley. DI Webber gave evidence that there were no discussions in the vehicle "about the death, or the incident".[253] His evidence and DSS Kitching's evidence is therefore that the investigation was not discussed at all in the course of the drive from the airport on the Friday afternoon, the dinner on Friday night or the visit to Dee Street on the Saturday morn-

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[247] ASF: 154.

[248] T1036.42-20; T1227.33-27.

[249] Exhibits A193 and A34.

[250] T1040.17-40; T1228.29-46.

[251] T1037.19-22; T1229.27-30.

[252] T1226.29-33.

[253] T1039.13-16.

ing. The Applicants submit that this is somewhat unlikely. However, the fact that the question is even being asked is a poor reflection on the way in which the investigation was conducted. Had DI Webber or the other officers who went to Dee Street taken Mr Bramwell's allegations seriously, that trip would not have occurred. Had they approached the investigation impartially from the outset, the other two incidents would not have occurred.

D.1.4 SS Hurley performing duties at the scene

156. The Applicants have pleaded in paragraph 236 of the 3FASC that SS Hurley:

> undertook and continued to perform duties associated with the investigative process, or other duties at the scene, and was present in the police station whilst the Investigation Team conducted interviews with other witnesses on 19 and 20 November 2004, in circumstances where there was an unacceptable risk that he may see or hear the interviews conducted at the police station.

157. The Applicants have further pleaded, in paragraph 237 of the 3FASC, that each of DI Webber and Insp Strohfeldt failed to provide advice or instructions to SS Hurley or to the investigation team to the effect that SS Hurley should not have been performing duties associated with the investigative process or other duties at the scene. It is agreed that neither of them did so.[254]

158. The Applicants' allegation that such advice ought to have been provided is based on provisions of section 1.17 of the OPM, including:

a. the Policy in paragraph 47 of the ASF, including the statement that "First response officers, regional duty officers and regional crime coordinators should ensure that the integrity of the independent versions of members directly involved and members who are witnesses to a police related incident is preserved as far as practicable", and that "Members directly involved in the incident or who are witnesses to the incident should not discuss the incident amongst themselves prior to being interviewed"; and

b. the Order in paragraph 49 of the ASF that the regional duty officer was to "wherever practicable, ensure that members who are involved in the incident, or who are witnesses to the incident, do not undertake, or continue to perform duties associated with the investigative process, or other duties at the scene".

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[254] ASF: 143.

159. The Applicants have pleaded that the following acts or omissions to act were "acts" for the purpose of section 9 of the RDA:

a. the failure to treat SS Hurley as a suspect;[255]

b. the failure of the QPS to suspend SS Hurley from duty;[256]

c. the fact of SS Hurley continuing to perform operational duties, including in relation to the investigative process and at the scene;[257]

d. the fact of SS Hurley being present in the police station when the investigation was taking place;[258] and

e. the failures by each of DI Webber and Insp Strohfeldt to provide advice or instructions or to take steps to ensure SS Hurley did not continue to perform duties at the scene.[259]

160. It is agreed that DI Webber was the "regional crime coordinator", and Insp Strohfeldt was the "regional duty officer", for the purpose of s 1.17 of the OPM.[260]

161. The Applicants also note the Order in paragraph 48(vii) of the ASF, that the first response officer must "wherever practicable, ensure that members involved in the incident do not leave the scene". Whilst neither DI Webber nor Insp Strohfeldt was the first response officer, the Applicants submit that, because DI Webber, as regional crime coordinator, was ultimately responsible for the investigation,[261] and in view of the Policy referred to in paragraph 47 of the ASF, DI Webber had a general responsibility to ensure that section 1.17 of the OPM was complied with, including a responsibility to ensure that, as far as practicable, members who were involved in the incident, or who were witnesses to the incident, did not undertake or continue to perform duties associated with the investigative process or other duties at the scene.

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[255] 3FASC: 244(k).

[256] 3FASC: 244(m)(v).

[257] 3FASC: 244(m)(v), (n)(iii).

[258] 3FASC: 244(m)(v), (n)(iii).

[259] 3FASC: 244(m)(v), (n)(iv).

[260] ASF: 176-177.

[261] See ASF: 50(a)(i).

162. In the Applicants' submission, in relation to Mulrunji's death, the "scene" plainly included the area between the garage of the police station and the cell in which Mulrunji was held, including the corridor leading from the garage to the cell. This was conceded by DI Webber.[262]

163. DSS Kitching conceded that SS Hurley had been present and performing duties in the police station whilst DSS Kitching and DS Robinson were conducting interviews.[263] DI Webber conceded that SS Hurley had been present and performing duties in the police station whilst DI Webber and Insp Williams were conducting video re-enactments[264] and that SS Hurley had been routinely walking through and over what was the scene.[265] It is clear from the evidence before the Court which depicts the police station as it then was[266] that the station was a small building. Accordingly, the Applicants submit that there was a high probability that SS Hurley had overheard at least some of the interviews and re-enactments being conducted in the station.

164. DI Webber's evidence indicates that he did not turn his mind to instructing SS Hurley not to perform duties at the scene.[267] Similarly, DSS Kitching gave evidence that it did not cross his mind that SS Hurley should not have been on duty.[268] In the Applicants' submission, SS Hurley's presence at the scene whilst the investigation was being conducted compromised the integrity of the evidence gathered in the course of the investigation by permitting SS Hurley to have an opportunity to be aware of what other interviewees had been saying and to adapt his version of events accordingly. Further, the Applicants submit that an honest and reasonable police officer in the position of the investigating officers would have ensured that SS Hurley was not present in the police station whilst interviews were being conducted. Accordingly, the failure to prevent SS Hurley from performing duties at the scene was a breach of the Integrity Duty and the Reasonable Diligence Duty.[269]

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[262] T1008.45-1009.12.

[263] T1202.37-42; T1203.30-42.

[264] T998.10-25;

[265] T1009.11-12.

[266] Exhibits A179, A192-A194, and A218.

[267] T1008.31-36.

[268] T1227.15-21.

[269] 3FASC: 243.

D.1.5 Appointment of DS Robinson to investigation team

165. The Applicants have pleaded that DS Robinson had an actual or an apparent conflict of interest in investigating the death of Mulrunji and, accordingly, his involvement in the investigation created a reasonable apprehension of bias.[270] The Applicants further plead that DS Robinson contravened the Impartiality Duty in his conduct of the investigation[271] and that his appointment to the investigation team was not appropriate in the circumstances as he was from the same police establishment as SS Hurley.[272]

166. The Applicants have pleaded that the following acts or omissions to act were "acts" for the purpose of section 9 of the RDA:

    a. the appointment of DS Robinson to the investigation team;[273]

    b. DS Robinson's involvement in the investigation;[274] and

    c. DS Robinson's failure to advise senior officers of his conflict of interest.[275]

167. It is agreed that DS Robinson was from the same police station or establishment as SS Hurley,[276] that he had worked and lived in close proximity to SS Hurley on Palm Island for about two years[277] and that he was the second most senior police officer stationed on Palm Island, SS Hurley being the most senior.[278] It is evident that DSS Kitching and DI Webber were aware of those matters.[279] Both officers also gave evidence that DSS Kitching was DS Robinson's direct line supervisor for criminal investigative matters, but SS Hurley was DS Robinson's direct line supervisor for operational matters.[280]

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[270] 3FASC: 226-227.
[271] 3FASC: 231, 233.
[272] 3FASC: 235.
[273] 3FASC: 244(n)(ii).
[274] 3FASC: 244(m)(i), (m)(iv).
[275] 3FASC: 244(m)(i).
[276] ASF: 225.
[277] ASF: 226-227.
[278] ASF: 24(d)-(e).
[279] T946.19-31; T1190.25-32.
[280] T946.3-15; T1190.12-25.

168. DI Webber's evidence was that DS Robinson was "not, as such, a member of the investigative team, but was there … to assist in relation to the identification of locations of interest, persons of interest, where they might live, etcetera"[281] and that it was "not originally intended that Robinson would play any significant role in the investigation".[282] However, DI Webber conceded that he knew that DS Robinson was playing a significant role in the investigation and took no steps to prevent it.[283] DSS Kitching also conceded that DS Robinson's role in the investigation went beyond being used for his local knowledge.[284]

169. The Applicants submit that any suggestion that DS Robinson was not a part of the investigation team ought to be rejected. It is clear that DS Robinson played a substantial role in the investigation, through the interviews he participated in[285] and the statements he took.[286] Further, DS Robinson continued to play a role in the investigation after the other members of the investigation team had departed Palm Island, including taking a statement from Queensland Ambulance Service officer Matthew Bolton.[287]

170. In the Applicants' submission, in view of his prior relationship with SS Hurley, a fair minded lay observer would reasonably have apprehended that DS Robinson might not have brought a fair and impartial mind to the investigation. Accordingly, the extent of DS Robinson's subsequent involvement in the investigation therefore created a reasonable perception of a flawed and biased investigation and was a breach of the Impartiality Duty. Further, DS Robinson's involvement in conducting interviews and taking statements likely adversely impacted on the information elicited from those interviews, as members of the community would have known that he had an association with SS Hurley, and in respect of SS Leafe and PLO Bengaroo, he was stationed at the same police station as they were and was their superior officer. Accordingly, his appointment to the investigation was a breach of the Integrity Duty and the Reasonable Diligence Duty.

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[281] T904.10-15.

[282] T946.45-6.

[283] TT947.23-42; T948.25-36.

[284] T1194.14-37.

[285] Exhibits A26-A32, A198-A201.

[286] Exhibits A187-A191, A213-A214.

[287] Exhibit A190; T951.20-45.

171. The Applicants further submit that the evidence establishes that DI Webber and DSS Kitching were not concerned at all with the impartiality of the investigation and, accordingly, appointed DS Robinson without pause for thought. It was conceded by both DI Webber and DSS Kitching that no steps were taken to ascertain whether a more suitable police officer was available to assist the investigation team with local knowledge, but it was likely that there would have been such an officer available.[288] It is apparent on the evidence that, the following week, at least two other officers were flown to Palm Island to assist the police with local knowledge—being Trevor Adcock[289] and Anthony Melrose[290]—and at least one other officer, Greg Baade, could have been.[291]

D.1.6 Appointment of DSS Kitching to investigation team

172. The Applicants have pleaded that the appointment of DSS Kitching to the investigation was not appropriate as he was from the same police establishment as the officers in whose custody the death had occurred.[292] The need to appoint police officers to investigate deaths in custody who are as far removed as possible from the officers in whose custody the death had occurred was discussed extensively in the RCIADIC report and recommendations.[293]

173. The Applicants have pleaded that the appointment of DSS Kitching to the investigation team was an "act" for the purpose of section 9 of the RDA.[294]

174. DSS Kitching's evidence was that he knew SS Hurley "reasonably well" prior to being appointed to the investigation of Mulrunji's death.[295] In the Applicants' submission, in view of the pre-existing relationship between DSS Kitching and SS Hurley, the appointment of DSS Kitching to the investigation team was not appropriate.

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[288] T954.32-955.25; T1191.23-25; T1194.42-1195.25.

[289] T773.25-774.5; T802.17-25; Exhibit A197, p11 at 1832, p14 at 1630.

[290] Exhibit A41, Item 260.

[291] T823.1-18.

[292] 3FASC: 235.

[293] 3FASC: Annexure A, 4.2.21; 3FASC: Annexure B, 33-34.

[294] 3FASC: 244(n)(ii).

[295] T1160.30-1162.30.

D.1.7 Failure to preserve independent versions of events

175. The provisions of section 1.17 of the OPM include:

a. the Policy referred to in paragraph 123(a) of the ASF that following a death in custody, police officers directly involved in the incident or who were witnesses to the incident should not discuss the incident amongst themselves prior to being interviewed;

b. the Policy referred to in paragraph 47 of the ASF, including the statement that "First response officers, regional duty officers and regional crime coordinators should ensure that the integrity of the independent versions of members directly involved and members who are witnesses to a police related incident is preserved as far as practicable"; and

c. the Order referred to in paragraph 49 of the ASF that the regional duty officer was to "wherever practicable, ensure that members who are involved in the incident, or who are witnesses to the incident, do not undertake, or continue to perform duties associated with the investigative process, or other duties at the scene".

176. It is agreed that DI Webber was the "regional crime coordinator", and Insp Strohfeldt was the "regional duty officer", for the purpose of s 1.17 of the OPM.[296] The Applicants have pleaded that, by reason of those provisions, both DI Webber and Insp Strohfeldt were obligated under s 1.17 of the OPM to instruct officers not to talk to each other about Mulrunji's death and the surrounding events and that they breached that obligation.[297]

177. It is agreed between the parties that between 19 November and 24 November 2004 neither DI Webber nor Insp Strohfeldt advised or directed SS Hurley not to discuss the circumstances surrounding the death in custody with other QPS officers,[298] and that, in the conduct of the interviews in the course of the investigation, DSS Kitching took no steps to ascertain what had been discussed by witnesses prior to their inter-

[296] ASF: 176-177.

[297] 3FASC: 241.

[298] ASF: 143.

views.[299] It is further agreed that before the investigation team arrived on Palm Island, SS Hurley, Sgt Leafe, and PLO Bengaroo discussed Mulrunji's death.[300]

178. The Applicants have pleaded that the following acts or omissions to act were "acts" for the purpose of section 9 of the RDA:

a. the failure to treat SS Hurley as a suspect;[301]

b. the failure to electronically record conversations with SS Hurley;[302]

c. the failures by each of DI Webber and Insp Strohfeldt instruct officers not to talk to each other about Mulrunji's death and the surrounding events;[303]

d. the fact of officers talking to each other about Mulrunji's death and the surrounding events;[304] and

e. the failure by DSS Kitching to ascertain what had been discussed by witnesses.[305]

179. In the Applicants' submission, for the reasons outlined above, DI Webber and Insp Strohfeldt had a responsibility to ensure that the integrity of the independent versions of events of the officers present at the scene were preserved as far as practicable. A simple direction to SS Hurley not to discuss the events with other officers might have prevented the discussions that he had with Sgt Leafe and PLO Bengaroo from taking place. A query from one of the investigating officers during interviews with those officers as to what had been discussed might have mitigated the impact of such discussions, by at least placing their existence and contents on the record. Neither occurred. In the Applicants' submission, this constituted a failure of DI Webber and Insp Strohfeldt to comply with their obligations under section 1.17 of the OPM.

180. Further, during his video re-enactment with DI Webber and Insp Williams on 20 November 2004, SS Hurley indicated several times that he had been discussing his

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[299] ASF: 144.

[300] ASF: 133.

[301] 3FASC: 244(k).

[302] 3FASC: 244(k).

[303] 3FASC: 244(n)(vi).

[304] 3FASC: 244(n)(vi).

[305] 3FASC: 244(n)(vii).

version of events with others, including that he had "just asked Michael [Leafe] before" when Sgt Leafe had gone through the corridor whilst he and Mulrunji were on the ground[306] and that he had found out that PLO Bengaroo had opened the door of the police station "only from hindsight and from speaking to the people".[307] Those statements are direct indications that, prior to the crucial video re-enactments in which Mr Bramwell's allegations that SS Hurley had assaulted Mulrunji were being tested, SS Hurley was conferring with Sgt Leafe and PLO Bengaroo about the incident and that the officers were ensuring that their stories were consistent. Particularly in circumstances where it was likely that SS Hurley had learnt of Mr Bramwell's allegations, either through listening to the interviews of Mr Bramwell as they were conducted or by conferring with DS Robinson or others, the Applicants submit that an honest and reasonable officer in the position of DI Webber or Insp Williams would have been extremely concerned that the evidence being taken from SS Hurley, Sgt Leafe and PLO Bengaroo had been corrupted. However, DI Webber not only failed to ascertain what had been discussed, the effect of his evidence on the subject was that he did not consider that any policy had not been complied with.[308] The Applicants submit that this is clear evidence that the integrity of the investigation was not DI Webber's concern.

181. The issue of the integrity of SS Hurley's version of events also arises in relation to his discussions with DS Robinson. In view of the close relationship between DS Robinson and SS Hurley, the Applicants submit that an inevitable consequence of DS Robinson's inclusion in the investigation was that DS Robinson would discuss the investigation with SS Hurley. Given the close proximity in which they lived and worked and the small number of other police officers on Palm Island, the probability that they would not discuss the progress of investigation was extremely low. As neither of them were called to give evidence, the Court cannot be sure whether or not they did in fact discuss the investigation, however there is at least a presumption that their evidence would not have assisted the Respondents. In any event, the Applicants submit that there was plenty of opportunity for them to have spoken to each other about the investigation.

182. In particular, at the time that he offered the meal to DSS Kitching and DI Webber, DS Robinson had participated in all of the interviews conducted that evening. He had then spent an unknown amount of time alone with SS Hurley at SS Hurley's resi-

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[306] Exhibit A34 at p312.97-98; Exhibit A193 at 05:25.

[307] Exhibit A34 at p314.205-207; Exhibit A193 at 10:13.

[308] T987.40-991.38.

dence, prior to being joined by DI Webber and DSS Kitching. DI Webber and DSS Kitching both gave evidence that they did not find this to be concerning or think, at the time, to ask DS Robinson or SS Hurley what the two had discussed.[309] It also is not clear whether DS Robinson and SS Hurley discussed the investigation the following morning, after Mr Bramwell had made his allegations of assault against SS Hurley. In the Applicants' submission it is at least plausible that they did so and it reflects poorly on the investigation that such a possibility exists.

183. The Applicants submit that the failure to maintain the integrity of the independent versions of events of police witnesses was by definition a breach of the Integrity Duty and the Reasonable Diligence Duty.[310] Further, a fair minded lay observer might reasonably apprehend that the investigating officers were not approaching the investigation with an impartial mind and rather were applying substantially less scrutiny to SS Hurley's evidence than to the evidence of Aboriginal witnesses. Accordingly, the Impartiality Duty was breached.[311]

D.1.8 Failure to take statements from police witnesses

184. It is agreed that section 16.24.3 of the OPM provided a Procedure that the commissioned officer responsible for the investigation into a death in custody was to "Obtain statements from all witnesses, including police officers, as soon as practicable after the incident and prior to any debriefing session where practicable".[312] In the Applicants' submission, this Procedure must be read with section 2.6 of the OPM, which contains the QPS procedures in relation to statements.[313] Relevantly, section 2.6 states "Statements form *a written version of the oral testimony of a witness* and therefore should be as comprehensive as possible" (emphasis added). Also relevant is section 2.5.1 of the OPM, concerning primary investigation, which states that primary investigation can include the "taking of statements from witnesses (*suitable for court production*)" (emphasis added).[314]

185. Written statements were not obtained from police officers who were witnesses to the incident in the course of the investigation into Mulrunji's death, despite such state-

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[309] T1026.23-45; T1219.25-1220.10.

[310] 3FASC: 243.

[311] 3FASC: 243.

[312] ASF: 43(iii).

[313] Exhibit F1, p19.

[314] Exhibit F1, p19.

ments being obtained from witnesses who were not police officers. DI Webber's evidence was that "statements" were taken within the meaning of section 16.24.3 of the OPM, as recorded interviews were conducted.[315] The Applicants submit that this cannot be the case, as a recorded interview is not a "written version of the oral testimony of a witness" and neither is it "suitable for court production". DSS Kitching's evidence was that he did not take statements from police witnesses as it was his expectation that "they would complete their own statements if they were required in the future".[316] In the Applicants' submission, there is no basis for that approach within the terms of the OPM and it is in fact contrary to the requirements of section 16.24.3.

D.1.9 Failure to interview Const Steadman

186. It is agreed that section 2.5.1 of the OPM specified a Policy that "primary investigation techniques should be followed in order to ensure that potential witnesses are identified and that complete information is obtained" and a Procedure in relation to primary investigation, techniques, which included the identification of witnesses and potential witnesses.[317]

187. The Applicants have pleaded that the failure of DI Webber to ensure Const Steadman was interviewed as soon as practicable was an "act" for the purpose of section 9 of the RDA.[318]

188. Const Steadman is plainly visible in the cell video.[319] DI Webber and DSS Kitching both agreed that they had watched the video whilst on Palm Island on the Friday afternoon[320] and DI Webber indicated that they again watched the video on the Saturday morning, with Insp Williams.[321] Both officers also agreed that Const Steadman was an important witness.[322] In the Applicants' submission, the failure to interview

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[315] T1011.1-1012.22.

[316] T1274.4-27.

[317] ASF: 54.

[318] 3FASC: 244(f).

[319] Exhibit A25 at 50:14 to 50:30.

[320] T1005.40-1006.4; T1211.5-10.

[321] T912.38-42; T1017.28-35;

[322] T1021.13-1022.10; T1212.5-1213.25.

Const Steadman was a breach by DI Webber and DSS Kitching of section 2.5.1 of the OPM.[323]

D.1.10 Failure of supervision by Insp Williams

189. It is agreed that section 1.17 of the OPM contained an Order that the officer representing the Internal Investigation Branch, Ethical Standards Command was to "overview the investigation and provide appropriate advice and assistance to the regional crime coordinator".[324] It is further agreed that this Order applied to Insp Williams.[325]

190. The Applicants plead in paragraph 239 of the 3FASC that after and as a result of receiving a briefing from DI Webber, DSS Kitching, and DS Robinson on 20 November 2004, and reviewing the interviews and statements which had been conducted, Insp Williams had actual or constructive knowledge of the actual or apparent conflicts of interest created by:[326]

a. the decision of DI Webber, DSS Kitching, and DS Robinson to eat dinner with SS Hurley;[327]

b. the decision of DI Webber to allow SS Hurley to collect the investigation team from the airport;[328]

c. the decision of DI Webber to drive members of the investigation team to the site of the arrest and recount the arrest of Mulrunji;[329]

d. the decision of DI Webber not to require that PLO Bengaroo also accompany the investigation team to the site of the arrest;[330]

e. the inclusion of DS Robinson in the investigation team by DI Webber and DSS Kitching;[331]

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[323] 3FASC: 204.

[324] ASF: 51(a)(iii).

[325] ASF: 115.

[326] 3FASC: 239.

[327] 3FASC: 229.

[328] 3FASC: 230(a).

[329] 3FASC: 230(b).

[330] 3FASC: 230(c).

f. the failure to suspend SS Hurley from duty immediately after Mulrunji's death;[332]

g. permitting SS Hurley to continue performing an operational role on Palm Island whilst the investigation was conducted;[333]

h. the investigation team failing to take any reasonable steps in good faith to keep the community of Palm Island informed of the progress of the investigation as it unfolded;[334] and

i. the investigation team failing to take any reasonable steps in good faith to appropriately address and respond to the Palm Island community's characteristics and cultural needs.[335]

191. DI Webber gave evidence that, on Insp Williams's arrival on Palm Island, DI Webber and DSS Kitching brought Insp Williams up to date on the progress of the investigation[336] and that they watched the cell video footage together.[337] DSS Kitching also gave evidence that he and DI Webber provided Insp Williams with a briefing of the information that had been gathered through the interviews of witnesses.[338]

192. The Applicants submit that DS Robinson's role in the investigation must have been apparent to Insp Williams, as would SS Hurley's continuing presence on Palm Island, as both were ongoing at the time of Insp Williams's arrival. Accordingly, the Applicants submit that the Court should at least make a finding that Insp Williams had constructive knowledge of the matters pleaded in paragraphs 231 and 232 of the 3FASC. Further, Insp Williams must have had actual knowledge of the matters pleaded in paragraphs 230(b)-(c) of the 3FASC, as they concerned the trip to the site of the arrest, in which Insp Williams participated.

193. The Applicants have pleaded that Insp Williams failed to liaise closely with DI Webber such that he was able to overview the investigation properly and, as a result, was

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[331] 3FASC: 231.

[332] 3FASC: 232(a).

[333] 3FASC: 232(b).

[334] 3FASC: 232(c).

[335] 3FASC: 232(d).

[336] T911.18-27.

[337] T912.38-42.

[338] T1149.25-41; T1226.38-40.

unable to and did not confer with DI Webber about the matters which may have adversely affected an impartial investigation as they arose[339] and that he ought to have provided appropriate advice to DI Webber regarding those matters, but failed to do so.[340]

194. The Applicants have pleaded that the failure by Insp Williams to overview, advise on and confer with DI Webber and the CMC to resolve issues regarding the integrity of the investigation was an "act" for the purpose of section 9 of the RDA.[341]

195. DI Webber gave evidence that he could not recall that he had discussions with Insp Williams regarding the issues created by DS Robinson's presence[342] or SS Hurley continuing to perform duties on the island.[343] DSS Kitching gave evidence that he had no such discussions with Insp Williams.[344]

196. Accordingly, the Applicants submit that the Court should find that Insp Williams did not provide appropriate advice (or any advice) to DI Webber regarding the matters which may have adversely affected an impartial investigation.

D.1.11 Treatment of PLO Bengaroo

197. The Applicants have pleaded that the investigation team failed to obtain a statement from PLO Bengaroo which was as comprehensive as possible, that they treated PLO Bengaroo as a person who was inferior to themselves and thereby breached various duties and obligations.[345]

198. The Applicants have pleaded that the following acts or omissions to act were "acts" for the purpose of section 9 of the RDA:

a. the failure to obtain a statement from PLO Bengaroo which was as comprehensive as possible; and[346]

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[339] 3FASC: 238.

[340] 3FASC: 240.

[341] 3FASC: 244(n)(v).

[342] T981.40-45.

[343] T982.1-5.

[344] T1226.20-1227.25.

[345] 3FASC: 217.

[346] 3FASC: 244(j).

b. the treatment of PLO Bengaroo as inferior to other police officers who were not Aboriginal.[347]

199. In support of those allegations, the Applicants rely on the above submissions concerning the involvement of DS Robinson in the initial interview with PLO Bengaroo and the decision to take SS Hurley to the scene of the arrest and not to take PLO Bengaroo, and say that the latter indicated that the investigating officers did not accord PLO Bengaroo the same level of respect afforded to SS Hurley.[348]

200. DI Webber told the Palm Island Review team that PLO Bengaroo was a "very reluctant witness" and "difficult to talk to".[349]

201. During the video re-enactment conducted by DI Webber and Insp Williams, in response to a question from Insp Williams as to whether he had been watching what SS Hurley had been doing with Mulrunji, PLO Bengaroo said "no". Then, in response to a follow up question from Insp Williams as to why PLO Bengaroo had been just standing there, PLO Bengaroo said "I just stood here because I was thinking if I see something I might get into trouble myself or something. The family might harass me or something you know".[350] Neither DI Webber nor Insp Williams asked what PLO Bengaroo had been afraid of seeing or why he had been afraid of seeing something in relation to which the family might harass him.

202. In the Applicants' submission, there is a clear inference from PLO Bengaroo's words that he had avoided watching what was happening because he did not wish to be implicated in any untoward behaviour on the part of SS Hurley. An honest and reasonable police officer in the position of DI Webber or Insp Williams would have asked PLO Bengaroo what he had been afraid of seeing. DI Webber's evidence was that he took that statement "in the sense that he doesn't want to be involved, doesn't want to have anything to do with it because then he would potentially be in trouble with the rest of the community"[351] and that he "didn't take it as a serious proposition at that point".[352] In the Applicants' submission, it behoved DI Webber to take the proposition as a serious proposition. The fact that he failed to do so would have cre-

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[347] 3FASC: 244(j).

[348] 3FASC: 217(b) and (e).

[349] Exhibit A21, pp 357-358; T1031.18-40.

[350] Exhibit A194 at 07:00; Exhibit A35, p8.257-259.

[351] T1032.35-38.

[352] T1032.43.

ated a reasonable apprehension in the mind of a fair minded lay observer that he was not bringing an impartial mind to the investigation. Accordingly, the Applicants submit that the allegations in paragraph 217 of the 3FASC should be accepted.

D.2. Failure to provide support to Aboriginal witnesses

203. It is agreed that section 6.3.2 of the OPM provided an Order that, prior to interviewing a person, a police officer was required to establish whether a special need exists, in accordance with certain criteria.[353] Further, section 6.3.6 of the OPM provided a Policy that persons of Aboriginal or Torres Strait Islander descent were "to be considered people with a special need because of certain cultural and sociological conditions" and, as such, "the existence of a need should be assumed until the contrary is clearly established using the criteria set out in s 6.3.1".[354]

204. In the Applicants' submission, these provisions are plainly included in order to mitigate the potential difficulties in communicating with Aboriginal people that non-Aboriginal police officers might otherwise face and, accordingly, to ensure that the non-Aboriginal police officers are able to elicit the same level of information from Aboriginal witnesses as from non-Aboriginal witnesses. It follows that the result of a failure to comply with the provisions would be that, in the course of the investigation, significantly more information would be elicited from non-Aboriginal witnesses, which would invariably mean that their versions of events carried more weight than those of Aboriginal witnesses. The Applicants also note SS Dini's evidence that "our police protocols require that a support person or a solicitor be present when you're interviewing disadvantaged persons" in order for the interview to "withstand scrutiny", as otherwise records of interviews with disadvantaged persons are "generally rendered inadmissible".[355] SS Dini was emphatic that the inadmissibility of a record of interview when those protocols are not followed is "the price you pay if you don't to what you're supposed to do".[356]

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[353] ASF: 124(a).

[354] ASF: 124(b).

[355] T826.27-30; T827.20-45.

[356] T828.1-15.

205. It is agreed that seven Aboriginal witnesses were interviewed in the course of the investigation, being PLO Bengaroo, Roy Bramwell, Patrick Bramwell, Penny Sibley, Gladys Nugent, Edna Coolburra, and Gerald Kidner.[357]

206. The Applicants have pleaded that the failure to provide adequate support to Aboriginal witnesses comprised "acts" for the purpose of section 9 of the RDA.[358] In the Applicants' submission, the following "acts" occurred:

a. a failure to organise for a support person to be available to assist in the conduct of interviews if needed;

b. the conduct of interviews with Aboriginal witnesses in a manner which was did not account for the cultural needs of the witnesses.

(a) Support persons

207. It is also agreed that none of the Aboriginal witnesses interviewed during the investigation was offered a support person at their interviews.[359] DI Webber gave evidence in relation to the provision of a support person that:

> We attempted to consider those things earlier – earlier in the piece by involving … the Legal Aid service, etcetera, and contacting them and communicating with them. Unfortunately for one reason or another, they … weren't able to … be engaged or to participate.[360]

208. The Applicants submit that this evidence should be rejected. It is clear that DI Webber spoke to Andrea Sailor and Owen Marpoondin that day and requested that they accompany him to inform Mulrunji's next of kin of the death. Ms Sailor's evidence was that she was asked "to accompany the police to the family".[361] Mr Marpoondin's evidence was that the police said to Ms Sailor "got to go, they're not a part of your family".[362] It was put to neither of them that DI Webber had requested that they provide assistance as support persons in the conduct of interviews. Further, DI Webber conceded that he did not take any steps after he landed on Palm Island to find someone who would be willing or able to play the role of a support person during

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[357] ASF: 223.

[358] 3FASC: 244(l).

[359] ASF: 223.

[360] T916.8-20; T1051.33-17.

[361] T84.20-27.

[362] T102.22-25.

the investigation.[363] In the Applicants' submission, the more likely explanation is that DI Webber simply did not consider whether a support person was needed and thereby breached his obligations under sections 6.3.2 and 6.3.6 of the OPM.

209. DSS Kitching gave evidence that he did not at any time give any consideration to whether or not any of the Aboriginal persons he interviewed out to have had a support person present.[364] In the Applicants' submission, that is plainly in breach of his obligations under sections 6.3.2 and 6.3.6 of the OPM.

(b) Cultural and sociological issues

210. In respect of the socio-linguistic concerns which need to be taken into account when interviewing Aboriginal witnesses, the Applicants rely on the evidence of Dr Diana Eades.[365] In particular, the Applicants submit that the following matters ought to be considered:

a. the inadequacy of the "question and answer" interview format as a means of eliciting information;[366]

b. the possibility of gratuitous concurrence in answers to questions;[367]

c. use of silence;[368]

d. difficulty in providing quantitative information, such as "clock time";[369]

e. the distinction between Aboriginal English and General Australian English;[370] and

f. other community-specific cultural factors.[371]

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[363] T1055.17-35.

[364] T1150.24-26; T1243.42-1244.40.

[365] Exhibit A6.

[366] Exhibit A6, p17.

[367] Exhibit A6, p18.

[368] Exhibit A6, p18.

[369] Exhibit A6, p19.

[370] Exhibit A6, p19.

[371] Exhibit A6, p20.

211. DSS Kitching conceded that, in the course of the investigation, he failed to take into account the inadequacy of question and answer style interviews[372] or that many people would have difficulty using clock time.[373] The Applicants submit that these failures evidently had a detrimental impact on the interviews[374] of Patrick Bramwell,[375] Edna Coolburra,[376] Gladys Nugent[377] and Roy Bramwell.[378]

212. In particular, DSS Kitching appears to have entirely failed to elicit any information from Patrick Bramwell which was relevant to the investigation. When he commenced the interview, DSS Kitching advised Mr Bramwell that he wanted to conduct an interview with Mr Bramwell about "what happened today" in the context of Mr Bramwell having been arrested by police.[379] He then proceeded to interrogate Mr Bramwell about the incident for which he was arrested.[380] When DSS Kitching then asked whether Mr Bramwell was with anyone else in the police vehicle or in the cell, Mr Bramwell said he was alone and did not mention Mulrunji.[381] In the Applicants' submission, DSS Kitching most likely gave Mr Bramwell the impression that he was being interviewed in relation to an offence for which he had been arrested. Certainly, Mr Bramwell does not appear to have understood that he was being interviewed in relation to Mulrunji's death.

D.3. Form 1 and autopsy

213. Section 447A of the PPRA established a duty for police to assist coroners in the performance of a function or exercise of a power under the *Coroners Act* 2003 (Qld) (***Coroners Act***), including the investigation of deaths and the conduct of inquests. That duty is defined in the 3FASC as the "Coroner Duty".[382]

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[372] T1245.37-1246.7.

[373] T1246.6-20.

[374] See, Exhibit A6, pp 21-24.

[375] Exhibits A201 and A29; T1249.40-1261.6.

[376] Exhibit A31, T1261.8-1263.

[377] Exhibit A28, T1263.17-1265.43.

[378] Exhibits A32 and A200, T1265.45-1268.31.

[379] Exhibit A29, p2.

[380] Exhibit A29, pp 4-5.

[381] Exhibit A29, pp 6-7.

[382] 3FASC: 100.

214. It is agreed that the death of Mulrunji was a "reportable death" as defined in section 8 of the *Coroners Act* and therefore was required to be investigated by a Coroner in accordance with section 11(2) of that Act.[383] Section 14 of the *Coroners Act* required that the State Coroner issue guidelines to all Coroners about the performance of their functions in relation to investigations generally, which guidelines were required to deal with investigations of deaths in custody and have regard to the RCIADIC recommendations relating to deaths in custody. Pursuant to section 217(1)(a)(i) of the *Coroners Act*, an inquest was to be held into the death of Mulrunji.[384]

215. A "Form 1" was a form whereby a police officer reported a death to the Coroner in order to "assist the Coroner in deciding whether an autopsy should be ordered, and to assisted the pathologist performing the autopsy to establish the cause of death".[385] The general requirements in terms of completing a Form 1 have been agreed.[386] Relevantly, section 8.4.8 of the OPM included a Procedure that the Form 1 was to be completed "as soon as possible",[387] and section 8.4.3 contained an order that, in cases where, after a Form 1 had been submitted, additional or relevant information had come to hand that may have assisted a government pathologist in determining a cause of death at a time prior to an autopsy being conducted, investigating officers were to "contact the pathologist as a matter of urgency and provide that information on a Supplementary Form 1".[388]

D.3.1 Delay in sending Form 1

216. It is agreed that the Form 1 in relation to Mulrunji[389] was completed on the evening of Friday 19 November 2004 by DSS Kitching, then checked by DI Webber that evening and that it was not sent to the Coroner until the morning of Monday 22 November 2004.[390]

217. DI Webber's evidence was that he would have expected DSS Kitching to send the Form 1 on the Friday night after it was checked, but he conceded that he did not spe-

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[383] ASF: 107(a).

[384] ASF: 107(b).

[385] ASF: 113, 163(a).

[386] ASF: 112-113, 162-164.

[387] ASF: 113, 163(b).

[388] ASF: 112(c), 163(c), 164(a).

[389] Exhibit A17.

[390] ASF: 166-169.

cifically ask DSS Kitching to send it.[391] DSS Kitching's explanation for the delay in sending the Form 1 was that he sent it on the next working day after it was completed,[392] although he conceded that he had no basis for taking the view that the requirement was to submit the Form 1 on the next working day.[393] It is noted in that regard that the first page of the Form 1 contains "Instructions" including that the completed Form 1 was to be sent to the State Coroner "prior to the end of shift".[394] The Applicants submit that the delay in sending the Form 1 was unexplained and unacceptable and was a breach of the requirement in section 8.4.8 that the Form 1 be submitted "as soon as possible".[395]

218. The Applicants have pleaded that the delay in sending the Form 1 was an "act" for the purpose of section 9 of the RDA.[396]

D.3.2 Discrepancies in Form 1

219. The Form 1 contained the statement that "the deceased laid on the floor of the cell and went to sleep immediately".[397] The Applicants submit that this was simply incorrect. The surveillance footage of the cell clearly shows Mulrunji writhing about in the cell from the moment that the video was turned on.[398] Both DI Webber and DSS Kitching conceded that they had watched the cell footage prior to the Form 1 being completed.[399] Therefore, they ought to have been aware that Mulrunji had not lain on the floor of the cell and gone to sleep immediately.

220. DI Webber's explanation for the statement in the Form 1 was that "it boils down to some people toss and turn in their sleep".[400] The Applicants submit that this was clearly untrue and distasteful in the extreme. When cross-examined about that

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[391] T1058.39-1059.2.

[392] T1279.45-1280.10.

[393] T1280.12-18.

[394] Exhibit A17, p1.

[395] 3FASC: 212.

[396] 3FASC: 244(h).

[397] Exhibit A17, p8.

[398] Exhibit A25.

[399] T1005.40-1006.4; T1211.5-10.

[400] T1061.45.

statement in the Form 1, DSS Kitching gave answers which could best be described as evasive and confused.[401]

221. In the Applicants' submission, the statement that Mulrunji "laid on the floor of the cell and went to sleep immediately" is misleading and tells a more benign version of events than was in fact the case. The information that Mulrunji was visibly writhing in pain after he was placed in the cell would likely have been of substantial assistance to the pathologist conducting the autopsy, but also would have reflected poorly on the police. The Applicants submit that no satisfactory explanation has been provided for its omission from the Form 1, but an inference can be drawn that it was providing a self-serving version of events on the part of the police.

222. The Applicants have pleaded that the inclusion in the Form 1 of the statement that "the deceased laid on the floor of the cell and went to sleep immediately" was an "act" for the purpose of section 9 of the RDA.[402]

D.3.3 Failure to include assault allegations

223. It is agreed that when the Form 1 was sent to the Coroner and the Government Pathologist, it did not include any reference to the allegations of assault by SS Hurley upon Mulrunji made by Roy Bramwell and Penny Sibley.[403] DSS Kitching conceded that those allegations were known to him at the time that the Form 1 was submitted and that he could have amended the Form 1 to include those matters prior to its submission.[404]

224. It is further agreed that neither DI Webber nor DSS Kitching prepared a Supplementary Form 1 advising of the allegations of assault by SS Hurley upon Mulrunji made by Roy Bramwell and Penny Sibley.[405] DSS Kitching conceded that those allegations were critical information to convey to the person conducting the autopsy.[406]

225. The Applicants have pleaded that the failure either to amend the Form 1 to include the assault allegations prior to submitting it or to submit a Supplementary Form 1

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401 T1278.14-1279.34.

402 3FASC: 244(h).

403 ASF: 204.

404 T1280.20-40.

405 ASF: 170; 207.

406 T1281.28-31.

containing the assault allegations was an "act" for the purpose of section 9 of the RDA.[407]

226. DSS Kitching gave evidence that the reason he had omitted the information about the assault allegations was that he had not had time to update the form[408] and that he had intended to submit a Supplementary Form 1, although he did not explain why he failed to carry out that intention.[409] The Applicants submit that it is unlikely that he in fact intended to do so. In any event, the fact remains that he did not submit a Supplementary Form 1 before the autopsy was conducted. As a consequence, the pathologist conducting the autopsy did not have the benefit of the information that two people had independently made allegations that the deceased was assaulted immediately prior to his death. The Applicants submit that this was a breach of section 8.4.3 of the OPM.[410]

D.3.4 Failure to advise pathologist of assault allegations

227. It is agreed that, when present at the autopsy, DSS Kitching advised the pathologist, Dr Lampe, that Mulrunji may have been drinking bleach or sniffing petrol, but did not advise Dr Lampe of the allegations made by Roy Bramwell or Penny Sibley that Mulrunji had been assaulted by SS Hurley.[411]

228. The Applicants have pleaded that the failure to advise Dr Lampe of the assault allegations was an "act" for the purpose of section 9 of the RDA.[412]

229. In his evidence, DSS Kitching struggled to explain why he had failed to advise the pathologist of the assault allegations, although he accepted that he ought to have done so.[413] He also conceded that the information that Mulrunji had been drinking bleach was unconfirmed hearsay told to him by DS Robinson.[414]

230. DSS Kitching's ultimate evidence on the failure to advise Dr Lampe of the assault allegations was "in my mind at that time, I was attempting to provide Dr Lampe

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[407] 3FASC: 244(h).

[408] T1281.19-26.

[409] T1281.33-35.

[410] 3FASC: 212(e)-(f).

[411] ASF: 208.

[412] 3FASC: 244(h).

[413] T1283.5-1285.13; T1321.15-25.

[414] T1285.15-1286.5.

with as much information as I could with what I knew that was consistent with the scene".[415] The autopsy was conducted on Tuesday 23 November 2004. On Saturday 20 November 2004, DSS Kitching had been advised by Roy Bramwell in an interview of allegations that SS Hurley had assaulted Mulrunji, had heard those allegations again during the subsequent video re-enactment and had no doubt discussed the allegations at least with DI Webber and Insp Williams. On Sunday 21 November 2004, he had driven to Ingham specifically to interview Penny Sibley and she had made separate allegations to those of Mr Bramwell that SS Hurley had assaulted Mulrunji.

231. The Applicants submit that it is extremely unlikely that those allegations had slipped DSS Kitching's mind two and three days later. Rather, the Applicants submit that the more likely explanation is that DSS Kitching deliberately did not tell Dr Lampe the allegations because he considered them not to be, in his words, "consistent with the scene", or in other words, consistent with the story that nothing untoward had happened to Mulrunji from any police officer. If, on the other hand, he genuinely did not remember the assault allegations, which were made to him by direct witnesses to the events, the Applicants submit that that would be a damning indication of the extent to which he had dismissed them in his mind, especially compared with the bleach allegations, which he knew to be unconfirmed hearsay. Accordingly, in the Applicants' submission, a fair minded lay observer might reasonably conclude that DSS Kitching did not bring an impartial mind to the performance of his duties in relation to the Form 1 and the autopsy. As a consequence, the results of the autopsy were not the result of a neutral evaluation of the merits. The Applicants submit that DSS Kitching thereby breached the Impartiality Duty.

D.3.5 Breaches of duties

232. The above issues in relation to the Form 1 and the autopsy are pleaded by the Applicants as breaches by DSS Kitching and/or DI Webber of the Coroner Duty, the Impartiality Duty, the Integrity Duty and the Reasonable Diligence Duty.

233. The Applicants submit that there is a clear inference from the discrepancies in the Form 1 and DSS Kitching's conduct during the autopsy that DSS Kitching was dismissing information which was unfavourable to SS Hurley and only advising the pathologist of information that was favourable to SS Hurley. The Applicants further submit that this shows a dearth of sympathy for Mulrunji or for the community and

[415] T1321.22-25.

a strong preference for the version of events provided by SS Hurley over versions provided by Aboriginal witnesses.

234. Further, the Applicants submit that the integrity of the autopsy was compromised by DSS Kitching's conduct and he thereby breached the Integrity Duty. Further, he breached the Reasonable Diligence Duty as an honest and reasonable police officer in his position would have been expected to consider all evidence fairly and on its merit, to ensure that the pathologist was advised of all relevant information and otherwise to comply with the provisions of the OPM.

235. In respect of DI Webber, the Applicants recognise that he played a minor role in these events. However, DI Webber was the officer ultimately in charge of the investigation and ultimately responsible for ensuring compliance with the relevant procedures pursuant to section 8.4.3 of the OPM.[416]

D.4. Failure to meet the cultural needs and expectations of the community

236. It is agreed that, following the death of Mulrunji, the Cultural Advisory Unit or "CAU" was required to be notified in accordance with section 16.24.1 of the OPM,[417] and that the functions of the CAU were to provide advice and support to members of the QPS in relation to cultural issues and to monitor racial issues.[418] Also agreed is that:

a. all QPS officers were subject to the Policy in section 6.4 of the OPM that "Officers should always consider cultural needs which exist within the community";[419]

b. officers in charge of stations or establishments were subject to a Policy in section 6.4.7 of the OPM that "Officers in charge of stations or establishments should, in managing the provision of services, take into account the specific cultural and ethnic demographic characteristics of their area of responsibility and the needs thereby created";[420] and

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[416] ASF: 112.

[417] ASF: 179.

[418] ASF: 38, 180.

[419] ASF: 181, 39(a).

[420] ASF: 182, 39(b).

c. the QPS provided Cross Cultural Liaison Officers or "CCLOs" to all regions, whose role, as set out in section 6.4.8 of the OPM, was:

> to establish and maintain effective liaison between police, Aboriginal, Torres Strait Islander and ethnic communities to identify the needs of communities and enable appropriate policies and strategies to be developed to ensure the delivery of an equitable service within the district or region.[421]

237. The parties agree that those systems accorded with recommendations 210, 214, 215, 225 and 228 of the RCIADIC.[422] In the Applicant's submission, those recommendations, in the context of the report,[423] are plainly calculated to ensure that Aboriginal residents of Queensland receive the same standard and quality of police services as do non-Aboriginal residents and to assist in overcoming the obstacles to equal service that would otherwise exist.

D.4.1 Failure of CAU

238. The Applicants have pleaded that, following the death in custody of Mulrunji, no officer of the CAU provided advice and support to members of the QPS stationed on Palm Island in relation to cultural issues or that any such advice and support was not appropriate in all the circumstances or not followed by members of the QPS stationed on Palm Island.[424]

239. The Applicants have pleaded that the failure to utilise the systems in place for advice and support from the CAU was an "act" for the purpose of section 9 of the RDA.[425]

240. Some communication concerning Mulrunji's death between the Police Communications Centre in Townsville and the CAU are in evidence.[426] Those documents do not indicate that any advice regarding cultural issues was provided. Further, there is no evidence that any advice that was provided was communicated to the officers on Palm Island. The allegation in paragraph 193(a) of the 3FASC should be accepted as made out.

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[421] ASF: 183, 40.

[422] ASF: 184-185.

[423] Exhibit A108, pp 755-808.

[424] 3FASC: 193.

[425] 3FASC: 244(d)(i).

[426] Exhibits R32-R34.

D.4.2 Failure of CCLO

241. The Applicants have pleaded that, following the death in custody of Mulrunji, no CCLO attended at Palm Island until about 12 pm on 26 November 2004, and no CCLO provided any advice to QPS officers on Palm Island either in connection with the investigation into the death in custody or other operational policing on Palm Island.[427]

242. The Applicants have pleaded that the failure to utilise the systems in place for advice and support from CCLOs was an "act" for the purpose of section 9 of the RDA.[428]

243. It is clear from SS Dini's evidence that no CCLO had been involved with the issues on Palm Island until he arrived at about 12 pm on 26 November 2004.[429] The allegations in paragraph 194 of the 3FASC should be accepted as made out.

D.4.3 Failure to take into account cultural needs

244. The Applicants have pleaded that the investigation team did not take any reasonable steps in good faith to keep the community on Palm Island informed of the progress of the investigation as it unfolded or to appropriately address and respond to the characteristics and cultural needs of the Palm Island community.[430]

245. The Applicants have pleaded that the following acts were "acts" for the purpose of section 9 of the RDA:[431]

a. the failure of the investigation team to take any reasonable steps in good faith to keep the community on Palm Island informed of the progress of the investigation as it unfolded; and

b. the failure of the investigation team to appropriately address and respond to the characteristics and cultural needs of the Palm Island community.

246. The evidence clearly establishes that no such steps were taken. It is clear that neither DI Webber nor DSS Kitching considered the history or the cultural needs of the

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[427] 3FASC: 194.

[428] 3FASC: 244(d)(i).

[429] T778.20-782.18.

[430] 3FASC: 232(c).

[431] 3FASC: 244(d)(ii).

community in great detail[432] and that they did not take any steps to contact community leaders.[433] DI Webber gave evidence that an Aboriginal death in custody required "an exercise of consideration in relation to any cultural issues that … may arise",[434] but conceded that he did not sufficiently consider that a death in custody in an Aboriginal community is particularly distressing not only for the immediate family, but for the community as a whole.[435] In the Applicants' submission, the allegations in paragraph 232(c) of the 3FASC should be accepted as made out.

D.4.4 Delay in notification of next of Kin

247. The provisions of the OPM applicable to the notification of the next of kin in the case of an Aboriginal death in custody can be found in sections 16.24.3(vi)-(vii) of the OPM.[436] The parties have agreed that these provisions conform with recommendations 19 to 20 of the RCIADIC.[437] Relevantly, they require that a commissioned officer to whom the responsibility for investigating the death in custody reverts pursuant to section 1.17 of the OPM to do the following:

a. immediately arrange for the deceased's next of kin to be notified;

b. use a cross-cultural liaison officer to make the notification if practicable;

c. in the notification of the next of kin, preferably ensure that such notification is assisted by someone known to the next of kin; and

d. notify the Aboriginal and Torres Strait Islander Legal Service or equivalent.

248. The Applicants have pleaded that a commissioned officer the subject of those provisions was subject to a duty to comply with those provisions, which has been defined as the "Notification Duty".[438] The Respondents have denied that any such obligation existed, on the basis that the relevant provisions were expressed as a Procedure.[439] The Applicants rely in that regard on the above submissions in relation to OPM Pro-

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[432] T1045.4-1049.26; T1239.35-1242.23.

[433] T1238.22-1239.2.

[434] T903.40-45.

[435] T1048.33-1049.33.

[436] ASF: 43(vi)-(viii).

[437] ASF: 210.

[438] 3FASC: 118.

[439] Defence: 75.

cedures. In this particular instance, the Applicants further rely on the Order in section 1.17 of the OPM that the regional crime coordinator was "in cases of deaths in custody ... ensure that where necessary the provisions of ss. 16.24 to 16.24.5 ... [were] complied with".[440]

249. The parties have agreed that SS Hurley telephoned the Queensland Ambulance Service and requested that they attend at the watchhouse at 11.19 am on 19 November 2004.[441] It is further agreed that Murunji's partner, Tracey Twaddle, was notified of Mulrunji's death at about 3.40 pm, that Mulrunji's mother and other family members were notified at about 3.55 pm and that DI Webber was in attendance, accompanied by Sgt Leafe and Owen Marpoondin of the Aboriginal and Torres Strait Islander Legal Service, when those notifications were performed.[442] The Applicants have pleaded that the delay in notifying the family was a breach by DI Webber of the Notification Duty.[443] DI Webber also conceded that Ms Twaddle attended at the Palm Island police station at about 1 pm that day to inquire as to Mulrunji's whereabouts and that she was sent away without being advised of the death.[444]

250. The Applicants have pleaded that the failure to immediately notify Mulrunji's next of kin of the death was an "act" for the purpose of section 9 of the RDA.[445]

251. DI Webber's evidence was that he determined that, as the senior officer responsible for the investigation, he should notify the next of kin.[446] The Applicants submit that this is a misreading of the relevant policy, which requires that the commissioned officer *arrange* for the *immediate* notification of the next of kin, not that the commissioned officer should notify the next of kin at the first available opportunity for them to do so personally. In fact, the relevant provision of the OPM suggests that a cross-cultural liaison officer should be used to notify the next of kin if practicable, which implies that in some instances it was preferable for the notification to be performed by someone other than the commissioned officer responsible for the investigation.

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[440] ASF: 50(b); 3FASC: 201.

[441] ASF: 19.

[442] ASF: 209.

[443] 3FASC: 213.

[444] T1013.10-26; see also, Mrs Agnes Wotton's evidence at T153.1-7.

[445] 3FASC: 244(i).

[446] T906.8-10; T1013.40-43.

252. In the Applicants' submission, the delay in notifying Mulrunji's next of kin was an unjustified breach of section 1.17 of the OPM. Further, it evidently created a degree of discontent in the community and was a failure to adequately consider the community's needs. In that regard, the Applicants note that the footage of the public meeting on Tuesday 23 November 2004 depicts community members expressing discontent at the delay in advising the family of the death.[447]

[447] Exhibit A7, Title01.mkv at 09:00.

E. Unlawful Racial Discrimination in QPS Failures

E.1. QPS Failures

253. The Applicants have pleaded that the "QPS Failures" as defined in the 3FASC, or so many of them as are proven at trial, breached section 9 of the RDA.[448]

254. For the reasons set out above, having regard to all of the evidence adduced at trial, the Applicants submit that the following acts comprising the QPS Failures have been proven:

a. the failure of the QPS to suspend SS Hurley from duty;[449]

b. the fact of SS Hurley continuing to perform operational duties, including in relation to the investigative process;[450]

c. the fact of SS Hurley continuing to perform operational duties, including at the scene of the arrest;[451]

d. the fact of SS Hurley being present in the police station when the investigation was taking place;[452]

e. the failures by each of DI Webber and Insp Strohfeldt to provide advice or instructions or to take steps to ensure SS Hurley did not continue to perform duties at the scene;[453]

f. the failure to treat SS Hurley as a suspect;[454]

g. the failure to electronically record the conversation in the police vehicle;[455]

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[448] 3FASC: 249-255.

[449] 3FASC: 244(v).

[450] 3FASC: 244(v), (n)(iii).

[451] 3FASC: 244(m)(v), (n)(iii).

[452] 3FASC: 244(m)(v), (n)(iii).

[453] 3FASC: 244(m)(v), (n)(iv).

[454] 3FASC: 244(k).

h. the fact of SS Hurley collecting the investigation team from the airport;[456]

i. the failure to electronically record the conversation that took place during the dinner at SS Hurley's house;[457]

j. the fact of the dinner at SS Hurley's house taking place and alcohol being consumed;[458]

k. the failure to electronically record the conversation in the police vehicle *en route* to the site of the arrest;[459]

l. the fact of the investigation team being driven to the site of the arrest by SS Hurley;[460]

m. the fact of the investigation team attending the site of the arrest with SS Hurley without being accompanied by PLO Bengaroo;[461]

n. the appointment of DS Robinson to the investigation team;[462]

o. DS Robinson's involvement in the investigation;[463]

p. DS Robinson's failure to advise senior officers of his conflict of interest;[464]

q. the appointment of DSS Kitching to the investigation team;[465]

r. the failures by each of DI Webber and Insp Strohfeldt to instruct officers not to talk to each other about Mulrunji's death and the surrounding events;[466]

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[455] 3FASC: 244(k).
[456] 3FASC: 244(m)(iii).
[457] 3FASC: 244(k).
[458] 3FASC: 244(m)(ii).
[459] 3FASC: 244(k).
[460] 3FASC: 244(m)(iii).
[461] 3FASC: 244(m)(iii).
[462] 3FASC: 244(n)(ii).
[463] 3FASC: 244(m)(i), (m)(iv).
[464] 3FASC: 244(m)(i).
[465] 3FASC: 244(n)(ii).
[466] 3FASC: 244(n)(vi).

s. the fact of officers talking to each other about Mulrunji's death and the surrounding events;[467]

t. the failure by DSS Kitching to ascertain what had been discussed by witnesses;[468]

u. the failure of DI Webber to ensure Const Steadman was interviewed as soon as practicable;[469]

v. the failure by Insp Williams to overview, advise on, and confer with DI Webber and the CMC to resolve issues regarding the integrity of the investigation;[470]

w. the failure to obtain a statement from PLO Bengaroo which was as comprehensive as possible;[471]

x. the treatment of PLO Bengaroo as inferior to other police officers who were not Aboriginal;[472]

y. the failure to organise for a support person to be available to assist in the conduct of interviews if needed; [473]

z. the conduct of interviews with Aboriginal witnesses in a manner which did not account for the cultural needs of the witnesses. [474]

aa. the delay in sending the Form 1;[475]

bb. the inclusion in the Form 1 of the statement that "the deceased laid on the floor of the cell and went to sleep immediately";[476]

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[467] 3FASC: 244(n)(vi).
[468] 3FASC: 244(n)(vii).
[469] 3FASC: 244(f).
[470] 3FASC: 244(n)(v).
[471] 3FASC: 244(j).
[472] 3FASC: 244(j).
[473] 3FASC: 244(l).
[474] 3FASC: 244(l).
[475] 3FASC: 244(h).
[476] 3FASC: 244(h).

cc. the failure either to amend the Form 1 to include the assault allegations prior to submitting it, or to submit a Supplementary Form 1 containing the assault allegations;[477]

dd. the failure of DSS Kitching to advise Dr Lampe of the assault allegations during the autopsy;[478]

ee. the failure to utilise the systems in place for advice and support from the CAU;[479]

ff. the failure to utilise the systems in place for advice and support from CCLOs;[480]

gg. the failure of the investigation team to take any reasonable steps in good faith to keep the community on Palm Island informed of the progress of the investigation as it unfolded;[481]

hh. the failure of the investigation team to appropriately address and respond to the characteristics and cultural needs of the Palm Island community;[482] and

ii. the failure to immediately notify Mulrunji's next of kin of the death.[483]

E.2. Breach of section 9

E.2.1 Relevant context

255. As noted above, it is common in cases alleging racial discrimination that the Court will need to draw an inference from "the united force of all the circumstances put together".[484] In establishing that the QPS Failures were a "distinction, exclusion, restriction or preference", the Applicants have pleaded a number of contextual factors

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[477] 3FASC: 244(h).

[478] 3FASC: 244(h).

[479] 3FASC: 244(d)(i).

[480] 3FASC: 244(d)(i).

[481] 3FASC: 244(d)(ii).

[482] 3FASC: 244(d)(ii).

[483] 3FASC: 244(i).

[484] *Sharma v Legal Aid (Qld)* (2002) 115 IR 91 at 98 (Heerey, Mansfield and Hely JJ).

which, in the Applicants' submission, must be taken into account in order to fully appreciate the circumstances of the case, including:

a. that the residents of Palm Island were overwhelmingly Aboriginal;[485]

b. the unique history of Palm Island, including the circumstances in which the community were forcibly relocated to Palm Island and the discriminatory treatment to which the community had historically been subjected;[486]

c. the interest of the community in the RCIADIC; [487] and

d. the knowledge of the police of the RCIADIC. [488]

256. The Applicants rely on the above submissions in respect of those matters.

E.2.2 Distinction, exclusion, restriction or preference based on race

257. The Applicants have pleaded that the acts comprising the QPS Failures constituted a "distinction, exclusion, restriction or preference" within the meaning of section 9(1) of the RDA, on the basis that the policing services provided to the Applicants or the policing services provided on Palm Island were not provided according to the same standard that they were provided in other areas of Queensland or to other communities in Queensland.[489] In that regard, the Applicants have pleaded[490] that, in November 2004, the QPS ordinarily complied with Orders, Policies, and Procedures, as well as the provisions of the PSAA,[491] that the QPS ordinarily acted in partnership with the community at large and provided policing services as required by the reasonable expectations of the community or as reasonably sought of officers by members of the community.[492] The Applicants rely on their above submissions in relation to the Respondents' denials and qualified admissions of those allegations.

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[485] 3FASC: 245(a); ASF: 245.

[486] 3FASC: 245(b)-(c) and (f).

[487] 3FASC: 245(d).

[488] 3FASC: 245(e).

[489] 3FASC: 249(a)-(e).

[490] 3FASC: 246.

[491] 3FASC: 246(a)-(c).

[492] 3FASC: 246(d).

258. The Applicants acknowledge that, viewed in isolation, most if not all of the acts could be characterised as simply, in the terms of the Defence,[493] "honest mistakes" or "errors of judgment". However, viewed as a composite, the Applicants submit that the following inferences can be drawn.

(a) Disregard for impartiality

259. Of the acts comprising the QPS Failures on which the Applicants rely, as submitted above, most detract in some way from the actual or perceived impartiality of the investigation. The acts relied on in that regard are the acts referred to in the following sub-paragraphs of paragraph 254 above: a, b, c, d, e, f, g, h, i, j, k, l, m, n, o, p, q, r, s, t, v, w, x, bb, cc, and dd.

260. In the Applicants' submission, the investigating officers did not once have regard to the appearance of impartiality throughout the entire investigation. As the Applicants have contended, the impartiality of the investigation was compromised from the moment DS Robinson was directed to accompany DI Webber and DSS Kitching to Palm Island until the moment DSS Kitching advised Dr Lampe of the allegations of Mulrunji drinking bleach and not of Mulrunji being assaulted. Further, the acts indicating a lack of impartiality occurred consistently throughout that period. As submitted above, the investigating officers were subject to obligations that they conduct a thorough and impartial investigation, and the Court should assume that investigations into deaths in custody were ordinarily conducted in accordance with those obligations. Accordingly, the acts creating an appearance of impartiality involved a "distinction" within the meaning of section 9 of the RDA.

(b) Preference for evidence from non-Aboriginal witnesses

261. As submitted above, the QPS procedures in relation to interviewing Aboriginal witnesses or persons from a disadvantaged background serve an important function. Where a police officer is interviewing someone from a mainstream Australian background, their shared cultural and socio-linguistic qualities will allow the officer to communicate effectively with the interviewee and thereby elicit useful information. Where the interviewee comes from a different cultural or socio-linguistic background to the officer, it is likely that the officer will not be able to communicate as effectively and the evidence emerging from the interview will therefore be incomplete or inaccurate. In the Applicants' submission, this was the case for the interviews with Abo-

[493] Defence: 167(b).

riginal witnesses conducted in the course of the investigation. The acts relied on in that regard are the acts referred to in the following sub-paragraphs of paragraph 254 above: w, x, y, z, cc, dd, ee, and ff.

262. In the Applicants' submission, the volume and detail of information elicited in the interviews of the non-Aboriginal witnesses is plainly superior to the information elicited from the Aboriginal witnesses. This is a direct function of the failure of the investigating officers to follow the appropriate procedures and utilise structures which the QPS had in place for dealing with such situations. As Dr Eades noted:

> It is relevant to note that the evident difficulties experienced by the interviewees in these examples were attended to by the interviewer. It is not known whether there were other difficulties for which there is no clear evidence. Further, it is quite possible that a different kind of investigation would have produced more information, if the witnesses' accounts had not been limited and structured by the interview format.[494]

263. The inevitable result of the failure to provide support to Aboriginal witnesses is that the evidence that would otherwise have been provided by those witnesses was effectively lost for all time. It must necessarily follow that the versions of events of the non-Aboriginal witnesses carried more weight in respect of the investigation than did those of the Aboriginal witnesses. It is submitted that the acts representing a failure to support Aboriginal witnesses involved a "distinction" within the meaning of section 9.

264. Further, there is evidence that, to the investigating officers, the information that was elicited from Aboriginal witnesses carried less weight than that elicited from the non-Aboriginal witnesses. In particular, the allegations made by Roy Bramwell and Penny Sibley were not given due and adequate consideration or treated with the seriousness they deserved. As submitted above, had this not been the case, the investigation would have taken a very different course. In the Applicants' submission, the evidence reveals that the relevant acts involved a "distinction" between the treatment of the evidence of Aboriginal witnesses and the evidence of non-Aboriginal witnesses and a "preference" for the evidence of the non-Aboriginal witnesses, within the meaning of section 9.

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[494] Exhibit E1, p24.

(c) Compromise of integrity of investigation

265. The Applicants have pleaded that the acts comprising the QPS failures created the appearance of a poorly conducted investigation.[495] In the Applicants' submission, each of the acts referred to in sub-paragraphs 254(a)-(dd) above contributed in some way to the overall compromise of the integrity of the investigation, albeit to varying degrees.

266. In addition to the matters noted above in relation to the perceived impartiality of the investigation and the treatment of Aboriginal witnesses, the compromising of the integrity of the investigation included the omission of important avenues of investigation, numerous failures to maintain the integrity of the evidence that was collected, providing misleading information to the Coroner and the pathologist and providing multiple opportunities to SS Hurley, the person most closely involved with the incident under investigation, to be aware of the progress of the investigation and to take measures to influence its findings. Further, as the Applicants have contended, most if not all of these acts were contrary to police obligations, or at least to ordinary police protocols and practice.

267. In the Applicants' submission, the Court should assume that, in an ordinary investigation into a death in custody, police obligations are complied with, police protocols are adhered to and the integrity of the investigation is maintained. Accordingly, the Applicants submit that the relevant acts involved a "distinction" within the meaning of section 9 of the RDA.

(d) Failure to address cultural needs of the community

268. The RCIADIC was established because between 1 January 1980 and 31 May 1989, 99 Aboriginal and Tones Strait Islander people died in the custody of prison, police or juvenile detention institutions[496] and there was "a growing public concern that deaths in custody of Aboriginal people were too common and public explanations were too evasive to discount the possibility that foul play was a factor in many of them".[497] As the Commission observed, deaths in custody are particularly likely to engender suspicion and doubt as "The deceased person has been in the custody and care of the State, not accessible in the general sense, his or her life controlled and or-

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[495] 3FASC: 248.

[496] Exhibit A108, p20 [1.1.1].

[497] Exhibit A108, p20 [1.1.2].

dered by functionaries of the State, out of sight and of normal contact" and "the suspicion can be allayed only by the most open and thorough going laying of the facts on the table".[498] Accordingly, whilst all police investigations should be done impartially and with transparency and rigour, this is even more the case when investigating a death in custody.

269. The Commission went on to note that this is particularly the case for Aboriginal deaths in custody, as a result of "the deep distrust grounded in history that Aboriginal people have for police and prison systems".[499] The Applicants submit that these observations hold even more true for Aboriginal people in a community such as Palm Island than for most communities in Queensland, in view of the particularly harsh and punitive treatment to which the Aboriginal people of Palm Island were subjected by the State of Queensland and its organs, solely on the grounds of their race.

270. The Royal Commission further wrote that: "The conclusions are clear. Aboriginal people die in custody at a rate relative to their proportion of the whole population which is totally unacceptable and which would not be tolerated if it occurred in the non-Aboriginal community".[500] The recommendations the Commission made were designed in an effort to eliminate that phenomenon and place the Aboriginal community on the same footing as the non-Aboriginal community.

271. Many of the police protocols which the Applicants allege were breached in the investigation into Mulrunji's death were enacted because of or conform with the Commission's recommendations. As noted above, these include the existence of the CAU and CCLOs, the requirements in respect of the notification of the next of kin and the overriding obligation to conduct an investigation that is both thorough and impartial. In the Applicants' submission, the failure of the QPS to adhere to those protocols served to perpetuate the disparity between Aboriginal and non-Aboriginal people in the criminal justice system which is "totally unacceptable and which would not be tolerated if it occurred in the non-Aboriginal community". In the Applicants' submission, this involves a "distinction, exclusion, restriction or preference" within the meaning of section 9 of the RDA.

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[498] 3FASC: Annexure A, 1.2.4.

[499] 3FASC: Annexure A, 3.1.2.

[500] Exhibit A108, p23 [1.3.3].

E.2.3 Based on race

272. In relation to the distinctions, exclusions, restrictions or preferences described above, the Applicants submit that preference for the evidence of non-Aboriginal witnesses and the failure to address the cultural needs of the community are self-evidently based on the race of the Applicants. Accordingly, these submissions need only address whether the disregard for impartiality and the compromise of the integrity of the investigation were based on race. Further, as the disregard for impartiality is a component of the compromise of the integrity of the investigation, if the latter was based on the race of the Applicants, then so too was the former.

273. In the Applicants' submission, it is apparent from a consideration of the acts compromising the integrity of the investigation in aggregate that they were not simply errors occurring as a result of laziness, incompetence or a disregard for procedure. In an investigation conducted with mere incompetence, evidence would be corrupted or omitted randomly and no particular outcome would be favoured. However, in the investigation into Mulrunji's death, the errors followed an unmistakeable pattern. It was not the case that the officers initially approached the investigation on the basis that there had probably been no misconduct on the part of the police and then began to take it seriously after significant allegations were made against SS Hurley. Neither was it the case that the investigating officers were concerned to conduct a thorough and impartial investigation at the outset and then relaxed a little when it became apparent that there were no visible signs of injury on the deceased. Rather, the investigating officers appear to have approached the investigation from start to finish on the basis of the following assumptions:

    a. that SS Hurley had done nothing wrong;

    b. that the death was from natural causes; and

    c. that they were doing no more than going through the motions of an investigation.

274. Further, the significance of the death and the needs and expectations of the community do not appear to have been considered.

275. The Applicants submit that those assumptions and the failure to consider the needs and expectations of the community are inextricably linked with the circumstances of Mulrunji being an intoxicated Aboriginal man arrested by a white police officer on Palm Island. Had the deceased been a non-Aboriginal person in a community which was less remote, better serviced, better educated and more politically educated and influential, the investigation team would have known that they were subject to significant scrutiny, more care would have been taken to ensure that the investigation

was conducted "by the book", steps would have been taken to ensure that the community was aware of its progress and the officers involved in the arrest would certainly be stood down from duty or transferred to another station pending the outcome of the investigation. Had the deceased not been Aboriginal and intoxicated, that he had died of a natural death would not so readily have been assumed. Had the person making serious assault allegations against the arresting officer not been an Aboriginal man who was known to drink on occasion, those allegations would have been taken seriously and the arresting officer would have been stood down immediately pending the outcome of the investigation.

276. For the above reasons, the Applicants submit that the distinction involved in the acts compromising the integrity of the investigation was one based on the race of the Applicants.

E.3. Breaches of rights

277. The breaches of rights alleged by the Applicants in relation to the acts comprising the QPS Failures are pleaded at paragraph 253 of the 3FASC. The Applicants do not press any allegations in relation to the nullification or impairment of the recognition, enjoyment or exercise of the Applicants' rights under Articles 5(b) or 5(e)(iv) of the CERD as a result of the acts comprising the QPS Failures.

E.3.1 Right to equality before the law and equal protection of the law

(a) Nature and contents of right

278. The Applicants have alleged the nullification or impairment of the recognition, enjoyment or exercise on an equal footing of their rights to equality before the law and equal protection of the law under Article 26 of the ICCPR[501] and of the right to quality before the law more generally.[502]

279. As must be the case for a claim under the RDA, each of the rights which the Applicants allege to have been breached are ultimately derived from the right to equality before the law. As submitted above, section 9 protects the rights referred to in Article 5 of the CERD and "any similar rights". Article 5 provides that:

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[501] 3FASC: 253(a).

[502] 3FASC: 253(h).

> In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to *guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law*. (emphasis added)

280. Article 26 of the ICCPR states:

> All persons are equal before the law and are entitled without any discrimination to the equal protection of the law. In this respect, the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status.

281. Both Article 5 of the CERD and Article 26 of the ICCPR embrace the concept of the equal protection of the law that is recognised in Article 7 of the UDHR,[503] which provides:

> All are equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.

282. In its *General Comment No 18*,[504] the United Nations Human Rights Committee (***HRC***), a body created under the ICCPR specifically to supervise the application of the ICCPR, and whose interpretation of the ICCPR should be "ascribe[d] great weight",[505] recognised that:

> Article 26 provides that all persons are equal before the law and are entitled to equal protection of the law without discrimination, and that the law shall guarantee to all persons equal and effective protection against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but *provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and protected by public authorities.* Article 26 is therefore concerned with the obligations imposed on States parties *in regard to their legislation and the application thereof*. Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle

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[503] *Maloney v The Queen* (2013) 252 CLR 168 at 249 [217]-[218] (Bell J).

[504] Human Rights Committee: General Comment No. 18 *Non-discrimination* (37th session) (Adopted 10 November 1989).

[505] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639, at [66].

> of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.[506]

283. The right to equality before the law lies at the heart not only of international treaty law, but also of the common law legal system. The LexisNexis *Concise Australian Dictionary* states "equality" is:

> A hallmark of the rule of law one of the most fundamental human rights is the right to be treated equally before the law, that is, to be subject to law applied generally and without discrimination.[507]

284. A.V. Dicey created a classical formulation of the rule of law in 1885. He stated that the rule of law has three meanings:

> It means, in the first place, the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power... Englishmen are ruled by the law, and by the law alone; a man may with us be punished for a breach of law, but he can be punished for nothing else. *It means, again, equality before the law or the equal subjection of all classes to the ordinary law of the land administered by the ordinary law courts*; the 'rule of law' in this sense excludes the idea of any exemption of officials or others from the duty of obedience to the law which governs other citizens or from the jurisdiction of the ordinary tribunals.[508]

285. In *Green v The Queen*, French CJ, Crennan and Kiefel JJ explained the principle of "equality before the law" as follows:

> "Equal justice" embodies the norm expressed in the term "equality before the law". It is an aspect of the rule of law. It was characterised by Kelsen as "the principle of legality, of lawfulness, which is immanent in every legal order". It has been called "the starting point of all other liberties". It applies to the interpretation of statutes and thereby to the exercise of statutory powers. It requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law

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[506] Human Rights Committee: General Comment No. 18 *Non-discrimination* (37th session) (Adopted 10 November 1989) [12]-[13], emphasis added; quoted with approval in *Maloney v The Queen* (2013) 252 CLR 168 at 250-251 [222] (Bell J); see also, Nowak, *UN Covenant on Civil and Political Rights: CCPR Commentary*, (1993) at 458-475; Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination", (1985) 79 *American Journal of International Law* 283 at 291-293; Lillich, "Civil Rights", in Meron (ed), *Human Rights in International Law*, (1984), vol 1 at 132-133; Schwelb, "The International Convention on the Elimination of All Forms of Racial Discrimination", (1966) 15 *International and Comparative Law Quarterly* 996 at 1018-1019.

[507] Fourth Edition, 2001.

[508] A.V. Dicey, *Introduction to the study of the law of the Constitution* (10th edition, 1959) at 202-203 emphasis added.

> permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law.[509]

286. In *Maloney,* Bell J found that "The right stated in Art 7 of the UDHR and its analogue in Art 26 of the ICCPR may now form part of the customary law of nations. The right should be accepted to be a human right of a kind that is within the scope of the Convention and s 10(1) [of the RDA]".[510] The Applicants submit that there is an autonomous human right to equality before the law and equal protection of the law which must be accepted as a customary rule of international law and a "human right" within the meaning of section 9 of the RDA. That right protects not only against discriminatory legislation, but also against the discriminatory *application* of legislation by public authorities.[511]

(b) Right to protection of police

287. The Applicants have pleaded that the Respondents nullified or impaired the recognition, enjoyment or exercise on an equal footing of their rights to go about their affairs in peace under the protection of the police services, under the common law.[512] It is necessary to explain the nature and contents of this right before setting out the basis for the breach of the Applicants' rights to equality before the law.

288. The QPS is an organisation created by statute to exercise statutorily prescribed functions and powers.[513] As submitted above, the police are also subject to a number of fundamental and long-recognised common law duties, including a general duty to enforce the law. That duty was authoritatively described by Lord Denning MR in *R v Metropolitan Police Commissioner* as follows:

> I hold it to be the duty of the Commissioner of Police of the Metropolis, as it is 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*

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[509] (2011) 244 CLR 462 at 472-473 [28] (French CJ, Crennan and Kiefel JJ) (references omitted).

[510] *Maloney v The Queen* (2013) 252 CLR 168 at 249-250 [219] (Bell J); see also, *European Roma Rights Centre v Immigration Officer at Prague Airport* [2005] 1 All ER 527 at 576-108 [97]-[105] (Baroness Hale of Richmond).

[511] See, eg, *Aurukun Shire Council & Anor v CEO Office of Liquor Gaming and Racing in the Department of Treasury* [2012] 1 Qd R 1 at 33 [43] (McMurdo P); see also, Human Rights Committee, *Final views: Carlos Orihuela Valenzuela v. Peru*, Communication No. 309/1988, U.N. Doc. CCPR/C/48/D/309/1988 (1993), finding that a failure to pay a public servant severance pay for discriminatory reasons was a breach of Article 26 of the ICCPR.

[512] 3FASC: 253(i).

[513] ASF: 9.

> *must decide whether or no suspected persons are to be prosecuted; and, if need be, bring the prosecution or see that it is brought.* But in all these things he is not the servant of anyone, save of the law itself. No Minister of the Crown can tell him that he must, or must not, keep observation on this place or that; or that he must, or must not, prosecute this man or that one. Nor can any police authority tell him so. The responsibility for law enforcement lies on him. He is answerable to the law and to the law alone.[514]

289. Those principles were echoed in the functions of the QPS as prescribed in section 2.3 of the PSAA, which included:[515]

a. the preservation of peace and good order in all areas of the State;

b. the protection of all communities in the State, and all members thereof:

i. from unlawful disruption of peace and good order that results, or is likely to result from actions of criminal offenders, or actions or omissions of other persons; and

ii. from commission of offences against the law generally;

c. the prevention of crime;

d. the detection of offenders and bringing of offenders to justice;

e. the upholding of the law generally;

f. the administration, in a responsible, fair and efficient manner and subject to due process of law and directions of the commissioner, of:

i. the provisions of the Criminal Code;

ii. the provisions of all other Acts or laws for the time being committed to the responsibility of the service;

iii. the powers, duties and discretions prescribed for officers by any Act;

g. the provision of the services, and the rendering of help reasonably sought, in an emergency or otherwise, as are:

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[514] *R v Metropolitan Police Commissioner; Ex parte Blackburn* [1968] 2 QB 118 at 136 (Lord Denning MR), emphasis added.

[515] ASF: 9(d); s 2.3 PSAA.

i. required of officers under any Act or law or the reasonable expectations of the community; or

ii. reasonably sought of officers by members of the community.

290. In the Applicants' submission, it follows that a failure by the police to carry out their prescribed functions constitutes a failure to preserve peace and good order and a breach of the rights of citizens to go about their affairs in peace.

291. As submitted above, the right to equality before the law and equal protection under the law without discrimination is an autonomous right which prevents both the enactment of discriminatory laws and the discriminatory application of laws by public authorities. In the Applicants' submission, the QPS is one such public authority and the application of powers and functions imparted on the QPS by force of law in a manner which constitutes racial discrimination can amount to a breach of the right to equality before the law and equal protection under the law.

292. Further, the Applicants submit that a failure by the police to exercise their functions as prescribed by statute and as recognised under the common law could amount to a breach of the rights of citizens to equal protection under the law in the sense that it would be a violation of their rights to go about their affairs in peace and under the protection of the police.

(c) Breach of rights

293. It is submitted above that the investigation was a "service" provided by the QPS which was required under section 2.3(g) of the PSAA to be provided "as required of officers under … the reasonable expectations of the community" or as "reasonably sought of officers by members of the community". The question then arises as to, if the investigation into Mulrunji's death was a "service", to whom was the service being provided? In ordinary police investigations, the service being provided is at least in part being provided to the victim of a crime. However, in the case of Mulrunji's death, it was not known at the time that the investigation commenced whether a crime had been committed. Further, the Applicants submit that the service of an investigation into a death in custody is plainly not rendered to the deceased.

294. In the Applicants' submission, the issue becomes clearer in view of the fact that, as submitted above, the community on Palm Island was one of the "communities in the State" in relation to which the QPS had a function prescribed under section 2.3(b) of the PSAA to protect from the unlawful disruption of peace and good order and from the commission of offences against the law generally. The Applicants submit that, in conducting the investigation into Mulrunji's death, the QPS was providing a service to the community on Palm Island. That service was to investigate the death in order

to, in the words of Lord Denning MR, "enforce the law of the land … that crimes may be detected; and that honest citizens may go about their affairs in peace".[516] In that regard, it is noted that the Queensland State Coroner's Guidelines said the following in relation to investigations into deaths in custody:[517]

> **In principle**
>
> Deaths in custody warrant particular attention because of the responsibility of the state to protect and care for people it incarcerates, the vulnerability of people deprived of the ability to care for themselves, the need to ensure the natural suspicion of the deceased's family is allayed and public confidence in state institutions is maintained. Further, a thorough and impartial investigation is also in the best interests of the custodial officers.
>
> **In practice**
>
> … In all cases investigations should extend beyond the immediate cause of death and whether it occurred as a result of criminal behaviour. It should commence with a consideration of the circumstances under which the deceased came to be in custody and the legality of that detention. The general care, treatment and supervision of the deceased should be scrutinised and a determination made as to whether custodial officers complied with their common law duty of care and all departmental policies and procedures and whether these were best suited to preserving the prisoner's welfare.
>
> Only by ensuring the investigation has such a broad focus as to identify systemic failures will a Coroner be given a sufficient evidentiary basis to discharge his/her obligation to devise preventative recommendations.

295. In the Applicants' submission, it follows that an investigation into a death in custody is a service rendered to the community in order to preserve public confidence in state institutions by ensuring that the relevant institution, in this case being the QPS, "complied with their common law duty of care and all departmental policies and procedures and whether these were best suited to preserving the prisoner's welfare". An investigation is therefore also an exercise of the QPS prescribed functions of protecting all communities in the State from unlawful disruption of peace and good order, the prevention of crime, the detection of offenders and bringing of offenders to justice, the upholding of the law generally, and the provision of services required of officers under the law and under the reasonable expectations of the community.

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[516] *R v Metropolitan Police Commissioner; Ex parte Blackburn* [1968] 2 QB 118 at 136 (Lord Denning MR) (emphasis added).

[517] ASF: 109.

296. It is noted that, when preparing the State Coroner's Guidelines, the Coroner was required to have regard to the RCIADIC[518] and the RCIADIC report is in fact referred to under the relevant section.[519] As the Royal Commission documented extensively, where investigations into Aboriginal deaths in custody are not conducted thoroughly, transparently and impartially, it creates a reasonable perception that Aboriginal people can be killed in police custody by the police with impunity.

297. As submitted above in detail, the acts comprising the QPS failures resulted in the investigation into Mulrunji's death being perceived to have been conducted in a poor and unacceptable manner and in contravention of multiple QPS obligations and procedures. In view of the subsequent events, it is clear that this constituted a dramatic failure to preserve confidence in state institutions. There is evidence that each of the Applicants lost confidence in the QPS as a result of the investigation.[520] This resulted in genuine fear for the life of Mr Wotton in circumstances where he was taken into police custody in a particularly violent manner just a week after Mulrunji had died.[521]

298. In view of the unique history of Palm Island, and the particular significance of Aboriginal deaths in custody to the community at large and to the Palm Island community in particular as a result of the racially discriminatory nature of the acts comprising the QPS Failures, the Applicants submit that the recognition, enjoyment or exercise on an equal footing of the rights of the Applicants to equality before the law and equal protection under the law were impaired.

E.3.2 Right to equal treatment before all organs administering justice

299. The Applicants have pleaded that the acts comprising the QPS Failures nullified or impaired the recognition, enjoyment or exercise on an equal footing of their rights under Article 5(a) of the CERD to "equality before the law and equal treatment before all organs administering justice".[522]

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[518] ASF: 107(d)-(e).

[519] Exhibit A15, pp 7.4-7.7.

[520] T153.43-154.31; T165.25-166.7; T430.27-33; T733.30-35; T734.3-5; Exhibit A207.

[521] T114.35-37; T160.32-47; also note the comments of Erykah Kyle in Title00.mkv at 18:15 regarding her concerns in relation to community members at the correctional centre in Townsville.

[522] 3FASC: 253(c).

300. As noted by McMurdo P in *Morton v Queensland Police Service*,[523] the term "organs administering justice" is not defined in the Convention or the RDA. Chesterman JA (Holmes JA agreeing) in *Morton* stated in respect of this right:

> The subject matter of that right would seem to be the equal application of municipal laws to all persons regardless of race etc. It suggests, to my mind at least, a requirement of non-discriminatory conduct by tribunals and courts, and such like institutions, which make decisions affecting the persons with whom they deal. *It probably extends to the executive enforcement of laws, for example by police officers.*[524]

301. The Applicants also note that, under the common law, the principles of natural justice are applicable not only to courts and tribunals, but to administrative decision makers such as police officers.[525] Further, those principles are expressly incorporated into the QPS Code of Conduct.[526] It follows that the QPS can be considered an "organ administering justice" for the purpose of Article 5(a) of the CERD. The Applicants rely on the above submissions in relation to the right to equality before the law in order to establish that their enjoyment or exercise of their rights under Article 5(a) were nullified in the conduct of the investigation into Mulrunji's death.

302. Further, the Applicants submit that a Coroner is also an "organ administering justice" and has the function of investigating deaths in custody in the circumstances set out above. In the Applicants' submission, it is clear from the terms of the State Coroner's Guidelines quoted above that the failure of the QPS to conduct a thorough and impartial investigation would impact substantially on the ability of the Coroner to make findings in relation thereto. It is noted that both Acting State Coroner Clements and Deputy Chief Magistrate Hine made remarks to that effect in the course of their respective findings in relation to Mulrunji's death.[527]

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[523] (2010) 271 ALR 112 at 119 [20] (McMurdo P).

[524] (2010) 271 ALR 112 at 119 [80] (Chesterman JA), emphasis added.

[525] *Annetts v McCann* (1990) 170 CLR 596, 598 (Mason CJ, Deane and McHugh JJ); *Rainbird v Bonde* [2016] TASSC 10 at [30] (Blow CJ).

[526] ASF: 105-106.

[527] Exhibit A95, pp 31-32; Exhibit A96, pp 143-147.

E.3.3 Right to access services

303. The Applicants have pleaded that the acts comprising the QPS Failures nullified or impaired the recognition, enjoyment or exercise of their rights under Article 5(f) of the CERD.[528]

304. Article 5(f) of CERD guarantees "the right of access to any place or service intended for use by the general public". As submitted above, the investigation constituted the provision by the QPS of a service to the community on Palm Island. For the following reasons, the Applicants submit that the service thereby provided was a "service" within the meaning of both Articles.

305. The expression "service" or "services" is not defined in the RDA. However, other discrimination laws do provide a definition and it is useful to refer to those. The expression "services" is defined in section 4 of the *Sex Discrimination Act* 1984 (Cth) to include "services of the kind provided by a government, government body or a local government body". The *Anti-Discrimination Act* 1991 (Qld) contains a similar definition of services "services provided by a public or local government".[529] Relevantly, the New South Wales Supreme Court has previously found[530] that the police do offer services (and those services were provided by a public service in the sense contemplated by the *Anti-Discrimination Act* 1977 (NSW)).[531]

306. Bell J in *Maloney*[532] noted that Article 5(f) recognises a right of access to any service intended for public use and that such a right is not found in other international human rights instruments. This right is an important aspect of the ability to live in full dignity and enjoy the public benefits of the society.[533]

307. The Applicants submit that against that background, the police officers are required to provide services to the community at large or the "general public". Their service is therefore a "service intended for use by the general public" and falls within Article 5(f).

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[528] 3FASC: 253(e) and (g).

[529] Dictionary of *Anti-Discrimination Act* 1991 (Qld).

[530] *Commissioner of Police, NSW Police Service v Estate of John Russell & Ors* [2001] NSWSC 745 at [43] (Sully J). (Not a matter before the Court on appeal)

[531] Note the definition is 'services' in section 4(1) of the Anti Discrimination Act 1977 (NSW) contained six categories of services including 'service provided by a ……public authority'.

[532] *Maloney v The Queen* (2013) 252 CLR 168 at 252 [225] (Bell J).

[533] *Gerhardy v Brown* (1985) 159 CLR 70 at 126 (Brennan J).

308. The Applicants submit that the acts comprising the QPS Failures nullified or impaired the recognition, enjoyment or exercise on an equal footing of their rights under Article 5(f) of the CERD for the reasons set out in the above submissions in relation to the right to equality before the law.

309. In relation to Article 5(e)(iv) of the CERD, the Applicants do not press this part of the claim.

E.4. Common questions of fact and law

310. Whether the investigation by members of the Queensland Police Service into the death of Mulrunji lacked independence, did not comply with the Queensland Police Service's Code of Conduct or the Queensland Police Service Operational Procedures Manual and/or was otherwise flawed are questions of fact and law common to the Applicants and the Group Members.[534] Further common questions of law are: (a) whether any or all of the acts, omissions or practices described in those claims involved a distinction, exclusion, restriction or preference based on race, colour, descent or ethnic origin; (b) had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, by the Applicants and group members, on an equal footing of any human right or fundamental freedom in the political, economic, social, cultural or any other field of public life; and/or (c) constituted unlawful discrimination for the purposes of the RDA and the AHRCA.[535]

311. The Applicants submit that the whole of the Court's findings in relation to the QPS Failures will concern issues common to the claims of the Applicants and the Group Members.

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[534] FAOA, Questions common to claims of group members, [1].

[535] FAOA, Questions common to claims of group members, [6].

F. 22 to 25 November 2004

F.1. SS Hurley's removal from the island

312. The parties have agreed that SS Hurley was not immediately suspended from duty following the death in custody of Mulrunji,[536] that he remained on Palm Island after Mulrunji's death until the afternoon of Monday 22 November 2004[537] and that at some time on that Monday he was relieved by SS Whyte, who took over as officer in charge of the police station.[538] It is further agreed that QPS officers stationed on Palm Island knew that there was a feeling of anger held by some residents on Palm Island over Mulrunji's death in custody and a perception by some residents of Palm Island that SS Hurley was not being held to account for that death.[539]

313. The Applicants have pleaded that the perceived partiality of the investigation was compromised in circumstances where SS Hurley was not suspended from duty immediately after Mulrunji's death and remained a stationed officer on Palm Island until 22 November 2004, and where he was permitted to continue performing an operational role on Palm Island whilst the investigation was ongoing, especially after the allegations made by Roy Bramwell and Penny Sibley had emerged.[540] It is further pleaded that the failure to immediately suspend SS Hurley from duty following the death in custody was contrary to the reasonable expectations of the community and was an act which was reasonably likely to, and which did in fact, bring the QPS into disrepute.[541]

314. The Applicants have pleaded that the failure to suspend SS Hurley from duty before the afternoon of 22 November 2004 was an "act" for the purpose of section 9 of the RDA.[542]

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[536] ASF: 233, 323.

[537] ASF: 236, 247.

[538] ASF: 250.

[539] ASF: 325.

[540] 3FASC: 232(a)-(b).

[541] 3FASC: 293.

[542] 3FASC: 309(a).

F.1.1 Expectation that SS Hurley would be removed

315. As submitted above, the community on Palm Island was small and close-knit, and, as a result of its nature as an Aboriginal community and its unique history, was prone to suspicion in respect of deaths in police custody. Accordingly, the Applicants submit that it would reasonably be expected that the following three steps would occur:

a. first, information concerning the death of Mulrunji would rapidly spread within the community, including information that SS Hurley was the arresting officer and that PLO Bengaroo was present during the arrest and information regarding the allegations of assault made by Roy Bramwell;

b. secondly, this would lead to substantial anger and suspicion within the community towards the police in general and SS Hurley in particular; and

c. thirdly, accordingly, SS Hurley would be suspended from duty, at least in relation to the performance of duties on Palm Island, unless and until the officer was cleared of any wrongdoing.

316. In the Applicants' submission, the evidence establishes that the first two steps in fact occurred and created a reasonable expectation on the part of the community that the third would follow.

317. As to the first step, it is apparent from the unchallenged evidence of the Applicants' witnesses that word of Mulrunji's death spread very quickly through the community, as did word of Mr Bramwell's allegations. In relation to the death, Collette Wotton was told of Mulrunji's death in Townsville by a school friend of hers on the day that the death occurred.[543] Ms Cecelia Wotton received a phone call from a friend of hers that day telling her of the death and she then passed the news on to Mr Wotton.[544] John Clumpoint heard about the death from Mulrunji's partner the following day.[545] Also in evidence is the media release which the QPS put out at 4.20 pm on 19 November 2004.[546] Mr Wotton gave evidence that he saw a report on the death in the newspaper the following morning.[547]

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[543] T279.19-32.

[544] T338.24-40; T556.22-2.

[545] T247.45-248.7.

[546] Exhibit A99.

[547] T556.42-46.

318. In relation to Mr Bramwell's allegations, Collette Wotton gave evidence of hearing rumours that Mulrunji had been bashed by SS Hurley.[548] Mr Wotton gave evidence that he had heard "over the weekend" of Roy Bramwell's allegations of having witnessed SS Hurley assaulting Mulrunji. This information motivated him on the Tuesday morning to arrange for Roy Bramwell to attend and speak at the public meeting.[549] The Applicants note that a video recording of Mr Bramwell's speech at the meeting on the Tuesday is in evidence.[550]

319. As to the second step, Mr Wotton[551] and William Blackman Snr[552] gave evidence that, on hearing of Mulrunji's death, they immediately expected that the police would cover it up. Mr Wotton gave further evidence that by Saturday 20 November, there was a great deal of discussion in the community regarding the death and a number of rumours were floating around.[553] The following day, community suspicion and anger had already reached the stage where a community meeting was being called for in respect of Mulrunji's death.[554]

320. As to the third step, both Mr Wotton[555] and Mrs Agnes Wotton[556] also gave evidence that the community wanted SS Hurley to leave the island at that time. Further, Insp Richardson told Channel 10 journalist John Flynn on the Tuesday that:

> in these communities problems frequently arise when there's been a death in custody uh and the Aboriginal communities, people in there tend to—you know, they are emotional about the deaths of course, especially when there's police involved, and quite often they become very personal against the officers. There's attacks made and allegations made. The majority of it's unfounded but it's developed through rumours that's spreading through the community … and in the interest of the community and also the police officer's welfare, it's a common practice for us to take the officer from the island for a short time.[557]

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[548] T280.5-12.

[549] T565.44-566.10.

[550] Exhibit A7, Title01.mkv at 25:00.

[551] T556.24-26.

[552] T181.33-45.

[553] T558.41-45.

[554] T558.34-559.16.

[555] T565.5-10.

[556] T154.9-17; T164.32-40.

[557] Exhibit A7, Title01.mkv at 05:20.

321. The Applicants submit, however, that notwithstanding the above, it is apparent that no thought was given to removing SS Hurley from the island between Mulrunji's death and Monday 22 November 2004. DI Webber conceded that SS Hurley had continued to perform duties on Palm Island all day on Friday 19 November 2004, on Saturday 20 November 2004 and on Monday 22 November 2004 up to the time that he was replaced by SS Whyte.[558] He further conceded that it would "perhaps" have been sensitive to community needs for SS Hurley to have been removed from the island, but he did not turn his mind to the issue.[559] Similarly, DSS Kitching gave evidence that it did not cross his mind that SS Hurley should not have been on duty.[560] There is not otherwise any evidence before the Court regarding consideration by the police of SS Hurley's removal from the island. The Applicants submit that the Court should find that no such consideration occurred.

F.1.2 Confrontation leading to SS Hurley's removal

322. Whilst SS Hurley was not stood down from duty, it is apparent that he was at least taken off Palm Island on Monday 22 November 2004. The Applicants have pleaded that SS Hurley's removal from Palm Island occurred following his being confronted by a crowd of Palm Island residents who were angry about the death of Mulrunji.[561]

323. Ms Cecelia Wotton gave evidence that, on the morning of 22 November 2004, she called the police to respond to a domestic violence incident occurring across the road from her and she saw SS Hurley, DS Robinson, PLO Bengaroo and another police officer respond to the call.[562] Mr Wotton gave evidence that, on that morning, he attended a community meeting at which a resolution was passed calling for SS Hurley to be removed from the island.[563] That evidence is corroborated by remarks made the next day by Mayor Erykah Kyle to Mr Flynn from Channel 10, to the effect that at the community meeting on the Monday morning, the community had been very angry about SS Hurley and had passed a resolution requesting that he leave the island by the end of the day[564] and that the community was holding SS Hurley responsible for

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[558] T1009.22-37.

[559] T1007.28-39; T1009.45-1010.6.

[560] T1227.15-21.

[561] 3FASC: 255.

[562] T357.35-358.15.

[563] T563.10-15.

[564] Exhibit A7, Title00.mkv at 20:20.

what had happened[565] The Applicants note that Ms Kyle was not available to be called to give evidence due to her health[566] and accordingly submit that her statements recorded on video are admissible as evidence of fact.[567]

324. Mr Wotton gave evidence that, during that public meeting, he saw a police vehicle containing SS Hurley, DS Robinson, PLO Bengaroo, and another police officer drive into the police station with a local resident named Tony Palmer locked in the cage at the back of the vehicle.[568] Mr Wotton further stated that a crowd of between 150 to 200 people surrounded the police station[569] and began shouting abuse at the police in response to cries from Mr Palmer that he was "going to be the next one",[570] an obvious reference to his fear that he would be the next Aboriginal resident of Palm Island to die in police custody. Mr Wotton then recounted a confrontation between community members, including himself, and SS Hurley.[571]

325. SS Whyte, who arrived on the island later that day, gave evidence that he could not recall being informed about any confrontation between SS Hurley and members of the community that morning,[572] but conceded that, on arrival on Palm Island, he understood that the community had demanded that SS Hurley be removed from the island and that A/AC Wall had determined to remove SS Hurley from his post.[573] SS Whyte also conceded that at the community meeting which he attended on the Monday afternoon, it was "articulated that the community wanted Hurley removed and charged",[574] and that, whilst he was on Palm Island, he became aware that there was a perception within the Palm Island community that SS Hurley would not be held to account.[575] It is noted that no police officer who was present on Palm Island on the morning of 22 November 2004 was called to give evidence. In particular, the Applicants note the absence of both SS Hurley and DS Robinson. It must be presumed that their evidence would not have assisted the Respondents.

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[565] Exhibit A7, Title00.mkv at 21:34.

[566] T81.29-40.

[567] *Evidence Act* 1995 (Cth) s 63(2)(b).

[568] T561.29-40.

[569] T562.4-5.

[570] T561.40-42; T561.47-562.5.

[571] T561.41-562.15.

[572] T1535.4-35.

[573] T1535.37-42.

[574] T1536.20-23.

[575] T1537.5-7.

326. It follows that Mr Wotton's evidence is unchallenged and should be accepted. Further, whilst A/AC Wall was not called to give evidence, and so the reason for SS Hurley's removal cannot be known for sure, the Applicants submit the Court should infer that the confrontation between SS Hurley and members of the community was the reason that SS Hurley was removed from the island. As submitted above, it appears that no consideration was given to his removal prior to that incident occurring and, in the Applicants' submission, it is unlikely that SS Hurley's removal from the island just hours after the confrontation with the community was a mere coincidence.

F.2. Failure to communicate with local community and diffuse tensions

F.2.1 Cultural needs of the community

327. The Applicants have pleaded[576] that each of SS Hurley, DI Webber, Insp Richardson and SS Whyte had actual or constructive knowledge of various matters in relation to the cultural needs and expectations of the community. The Applicants rely primarily on their above submissions in that regard.

328. Further, there is evidence that, from the outset, various members of the QPS were aware that the death in custody was likely to lead to widespread anger and discontent in the community. DI Webber gave evidence that, during the drive from the airport to the police station on 19 November 2004, he, DSS Kitching and SS Hurley discussed whether there might be any unrest or ill will in the community once the news of the death became widespread.[577] Similarly, Exhibit R34 refers at 12.30 pm on 19 November 2004 to a "Contingency plan being implemented for policing Palm Island in event of an increase in public disorder". In his interview that day with DSS Kitching, Sgt Leafe said that, after he had been advised that Mulrunji was deceased, he tried to call his wife "to tell her what had happened and to advise her not to leave the police compound for um just for fear of um any sort of retribution if word had got out".[578] Accordingly, the Applicants submit that the evidence establishes the allegations in paragraph 294 of the 3FASC in respect of the actual knowledge of SS Hurley and DI Webber have been made out, and the Court should accept that the

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[576] 3FASC: 294.

[577] T905.19-25.

[578] Exhibit A30, p7.185-187.

other officers named in that paragraph at least had constructive knowledge of the relevant matters.

F.2.2 Police knowledge of tensions within the community

329. The parties agree that, during the week after Mulrunji's death, QPS officers stationed on Palm Island knew that there was a feeling of anger held by some residents on Palm Island over Mulrunji's death in custody and a perception by some residents of Palm Island that SS Hurley was not being held to account for that death.[579] The Applicants have put their case higher, and pleaded that the relevant officers knew that "there was a feeling of grief and anger amongst the residents of Palm Island over Mulrunji's death in custody and a widespread perception that SS Hurley was not being held to account for that death".[580] The pleaded basis for the Applicants alleging such knowledge includes the public meetings that took place on the island during the week beginning 22 November 2004 and the sentiments expressed at those meetings,[581] that the public meetings were attended or observed by the police,[582] various other indications of community unrest over the course of the week[583] and various aspects of the police response to that unrest.[584]

(a) Perception regarding SS Hurley

330. In relation to police knowledge of the perception that SS Hurley was not being held to account for Mulrunji's death, the Applicants rely on the above submissions regarding the failure of the QPS to remove him from the island. The Applicants also refer to the running sheet made by Insp Richardson, SS Whyte and DS Robinson regarding the second meeting on the Monday, which records:

> WOTTON vocal and protesting criminal actions of police relating to death of Cameron DOOMADGEE. WOTTON demanding with support of persons present that S/Sgt. HURLEY be arrested and in custody. WOTTON is demanding and with the support of the persons present that S/Sgt. HURLEY be taken off the island immediately. [585]

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[579] ASF: 325.

[580] 3FASC: 296(a)(i).

[581] 3FASC: 260.

[582] 3FASC: 261.

[583] 3FASC: 262.

[584] 3FASC: 259, 263-268.

[585] Exhibit A40, p2 at 1430.

331. With respect to that meeting, Mr Wotton gave evidence that there were about 150 people present[586] and, similarly, SS Whyte gave evidence that there were "probably a couple of hundred".[587] Further, both Mr Wotton and SS Whyte agreed that Insp Richardson addressed the meeting and that he assured the crowd that SS Hurley was no longer on the island.[588] In the Applicants' submission, the police officers on the island must have known not only that there was a perception in the community that SS Hurley was not being held to account for Mulrunji's death, but that the perception was widespread.

(b) SS Whyte's credit

332. Mr Wotton's recollection of what was said at the public meeting on the Monday afternoon[589] was significantly more detailed than SS Whyte's recollection.[590] There are a number of other events over the course of that week in relation to which the evidence of Mr Wotton and SS Whyte are in conflict. For example, Mr Wotton gave evidence of an encounter with SS Whyte and Insp Richardson on the Monday afternoon prior to the meeting,[591] while SS Whyte gave evidence that he could not recall any such encounter.[592]. Accordingly, it is necessary to address the issue of their respective credit as witnesses.

333. It is submitted in that Mr Wotton in his evidence revealed a detailed recollection of the relevant events and that his evidence was delivered with candour, to the extent that he volunteered information which was not flattering to him and which could be seen to undermine his case to an extent, such as that he "attacked the police station" on the Friday.[593]

334. Conversely, the Applicants submit that SS Whyte did not reveal himself to be a reliable witness. In many instances, he did not appear to be able to remember any details of events in which he acknowledged he was involved.[594] Further, SS Whyte's

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[586] T565.17-18.

[587] T1506.40-43.

[588] T565.5-10; T1507.1-8.

[589] T564.44-565.10.

[590] T1507.1-13; T1536.20-23; T1539.35-1542.13.

[591] T563.31-47.

[592] T1539.9-32.

[593] T607.20.

[594] See, eg, T1512.45-1514.5.

memory appeared to be inconsistent over the course of his evidence. For example, a number of matters appeared to have slipped his memory over the luncheon adjournment.[595] In the Applicants' submission, where there is a conflict between the evidence of Mr Wotton and the evidence of SS Whyte, the evidence of Mr Wotton should be preferred.

(c) Feeling of grief and anger

335. In relation to the police knowledge of feeling of grief and anger amongst the residents of Palm Island over Mulrunji's death in custody, the Applicants have pleaded that, in the period between 19 and 25 November 2004, a number of public gatherings were held[596] and were attended or observed by the police[597] and that QPS officers received numerous reports of there being discontent amongst members of the community and observed an increase in civil unrest on the island.[598] As set out above, the evidence shows that various police officers were present at the two public meetings that took place on the Monday and it is agreed at least that DS Robinson, Insp Richardson and SS Whyte attended the meeting on the Monday afternoon.[599] In relation to SS Whyte in particular, he conceded that he knew that the community was complaining about the death and at least some members were angry[600] and he also conceded that he knew that there was grief on the island.[601]

336. A number of the Applicants' witnesses gave evidence about the anger and suspicion in the community generally, including a common refrain that they and other members of the community wanted "answers", in respect of how and why Mulrunji had died and whether the police would be held to account. This included Mrs Agnes Wotton,[602] William Blackman Snr,[603] William Blackman Jnr,[604] John Clumpoint,[605] Collette Wotton,[606] Zachias Sam[607] and Mr Wotton.[608]

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[595] See, eg, T1555.45-1556.15; T1550.10-26.

[596] 3FASC: 260.

[597] 3FASC: 261.

[598] 3FASC: 262(a) and (d).

[599] ASF: 254.

[600] T1545.20-25.

[601] T1548.13-14.

[602] T153.25-41; T154.24-47;

[603] T180.42-181.45.

[604] T231.25-35.

337. It also is evident that these feelings were communicated to the police, including at both public meetings on the Monday, as set out above.

338. Further, the parties agree that a public meeting occurred at about 10:30 am on the Tuesday which was attended by SS Bennett.[609] It is apparent from the running sheet that SS Bennett observed the meeting and provided situation reports to SS Whyte.[610] SS Whyte confirmed that this was the case.[611] Mr Wotton gave evidence about the community meeting on the Tuesday and verified that the footage in Exhibit A7, Title01.mkv is footage of that meeting.[612] That footage relevantly records community members expressing discontent regarding the manner of and reasons for Mulrunji's arrest,[613] the failure of the Police Commissioner and Police Minister to engage with the community,[614] the manner in which the police had been communicating with the community[615] and the depiction of the community as violent.[616] As Mr Wotton pointed out,[617] he is visible towards the end of the video, in the background, behind Mr Flynn from Channel 10, speaking on the microphone and addressing the meeting.[618] Mr Wotton's evidence was that he spoke about the RCIADIC and said that the meeting was an opportunity for the community to air their grievances in relation to their treatment by the police.[619]

339. Another way in which the community's grief and anger manifested itself was in an escalation of anti-social acts on the island. In that regard, the Applicants have plead-

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[605] T248.18-27.

[606] T279.43-280.12.

[607] T308.19-41; T314.27-31.

[608] T559.47-560.6; T564.44-565.10.

[609] ASF: 225.

[610] Exhibit A40, p5 at 1020 and 1040.

[611] T1550.37-1551.21.

[612] T593.14-594.20.

[613] Exhibit A7, Title01.mkv at 10:20. Also note the remarks made by Erykah Kyle in Title00.mkv at 09:24 and 15:50.

[614] Exhibit A7, Title01.mkv at 12:00. Also note the remarks made by Erykah Kyle at 16:57.

[615] Exhibit A7, Title01.mkv at 29:12.

[616] Exhibit A7, Title01.mkv at 20:15. Also note the remarks made by Erykah Kyle in Title02.mkv at 04:02.

[617] T595.29-47.

[618] Exhibit A7, Title01.mkv at 32:33.

[619] T592.2-19.

ed that QPS officers on Palm Island between 19 and 25 November 2004 observed an escalation in anti-social acts directed at the QPS and QPS property[620] and observed a deterioration in the preservation of peace and good order on Palm Island.[621]

340. In relation to anti-social acts directed at the QPS and the deterioration in peace and good order on the island, the parties agree that members of the community reported to QPS officers stationed on Palm Island that other members of the community intended to cause damage to the police station and barracks,[622] that various attacks occurred on police property during that week[623] and that various reports were received regarding threats to fire bomb the police station.[624] Those occurrences were recorded in the running sheet[625] and a number of them were confirmed by SS Whyte.[626]

341. In the Applicants' submission, for the above reasons, the evidence clearly establishes that the QPS officers stationed on Palm Island had actual knowledge that there was a feeling of grief and anger amongst the residents of Palm Island over Mulrunji's death in custody. If the officers did not have knowledge of those matters, they at least had knowledge which would have indicated those matters to honest and reasonable police officers in their position and they must have been wilfully shutting their eyes to those matters.

F.2.3 Anticipation of social disorder

342. The Applicants have pleaded that the QPS officers stationed on Palm Island anticipated that the grief and anger in the community was such that it might lead to riotous or socially disorderly behaviour[627] and that, instead of taking steps to diffuse the community's grief and anger, the QPS increased the police presence on the island with officers who were not appropriately trained in culturally sensitive policing.[628]

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620 3FASC: 262(b).

621 3FASC: 262(c).

622 ASF: 257; 3FASC: 262(e).

623 ASF: 258, 263.

624 ASF: 259, 261.

625 Exhibit A40, p3 at 2230 and 2300, p4 at 0000 and 0745, p5 at 1210 and 1430, p6 at 1500, 1520 and 1530, p8 (entire page), p15 at 2225, 2250 and 2300, p16 at 2305 and 0010, p21 at 0530.

626 T1510.29-1513.40; T1550.28-35; T1561.8-30.

627 3FASC: 296(a)(ii).

628 3FASC: 296(a)(v) and (f).

343. The Applicants have pleaded that the following acts or omissions to act were "acts" for the purpose of section 9 of the RDA:

a. the increase of the police presence on the island with officers who were not appropriately trained in culturally sensitive policing;[629]

b. the failure of QPS officers stationed on Palm Island to take steps to diffuse the community's grief and anger.[630]

344. In the Applicants' submission, that the police officers anticipated socially disorderly behaviour is evident from the following matters.

345. First, the police apparently brought in reinforcements in anticipation of civil unrest. It is agreed that the number of police officers on Palm Island increased from about seven officers on 19 November 2004 to about 20 officers by 26 November 2004.[631] Insp Richardson said Mr Flynn from Channel 10 that reinforcements were sent to the island as a result of "about 200 people outside the police station here, demanding a meeting and asking questions" and "taking into consideration the history of the island".[632] This accords with Mr Wotton's evidence that the police reinforcements were brought in after the public meeting on the Monday morning, during which members of the community confronted SS Hurley.[633]

346. Secondly, it is apparent that the police took extraordinary measures to arm themselves at all times. Mr Wotton gave evidence that, on the Tuesday morning, he noticed police wearing guns whilst pulling people over for traffic offences and that this was unusual as the police did not ordinarily carry firearms on Palm Island.[634] Both SS Whyte and SS Dini agreed that it was generally not normal practice for police to wear firearms in Aboriginal communities such as Palm Island.[635] The parties also agree that on about 23 November 2004, A/AC Wall directed that police officers on

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[629] 3FASC: 296(a)(v) and (f), 309(b).

[630] 3FASC: 296(a)(v), 309(b).

[631] ASF: 253. Note that Annexure F to the ASF contains a list of officers stationed on Palm Island on or before 19 November 2004 (p11) and of officers stationed there during the week beginning 22 November 2004 (pp 13-14).

[632] Exhibit A7, Title01.mkv at 06:20.

[633] T563.2-10.

[634] T591.17-23. Note that Mr Wotton's evidence that the police were pulling vehicles over is corroborated in the running sheet: Exhibit A40, p4 at 0900.

[635] T781.32-35; T1557.4-25.

Palm Island take their weapons to their sleeping quarters with them.[636] It is apparent from the running sheet and SS Whyte's evidence that this was in direct response to the reports of threats to the police station which the police had received.[637]

347. Thirdly, the police took extraordinary measures in anticipation of the police station being fire bombed. It is evident that, in response to the threat of fire bombs, SS Whyte organised for a fire evacuation plan to be drawn up[638] and Sgt Leafe organised for the Queensland Fire Service to send additional staff to Palm Island.[639]

348. Fourthly, the Applicants note that Insp Richardson spoke in some detail to Mr Flynn at an unconfirmed time during the week[640] about the tensions in the community and the rocks being thrown at police property.[641]

349. In relation to the cultural training of the officers who were deployed, it is further pleaded that no CCLO was sent to Palm Island to assist the QPS in managing the tensions within the community.[642] In the Applicants' submission, it is clear from the evidence of both SS Whyte and SS Dini that no CCLO was on the island.[643] Whilst there was a PLO, it does not appear that he was given any role in terms of community outreach.[644] Further, it is evident from the running sheet that PLO Buttigeg arrived from Townsville on the Monday afternoon[645] and departed the island on the Wednesday morning.[646] The Applicants submit that there would likely be little utility in having a PLO present for only a day and a half, especially in circumstances where he does not even appear to have performed the role of PLO during that time.

350. The Applicants have pleaded that the failure to send a Cross Cultural Liaison Officer to Palm Island to assist the QPS in managing obvious tensions within the community

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[636] ASF: 260; see also, Exhibit A178.

[637] Exhibit A40 at 1520; T1556.35-18.

[638] T1512.7-20; T1558.20-1559.45.

[639] Exhibit A40, p6 at 1525 and 1625, p7 at 1705 and 1740; T1511.45-1512.5.

[640] Note that Exhibit A7, Title02.mkv commences with what the First Applicant gave evidence was the public meeting on the Thursday (T599.5-35).

[641] Exhibit A7, Title02.mkv at 29:35.

[642] 3FASC: 296(c).

[643] T778.20-38; T780.25-35; T1579.5-12.

[644] T1578.45-1580.2.

[645] Exhibit A40, p1 and p2 at 1410.

[646] A40, p13 at 1100.

which had arisen since the death of Mulrunji, until at or about midday on 26 November 2004 was an "act" for the purpose of section 9 of the RDA.[647]

351. Otherwise, the Applicants note that SS Whyte was sent to Palm Island on 22 November 2004 to be the officer in charge of the station and Insp Richardson was sent in order to oversee the policing operations. In respect of SS Whyte, the Applicants submit that his training in culturally sensitive policing was wholly inadequate and rely on the following matters in that regard:

a. his description in his interview of 26 November 2004 of Mr Wotton as "not blackie blackie half cast"[648] and of David Bulsey as a "skinny fella, half caste fella";[649]

b. his statements in that same interview that Aboriginal people "will turn on you when they're drinking alcohol" and will "turn on you if they've got something that, ah, really makes them go off";[650]

c. his attempt in his evidence to justify the remark that Aboriginal people will "turn on you when they're drinking alcohol" on the basis that, after he was "promoted to the rank of sergeant to take charge of the Pormpuraaw Aboriginal community",[651] of the 600 Aboriginal people in the Pormpuraaw community, there were "two people that didn't consume alcohol, to [his] knowledge";[652]

d. his disrespectful remark in the 26 November 2004 interview that "this is obviously the death of Doomadgee person made them go off";[653]

e. his description during his evidence to the committal hearing of Lance Poynter being an "ugly looking fellow";[654]

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[647] 3FASC: 296(c), 309(b).

[648] T1528.5-1531.40.

[649] T1533.30-1534.21.

[650] T1531.44-1532.35.

[651] T1503.28-30.

[652] T1532.40-1533.2; T1581.15-40.

[653] T1533.4-16.

[654] T1583.3-1584.12.

f. the pride that he apparently took in having told Mr Wotton to "fuck off" outside the police barracks on 26 November 2004;[655] and

g. his remarks on 26 November 2004 in the police barracks to the other police officers that:

> it may be the case that you have to discharge a few fuckin' rounds in the air to scare the shit out of these cunts. I don't know about you, but that's fuckin' it, that's just ridiculous. There's not one court in the land, not one cunt anywhere in Australia that's gonna fuckin' put up with all this.[656]

352. As for Insp Richardson, he was not called to give evidence and it must be inferred that his evidence would not have assisted the Respondents. In any event, the Applicants submit that it is evident from the manner in which policing was conducted on the island over the period in which Insp Richardson was in charge, as detailed elsewhere in these submissions, that Insp Richardson did not have an appropriate level of training in culturally sensitive policing. Further, in the Applicants' submission, that Insp Richardson was not adept at culturally sensitive policing is apparent from the two interviews conducted with him by Mr Flynn,[657] in which he derided the community's concerns regarding Mulrunji's death as "rumours" and "not factual", he made repeated calls for the community to "sit back and wait" for more information and he remarked that the community "can ask their questions, when they get all the facts".[658] The Applicants submit that these remarks indicate a patronising and insensitive approach to the deeply felt grief and anger within the community and denigrates the community because it is Aboriginal.

F.2.4 Failure to take measures to diffuse tensions

353. The Applicants have pleaded that "no special measures were put in place or undertaken by the Second Respondent or QPS officers to preserve peace and good order on Palm Island in the period following the death of Mulrunji".[659] It is further pleaded that the QPS officers stationed on Palm Island did not attempt to liaise with the members of the community who attended the public meetings and were apparently

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[655] T1518.21-33; T1591.30-1594.1.

[656] Exhibit A54 at 10:35; T1591.38-1593.10.

[657] Exhibit A7, Title01.mkv at 02:20 and Title02.mkv at 28:45.

[658] See full quotations below.

[659] 3FASC: 395.

dissatisfied with the death in custody and the subsequent investigation,[660] did not issue or cause to be issued a public apology or expression of regret or remorse at Mulrunji having died in police custody[661] and otherwise made no visible attempts to engage with the community and adequately address the concerns which had arisen since Mulrunji's death.[662]

354. The Applicants have pleaded that the following acts or omissions to act were "acts" for the purpose of section 9 of the RDA:

a. the failure to put in place or undertake special measures to preserve peace and good order on Palm Island in the period following the death of Mulrunji;[663]

b. the failure of QPS officers stationed on Palm Island to liaise with the members of the community who attended public meetings and were apparently dissatisfied with the death of Mulrunji in police custody and the subsequent police investigation;[664]

c. the failure of QPS officers stationed on Palm Island to issue or cause to be issued a public statement containing an apology for Mulrunji's death or an expression of regret or remorse for the death having occurred in police custody;[665]

d. the failure of QPS officers stationed on Palm Island to issue or cause to be issued a public statement containing an explanation of the investigation into Mulrunji's death and the procedure that would then be followed;[666]

e. the failure to make visible attempts to engage with the Aboriginal community on Palm Island in order to adequately address concerns amongst the community which had arisen since the death in custody of Mulrunji;[667]

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[660] 3FASC: 296(a)(iii).

[661] 3FASC: 296(a)(iv) and (b)(ii).

[662] 3FASC: 296(d).

[663] 3FASC: 295, 309(b).

[664] 3FASC: 296(a)(iii), 309(b).

[665] 3FASC: 296(a)(iv) and b(ii), 309(b).

[666] 3FASC: 296(a)(iv) and (b)(i), 309(b).

[667] 3FASC: 296(d), 309(b).

f. the failure to put in place or undertake special measures to preserve peace and good order on Palm Island in the period following the death of Mulrunji;[668]

g. the failure of the QPS to provide appropriate responsive policing services on Palm Island;[669]

h. the failure of the QPS to act in partnership with the community in a way that met or considered the cultural needs which existed within the community;[670]

i. the failure of QPS officers stationed on Palm Island to provide responsive and culturally sensitive policing in the community;[671]

j. the failure of Insp Richardson to engage with the Palm Island Council or the community in a culturally appropriate and sensitive way.[672]

(a) Liaison with members of community attending meetings

355. The Applicants submit that it is clear that the police had minimal engagement with the public meetings and the persons who attended those meetings. In that regard, SS Whyte conceded that neither he nor Insp Richardson spoke at any of the public meetings that week except for the public meeting on the Monday afternoon[673] and he could not recall attending another community meeting.[674]

356. Further, Mr Wotton gave evidence about a resolution being passed at a public meeting requesting that Premier Beattie, Police Minister Spence and Police Commissioner Atkinson attend Palm Island.[675] The footage of the Tuesday meeting shows this resolution being discussed by Alf Lacey[676] and Mayor Kyle.[677] Zachias Sam gave evidence that this resolution had been acted on by the Council.[678]

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[668] 3FASC: 295, 309(b).

[669] 3FASC: 296(i)(i), 309(b).

[670] 3FASC: 296(i)(ii), 309(b).

[671] 3FASC: 296(a)(v), 309(b).

[672] 3FASC: 296(e)(ii), 309(b).

[673] T1543.19-37.

[674] T1577.29-1578.29.

[675] T563.10-15; T594.20-595.5.

[676] Exhibit A7, Title01.mkv at 11:50.

357. Mr Wotton gave evidence that he discussed the request for the Premier, the Police Commissioner, and the Police Minister to attend at Palm Island with Insp Richardson and SS Whyte on the Wednesday.[679] SS Whyte agreed that a conversation had taken place with Mr Wotton mid-week, but was adamant that it was on the Thursday.[680] Otherwise, he did not recall many details of what was said, other that Mr Wotton had apparently assured him that everything was "going good".[681] In any event, it is clear that SS Whyte took no action in relation to the request that the Premier, the Police Minister and Police Commissioner come to the island.[682]

358. It is noted that the conversation on the Wednesday appears to have occurred by chance and was not a deliberate effort by the police officers to engage with Mr Wotton. There is not otherwise any evidence of any police officers engaging with the persons at the public meetings or the concerns that they were raising.

(b) Meetings with Mayor Kyle

359. The Applicants accept that SS Whyte and Insp Richardson apparently met with Mayor Kyle on three occasions during the week, which meetings were recorded in the running sheet.[683] However, for the following reasons, the Applicants submit that these meetings did not amount to visible attempts to engage with the community and adequately address the concerns which had arisen since Mulrunji's death.

360. First, it is noted that the meetings were behind closed doors and were not "visible" to anyone except the attendees. No efforts appear to have been taken by the police to reach out to the general community, as opposed to just the Mayor.

361. Secondly, the meetings with Mayor Kyle appear to have been a belated effort to open lines of communication. The first meeting, during which it was apparently arranged that Insp Richardson, SS Whyte, and Mayor Kyle would subsequently meet daily, took place at 3 pm on the Wednesday.[684] In the Applicants' submission, had SS Whyte and Insp Richardson genuinely intended to engage with the community and

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[677] Exhibit A7, Title01.mkv at 16:30.

[678] T309.3-40.

[679] T597.26-598.26.

[680] T1561.30-1562.16.

[681] T1546.39-46; T1562.20-1563.41

[682] T1552.20-1554.10.

[683] Exhibit A40, p14 at 1500, p17 at 1030, p18 at 1530.

[684] Exhibit A40, p14 at 1500.

open lines of communication with the community leaders, they would have established a meaningful dialogue and set up regular meetings on the Monday straight after they arrived.

362. Thirdly, the meetings with Mayor Kyle do not appear to have been aimed at addressing community concerns in relation to Mulrunji's death. On the Tuesday, Mayor Kyle told Mr Flynn that the police had not given the council "the full picture" regarding what had occurred in relation to the death.[685] In the Applicants' submission, it is highly unlikely that her concerns in that regard were addressed at the meetings with SS Whyte and Insp Richardson. In particular, the Applicants note that SS Whyte adamantly maintained in his evidence that he had no responsibility, as officer in charge of the Palm Island police station, to keep the community informed of the progress of the investigation, or even to keep himself so informed.[686] Further, none of the entries in the running sheet indicate that anything to do with the death or the investigation was discussed and SS Whyte gave no evidence to that effect.

(c) Autopsy report

363. In relation to the autopsy report and the investigation in particular, the Applicants have pleaded that the QPS officers on Palm Island did not issue or cause to be issued an explanation of the investigation into Mulrunji's death and the procedure that would be followed,[687] that Insp Richardson was inadequately briefed on the results of the autopsy[688] and that QPS strategic planning failed to take the autopsy results into account.[689]

364. The Applicants have pleaded that the following acts or omissions to act were "acts" for the purpose of section 9 of the RDA:

a. the failure to adequately brief Insp Richardson on the contents of the Preliminary Autopsy Report;[690]

b. the failure of the QPS to conduct strategic planning in response to the intelligence that the autopsy report was to be released to members of the public

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[685] Exhibit A7, Title00.mkv at 10:10.

[686] T1567.11-23; T1574.45-1577.27.

[687] 3FASC: 296(a)(iv) and (b)(ii).

[688] 3FASC: 296(e)(i).

[689] 3FASC: 296(g)-(h).

[690] 3FASC: 296(e)(i), 309(b).

which took into account the fact that Mulrunji had sustained four broken ribs and his liver had been ruptured at or about the time of his death;[691] and

c. the failure of the QPS officers on Palm Island to make special or other arrangements in response to the information that the autopsy report was to be released to the community.[692]

365. In relation to the autopsy results, Insp Richardson told Mr Flynn on the Tuesday that he knew that the autopsy was being conducted that day.[693] It is evident from the running sheet that Insp Richardson knew that the autopsy had been completed on the Tuesday afternoon.[694] SS Whyte's evidence was that he was not informed of the contents of the autopsy report prior to the events of 26 November 2004[695] and, to his knowledge, no one advised Insp Richardson of the results.[696] Further, neither he nor Insp Richardson made any inquiries as to the results.[697] SS Whyte gave further evidence that, even after he found out on the Thursday that the family was being advised of the autopsy results, he made no effort to ascertain what the results were.[698]

366. The Applicants note that, in his first interview with Mr Flynn, Insp Richardson said:

> From what I can make of it, a lot of the questions they're asking are based on rumours. They're not factual. It's what people are saying. We had a meeting with them yesterday—a public meeting with them here yesterday, and I explained to the people that they need to sit back and wait, and let us put the investigation together—to tie it together, wait for the post-mortem to take place, and then let's see what happens from there—and then they can ask their questions, when they get all the facts.[699]

367. Similarly, in his second interview with Mr Flynn, Insp Richardson said:

> What I say to them [the community] is that they should just sit back, just wait for the [autopsy] report to come out. When it comes out, just see what's in that report and look at it in a positive factor. We need to then look at what's happening out of the investigation. Nothing's gonna come out of this overnight. It's all gotta take time and

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[691] 3FASC: 296(g), 309(b).

[692] 3FASC: 296(h), 309(b).

[693] Exhibit A7, Title01.mkv at 06:15.

[694] Exhibit A40, p12 at 0815.

[695] T1510.1-6; T1566.37-1567.2; T1567.25-28.

[696] T1565.32-46.

[697] T1566.1-7; T1567.4-6.

[698] T1566.9-17; T1567.30-1568.5.

[699] Exhibit A7, Title01.mkv at 04:35.

> then needs to be pieced together. And the other thing is, to the community out there, don't go listening to rumours. We need the facts to come out and then work off the facts. And listen to some people who have the ability to reason—to sensibly reason and sort through the problems that are associated with this particular type of incident.[700]

368. It is also evident that Insp Richardson also made remarks to a similar effect at the public meeting on the Monday.[701]

369. Perhaps even more noteworthy than what Insp Richardson said to Mr Flynn was what he did not say. He did not state that the death was being taken very seriously and a rigorous investigation was being conducted. He did not state that Ethical Standards Command and the CMC were involved in the investigation. He did not express regret that Mulrunji had died whilst in police custody. He did not extend his sympathy to the family. He did not acknowledge that there was a lot of grief in the community over the death. He did not say that the police were working with the Council in order to attempt to address the community's concern. In the Applicants' submission, his remarks were callous, flippant and insulting.

370. The Applicants further submit that, in the already volatile atmosphere on Palm Island during that week, the fact that Mulrunji had died as a result of a cleaved liver and a ruptured portal vein and that he had sustained four broken ribs would reasonably be expected to have a substantial detrimental impact on the peace and good order on the island if not handled appropriately. In those circumstances, it is astounding that Insp Richardson and SS Whyte apparently made no effort to find out what those results were. Equally, it is astounding that the senior officers on the mainland who knew the results made no effort to advise them of the results.

F.2.5 Breach of prescribed responsibility

371. The Applicants have pleaded that, in the course of 22 to 25 November 2004, the QPS failed to provide appropriate responsive policing services on Palm Island in accordance with the responsibilities of the Police Commissioner in section 4.8 of the PSAA. Further, the QPS failed to act in partnership with the community in a way that met or considered the cultural needs which existed within the community, as required by section 2.4(2) of the PSAA.[702]

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[700] Exhibit A7, Title01.mkv at 30:30.

[701] T1572.25-26.

[702] 3FASC: 296(i).

372. In the Applicants' submission, it is clear that policing on Palm Island during that week was conducted in a defensive and reactive manner, without regard to the needs and expectations of the Indigenous community. The police failed to remove SS Hurley from the island until some 150 to 200 community members went to the police station to confront him, despite being aware of the anger and suspicion that a death in custody would likely provoke and of the allegations made by Roy Bramwell. Insp Richardson and SS Whyte did not arrange a meeting with Mayor Kyle after their arrival until two days had passed and multiple escalating attacks on police property had occurred.

373. SS Whyte conceded that, despite knowing that there was community unrest because of a death in custody and despite having read the RCIADIC report in part, he did not review the RCIADIC recommendations on Palm Island and they were not, to his knowledge, reviewed by Insp Richardson.[703]

374. SS Whyte also conceded that he did nothing to address the resentment and anger of the community between the Monday and the Friday[704] and he did not arrange for an apology or an expression of regret to be issued by the QPS in relation to the death in custody.[705] The Applicants submit that it is clear that no such apology or expression of regret was ever issued.

375. In the Applicants' submission, during the week beginning 22 November 2004, the police on Palm Island failed to provide appropriate and responsive policing services which met the cultural needs of the community. The allegations in paragraph 296(i) of the 3FASC should be accepted as made out.

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[703] T1578.30-43.

[704] T1574.37-38.

[705] T1574.40-45.

G. Emergency situation

G.1. Public Safety Preservation Act

G.1.1 Structure and purpose of the PSPA

376. Whilst the *Public Safety Preservation Act* 1986 (Qld) (***PSPA***) does not contain any express purposive provisions except in the Part relating to "CBR emergencies", which is irrelevant for present purposes, the short title of the Act makes it clear that its purpose is the preservation of "public safety". Similarly, the long title indicates that the purpose of the Act is to "*provide protection for members of the public* in chemical, biological, radiological or other emergencies that create or may create danger of death, injury or distress to any person, loss of or damage to any property or pollution of the environment and for related purposes" (emphasis added). In order to achieve that objective, the Act creates a scheme whereby an "emergency situation" can be declared to exist pursuant to section 5, which then authorises the police to use a number of powers under section 8 to deal with that situation.

(a) Definition of "emergency situation"

377. Under section 5(1) of the PSPA, a person may declare an emergency situation to exists in respect of a specified area where that person:

a. is a commissioned officer;[706] and

b. is reasonably satisfied that:

i. a particular situation is an emergency situation; and

ii. that situation:

A. has arisen; or

B. is likely to arise.

378. The term "emergency situation" is defined in the Schedule to the PSPA. The definition contains two limbs, each of which is broken down into further steps. The first

[706] Defined in the PSPA as "any police officer of or above the rank of inspector".

limb is that the situation must fall under one or more of the categories in sub-paragraphs (a) to (f) of the definition. The second limb is a requirement that the situation must be a situation which:

a. either:

i. causes or;

ii. may cause,

b. one or more of the following:

i. a danger to a person of death, injury or distress;

ii. property to become lost or damaged;

iii. pollution of the environment.

379. That definition should be interpreted in its plain and natural sense.[707] However, the Court must prefer the interpretation that "will best achieve the purpose of the Act".[708] Whilst the PSPA does not expressly state its purpose in its provisions, regard may be had to the title of the Act[709] and to the other provisions of the Act.[710]

380. In the Applicants' submission, a number of matters are apparent from the short and long titles of the PSPA and from its substantive provisions, which assist in the interpretation of the definition of "emergency situation". First, it is clear that the situations to which the Act is directed are ones of a public and not a private nature, in that they create a threat to "public safety" or to "members of the public", rather than to particular individuals. Secondly, as the principal function of the Act is to create a number of extraordinary police powers in order to deal with emergency situations, such situations must be of a type that creates a threat to public safety of sufficient magnitude that the use of such extraordinary powers would be necessary.

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[707] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129 at 161-2 (Higgins J).

[708] *Acts Interpretation Act* 1954 (Qld) s 14A(1); see also *Saraswati v R* (1991) 172 CLR 1 at 21-3 (McHugh J).

[709] *Birch v Allen* (1942) 65 CLR 621 at 625-6 (Latham CJ).

[710] *X v APRA* (2007) 226 CLR 630, [116] (Kirby J).

381. In that regard, it is noted that the section 8 powers permit the police to engage in conduct which would otherwise constitute the unlawful infringement of individual rights. The Applicants submit that the "principle of legality", which "holds that in the absence of clear words or necessary implication the courts will not interpret legislation as abrogating or contracting fundamental rights or freedoms",[711] must be applied when construing such legislation. The basis of the principle was explained by Lord Hoffman in *R v Secretary of State for the Home Department; Ex parte Simms*[712] as follows:

> the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. This is because there is too great a risk that the full implications of their unqualified meaning may have passed unnoticed in the democratic process. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual.

382. Accordingly, for a statute to be construed as abrogating a fundamental freedom, that it does so must be made "unmistakably clear",[713] and where there is any ambiguity, the Court should interpret the legislation in a manner that upholds the legal rights which would otherwise be abrogated. In the case of emergency powers in particular, the Court should be mindful that such powers are prone to abuse and the officers who exercise them must be judged with strict scrutiny.[714]

(b) Meaning of "any other accident"

383. DI Webber relied on sub-paragraph (f) of the definition of "emergency situation" when completing the certificate required to be completed under section 5(2) of the PSPA. Sub-paragraph (f) refers to "any other accident". The starting point for an analysis of the meaning of "any other accident" is its meaning in its plain and natural

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[711] *Attorney-General for South Australia v Corporation of the City of Adelaide* (2013) 249 CLR 1, 66 [148] (Heydon J); see also, *Potter v Minahan* (1908) 7 CLR 277 at 304; *Electrolux Home Products Pty Ltd v Australian Workers' Union* (2004) 221 CLR 309 at 329 (Gleeson CJ).

[712] [2000] 2 AC 115 at 131.

[713] *Re Bolton; Ex parte Beane* (1987) 162 CLR 514, 523; quoted with approval in *Coco v The Queen* (1994) 179 CLR 427 at 437 (Mason CJ, Brennan, Gaudron and McHugh JJ).

[714] *Cf, Reid v Sinderberry* (1944) 68 CLR 504, 510 (Latham CJ and McTiernan J).

sense.[715] The term "accident" is relevantly defined by the *Oxford English Dictionary* to include both:

a. "an unfortunate incident that happens unexpectedly and unintentionally, typically resulting in damage or injury"; and

b. "an event that happens by chance or that is without apparent or deliberate cause".

384. The term "any other accident" is a term of general application following a list of terms of particular application and, as such, should be interpreted *ejusdem generis* with those earlier terms.[716] Whilst the word "accident" is expressly used in respect of only one other category of emergency situation, being sub-paragraph (d), which refers to "any accident involving an aircraft, or a train, vessel or vehicle", in the Applicants' submission, each of sub-paragraphs (a) to (d) refer to situations which could ordinarily be described as "accidents", in that they happen by chance or without apparent cause.[717] The Applicants submit that these sub-paragraphs thereby create a "genus" in respect of which sub-paragraph (f) must be interpreted *ejusdem generis*.

385. The exception to the "accident" genus is sub-paragraph (e), which refers to "any incident involving a bomb or other explosive device or a firearm or other weapon". In the Applicants' submission, the terms "bomb or other explosive device or a firearm or other weapon" create a genus of "weapons", where a "weapon" is relevantly defined in the *Oxford English Dictionary* as "a thing designed or used for inflicting bodily harm or physical damage". This is distinct from the categories of situation provided for in sub-paragraphs (b) to (d), in that a weapon is "designed or used" to cause harm, whereas sub-paragraphs (b) to (d) refer to things such as vehicles, oil and chemicals, which are ordinarily used for benign purposes, but may cause harm *by accident*. Similarly, note the distinction between the reference in sub-paragraph (e) to an "incident involving a bomb or other explosive device" and the reference in sub-paragraph (a) to "an explosion". A "bomb or other explosive device" is an implement calculated to create an explosion in order to cause harm. Where not caused by

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[715] *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd (Engineers' Case)* (1920) 28 CLR 129 at 161-2 (Higgins J).

[716] *Telstra Corp Ltd v Australasian Performing Right Assn Ltd* (1997) 191 CLR 140 at 167 (McHugh J); see also *Cody v JH Nelson Pty Ltd* (1947) 74 CLR 629 at 647-8 (Dixon J); *Collett v Repatriation Commission* (2009) 178 FCR 39 at [29] (Logan J).

[717] Sub-paragraph (a) refers to explosions and fires, (b) refers to oil or chemical spills, and (c) refers to the escape of various substances.

such a device, "an explosion" would be expected to be caused *accidentally*, due to, for example, an equipment malfunction.

386. Accordingly, in the Applicants' submission, the "incidents" referred to in sub-paragraph (e) are distinct from the situations described by sub-categories (a) to (d), which can all broadly be described as "accidents" (and in the case of (d) are specifically described as such), in that sub-paragraph (e) encompasses situations requiring an element of deliberation which goes beyond what is meant by the term "accident". It follows that the term "any other accident" in sub-paragraph (f), which is to be interpreted *ejusdem generis* with sub-paragraphs (a) to (d) but not (e), is intended to refer to situations causing a threat to public safety, which occur by chance or without apparent cause, and do not otherwise fall into the categories in sub-paragraphs (a) to (d).

G.1.2 Situation of 26 November 2004 not "any other accident"

387. The Respondents have pleaded that the course of events of 26 November 2004 were "unexpected" or "unforeseen" and thereby constituted an "accident".[718] This allegation must be rejected for the following reasons. First, whilst the magnitude of those events was unexpected and unforeseen, the occurrences themselves had been expected and were foreseen, as evident from the police actions between 22 and 25 November 2004. Secondly, whilst the Respondents have yet to adequately particularise a basis for asserting the existence of an emergency situation, it is evident that the allegation that the relevant situation was "any other accident" originated with DI Webber.[719] In his evidence, DI Webber claimed to have declared the emergency situation for the following reasons:

a. police officers' accommodation was under attack;[720]

b. the road to the airport from the township was being blocked and the runway was being blocked;[721]

c. there was unspecified information "in relation to the water supply";[722] and

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[718] Defence: 193(d); 214(e)-(f). Also note DI Webber's evidence that he considered that an "accident" included "an unplanned event": T1082.22.

[719] See Exhibit A20; T1078-1080.

[720] T917.22.

[721] T1079.26.

d. he believed officers' lives were directly under threat.[723]

388. Of those reasons, all but the first can be dismissed because, first, they are not pleaded and neither is there any evidence to suggest that either of the matters referred to in 387.b or 387.c above in fact existed, and nor is there anything either in the pleadings or on the evidence to indicate that DI Webber had reasonable grounds to suspect their existence.[724] Secondly, that the officers' lives were under threat would fall into the second limb of the definition of "emergency situation" and cannot be taken to indicate that the situation was "any other accident".

389. Accordingly, the only situation which could be argued to have amounted to "any other accident" is that police officers' accommodation was under attack. Relevantly, it is agreed between the parties that this was the case, in that:

a. rocks were thrown at the Police Station;

b. the Police Station, courthouse and police residence of SS Hurley were set on fire; and

c. a police vehicle was set on fire.[725]

390. Such attacks on the police station cannot amount to an "accident". They are plainly not situations which occur by chance or without apparent cause. Further, sub-paragraph (a) of the definition of emergency situation includes a "fire", and an attack by rocks or by inflammatory implements that threatens public safety would amount to an "incident" involving an "other weapon" under sub-paragraph (e). Accordingly, such incidents cannot amount to "accidents" for the purpose of sub-paragraph (f), and the allegations in paragraph 299(c) of the 3FASC must be accepted.

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[722] T1079.29.

[723] T917.43

[724] In respect of the purported threats to the airport, note that DI Webber gave evidence that, prior to landing on Palm Island on 26 November 2004, his aircraft "did a couple of … fly pass [sic] over the airport itself just to determine that it was safe to land on the airstrip there before the pilot actually landed", then, after landing, he directed a helicopter to fly over the road between the airport and the township to ensure that it was clear and no one was waiting in ambush: T918.14-15 and 27-32; T1079.32-34.

[725] ASF: 274.

G.1.3 DI Webber not reasonably satisfied that an emergency situation had arisen

391. The parties agree that DI Webber relied on section 5 of the PSPA in declaring the emergency situation on Palm Island on 26 November 2004 and he was a "commissioned officer" for the purpose of the PSPA.[726]

392. The Applicants have pleaded that the declaration of an emergency situation was an "act" for the purpose of section 9 of the RDA.[727]

393. The particulars to paragraph 193(d) of the Defence allege that DI Webber declared the emergency situation because he had received the following information from other officers:

i. that the lives and safety of police officers and other persons on Palm Island were in imminent danger;

ii. that the Palm Island police station and SS Hurley's residence had been set alight, and police officers were under attack and believed they were going to die;

iii. that attempts were being organised by rioters on Palm Island to attack the Palm Island airport and to block the road between the airport and the township;

iv. that the airstrip on Palm Island was also to be blocked to prevent aircraft from landing on Palm Island;

v. that an ambush had been established on the road to the Palm Island airport so as to prevent police reinforcements from attending the scene, and the road had been blocked with a truck;

vi. that the hour the rioters had given police officers to leave Palm Island before they would be killed had expired or would shortly expire;

vii. that police officers on Palm Island were under continual attack by rocks and fire and were going to move on foot from the Palm Island police barracks to the Palm Island hospital rather than being burnt out.

394. For DI Webber to have a "reasonable satisfaction" requires "the existence of facts which are sufficient to induce that state of mind in a reasonable person."[728]

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[726] ASF: 281-282.

[727] 3FASC: 299(a), 309(c).

395. In his evidence, DI Webber claimed to have declared the emergency situation for the following reasons:

a. police officers' accommodation was under attack,[729] which appears to correspond with particulars 193(d)(ii) and (vii);

b. he believed officers' lives were directly under threat,[730] which appears to correspond with particular 193(d)(i);

c. the road to the airport from the township was being blocked and the runway was being blocked, [731] which appears to correspond with particulars 193(d)(iii)-(v); and

d. there was information "in relation to the water supply".[732]

396. It follows that the Respondents have failed to establish that particular (vi) was a matter considered by DI Webber in declaring the emergency situation.

397. As to the balance of the particulars, it is submitted that these too must be rejected as it is not clear the DI Webber was in fact satisfied that such a situation occurred. DI Webber has shown a propensity for putting forward self-serving *ex post facto* justifications for his conduct. His reliance on unspecified information "in relation to the water supply"—which has not been raised before, to the Applicants' knowledge—is an example of this. Accordingly, the Applicants submit that his evidence concerning his state of mind at the time that the emergency situation was declared ought to be rejected unless corroborated by contemporaneous documents. As explained below, no contemporaneous documents exist, and the lack of such documents is a direct result of DI Webber's breach of his statutory obligations.

398. Alternatively, if DI Webber was in fact satisfied of those matters, the Applicants submit that he did not have reasonable cause for satisfaction. The Respondents have never particularised the nature of any such reasonable grounds. Further, there is no evidence of DI Webber's grounds for being satisfied of those matters except for

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[728] *George v Rockett* (1990) 170 CLR 104 at 112 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[729] T917.22.

[730] T917.43.

[731] T1079.26.

[732] T1079.29.

vague assertions about listening to the police radio and making various telephone calls[733] and being "told information".[734] The precise information he received and the source of any such information has not been identified. DI Webber himself conceded that the information he had received was "coming in third-hand".[735] Accordingly, the contention that he was satisfied on reasonable grounds that an emergency situation had arisen must fail.

399. In particular, to the extent that DI Webber relied on allegations concerning the water supply, a roadblock from the airport or an attack on the airport, it is clear that no reasonable grounds existed on the basis of which he could be satisfied that such a situation existed. No allegations "in relation to the water supply" have previously been raised. In relation to the rumours of a roadblock or an attack on the airport, it can be accepted that such rumours were circulating amongst the police at the time[736]—so much so that the a request was apparently made for the army to "secure the airport".[737] However, no reasonable basis for the rumours has ever been identified and as DI Webber himself conceded, as soon as he arrived on Palm Island he verified that the rumours of a roadblock or an attack on the airport were false.[738]

400. Of the particulars to paragraph 193(d) of the Defence, (i) and (vii) relate to the second limb and not the first limb of the PSPA definition of "emergency situation". Accordingly, the only remaining justifications relied on by DI Webber of which he could arguably have been reasonably satisfied which might have satisfied the first limb of the definition are:

    a. that the Palm Island police station and SS Hurley's residence had been set alight; and

    b. that police officers were under attack or under continual attack by rocks and fire.

401. As previously explained, neither of those matters could have constituted "any other accident" within the meaning of sub-paragraph (f) of the definition of emergency situation. In the event that, contrary to the Applicants' primary submissions, the

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[733] T917.19-25.

[734] T1079.26-30.

[735] T1081.13.

[736] See, eg, Exhibit A41, Item 4.

[737] Exhibit A41, Item 5.

[738] T918.14-15 and 27-32; T1079.32-34.

Court finds that DI Webber was reasonably satisfied that those matters existed, the Applicants accept that:

a. the fires in the police station and SS Hurley's residence could arguably have constituted a "fire" within the meaning of sub-paragraph (a) of the definition of "emergency situation"; and

b. attacks on the police officers, by rocks and fire or otherwise, could arguably have constituted an "incident" involving an "other weapon" within the meaning of sub-paragraph (e) of the definition of "emergency situation".

402. Accordingly, the only plausible argument that the Respondents can make is that DI Webber was reasonably satisfied that a "fire" existed, or that an "incident" involving "any other weapon" existed. It can be accepted that both situations caused or may have caused danger or injury to one or more persons or damage to property. However, DI Webber made the declaration at about 1.45pm and, on his own evidence, at the time when the police were moving from the barracks to the hospital. The Applicants submit that, at that time, the fire was under control[739] and the police were no longer under attack in any manner which could be described as a threat to public safety, or which was more serious than the various incidents which had occurred in the previous week and were not deemed to be emergency situations.[740]

403. Further, the declaration related to the entire island of Palm Island. Aside from the wholly unsubstantiated allegations of a roadblock, an attack on the airport, or information "in relation to the water supply", any emergency situation was entirely confined to the "Mission" area of Palm Island, and did not affect the entire island. There was no reasonable basis for DI Webber to be satisfied that an emergency situation had arisen over the entire island.

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[739] Exhibit A54 at 4:20 records the sirens of the fire trucks. The same sirens are recorded in Exhibit A11 at 11:06, which then depicts fire crews bringing the fires under control. Whilst the accuracy of the time stamp on Exhibit A54 has not been verified, it indicates that the fire trucks arrived at 13:34hrs—about 43 minutes before the police left for the hospital, as depicted in that video at 11:20 (showing a time stamp of 14:21hrs). The police walking to the hospital are also depicted in Exhibit A11 at 16:13.

[740] See Exhibit A54 at 11:20 and A11 at 16:13.

G.2. Revocation of the emergency situation

404. Paragraph 299(d) of the 3FASC contends that if there was an emergency situation during the protests on 26 November 2004, it ended when the crowd of protesters dispersed and returned to their homes and when the emergency situation ended, DI Webber failed to declare the emergency situation to be revoked.

405. The Applicants have pleaded that the failure to revoke the declaration of an emergency situation on the afternoon of 26 November 2004 after any emergency situation that may have been in existence had ended was an "act" for the purpose of section 9 of the RDA.[741]

G.2.1 Evening of 26 November 2004

406. As explained above, the only possible bases for an emergency situation to have been declared were the existence of a fire and attacks on the police.

407. If the emergency situation that existed was the fire, it ceased to exist once the fire was brought under control. At that stage, it no longer had the potential to cause any further danger or injury to any persons or damage to any property.

408. If the emergency situation that existed was the attacks on the police, then that situation ended when the fire was under control and when people had ceased throwing rocks at the police. This occurred at least by some time after 3 pm, when the crowd outside the hospital dispersed.[742] In fact, on the evidence before the Court, the situation at the hospital, whilst tense, was not a situation that could reasonably be described as amounting to a threat to public safety that could not be dealt with otherwise than by invoking extraordinary police emergency powers.[743] The situation had certainly calmed down later that afternoon/evening.[744]

G.2.2 Requirement to revoke declaration

409. Section 5(3) of the PSPA provides that "The declaration that an emergency situation exists shall continue until revoked by the incident coordinator". There is no express

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[741] 3FASC: 299(d), 309(c).

[742] ASF, 277.

[743] See, eg, Exhibit A11 at 16:15 to 20:45; Exhibit A54 at 11:20 to 14:08; T796.10-798.18; T1093.1-1095.2.

[744] T1084.30-1085.30; 1087.5-1088.10.

timeframe in the Act for when a declaration must be revoked under section 5(3).[745] However, for the following reasons, the Applicants submit that, on a proper construction of the Act, the declaration must be revoked as soon as practicable after the emergency situation has ended.

410. The definition of an "emergency situation" does not refer to a declaration being made. Similarly, a declaration can be made under section 5(1) if the incident coordinator is reasonably satisfied that an emergency situation has arisen or is likely to arise, without an emergency situation having in fact arisen or being likely in fact to arise. In view of the provision in section 5(3) that the declaration continues until revoked, it follows that a declaration can continue to be in place despite the actual emergency situation having abated.

411. Further, the emergency powers under section 8 are not engaged by reference to a declaration of an emergency situation being in place, and, rather, are only engaged "during the period of and in the area specified in respect of *an emergency situation*" and where "the incident coordinator is satisfied on reasonable grounds that it is necessary to effectively deal with *that emergency situation*" (emphasis added). Accordingly, where the relevant emergency situation no longer exists, but the declaration remains in place, the declaration serves no purpose and ought to be revoked. It cannot have been Parliament's intention that an emergency situation can continue to be declared long after it has in fact abated. In view of the principle of legality and the nature of the section 8 powers, the Court ought to construe section 5(3) narrowly.

412. As explained above, any emergency situation that may have existed on Palm Island on 26 November 2004 ended by about 3pm that day. DI Webber was required to revoke the declaration of the emergency situation at that time. He failed to do so. Consequently, the Applicants' allegations in paragraph 299(d) of the 3FASC has been made out.

G.2.3 Respondents' justification for failing to revoke the declaration

413. The Respondents contend that the emergency situation was not revoked before 8.l0am on Sunday 28 November 2004 "because DI Webber considered, for the following reasons, that a high risk situation continued to exist":[746]

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[745] Although note that OPM s 17.3.1 requires that the incident coordinator "revoke the declaration when the emergency situation no longer exists": Exhibit F1, p75 at (iv).

[746] Defence: 205(c).

(i) serious offences including arson and riotous behaviour had been committed;

(ii) there had been threats to murder police officers;

(iii) there was ready access in the Palm Island community to weapons including knives, spears, machetes and other blade type weapons as well as rocks;

(iv) a QPS firearm (a semi-automatic .223 Mini-Ruger rifle) was reported missing from the police barracks and could not be located;

(v) there were ongoing concerns about a further outbreak of violence and civil unrest because it was unknown what further action might be planned by residents of Palm Island.

414. The Respondents confirmed in their further and better particulars that the reference in paragraph 205(c) of the Defence to a "high risk situation" was to that term as it is defined in the *National Guidelines for the Deployment of Police in High Risk Situations* (Exhibit R8) (***National Guidelines***), and stated that the relevance of a "high risk situation" to the existence or absence of an emergency situation "is evident from the provisions of the *Public Safety Preservation Act* 1986 (Qld) itself and from the National Guidelines for the Deployment of Police in High Risk Situations". It is submitted that this contention must be rejected.

415. A "high risk situation" as defined in the National Guidelines relates to the deployment of police "special operations groups", such as SERT. It does not relate to an "emergency situation" as defined in the PSPA. No doubt there may be some overlap on some occasions, in that an incident involving a bomb or a firearm would likely require SERT to be deployed. On the other hand, the PSPA also applies to situations such as car crashes and oil spills, where it is not clear what contribution, if any, SERT would bring to the police response. Similarly, SERT could be deployed to high risk situations such as the apprehension of a drug dealer which could not conceivably fall under the operation of the PSPA. It follows that the existence of a high risk situation does not excuse a failure to revoke a declaration of an emergency situation.

416. In his evidence, DI Webber did not rely on the existence of a high risk situation. Rather, he stated that he did not revoke the emergency situation on Friday evening because he considered that:

a. there was a missing police firearm which had not been located,[747] which corresponds with paragraph 205(c)(iv) of the Defence;

b. a number of persons had still to be taken into custody,[748] which may loosely correspond with paragraph 205(c)(i)-(ii) of the Defence;

c. there was "an air of tenseness around the community" and "a fear that there could be further incidents on – during that evening and night",[749] and there was "an ongoing and continuing threat and a risk of harm to the community",[750] which broadly corresponds with paragraphs 205(c)(iii) and (v) of the Defence.

417. As to the reasons why the declaration was in fact revoked, the Respondents contend that this occurred at 8.10am on 28 November 2004 because:

a. various persons had been apprehended by police officers on 27 November 2004;[751]

b. there was a significant level of QPS officers and QPS equipment available to respond to any further incident of civil unrest;[752]

c. infrastructure points on Palm Island, including the Palm Island State School, the petrol station, the hospital and the airport had been secured by establishing patrols or cordons of police officers around the locations;[753]

d. there were no incidents on Palm Island, being incidents which cause or may cause a danger of death, injury or distress to any person or a loss of or damage to property, to indicate any damage to police patrols.[754]

418. DI Webber claimed to have revoked the emergency situation at 8.10am on 28 November 2004 because:

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[747] T925.47.

[748] T926.1.

[749] T926.2-3.

[750] T1085.23.

[751] Defence: 205(b)(i).

[752] Defence: 205(b)(ii).

[753] Defence: 205(b)(iii).

[754] Defence: 205(b)(iv).

a. most if not all, of the persons of interest had been arrested and taken into custody;[755]

b. whilst the police firearm had not been located "we were comfortable with the situation";[756] and

c. there were no further acts of violence overnight.[757]

419. It follows that paragraphs 204(b)(ii) and (iii) of the Defence have not been established. In any event, the arrival of further QPS officers and the deployment of police officers around the relevant infrastructure sites occurred on the evening of 26 November 2004 and not at 8.10am on 28 November 2004.[758]

420. The relevance (or lack thereof) of a high risk situation to a declaration or revocation of an emergency situation is addressed above. As to the lack of incidents occurring on Palm Island on the night of 27 November 2004, there is clear evidence that no incidents occurred after 3pm on 26 November 2004.[759] It cannot possibly be maintained that the declaration is only required to be revoked 40 hours after any incidents had ceased.

421. In relation to the allegedly "missing" police firearm, whilst this is addressed in more detail below, suffice it to say that only discovered to be "missing" after the declaration had been made and it remained "missing" after the declaration had been revoked. Further, the police misplacing a firearm does not constitute an "incident" involving a firearm for the purpose of the PSPA, as it does not, of itself, threaten the safety of the public, and there is no apparent need for extraordinary police powers. In that regard, it bears noting that the rifle continued to be "missing" for several days after the emergency situation was revoked by DI Webber. Any contention that the rifle being "missing" constituted or contributed to the existence of an "emergency situation" must be rejected.

422. With respect to the allegedly feared "further incidents", DI Webber did not provide any reasonable basis for holding such fears, and those fears do not otherwise appear to have been based on anything except speculation and conjecture based on a preju-

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[755] T926.8.

[756] T926.9.

[757] T926.10.

[758] T920.30-36; T1421.1-33.

[759] T1085.29

diced perception of Palm Island residents. In any event, if DI Webber was reasonably satisfied that a further incident was likely to arise and that incident would be an emergency situation, he would have been required to issue a declaration with respect to that incident. He did not do so. In order to declare an emergency situation under section 5 of the PSPA, an incident coordinator must be reasonably satisfied that a particular and identifiable emergency situation has arisen or is likely to arise. It is not sufficient to hold a fear that vague and undefined "incidents" might occur.

423. The final reason for DI Webber to have revoked the declaration at the time that he did is that various persons had been taken into police custody. The Applicants accept that this is the most likely explanation. If that is the case, it is clear that the failure to revoke the declaration was unlawful. A suspect being at large cannot possibly amount to an "emergency situation" under the PSPA. There is no emergency power under the PSPA to apprehend suspected criminals. Keeping a declaration of an emergency situation in place in order to use emergency powers to apprehend suspects is contrary to the intention of the PSPA, *ultra vires* and a manifest abuse of police power.

G.2.4 Requirement to issue certificate declaring emergency situation

424. Section 5(2) of the PSPA provides:

> The incident coordinator, as soon as practicable after he or she declares that an emergency situation exists, shall issue a certificate to this effect signed by the incident coordinator which certificate shall set out the nature of the emergency situation, the time and date it was declared to exist and the area in respect of which it exists.

425. The Applicants submit that, on a plain reading, the purpose of section 5(2) is to create a contemporaneous record of when, where and why a declaration of an emergency situation is made, as well as to introduce an aspect of formality to what is a very serious procedure. For the reasons set out below, the Applicants submit that DI Webber breached that provision, in that he released an inadequately particularised certificate and he did so long after issuing the certificate became practicable.

426. The Applicants have pleaded that the following acts or omissions to act were "acts" for the purpose of section 9 of the RDA:

a. the issuing of a Certificate in relation to the Declaration of an Emergency Situation without providing adequate particulars of the emergency situation;[760]

b. the failure to issue a Certificate in relation to the Declaration of an Emergency Situation as soon as practicable after the emergency situation was declared.[761]

G.2.5 Inadequacy of certificate

427. Paragraph 299(b) of the 3FASC alleges that, in breach of section 5(2) of the PSPA, the certificate issued by DI Webber was not adequately particularised. Relevantly, section 5(2) requires that the certificate "set out the nature of the emergency situation, the time and date it was declared to exist and the area in respect of which it exists."

428. The particulars provided by DI Webber in the certificate he issued in relation to the declaration of the emergency situation were as follows:[762]

> I declared an emergency situation to exist at (c) The entire Island of Palm Island
>
> on (d) 26/11/2004 at (e) 1345 hours.
>
> The emergency situation was declared for the purpose nominated in sub-paragraph (f) any other accident; that causes or may cause a danger of death, injury or distress to any person, a loss of or damage to any property or pollution of the environment.
>
> _____ of the definition of 'emergency situation' as defined in section 4 of the Act.

429. The certificate plainly did not "set out the nature of the emergency situation". As noted above, the apparent purpose of section 5(2) is in part to create a contemporaneous record of the reasons for an emergency situation being declared. The *Oxford English Dictionary* relevantly defines "nature" as "the basic or inherent features, character, or qualities of something". The Applicants submit that the provision requires the incident coordinator to explain what the emergency situation was, not which paragraph of the statutory definition they consider it fell into. The reference in DI Webber's certificate to sub-paragraph (f) of the definition under the Act—which, as explained above, was not applicable in any event—says nothing about the *nature* of the situation. It is submitted that the allegations in paragraph 299(b) of the 3FASC have been made out.

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[760] 3FASC: 299(b), 309(c).

[761] 3FASC: 299(e), 309(c).

[762] Exhibit A20; see also, Defence paragraph 214(c).

G.2.6 Delay in issuing certificate

430. The importance of the section 5(2) certificate being issued as soon as practicable after the emergency situation is declared is self-evident. As the certificate provides a contemporaneous record of the declaration, the sooner it is issued, the more accurate will be the record of the reasons for the declaration. It also makes available pertinent information to more senior officers within the QPS within a relevant timeframe for related decisions to be made.

431. It is agreed that no certificate declaring a situation was issued or caused to be issued pursuant to section 5(2) of the PSPA on 26 November 2004, or at all until after 8.10 am on 28 November 2004—at which time the emergency situation was revoked.[763] The certificate itself, being Exhibit A20, was completed by DI Webber and faxed to Townsville at about 9.15 am on 28 November 2004.[764] By then, approximately 44 hours had passed since the declaration had been made. Accordingly, there is not now in existence a contemporaneous record of the matters of which DI Webber was satisfied at 1.45pm on 26 November 2004.

432. Paragraph 299(e) of the 3FASC alleges that the certificate was not issued as soon as practicable, and that this was a breach of section 5(2) of the PSPA. That allegation must be accepted. No explanation has been provided by the Respondents as to why it would not have been practicable for DI Webber to issue the certificate earlier. When challenged, DI Webber claimed that he was unable to produce a form on the Friday evening as there was no police computer system in place.[765] However, there is evidence that the police on Palm Island had a working fax and a computer with email as early as 5.30pm that day.[766] Further, DI Webber conceded, albeit in relation to another document, that paperwork was not "a priority for completion at that time."[767]

433. The Applicants submit that DI Webber's evidence that he could not produce a form on the evening of 26 November 2004 is self-serving and misleading and must be rejected. The more probable explanation is that he simply did not turn his mind to his statutory obligations as incident coordinator that evening. It is noted that this case il-

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[763] ASF: 283, 285.

[764] ASF: 316.

[765] T1083.20-30.

[766] Exhibit A41, Item 47; T1311.10-20.

[767] T1104.18-21.

lustrates precisely the reason that section 5(2) exists and what the consequences are of its breach. Had DI Webber complied with his statutory obligations, there would not now be a need for the Court to reconstruct his reasons for declaring the emergency situation. It is submitted that the allegation in paragraph 299(e) of the 3FASC has been made out.

G.3. Deployment of SERT

434. It is agreed that the Special Emergency Response Team or SERT was a specialist support unit, established to provide the QPS with the ability to respond to terrorist incidents state-wide and whose primary role was set out in section 2.26.1 of the OPM as follows:[768]

    a. respond to terrorist incidents within the arrangements agreed to under the State Anti-terrorist Plan;

    b. provide specialist police capability to resolve high risk situations and incidents which were potentially violent and exceeded normal capabilities of the QPS;

    c. provide assistance to all officers of the QPS with low risk tasks which required specialist equipment, skills or tactics; and

    d. provide a rescue function in incidents which required specialised recovery techniques.

435. DI Webber's evidence was that his declaration of the emergency situation "initiated an activation plan for [SERT and PSRT] to actually attend to assist other officers".[769] However, the precise reasons for SERT's deployment on Palm Island are unclear. In particular, contrary to ordinary procedure,[770] the form requesting the deployment of SERT[771] was completed not prior to their deployment, but several days later.[772] As occurred in relation to the certificate purported to be issued pursuant to section 5(2) of the PSPA, as a result of DI Webber's disregard for due process, there is no contemporaneous record of his reasons for requesting SERT.

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[768] ASF: 292; see Exhibit A14 p35.

[769] T923.20.

[770] See OPM s 2.26.3; Exhibit A14, p35.

[771] Exhibits A79 and A80.

[772] T1101.35-1103.13.

436. It is noted in particular that DI Webber backdated the request for SERT form and wrote it such that it would appear to the reader that the form was completed at the time of the request. This reflects poorly on his credit. His rationalisation that the document was "not produced for anything other than the information and the records of the police service"[773] does not assist him. There is no conceivable reason why the police service would benefit from keeping inaccurate and misleading records.

437. DI Webber also contended that "the document was completed in relation to what was acting upon [his] knowledge and [his] request at the time … not what [he] subsequently found out".[774] That too must be rejected. The document creates an entirely misleading and self-serving narrative, in which DI Webber selects information that apparently justifies his course of action and ignores information which undermines it. For example:

a. The document contains an accurate transcript of remarks made by David Bulsey at the community meeting at about midday on 26 November 2004.[775] These would not have been available to DI Webber when he made the request for SERT at about 2pm on that day.[776]

b. The document asserts that "The remaining police residences were then looted by the crowd and property was destroyed and stolen".[777] If this had occurred at the time the request for SERT was made (and there is no evidence to suggest that to be the case), DI Webber could not possibly have known that it had occurred, as all of the police officers on Palm Island were, at that time, located at the hospital and not the barracks.

c. The document asserts that "Persons on the island are capable of using lethal force including rocks, molotov cocktails and have access to other weapons including knives, machetes, spears and possibly stolen police firearms".[778] At the time that the request for SERT was made, the police firearm had not yet

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[773] T1107.15-16.

[774] T1107.20-25.

[775] A80: p1, first paragraph. See Exhibit R21, p3 for the transcript of Bulsey's remarks.

[776] T1102.15.

[777] A80: p1, third paragraph.

[778] A80: p1, last paragraph; p2 at 2.4.

been reported missing. By the time the form was filled out, DI Webber knew that the firearm was not missing.[779]

d. The document asserts that assistance was sought from SERT:

> to search for and apprehend persons who took part in the riot and arson of Police property. These persons may be armed with weapons and pose a serious threat to the life and safety of police members. The identity of individual offenders will be provided on an ongoing basis for operational planning.

The plan for SERT to search for and apprehend persons who were accused of arson and rioting was formulated several hours after SERT had arrived on the island and was not a basis for their presence being requested.[780] By the time the form was filled out, those searches and apprehensions had taken place and, as DI Webber well knew, not one person who had been apprehended was armed with a weapon or found to have access to knives, machetes or spears.[781]

438. It is apparent that, in confecting the request for SERT form *ex post facto*, DI Webber included information depicting Palm Islanders as thieves or as dangerous and violent which had come into his possession after the actual request for SERT was made and been proven to be false before the form was filled out. Further, he had omitted information in his possession when the form was filled out that contradicted such a depiction of Palm Islanders. In the Applicants' submission, this reveals a distinct prejudice in DI Webber's mind regarding Aboriginal people.[782]

G.3.1 Allegedly "missing" firearm

439. The Respondents rely on the existence of a "missing" police Ruger Mini-14 rifle in support of DI Webber's alleged satisfaction that a high risk situation continued to exist on Palm Island after 3pm on 26 November 2004.[783] In turn, this is relied on to justify his failure to revoke the declaration of an emergency situation at that time—although, as explained above, that submission must fail. Nevertheless, given the central role that the allegedly "missing" rifle apparently played in the deployment of

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[779] T1107.25-30.

[780] T1108.35-45; T1418.1-10.

[781] TT1105.45-1106.34.

[782] *Cf,* T1106.34-1107.6.

[783] Defence: 205(c)(iv).

SERT and the planning and conduct of the SERT raids, as emerged at trial,[784] the issue warrants some detailed consideration in these submissions.

440. The Applicants requested that the Respondents provide further and better particulars of paragraph 205(c)(iv) of the Defence by advising by whom the rifle was reported missing and what, if any, efforts are alleged to have been undertaken by the QPS in order to locate the missing rifle. The Respondents declined to do so on the basis that these were matters for evidence. The Applicants have accordingly objected to the Respondents' reliance on the allegation on the basis that it failed to give the Applicants fair notice of the case to be made against them at trial,[785] and as the allegation that the rifle "could not be located" is conclusory and the Respondents failed to state the material facts on which they relied in order to reach that conclusion.[786] Alternatively, the Applicants have not admitted or denied the allegation.[787]

441. The Applicants remain uncertain as to the basis for the Respondents' contentions. Nevertheless, the following matters concerning the firearm are clear.

(a) Rifle not missing

442. It is agreed that the rifle was initially removed from the police station by Constable Craig Robertson when the police officers moved from the Police Station to the police barracks; that Constable Robertson did not have any ammunition or magazines for the Mini-14; that when the police officers moved from the police barracks to the Palm Island Hospital, Constable Robertson did not take the Mini-14 with him; and that the Mini-14 was subsequently found in the police barracks on or about 8 December 2004.[788]

443. That Constable Robertson had possession of the rifle and that he did not have ammunition is confirmed in the footage that he recorded.[789] The only person who gave evidence at the trial and was present at the time that Constable Robertson hid the rifle was SS Whyte, who, remarkably, appeared to also be the only witness called by

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[784] T1110.27; T1108.27

[785] Reply: 69(a)(i), relying on FCR 16.02(1)(d).

[786] Reply: 69(a)(ii), relying on FCR 16.02(1)(d); *cf, Australian Competition and Consumer Commission v April International Marketing Services Australia Pty Ltd* [2007] FCA 2024 at [41] (Bennett J).

[787] Reply: 69(c).

[788] ASF: 278-280.

[789] See Exhibit A54 at 02:47, 03:55, 04:27, and 08:10.

the Respondents at the trial with no recollection whatsoever that a rifle had gone missing.[790]

444. That notwithstanding, SS Whyte does appear to have caused DSS Kitching to record in the MIR running sheet at 8.54pm on 26 November 2004 that the rifle was missing, had been removed from the station, was hidden in the barracks, and did not have any ammunition or a magazine.[791] DSS Miles recorded in the running sheet on 8 December 2004 at 2.40pm that the rifle was located in a cupboard at the rear of the police barracks and was believed to have been removed by a staff member and locked in the cupboard for safekeeping.[792] DI Webber was adamant that the rifle had in fact been found earlier.[793]

445. Curiously, the Respondents have disputed that the rifle remained in the garage between 26 November 2004 and 8 December 2004, or that it was found in the garage where Constable Robertson had left it,[794] although no alternative explanation has been propounded. In any event, the Respondents' witnesses conceded that the rifle remained in the barracks where it had been left at all relvant times.[795] The Applicants submit that it is distinctly unlikely that the rifle was removed from the barracks and then returned there, and the Court should accept that it remained in the barracks where Constable Robertson had hidden it on 26 November 2004 until on or before 8 December 2004.

(b) Police search for the rifle

446. The entry in the running sheet made by DSS Kitching recording advice from SS Whyte regarding the rifle also states "Confirms that barracks have been entered by community persons since that time and a search is now unable to locate the rifle".[796] As previously noted, SS Whyte was apparently unable to recall that there was a rifle missing, let alone the details of any search conducted for the rifle. DI Webber claimed to have "understood that a search had been conducted" in the barracks, but conceded that it had not been conducted at his direction, and did not otherwise pro-

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[790] T1609.7-1610.12.

[791] Exhibit A41, Item 85; T1314.20-1315.40. Note that DSS Kitching agreed that the entry refers to SS Whyte, despite the misspelling of SS Whyte's name.

[792] Exhibit A195, Item 582.

[793] T1111.6-18.

[794] Notice of Dispute filed on 2 February 2016.

[795] Mr Dini at T814.5; DI Webber at T1108.15 and at T111.20; SS McKay at T1456.36.

[796] Exhibit A41, Item 85.

vide any details of any such search.[797] The most detailed evidence with respect to a search was from SS Dini, who stated:

> when they went through and did the sweep they noticed a gun case there with the gun not in it. And Craig [Robertson] and the officers that were there during the riot had been taken off the island, and so when we saw the empty case it was assumed that the firearm had been taken. I didn't find it, somebody else did, and they told me that, "We – we think we're missing a 223."[798]

447. There is not otherwise any evidence that any search was conducted for the rifle in the barracks where it had been left, or of the nature and scope of any such search. It follows that the most plausible explanation for the course of events regarding the rifle was that Constable Robertson removed it from its case, discovered that it was useless to him as it had no ammunition and no magazine, and therefore locked it in a cupboard in the barracks. Later, a "sweep" was conducted of the barracks, in which the case for the rifle was located but the rifle itself was not located.

448. At that stage, Constable Robertson was not asked if he could remember where the rifle was and neither was a search conducted of the barracks in order to locate the rifle which reached the level of rigour of checking in all the cupboards. It is apparent that even after Constable Robertson gave a formal interview the following day in which he reiterated that he had left the rifle in the barracks without ammunition or a magazine,[799] the focus of the search for the rifle continued to be locating the local residents who the police had come to believe had stolen the rifle.[800] In SS Dini's words:

> the assumption we were working under was the gun wasn't where it was supposed to be and because we knew that the residents had been through that area, the assumption was that one of them had taken the weapon.[801]

449. In the Applicants' submission, in view of what subsequently occurred, it is apparent that the assumptions made by the police went beyond that one of the residents had stolen the firearm when the residents went through the barracks. Rather, the assumptions made by the police were that:

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[797] T110.17-21 and T111.40.

[798] T815.10-15.

[799] Exhibit A41, Item 197; T1109.36-1110.18.

[800] T1358.45-1359.5

[801] T816.40-45.

a. one of the residents had stolen the firearm when the residents went through the barracks;

b. that resident was Aboriginal;

c. that resident was or was likely to have access to ammunition and, potentially, a magazine for the rifle;

d. that resident was or was likely to be ready, willing and able to use the rifle to attack the police.

450. The Applicants further submit that the fact that these assumptions were so readily made, to the point where the persons tasked with searching for it apparently did not even bother asking the person who had last had it where he had left it and then checking whether it was still there, is reflective of a racial prejudice towards the local Aboriginal community and an apprehension that at least some community members were violent criminals. It relied on an assumption that a magazine and some ammunition could be readily located by members of the local Aboriginal community, an assumption with no factual foundation at the time (or since).

G.4. Unlawful arrests

G.4.1 Requirements for lawful arrest

451. As a preface to the submissions on the lawfulness of the arrests the subject of these proceedings, the Applicants submit that the Court should have regard to the principles articulated by Deane J in *Donaldson v Broomby*[802] as follows:

> 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. 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.

452. The power of police to make arrests without warrant was contained in section 198 of the PPRA. Section 198(1) made it "lawful for a police officer, without warrant, to arrest an adult the police officer reasonably suspects has committed or is committing

[802] (1982) 60 FLR 124 at 126.

an offence if it is reasonably necessary for 1 or more of the following reasons…", which reasons included *inter alia* "(a) to prevent the continuation or repetition of an offence or the commission of another offence;" "(h) to prevent a person fleeing from a police officer or the location of an offence;" and "(k) because of the nature and seriousness of the offence". Section 198(2) made it lawful to arrest a person for questioning about an indictable offence if the police officer who made the arrest reasonably suspected that the person had committed or was committing that indictable offence.

453. Kitto J explained the requirements of a "reasonable suspicion" in *Queensland Bacon Pty Ltd v Rees*[803] as follows:

> A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as Chambers's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence.

454. The interpretation of a reasonable suspicion in the context of a statutory power of arrest was considered by Gray and Lee JJ in *Goldie v Commonwealth*.[804] Their Honours held that:

> Reasonable suspicion, therefore, lies somewhere on a spectrum between certainty and irrationality. The need to ensure that arrest is not arbitrary suggests that the requirement for a reasonable suspicion should be placed on that spectrum not too close to irrationality.

455. The word "arrest" under section 198 had its ordinary common law meaning, which includes to "apprehend" or "take into custody", but also includes any circumstances where the conduct of a police officer is "calculated to bring to the defendant's notice, and did bring to the defendant's notice, that he was under compulsion and thereafter he submitted to that compulsion".[805]

456. The police officer who must hold the reasonable suspicion required under section 198 is the police officer who effects the arrest, and not "a superior police officer, remote from the scene of the arrest, who had ordered the detention".[806] Accordingly, pursuant to section 198:

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[803] (1966) 115 CLR 266 at 303.

[804] (2002) 117 FCR 566 at 569/[5].

[805] *Alderson v Booth* [1969] 2 QB 216 at 220 (Lord Parker CJ; Blain and Donaldson JJ agreeing).

[806] *Bulsey & Anor v State of Queensland* [2015] QCA 187 at [13] (Fraser JA).

> although an arresting officer may in appropriate cases form the necessary reasonable suspicion upon the basis of information supplied by another police officer, the suspicion must be held by the arresting officer; it is not sufficient that it is held by a superior officer who ordered the arrest. … the person who must hold the belief required by that provision is the arresting officer. … this requirement is intended to ensure "[t]hat the arresting officer is held accountable".[807]

457. Pt 1 of Ch 6 of the PPRA, which includes the power under section 198 to arrest a person without warrant, can be contrasted with the scheme of in Pt 2 of Ch 6, which includes the power under section 202 to arrest a person with a warrant. Section 202 of the PPRA permits a police officer to arrest a person named in a warrant, where "arrest" is defined to include "apprehend, take into custody, detain, and remove to another place for examination or treatment". Section 203 permits a police officer to apply to a justice for an arrest warrant by way of sworn application stating the grounds on which the warrant is sought. Under section 204, a justice may only issue an arrest warrant where the justice is satisfied there are reasonable grounds for suspecting that the person has committed the offence. Section 204(3) permits a justice to refuse to consider the application "until the police officer gives the justice all the information the justice requires about the application in the way the justice requires"—where such information must also be given under oath or affirmation.[808]

458. The procedure for obtaining an arrest warrant creates an important step between the police officer wishing to effect an arrest and the arrest being effected, by requiring that "it must appear to the issuing justice, not merely to the person seeking the … warrant, that reasonable grounds for the relevant suspicion and belief exist."[809] The importance of obtaining a warrant in such circumstances was stated by Burchett J in *Parker v Churchill:*[810]

> The duty, which the justice of the peace must perform in respect of an information, is not some quaint ritual of the law, requiring a perfunctory scanning of the right formal phrases, perceived but not considered, and followed by simply an inevitable signature. What is required by the law is that the justice of the peace should stand between the police and the citizen, to give real attention to the question whether the information proffered by the police does justify the intrusion they desire to make into the privacy of the citizen and the inviolate security of his personal and business affairs.

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[807] *Bulsey & Anor v State of Queensland* [2015] QCA 187 at [15] (Fraser JA).

[808] *George v Rockett* (1990) 170 CLR 104 at 113-114 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[809] *George v Rockett* (1990) 170 CLR 104 at 112 (Mason CJ, Brennan, Deane, Dawson, Toohey, Gaudron and McHugh JJ).

[810] (1985) 9 FCR 316 at 322.

459. When comparing the section 198 power with the section 202 power, it is particularly important to recognise that the section 198 power is non-delegable and can be used only by the police officer with the requisite reasonable suspicion. On the other hand, the section 202 power, with all of the procedural safeguards associated with obtaining a warrant, can be used by police officers to arrest a person for no reason other than that they are named on a warrant. It follows that where a police officer has developed a reasonable suspicion that a person ought to be arrested, but does not intend to undertake the arrest themselves, that police officer must obtain a warrant for the person's arrest in order for other officers acting at that officer's direction to be empowered under the PPRA to conduct the arrest. Were that not the case, "an order by a superior officer [would have] substantially the same effect as an arrest warrant even though it lacks any of the statutory protections of personal liberty in Pt 2 of Ch 6".[811]

G.4.2 Arrests not lawful

460. The Applicants have pleaded that the arrests conducted during the SERT raids were not conducted lawfully and not in accordance with section 198 of the PPRA.[812] It is agreed that all such arrests were without warrant.[813] Whilst a number of arrests were canvassed in the evidence, the particular arrests at issue in these proceedings are the arrests of the First and Third Applicants.

461. The Applicants have pleaded that the following acts or omissions to act were "acts" for the purpose of section 9 of the RDA:

a. the arrest of the First Applicant;[814]

b. the arrest of the Third Applicant; [815]

c. the formation of an Action Plan which required that DS Robinson identify the persons to be arrested;[816]

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[811] *Bulsey & Anor v State of Queensland* [2015] QCA 187 at [16] (Fraser JA).

[812] 3FASC: 300 and 302.

[813] ASF: 314.

[814] 3FASC: 287, 288, 300, 309(d).

[815] 3FASC: 287, 288, 300, 309(d).

[816] 3FASC: 284, 300, 309(d).

d. the preparation of a list of persons to be arrested by DSS Miles in Townsville on the night of 26 November 2004;[817]

e. the failure to obtain a warrant for the arrest of any person arrested in the presence of SERT and PSRT officers in connection with the events on Palm Island of 26 November 2004.[818]

(a) Arrest of First Applicant

462. It is agreed that the First Applicant was convicted of the offence of "rioters injuring building or machinery etc" in respect of his conduct on 26 November 2004.[819] In claiming that the First Applicant was arrested unlawfully, the Applicants do not seek to re-agitate that conviction or otherwise to claim that the First Applicant was not guilty. Rather, the Applicants submit that the First Applicant's innocence or guilt should have no bearing on the lawfulness or otherwise of his arrest. Even the guilty are subject to "a legal immunity from arrest and from the threat of arrest unless and until the conditions governing the exercise of the arresting power are fulfilled".[820]

463. It is evident that the decision to arrest the First Applicant was made early in the evening on 26 November 2004.[821] However, no warrant was obtained for his arrest prior to him being arrested at about 5 am the following morning. DSS Campbell gave evidence that he was directed not to obtain warrants for the arrests of suspects on the basis that the police were relying on emergency powers under the declared emergency situation.[822] No such emergency powers existed. The only power of arrest that could have been deployed in the absence of a warrant for Mr Wotton's arrest was section 198 of the PPRA.

464. Whilst it is clear that the decision to arrest Mr Wotton was made on the Friday evening, it is not clear by whom the decision was made or on what basis. The Respondents' main witness in relation to the process that was conducted to determine who was arrested was DSS Campbell. His evidence on the subject of who in fact made the decision to arrest Mr Wotton could best be described as equivocal.[823] In particular, he

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[817] 3FASC: 285, 300, 309(d).

[818] 3FASC: 286, 300, 309(d).

[819] ASF, Annexure A, p8.

[820] *Webster v Mcintosh* (1980) 49 FLR at 322 (Brennan J).

[821] 1330.9; 1329.32-34

[822] T1346.45-1347.29; T1358.5-25.

[823] T1312.1-10; T1341.24-1344.15.

gave evidence that sometimes he made the decision to arrest a person and sometimes he was directed to arrest a person by the MIR.[824] There is no evidence as to which category Mr Wotton fell into. Neither is there any evidence as to what grounds the person who made the decision to arrest Mr Wotton was relying on when the decision was made.

465. In respect of the selection process, the Applicants note that there is substantial evidence that Mr Wotton was the first target and the Mayor, Erykah Kyle, was the second.[825] It is not clear why a decision was ultimately made not to arrest Ms Kyle.[826]

466. The evidence shows that Mr Wotton was in fact arrested by SC Kruger, possibly at the direction of DS Robinson.[827] It is apparent that SC Kruger knew very little about Mr Wotton, other than that he had been selected for arrest and was allegedly the "ringleader" of the "Riot".[828] Despite being a practising solicitor in Townsville and being present in Townsville for a part of the trial,[829] DS Robinson was not called to give evidence. As a consequence, it must be presumed that his evidence would not have assisted the Respondents' case.[830] In any event, as submitted above, the section 198 power is not delegable. In order to arrest a person under section 198, the police officer making the arrest must reasonably suspect that person of having committed an offence. SC Kruger did not have any suspicion in that regard towards Mr Wotton and neither did he have any reasonable grounds for such a suspicion.

467. The difficulties described above are precisely the circumstances that the arrest warrant regime are designed to prevent. Had Mr Wotton been arrested pursuant to section 202 of the PPRA, a police officer would have had to have provided evidence on oath or affirmation of precisely the grounds being relied on to arrest Mr Wotton. Further, that police officer would have had to have satisfied a justice that there were reasonable grounds to suspect that Mr Wotton had committed an offence. Mr Wotton could then have been arrested lawfully in accordance with that warrant. In circumstances where there were apparently some 12 hours between the decision being made to arrest Mr Wotton and his arrest taking place, and where there is evidence

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[824] T1343.35-37.

[825] T662.23-25.

[826] T1340.6.

[827] T1665.28

[828] T1654.17-21

[829] T670.45-671.35.

[830] *Jones v Dunkel* (1959) 101 CLR 298.

that a search warrant could be obtained late in the evening of 27 November 2004 within about two hours,[831] it cannot possibly be contended that obtaining a warrant would not have been practicable. It is also worth noting the extraordinary measures that were taken in anticipation of Mr Wotton's arrest, such as arranging for a helicopter to be on standby in order to remove him from the island.[832]

468. Irrespective of whether guilty or not, the First Applicant was entitled to due process of law. As a citizen of Australia, he could not have his liberty infringed by the police without a very strict set of conditions being complied with. That did not occur, and as a result there was an astounding lack of accountability and transparency in the manner in which his arrest was conducted. The allegations in 3FASC paragraphs 300 and 302 have been made out in relation to the First Applicant.

(b) Arrest of Third Applicant

469. The Third Applicant had armed men come into her home and tell her to "get the fucking hell inside and lay down".[833] She and her children were herded into a bedroom in her home. She was made to lie down and to watch as a masked man held an assault rifle at her terrified daughter's head. She was told to get down and stay down. She was not permitted to get up or to leave the room for several minutes.[834] That evidence is corroborated by two other persons who were present, is in accordance with the standard SERT methodology,[835] and is entirely uncontradicted. The Respondents did not call any of the police officers who entered the Wotton household that morning to give evidence and so it must be presumed that such evidence would not have assisted the Respondents' case.[836]

470. As noted above, an "arrest" at law includes circumstances where police conduct is "calculated to bring to the defendant's notice, and did bring to the defendant's notice, that he was under compulsion and thereafter he submitted to that compulsion".[837] There can be no doubt that the Third Applicant was subject to an "arrest", under that definition, on the morning of 27 November 2004. It is noted that a police

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[831] T1356.9-1358.40; T113.25-40;

[832] Exhibit A41, Item 103; T1346.20-25.

[833] T340.36-40.

[834] T169.1-172.30; T340-341l; T418.8-31.

[835] T812.20-35; T1435.35-45.

[836] *Jones v Dunkel* (1959) 101 CLR 298.

[837] *Alderson v Booth* [1969] 2 QB 216 at 220 (Lord Parker CJ; Blain and Donaldson JJ agreeing).

officer has a general power under section 44 to "take the steps the police officer considers reasonably necessary to prevent the commission, continuation or repetition of an offence," as well as general powers in ss 375 to 377 to use such force as is reasonably necessary to exercise a power otherwise granted to police under law. As the entry into the First and Third Applicants' home was itself *ultra vires* and not done in the exercise of a lawful function of the police, none of sections 375 to 377 can apply. As there was no basis for the entry to be reasonably considered necessary to prevent the commission or repeat of an offence, section 44 cannot apply. The arrest of the Third Applicant was unlawful.

G.4.3 Not conducted with minimum force necessary

471. The Applicants allege in 3FASC paragraph 300 that the arrests conducted by SERT were not conducted with the minimum force necessary. It is agreed between the parties that the Action Plan included that the arrests were to be conducted with the minimum force necessary,[838] and it is also apparent from the evidence of SS McKay and SC Kruger that the SERT officers' understanding was that arrests must be conducted with the minimum force necessary.[839]

472. The Applicants have pleaded that the following acts or omissions to act were "acts" for the purpose of section 9 of the RDA:

a. the use in the arrest of the First Applicant of more force than was necessary;[840]

b. the use in the arrest of the Third Applicant of more force than was necessary;[841]

c. the subjection of the First Applicant to violence including the use of a taser;[842]

d. the holding of the First Applicant at gunpoint whilst he was unarmed;[843]

e. the holding of the Third Applicant at gunpoint whilst she was unarmed;[844]

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[838] ASF: 288(d).

[839] T1617.28; T1387.13-19

[840] 3FASC: 300, 309(d).

[841] 3FASC: 300, 309(d).

[842] 3FASC: 287(d), 300, 309(d).

[843] 3FASC: 288(a), 300, 309(d).

f. the forcing of the First Applicant to lie face down with guns pointed at him;[845]

g. the forcing of the Third Applicant to lie face down with guns pointed at her.[846]

(a) Force used to arrest the Third Applicant

473. In respect of the Third Applicant, the Applicants adopt the submissions above in relation to her arrest and say that as there was no reasonable basis for her to be arrested at all and there was no conceivable threat to anyone posed by her or her family members, the use of force during the arrest was manifestly excessive. The First Applicants' arrest, however, requires a more detailed consideration.

(b) Force used to arrest the First Applicant

474. There was substantial evidence given in respect of the force used to arrest the First Applicant, from both the Applicants' and the Respondents' witnesses. In the Applicants' submission, there was broad agreement between all witnesses on the course of events that occurred. The only disagreement is on whether the force that was used was necessary or excessive.

475. The First Applicant knew that he was going to be arrested from the evening of 26 November 2004.[847] He sat his family down that evening and told them that he would be going away for a long time.[848] When the police arrived to arrest him, Mr Wotton was in the front room waiting for them.[849] The police convoy came down Farm Road and parked at Mr Wotton's property outside the gate.[850] On seeing the police arrive, he went outside voluntarily,[851] wearing just a pair of shorts, with no shirt and no shoes on and with his hands up.[852] He was met with a number of SERT officers, including SC Kruger, pointing their assault rifles at him and shining lights in his

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[844] 3FASC: 288(a), 300, 309(d).

[845] 3FASC: 288(b), 300, 309(d).

[846] 3FASC: 288(b), 300, 309(d).

[847] T723.10-20.

[848] T168.34-40; T340.1-10; T656.25-657.30.

[849] T169.7-9; T657.43-44.

[850] T658.1-5; T723.30-730.30; T1440.14-47; T1621.19-23.

[851] T657.43-46; T1670.46-1671.6.

[852] T658.16-20; T1437.14-20.

face.[853] SC Kruger gave evidence that he quickly identified that Mr Wotton had nothing in his hands and that there were other SERT officers around, so he "slung" his assault rifle and took out his taser.[854]

476. Mr Wotton had then an exchange with SC Kruger, in which SC Kruger asked him if he was Lex Wotton, he said yes, SC Kruger told him to get down on the ground, and he asked why.[855] Mr Wotton then looked over his shoulder in the direction of his house in order to comfort his family.[856] At that moment, numerous SERT officers had gathered at the door to the house and Mr Wotton could hear his children crying from inside.[857] SC Kruger claims to have interpreted this as a sign that Mr Wotton was about to flee, and accordingly he decided to use his taser on Mr Wotton.[858]

477. Mr Wotton was shot in the chest with a taser with the probes spread about 10-15cm apart.[859] On SS McKay's evidence of the effect of being shot with a taser, the manner in which Mr Wotton was shot would have caused pain localised to the area between the probes.[860] As Mr Wotton described the experience, he first considered that he had been shot with a rubber bullet, then could feel the current going through him.[861] The tasering was evidently a very traumatic experience for Mr Wotton, so much so that he struggled to articulate his memory of it.[862]

478. After being tasered, as a result of what SS McKay referred to as "pain compliance",[863] Mr Wotton dropped first to his knees, and then to the ground. He then had his hands handcuffed behind his back, which caused him significant pain, given his prior shoulder injuries.[864]

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[853] T659.25-29; T1437.22-27.

[854] T1622.46-1623.15.

[855] T658.23-40; T731.30-35. T1671.20-1672.11.

[856] T658.43; T1670.25.

[857] T658.35-45.

[858] T1672.12-15.

[859] T1673.15-28.

[860] T1389.30-1390.15.

[861] T658.43-659.2.

[862] T731.1-20.

[863] T1497.34-36.

[864] T550.28-551.20; T659.2-7; T1673.31-43.

479. Following his apprehension by SERT, Mr Wotton's uncontradicted evidence is that he was then taken to the airport and was strapped into a seat in a helicopter with his hands still cuffed behind his back, with his legs shackled, and without a life jacket[865]—meaning that he was certain to drown if he fell from the helicopter. He made it known to the police officers escorting him that the handcuffs were causing him significant discomfort and this was ignored.[866]

(c) Force necessary to arrest the First Applicant

480. The Applicants submit that the force employed by the police in Mr Wotton's arrest went well beyond that which was reasonably necessary and that this caused him a great deal of pain and unnecessary suffering as a result.

481. That Mr Wotton knew he was going to be arrested was known at least by DI Webber[867] and was likely known also by Mr Robinson, although as Mr Robinson did not give evidence, the state of his knowledge is unclear. However, none of the SERT officers were apparently briefed on the fact that Mr Wotton knew that he was to be arrested.[868]

482. SS McKay and SC Kruger both gave evidence that they interpreted Mr Wotton's refusal to get on the ground and his looking over his shoulder as an indication that he was planning on fleeing.[869] Mr Wotton denied trying to run away before being tasered[870] and SC Kruger conceded that Mr Wotton had not in fact been running away and that the use of the taser was pre-emptive.[871] It was not put to Mr Wotton that he was at any stage contemplating running away. Accordingly, it cannot be established that Mr Wotton was in fact considering fleeing. The Respondents' argument, at its highest, is that SC Kruger and SS McKay made an assumption that he was and that the assumption was mistaken.

483. It is important to note that both SS McKay and SC Kruger conceded that, in their minds, Mr Wotton had not in fact made a decision to flee. Rather, they considered that Mr Wotton was, in SS McKay's words, "assessing the situation as to whether

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[865] T662.44-663.7.

[866] T663.20-30.

[867] T1140.40-1141.4.

[868] T1720.25-30.

[869] T1678.31.

[870] T659.45-46.

[871] T1679.13-25.

there was an opportunity to get away"[872] or, in SC Kruger's words, "buying time to look for options available to him".[873] In justifying his decision to taser Mr Wotton, SC Kruger stated that he was removing the option of fleeing from Mr Wotton, as more force would have had to have been used if Mr Wotton had fled, because the equipment being carried by SERT made it unviable to chase Mr Wotton if he fled, and a QPS canine would have to have been used to catch Mr Wotton instead.[874] Similarly, SS McKay gave evidence that had Mr Wotton fled, he would have had to have been tackled to the ground or a police dog would have had to have been deployed.[875]

484. In the Applicants' submission, SC Kruger ought to have taken other factors into consideration before determining to deploy his taser. If Mr Wotton was going to flee, it would have made far more sense for him to do so before he was surrounded by SERT and PSRT officers. Instead he actually walked towards the police as they arrived. Mr Wotton looking around had numerous plausible explanations other than that he was attempting to flee. As SC Kruger could see, SERT officers were about to enter Mr Wotton's home. He also could most likely hear Mr Wotton's family crying inside,[876] but if that was not the case, he at least knew that it was likely that they would be there.[877] That Mr Wotton would turn to see what was happening in that direction ought not have come as a surprise to SC Kruger. Additionally, on his own evidence, SERT officers were likely shining torches in Mr Wotton's face, which is a tactic that SERT use in order to make it difficult for someone to see.[878] It presumably would not have been too unusual for any person, including Mr Wotton, to turn his head away from the light sources.

485. Further, Mr Wotton was not wearing shoes, it was not fully light and he was surrounded by SERT officers, PSRT officers, and two members of the Dog Squad with German shepherds. If he had in fact been looking around to assess whether or not to flee, his most likely conclusion would have been that fleeing was not a plausible option for him. In any event, on SC Kruger's evidence, the entire interaction with Mr Wotton occurred over about 10 seconds,[879] during which Mr Kruger gave Mr Wotton

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[872] T1438.28.

[873] T1673.13.

[874] T1678.20.

[875] T1497.27-30.

[876] T1674.27-31; T1675.45-47; T1676.38-1677.5.

[877] T1661.15-21.

[878] T1629.20-36.

[879] T1622.42-43.

about four instructions to get down.[880] The Applicants submit that, even if the use of a taser was warranted (which is denied), its use on Mr Wotton was plainly premature.

486. SC Kruger used the full five-second charge of the taser on Mr Wotton, despite having control over the duration of the charge.[881] This resulted in the taser continuing to discharge after Mr Wotton had dropped to his knees, causing him to then fall onto his stomach.[882] In his evidence, he denied that he had any motivation of punishing Mr Wotton when he chose to use the taser.[883] However, he provided no explanation for discharging the taser for a full five seconds. On his own evidence, SC Kruger left the probes in Mr Wotton's torso until after Mr Wotton was handcuffed, in order to be able to use the taser again.[884] On the Applicants' submission, after Mr Wotton had dropped to his knees, the continued discharge of the taser served no apparent function other than to cause additional pain to Mr Wotton.

487. As to the treatment of Mr Wotton during his transportation to Townsville, the Applicants submit that it was entirely unnecessary to have taken him on the helicopter with his hands handcuffed behind his back, his legs shackled and no life jacket. This would clearly have been a terrifying experience, and the officers involved appear to have deliberately left Mr Wotton in a position which they knew was causing him substantial discomfort.

488. In view of the foregoing, the Applicants submit that the force used to arrest Mr Wotton was far in excess of what might reasonably have been considered necessary in the circumstances.

G.5. Unlawful entries

489. The Applicants have pleaded that the following acts or omissions to act were "acts" for the purpose of section 9 of the RDA:

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[880] T1622.40; T1671.40

[881] T1623.40-47; T1673.15.

[882] T659.1-3.

[883] T1680.1-3.

[884] T1624.1-5.

a. the entry and search by SERT officers of the dwelling of the First and Third Applicants on 27 November 2004;[885]

b. the entry and search by SERT officers of the dwelling of the Second Applicant on 27 November 2004;[886]

c. the use of unnecessary force and unnecessary disturbance of occupants in the entry and search of the home of the First and Third Applicants;[887]

d. the use of unnecessary force and unnecessary disturbance of occupants in the entry and search of the home of the Second Applicant.[888]

G.5.1 Invalid use of emergency powers

490. The Applicants plead in paragraph 238 of the 3FASC that SERT officers entered and searched "dwellings of Aboriginal Palm Island residents, purportedly pursuant to section 8" of the PSPA, and in paragraph 304 that when the dwellings were entered, there was no emergency situation, and DI Webber could not have been reasonably satisfied that the entries were necessary to effectively deal with the emergency situation, as declared. In response, the Respondents have pleaded that section 8 of the PSPA authorised the entry and search of dwellings, that there was an emergency situation at the time that the dwellings were entered and searched and that DI Webber could have been and was satisfied on reasonable grounds that it was necessary to enter and search premises.[889] The Respondents' witnesses who actually participated in the entries confirmed in their evidence that they were purporting to rely on emergency powers and to be acting on DI Webber's instructions.[890]

491. The Applicants have pleaded that the QPS officers on Palm Island proceeding to act as though an emergency situation was lawfully in place after any emergency situation that may have been in existence had ended on the afternoon of 26 November 2004 was an "act" for the purpose of section 9 of the RDA.[891]

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[885] 3FASC: 283, 287(a), 300, 303-305, 309(d)-(e).

[886] 3FASC: 283, 287(a), 300, 303-305, 309(d)-(e).

[887] 3FASC: 303, 309(e).

[888] 3FASC: 303, 309(e).

[889] Defence: 199(e) and 219(b)-(c).

[890] T1382.14; T1346.47-T1347.1; T1453.23.

[891] 3FASC: 299(d), 309(c).

492. Section 8(1)(f) of the PSPA permits the incident coordinator or another police officer acting on the incident coordinator's instructions to "enter or cause to be entered (using such force as is necessary for that purpose) any premises". Section 8(1)(g) permits the incident coordinator or another police officer acting on the incident coordinator's instructions to "search or cause to be searched (using such force as is necessary for that purpose) any premises and anything found therein or thereon". These are plainly extraordinary powers to interfere with a person's property rights and their use must be strictly confined in accordance with the principle of legality.

493. The section 8(1) powers may be exercised either by the incident coordinator or a police officer acting on the instructions of the incident coordinator, and may be exercised only:

a. during the period of an emergency situation;

b. in the area specified in respect of an emergency situation;

c. where the incident coordinator is satisfied that it is necessary to effectively deal with that emergency situation; and

d. where the incident coordinator has reasonable grounds to be so satisfied.

494. It is trite law that, ordinarily, agents of the Crown, such as police, have no more right than any other person to enter onto private property without the consent of the occupier.[892] As Lord Denning held in *Southam v Smout*[893]:

> "The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail—its roof may shake—the wind may blow through it—the storm may enter—the rain may enter—but the King of England cannot enter—all his force dares not cross the threshold of the ruined tenement." So be it—unless he has justification by law.

495. Property rights are fundamental rights under the common law. Any legislation permitting interference with a person's property rights is to be interpreted as strictly as possible, in accordance with the principle of legality.[894]

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[892] *Plenty v Dillon* (1991) 171 CLR 635, 639 (Mason CJ, Brennan and Toohey JJ); applying *Entick v Carrington* (1765) 19 St Tr 1029; 95 ER 807 (Lord Camden LCJ).

[893] [1964] 1 QB 308 at 320, quoting a speech by the Earl of Chatham.

496. That no emergency situation existed at the time that the entries were conducted is explained above. As also explained above, the period in which an emergency situation exists is not necessarily the same as a period in which a declaration of an emergency situation exists. Accordingly, whilst it is not possible for the section 8(1) powers to be exercised prior to a declaration being made, as there would then be no incident coordinator to exercise them, in the event that the declaration is made on the basis that an emergency situation is likely to arise, it is possible for the section 8(1) powers to be exercised to deal with that emergency situation before it arises.

497. However, the Applicants submit that it is not possible to exercise the section 8(1) powers after the emergency situation has ceased to exist but before it is revoked. That is because the incident coordinator could not possibly have reasonable grounds to be satisfied that exercising those powers is necessary to effectively deal with an obsolete emergency situation. The *Oxford English Dictionary* relevantly defines to "deal with" as to "take measures concerning (someone or something), especially with the intention of putting something right" or to "cope with or control (a difficult person or situation)". An emergency situation that no longer exists cannot be further "dealt with".

498. In any event, DI Webber denied that he ever instructed the SERT officers to enter any premises except to search for the person that they had been sent there to locate.[895] This may indeed be the case, as each of SS McKay and SC Kruger were adamant that they could not have simply arrested a person without also searching the premises[896] and, accordingly, the extent to which they were in fact relying on DI Webber's instructions is questionable. On the other hand, the Applicants submit that, in view of DI Webber's general manner as a witness, it is a distinct possibility that he in fact instructed SERT to enter and search each and every premises, and his denial of doing so was self-serving and misleading calculated to exculpate himself from having done so without a lawful basis. In either case, the entries would not have been lawful pursuant to section 8 of the PSPA.

499. It is agreed that the home of the First and Third Applicants was entered by SERT at 5 am on 27 November 2004 and that SERT had been sent there to locate Mr Wotton.[897]

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[894] *American Dairy Queen (Qld) Pty Ltd v Blue Rio Pty Ltd* (1981) 147 CLR 677 at 683 (Mason J); *Marshall v Director-General, Department of Transport* (2001) 205 CLR 603 at [37] (Gaudron J); *Melbourne Corporation v Barry* (1922) 31 CLR 174 at 206.

[895] T1118.30-40

[896] T1443.27-45; T1676.1; T1677.2-5.

[897] ASF: Annexure F, Entry 1.

It is further agreed that the home of the Second Applicant was entered by SERT at 6.15 pm that same day and that SERT had been sent there to locate Jason Richard Poynter.[898] The Applicants have pleaded that there were no reasonable grounds on which DI Webber could have been satisfied that the entry into and search of either the First and Third Applicants' home or the Second Applicants' home was necessary to effectively deal with the emergency situation.[899]

500. The First and Third Applicants lived in the "Farm" area of Palm Island, where there had been no incident which could conceivably have been described as an emergency situation. The raid on their home occurred at 5 am, whilst the Third Applicant and the children were asleep, and after the First Applicant had been arrested outside. There simply is no plausible basis to claim that the entry and search of that dwelling was necessary to effectively deal with the fire and the attacks on police property which had occurred the previous day and had ceased 12 hours prior to the raid. As the SERT officers who gave evidence conceded, everything was quiet at the time.[900]

501. As for the Second Applicant, the entry and search of her dwelling occurred at 6.15 pm on 27 November 2004, more than 24 hours since any emergency situation had ended. As the SERT officers who gave evidence conceded, everything remained quiet at the time, and, further, the NOTAM had been revoked.[901] Whilst Mr Poynter was present in the property and was arrested and charged, he could not conceivably have posed any threat to public safety from the Second Applicant's shower.

502. It is clear that SERT were entering and searching residences arbitrarily and without regard for the necessity of doing so. Section 8(1) powers cannot be interpreted to permit such arbitrary violations of fundamental rights. It is submitted that the allegations in paragraphs 238 and 304 of the 3FASC have been made out.

G.5.2 Not justified under PPRA

503. The PPRA provides certain rights to police officers to enter and search dwellings without the consent of the occupants. The Applicants allege in paragraph 305 of the 3FASC that section 19 of the PPRA did not authorise the entries into the dwellings. That provision permits police officers to enter a place and stay for a reasonable time

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[898] ASF: Annexure F, Entry 15.

[899] 3FASC: 304(b).

[900] T812.20-35; T1435.35-45

[901] T1099.44.

to arrest a person named in a warrant or without a warrant. However, under section 19(2), where the place is a dwelling, "a police officer may enter the dwelling without the consent of the occupier to arrest or detain a person only if the police officer reasonably suspects the person to be arrested or detained is at the dwelling".

504. Section 19(1)-(2) of the PSPA authorises a police officer to enter a dwelling to "arrest or detain *a person*" only if the police officer reasonably suspects that "*the person* to be arrested or detained *is* at the dwelling". It follows that, in order for the power to be engaged, the particular police officer entering the dwelling must be doing so in order to arrest or detain a particular person, and must have a reasonable suspicion that *that particular person* is in the dwelling.

505. The language used in section 19(2) mirrors the language used in section 198, in that, where section 198 authorises a police officer to arrest a person if the police officer reasonably suspects has committed an offence, section 19(2) authorises a police officer to enter a dwelling if that police officer reasonably suspects that a person who has committed an offence is at the dwelling. The Applicants submit that section 19(2) should accordingly be interpreted to authorise only that officer to enter the dwelling and not other officers acting at that officer's direction.

506. The Respondents have pleaded that the police officers who entered dwellings in the course of the SERT raids reasonably suspected that "a person to be arrested or detained was at the dwelling".[902] When asked for further and better particulars of this allegation with specific reference to the homes of the Applicants, they declined to provide such particulars on the basis that it was a matter for evidence. However, the Respondents have adduced no evidence whatsoever that the police officers who entered the dwellings of the Applicants had a reasonable suspicion that a person to be arrested or detained was at the dwelling.

(a) Entry into home of First and Third Applicants

507. No police officer who entered the home of the First and Third Applicants was called to give evidence. Accordingly, there is no evidence of any reasonable suspicion that those officers may have held about who was present in the residence.

508. SC Kruger accepted that the SERT officers who entered the residence did so at his direction.[903] As previously explained, section 19(2) does not permit a police officer to

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[902] Defence: 220(b).

[903] T1675.1-2.

direct another to enter a dwelling. Consequently, the fact that the officers were acting on SC Kruger's instructions would not assist the Respondents even if SC Kruger had had the requisite reasonable satisfaction and, as explained below, it is clear that he did not.

509. SC Kruger gave his reasons for directing his officers to enter the First and Third Applicants' home as "to clear the house and make sure that there were no other people of interest in the house, or no threats within the house".[904] When pressed, SC Kruger was unable to articulate the "threats" that may have been inside the house, and rather made circular assertions that they existed. For example, in response to the proposition that there could not have been safety issues inside the house if SERT did not go inside the house, SC Kruger stated, "You don't know what's in the house until you go into the house and clear it, and ensure that it's safe".[905] He provided no explanation as to why what was in the house was of any interest to him in circumstances where the person to be apprehended had been arrested outside. It is entirely unclear what the threats that concerned him were or to whom they were posed. In any event, it is clear that SC Kruger's concerns about those threats did not amount to a reasonable suspicion that a person to be arrested was at the dwelling.

510. Aside from these ephemeral "threats" to safety, SC Kruger's evidence regarding the entry continually returned to the fact that there were "still a significant number of suspects and offenders outstanding".[906] The clear implication is that he sent his officers into the dwelling in order to confirm whether any other wanted persons were also present there. However, he accepted that he had "no intelligence recorded anywhere that anyone else on the list might be in Mr Wotton's house".[907] He claimed not to have recalled Mr Robinson briefing SERT on the "transient" nature of Palm Islanders, but he conceded that it was a "fair assumption".[908]

511. Similarly, SS McKay gave evidence that the plan was to go to all of the addresses and search them for suspects, and that "one of our operating procedures is after we apprehend a person – that we need to secure the address to make sure that there were no other people there. It … would have not been appropriate to leave that situation

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[904] T1675.10-15; 1677.1-8.

[905] T1676.20-25.

[906] T1675.45-1676.20.

[907] T1675.15-16.

[908] T1651.37-1652.15.

and then only find that there was someone else at that address later on".[909] This was based entirely on Mr Robinson's perception of the "transient" nature of Palm Islanders.[910] SS McKay also conceded that he had no specific information that another suspect was at Mr Wotton's house, and he took no steps to verify with Mr Robinson whether this was likely the case.[911]

512. The Applicants submit that it follows from SC Kruger's evidence and the evidence of SS McKay and DI Webber that SERT entered the home of the First and Third Applicants because of vague and entirely baseless suspicions that other persons to be apprehended might have been sleeping there, and that the persons in the residence were violent criminals who were probably sleeping on knives and axes, and might have had a stolen police-issue assault rifle. Those suspicions were based on assumptions mired in racial prejudice and fell well short of the reasonable suspicion that a person to be arrested or detained is at the dwelling required pursuant to section 19(2) of the PPRA.

(b) Entry into home of Second Applicant

513. The only police officer who entered the home of the Second Applicant called to give evidence was Const Folpp. He conceded that he never personally saw the list of addresses which he was supposed to attend or of persons to be arrested.[912] When asked about the Second Applicants' home, Const Folpp could recall that a person was arrested there, but otherwise was unable to recall any detail of who that person was or what had occurred.[913] In the Applicants' submission, it is clear that Const Folpp was simply acting on direction and did not personally have any reasonable suspicion that Mr Poynter was at the residence.

514. SS McKay gave evidence that the entry into the Second Applicants' home was an "example of the community calling the police and telling them where someone was located",[914] but he gave no evidence as to who in the community had called, when they had called, or what information had been provided.

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[909] T1433.20-46.

[910] T1444.1-40.

[911] T1444.42-1445.16.

[912] T1756.15-45.

[913] T1762.11-45

[914] T1460.29-30.

515. Otherwise, there is no evidence that any of the police officers who entered the Second Applicant's home had a suspicion that a person to be arrested was at that dwelling or had a reasonable basis to form such a suspicion. The Applicants submit that it is entirely irrelevant that Mr Poynter was in fact at the residence. There also is no evidence that any of those officers had a reasonable suspicion that Mr Poynter had committed an offence, and neither is there evidence of when, how, why, or by whom he was selected as a target for arrest.

G.5.3 Unnecessary disturbance of occupants

516. 3FASC paragraph 303 alleges that the entry into dwellings by QPS members during the raids was conducted such that the occupants were unnecessarily disturbed. It is agreed between the parties that a component of the Action Plan was to avoid disturbing the occupants of the dwellings that were raided unnecessarily.[915] In the Applicants' submission, this could not conceivably have been achieved unless the SERT officers had some idea of who was likely to have been in the dwellings prior to their being entered.

517. The Applicants have pleaded that the following acts or omissions to act were "acts" for the purpose of section 9 of the RDA:

a. the use of unnecessary force and unnecessary disturbance of occupants in the entry and search of the home of the First and Third Applicants;[916]

b. the use of unnecessary force and unnecessary disturbance of occupants in the entry and search of the home of the Second Applicant;[917]

c. the ransacking of the home of the First and Third Applicants;[918]

d. the damage to property in the home of the Second Applicant.[919]

518. In relation to the home of the First and Third Applicants, the degree to which the occupants were disturbed is beyond doubt. Three of the occupants—Cecilia Wotton,[920]

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[915] ASF: 288(f).

[916] 3FASC: 303, 309(e).

[917] 3FASC: 303, 309(e).

[918] 3FASC: 287(b), 290(b), 300, 303-305, 309(d)-(f).

[919] 3FASC: 290(b), 300, 303-305, 309(d)-(f).

[920] T340.46-341.9; T341.43.

Albert Wotton,[921] and Schanara Bulsey[922]—gave unchallenged evidence in that regard. Further, the degree to which Mrs Wotton and her children were disturbed was recorded contemporaneously in her interview with DS Robinson the next morning.[923]

519. The Applicants submit that it was entirely unnecessary to disturb the occupants of the First and Third Applicants' home, in circumstances where the First Applicant had already been apprehended outside. As addressed above, both SC Kruger and SS McKay gave evidence that they did not have any information identifying a specific wanted person who was likely to be at that residence. SC Kruger gave evidence that he did not recall being specifically advised that there would be women and children in First and Third Applicants' home, but he was broadly aware that it was a possibility.[924] In the Applicants' submission, there was no reasonable basis for the deliberate decision to make "a dawn raid on a citizen's home by armed, masked men and to treat those found within as one would dangerous criminals with no regard whatever for their dignity or rights".[925]

520. Similarly, with respect to the home of the Second Applicant, Ms Harvey gave evidence of the degree to which she was disturbed,[926] which was corroborated by Const Folpp,[927] and Mr Morton gave unchallenged evidence in respect of the way he was treated.[928] It is agreed that when SERT officers entered the Second Applicants' home, Richard Poynter was in the shower,[929] and it is clear on the evidence that he was removed from the shower by SERT officers and made to put clothes on,[930] and the shower curtain and bathroom door were damaged in the process.[931] In the Applicants' submission, there is no evidence whatsoever to suggest that it was necessary for Mr Morton, Ms Harvey or Mr Poynter to have been treated in that manner and nor could there be. Any suggestion that the children and young teenagers of Palm Island posed a serious threat to the safety of anyone is fanciful and deeply prejudiced.

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[921] T113.39; T114.33; T116.6.

[922] T172.6.

[923] Exhibit A205; see also, T1468.36-45.

[924] T1611.16-21; T1675.41-1676.13.

[925] *Bulsey & Anor v State of Queensland* [2015] QCA 187 at [127] (McMeekin J).

[926] T135.45; T136.40.

[927] T1731.29-17.

[928] T1761.37.

[929] ASF: 311.

[930] T140.44-141.5; T1762.18-25.

[931] Exhibit A207; Exhibit A4, "Entry 14".

521. As submitted above, the homes of the Applicants were not entered in order to arrest a particular person. It follows that, if they were entered for any basis other than simply to intimidate the local population, they were entered in search of persons who may or may not have been present. Whilst no search warrant was obtained in relation to the homes of the Applicants, the Applicants note the following remarks by Kyrou J in *Slaveski v Victoria* in relation to a search of a premises conducted pursuant to a search warrant:

> *In order to be reasonable, a search must be "targeted"* in the sense that it is focused on finding and seizing the items described in the search warrant. *The method that is used to conduct the search must also be appropriate to the circumstances of the particular case.* Common sense will often be a useful guide in this respect. In some cases, a search from one end of the premises to the other with minimal engagement with the occupier may be appropriate. In other cases, a responsive approach, involving dialogue with the occupier about the location of the items described in the warrant, will be appropriate.[932]

522. In the Applicants' submission, where a search is conducted without a warrant, it is even more important that the search be targeted and that the method used to conduct the search must be appropriate to the circumstances. The Applicants submit that the searches of the homes of the Applicants by SERT were neither targeted nor done using appropriate methods.

G.6. Other police conduct during emergency

G.6.1 Evacuation of residents

523. The Applicants plead in paragraph 291 of the 3FASC that on 26 November 2004, the QPS evacuated public sector staff, including teachers, from Palm Island, and thereby created a perception that non-Aboriginal, short-term residents of the island were being removed, whilst the Applicants and Group Members were forced to remain there under quasi-martial law. The Applicants further plead in paragraph 292 that over the course of the purported "emergency situation", none of the Applicants or Group Members were permitted to travel to Palm Island or to leave Palm Island, otherwise than in police custody, as all flights and ferry services were suspended. In paragraph 307 of the 3FASC, it is pleaded that the QPS thereby breached section 10.14 of the Code of Conduct.

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[932] *Slaveski v Victoria* [2010] VSC 441 at [177] (Kyrou J), emphasis added.

524. The Applicants have pleaded that the following acts or omissions to act were "acts" for the purpose of section 9 of the RDA:

a. the evacuation of teachers and other public sector employees from Palm Island on 26 November 2004;[933]

b. the suspension of ferry services on Palm Island over the course of the purported "emergency situation";[934]

c. the suspension of flights to and from Palm Island over the course of the purported "emergency situation";[935]

d. the failure to permit the Applicants or Group Members to travel to Palm Island or to leave Palm Island over the course of the purported "emergency situation".[936]

(a) NOTAM

525. It is agreed between the parties that between 1.45 pm on 26 November 2004 and 1.30 pm on 27 November 2004, all commercial flights to and from Palm Island were suspended.[937] This is evidently due to the "Notice to Airmen" or "NOTAM"[938] which DI Webber caused to be issued[939] and subsequently revoked.[940] There is evidence that Palm Island residents were stranded in Townsville over the period of the NOTAM.[941] The Applicants submit that it is clear on the evidence that, as a result of the NOTAM, commercial flights were in fact only resumed at around midday on 28 November 2004.[942] The Applicants further submit that this was reasonably to have been expected, as the commercial airline would in all likelihood be unable to resume flights immediately after the NOTAM was revoked, and would require time to organise their resumption.

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[933] 3FASC: 291; 307(b), 309(f).

[934] 3FASC: 292; 307(b), 309(f).

[935] 3FASC: 292; 307(b), 309(f).

[936] 3FASC: 292; 307(b), 309(f).

[937] ASF: 322.

[938] See, *Air Services Regulations* 1995 (Cth) r 4.12.

[939] T916.1-6.

[940] T925.20-30.

[941] Exhibit A41, Item 151.

[942] Exhibit A41, Item 301.

526. DI Webber gave evidence that he caused the NOTAM to be issued because, in his view, as a "serious incident" was occurring, "there was a danger to aircraft and … potentially for … the airstrip itself".[943] Presumably, this was a reference to the rumours of an attack on the airport, which, as noted above, DI Webber discovered to be false as soon as he arrived on the island. In any event, the police certainly seemed to have no difficulty using the airport during the period that the NOTAM was in effect and, as DI Webber conceded,[944] a number of media representatives were apparently permitted to land on the island on the Friday night whilst the NOTAM was theoretically in effect.[945]

527. DI Webber claimed to have caused the NOTAM to be revoked on the basis that:

> the vicinity of the airport was secure. There was no apparent risk in relation to the airport or whatever being the subject of, I suppose, disruption. There was a suggestion that barrels and all sorts of things would be put on the airport to prevent aircraft landing, etcetera. That risk had dissipated.[946]

528. However, DI Webber also gave evidence that, prior to landing on Palm Island on the Friday, his aircraft "did a couple of … fly pass [sic] over the airport itself just to determine that it was safe to land on the airstrip there before the pilot actually landed". Then, after landing, he directed a helicopter to fly over the road between the airport and the township to ensure that it was clear and no one was waiting in ambush.[947] Further, there is evidence that police were deployed to guard the airport overnight.[948] It follows that DI Webber must have known from about 2:30 pm on 26 November 2004 that there was no risk to the airport. There was no apparent change in circumstance at 1:30 pm the following day which would have led to the airport being safer. The Applicants also note that DI Webber failed to adequately explain why the NOTAM was revoked at that time but the declaration of an emergency situation was not.[949]

529. In respect of the NOTAM, the Applicants draw the Court's attention to the group of persons at the airport who were identified on the MIR running sheet by DSS Kitch-

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[943] T1099.24-28.

[944] T1099.30-45.

[945] Exhibit A41, Item 104.

[946] T925.20-30.

[947] T918.14-15 and 27-32; T1079.32-34.

[948] T1380.39-45; T1384.15-20; T1420.14-25.

[949] T1100.8.

ing, as reported to him by Inspector Kachel, as "Civilian Non Atsi".[950] Twenty minutes later, Inspector Kachel reported "Concerns that civilians will be at risk if left by the police at airport alone".[951] The Applicants submit that, on its face, this refers to the same 20 non-ATSI people as the previous entry.[952] SS Dini, who was present at the airport, gave evidence that the persons waiting there were eventually allowed to leave because:

> if we kept them on the island then we would be responsible for them and we didn't want them – to put them in a dangerous situation so when the pilot asked if he could leave the airport and take the passengers with him it seemed to me a logical idea at the time.[953]

530. The appropriate inference to draw is that the police at the airport and in the MIR were concerned at leaving non-Aboriginal "civilians" at the airport as they considered that the Aboriginal people on Palm Island were dangerous and violent and that they posed a threat to anyone who was not Aboriginal. Such a construction is further evidenced by the manner in which "ATSIs" and "non-ATSIs" are referred to throughout the running sheet.[954]

531. DSS Kitching was the only police officer who gave evidence who was present in the MIR and was entering information into the running sheet. In the Applicants' submission, his evidence in relation to the references to "ATSIs" in the running sheet was evasive and self-serving and ought to be given no weight.[955]

532. In particular, DSS Kitching's evidence in respect of the entry at Item 3 of Exhibit A41, which he conceded was entered into the running sheet by him,[956] that he was simply recording the information given to him and that he had no understanding of its meaning,[957] must be rejected. The entry is plainly not a transcript of the conversation between DSS Kitching and Inspector Kachel. At best, it is a summary by DSS Kitching of the information relayed to him by Inspector Kachel. After speaking to Inspector Kachel, DSS Kitching must have gone through a process of determining what in-

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[950] A41, Item 3; T1296.25-37.

[951] Exhibit A41, Item 6.

[952] *Cf*, T1297.14-1298.20.

[953] T793.2-7.

[954] Exhibit A41, Items 5, 10, 253, 408, 428; Exhibit A195, Items 498, 606.

[955] See, T1296.30-1302.6; T1308.4-1310.35.

[956] T1301.20.

[957] T1301.22-38.

formation to enter into the running sheet and how that information ought to be entered. He made a conscious decision to use the term "Civilian Non Atsi" to describe the persons at the airport. That he refused to acknowledge any editorial role in the authorship of the entry or to provide any explanation of its meaning reflects poorly on his credit.

533. In respect of permitting the plane containing the "Civilian Non Atsi" to depart the airport in violation of the NOTAM, SS Dini stated "I wasn't aware that there was an exclusion zone in place or that I couldn't let them go so I made a decision to let them go and I did".[958] That evidence must be rejected. SS Dini conceded to having been informed of the exclusion zone by the pilot of the airplane.[959] On the Applicants' submission, SS Dini must have made a conscious decision to permit the airplane to leave the airport in violation of the NOTAM.

(b) Ferry to Townsville

534. The parties have agreed that on 26 November 2004, the QPS arranged for a ferry to be available from Palm Island to Townsville and that some teachers and service providers left Palm Island on this ferry.[960] The Applicants note that, despite plainly being involved in this exercise, DSS Kitching apparently could not recall that any of it had ever occurred.[961] Nevertheless, it is apparent on the face of the MIR running sheet that the following events occurred in relation to the ferry.

535. At about 3:10 pm, an officer at the MIR received a telephone call from SunFerries, regarding the ordinary Palm Island ferry service. In that discussion, it was resolved that the ferry would not function in its ordinary commercial capacity that day, but would instead travel to Palm Island and collect people whom the QPS had selected for travel.[962] The MIR then liaised between Inspector Richardson on Palm Island and SunFerries in order to arrange for the ferry to arrive and to collect certain persons whom the QPS had organised to be collected.[963] In particular, the running sheet rec-

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[958] T793.2-7.

[959] T792.24-40.

[960] ASF: 320.

[961] T1306.10-1308.20.

[962] Exhibit A41, Item 11.

[963] Exhibit A41, Items 32, 33, 38, 45, 58

ords DSS Scanlon organising for the evacuation from the island of the staff of the schools and their families.[964]

536. The Applicants adduced evidence that the ferry was at least perceived by community members to have been arranged by the police to evacuate non-Indigenous public servants from the island, such that Indigenous Palm Island residents were not permitted on board. Mr Sam referred to "a special ferry … to take out non-indigenous staff from the hospital and the teachers".[965] Mr Wotton gave evidence that a number of community members advised him that they had tried to board the ferry and were not being allowed on.[966] Further, SS Dini gave evidence that he was asked at the school, after it had become the temporary police command post, to escort a number of persons, whom he assumed to be teachers, to the ferry in order to leave the island.[967] He conceded that most of these people were non-Indigenous and he could not recall any who were Indigenous.[968]

537. In respect of who was or was not allowed on the ferry, the Applicants note the entry in the running sheet made by DSS Kitching recording that Inspector Richardson was "Organising civilians for 5.30 ferry".[969] Whilst DSS Kitching again claimed to have no recollection of writing the entry and to have no understanding of its meaning,[970] in the Applicants' submission, the meaning of that entry becomes apparent on an analysis of the use of the word "civilian" in the document.

538. The word "civilian" first appears in the running sheet in the entry referring to the "20 Civilian Non Atsi at airport".[971] Its next appearance is in the entry at Item 5, which states "Must maintain police presence on account of civilian presence on the Island". The same entry contains the following references to Indigenous persons:

> 2 large ATSI's broken in and set fire to station.
>
> Have a report but source unknown is that the road to the airport between the airport and the town is blocked by ATSI person.

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[964] Exhibit A41, Items 32, 38, 58.

[965] T312.5-6.

[966] T656.13-24; T721.15-45.

[967] T770.15-42.

[968] T799.3-16.

[969] Exhibit A41, Item 33.

[970] T1308.1-20.

[971] Exhibit A41, Item 3.

ATSI's have possession of the police vehicle with radio access.

539. The subsequent Item refers to "civilians", in the context of the non-Indigenous persons at the airport, and expresses concerns regarding their safety if left at the airport without police protection. The running sheet then uses the word "civilians" to refer to the teachers in the public school,[972] the persons evacuated on the ferry,[973] persons brought to Townsville apparently as a result of injuries obtained during the "affray",[974] and, finally, persons who contacted the police communications centre in respect of the incident on 26 November 2004.[975] In the Applicants' submission, with the possible exception of the reference to the persons who contacted the police communications centre, every reference to "civilians" is plainly to teachers and other service providers on the island who were wholly or predominantly non-Indigenous and, in fact, the term "civilian" appears to be used on several occasions in contrast with the local "ATSI" population.

540. SS Dini later asserted that he would not have turned any Indigenous persons away had they asked to board the ferry and that the ferry had simply been organised for persons who wanted to leave the island.[976] That evidence must be rejected. The ordinary service provided by the ferry was to provide a means for persons wanting to leave the island to do so. The QPS clearly made a decision to disrupt the ferry's ordinary service, such that instead of taking any passenger who had purchased a ticket, it only took passengers selected by the QPS. The ferry ultimately departed Palm Island with 30 passengers on board,[977] despite previously advising that it could take 147.[978] In the Applicants' submission, there is a strong inference that the ferry was organised by the police in order to take non-Indigenous service providers from the island, and the Respondents have advanced no plausible explanation to the contrary.

(c) Failure to comply with Code of Conduct

541. As submitted above, the issuing of the NOTAM and the organising of the ferry to remove the school staff and other service providers from Palm Island effectively prevented the Aboriginal members of the community from leaving Palm Island for the

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[972] Exhibit A41, Item 9.

[973] Exhibit A41, Item 33; Exhibit A195, Item 480.

[974] Exhibit A41, Item 67.

[975] Exhibit A41, Item 174.

[976] T835.4-40.

[977] Exhibit A41, Item 58.

[978] Exhibit A41, Item 11.

duration of the declaration of the emergency situation. Further, it is apparent that the police were not only permitting non-Aboriginal people to leave the island, but actively encouraging them to do so.

542. There also was no apparent reasonable basis for either decision. No justification has ever been proffered by the Respondents in respect of the ferry. In respect of the airport, not only were the rumours of its being threatened quickly discovered to be false, it was apparently safe enough for QPS aircraft to come and go as they pleased and for "civilian non-ATSI" to leave. The proposition that it was too dangerous for the ordinary commercial airline to operate is absurd.

543. In the Applicants' submission, those measures showed an utter lack of integrity, fairness, compassion, conscientiousness, courtesy and impartiality. Further, no honest and reasonable police officer in the position of DI Webber, Insp Richardson, DSS Kitching, DSS Scanlon, SS Dini and all other officers involved in these decisions would have taken such measures, and those officers therefore failed to perform their duties diligently or in a manner that bears the closest public scrutiny and meets all legislative, government and QPS standards. In fact, as submitted above, they failed to meet legislative standards. The officers breached the provisions of the Code of Conduct relied on in paragraph 307 of the 3FASC.

G.6.2 School bus

544. It is agreed between the parties that, on the afternoon of Friday 26 November 2004, a QPS officer took possession of the local St Michael's Catholic School bus with the agreement of the school principal. It is apparent from SS Dini's evidence that he was that officer.[979] In paragraph 307 of the 3FASC, it is pleaded that the QPS thereby breached section 10.14 of the Code of Conduct.

545. The Applicants have pleaded that the following acts or omissions to act were "acts" for the purpose of section 9 of the RDA:

a. the QPS officers on Palm Island proceeding to act as though an emergency situation was lawfully in place after any emergency situation that may have been in existence had ended on the afternoon of 26 November 2004;[980]

b. the commandeering of the St Michael's school bus.[981]

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[979] T765.19-26.

[980] 3FASC: 299(d), 309(c).

546. SS Dini gave evidence that he believed that he had the authority to seize the school bus and other vehicles as a result of the emergency situation.[982]

547. Section 8(1)(a) of the PSPA gives authority to the incident coordinator or a police officer acting on the incident coordinator's instructions to "direct the owner or the person for the time being in charge or in control of any resource to surrender it and place it under the incident coordinator's or police officer's control", where "resource" means "any animal or anything which may provide aid or be of assistance in any emergency situation". The Applicants concede that the definition of "resource" is broad enough to encompass the school bus. However, the Applicants submit that the seizure and use of the school bus was nevertheless *ultra vires* and unlawful.

548. As with the other section 8(1) powers, the power to make a section 8(1)(a) resource surrender direction may only be exercised by the incident coordinator or a police officer acting on the incident coordinator's instructions. SS Dini and DI Webber both conceded that DI Webber, as incident coordinator, had not instructed SS Dini to seize any vehicles and, rather, SS Dini did so of his own accord, albeit with DI Webber's subsequent implied approval (or at least, without his disapproval).[983]

549. Also as with the other section 8(1) powers, a section 8(1)(a) resource surrender direction may only be made "during the period of and in the area specified in respect of an emergency situation" where "the incident coordinator is satisfied on reasonable grounds that it is necessary to effectively deal with that emergency situation". The section 8(1) powers may only be used by or at the instruction of the incident coordinator. There is no provision in the PSPA permitting the subsequent ratification of the use of the section 8(1) powers. In the Applicants' submission, DI Webber was not satisfied on reasonable grounds that seizing the school bus was necessary to effectively deal with the emergency situation when SS Dini took it upon himself to do so, as he could not have been satisfied that something was necessary when he was not aware that it was occurring.

550. The Respondents have pleaded that the school bus was "returned to the school as soon as possible".[984] It is agreed that the bus was returned approximately one week

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[981] 3FASC: 309(f).

[982] T788.29-789.15.

[983] T788.44-789.14; T1090.29-44.

[984] Defence: 206(d).

after being seized.[985] Despite seizing the bus, SS Dini disavowed any responsibility for ensuring its return.[986] Despite being the incident coordinator, DI Webber also disavowed any responsibility for ensuring that the bus was returned.[987] The running sheet records the vehicles seized by SS Dini from Q-Build being returned on the morning of Monday 29 November 2004.[988] Ms Collette Wotton gave evidence that the failure to return the bus to St Michael's School meant that for the week between 29 November and 2 December 2004, students had to walk to the school, many of them without shoes, over tarmac that had become very hot in the summer sun.[989]

551. There is no evidence as to the reason why the school bus was not returned on the Monday morning at the same time as the vehicles from Q-Build. In the Applicants' submission, there is a clear inference that the QPS had less regard for the wellbeing of the Aboriginal children of Palm Island than for the convenience of the non-Aboriginal public servants working on the island temporarily.

552. The unlawful seizure of the school bus, particularly in view of the length of time it was kept and the fact that it was not returned with the other vehicles seized by SS Dini, was in clear breach of section 10.14 of the Code of Conduct. SS Dini and the other QPS officers involved failed to demonstrate high standards of professional integrity and honesty, did not perform their duties in a way which bears the closest public scrutiny, breached legislative standards, were unconscientious and discourteous, and did not act in good faith. The allegations in paragraph 307 of the 3FASOC in relation to the school bus have been made out.

G.6.3 Damage to property

553. The Applicants plead in paragraph 290(b) of the 3FASC that property was damaged in their homes. The Third Applicant's unchallenged evidence is that, during the raid on her home, the SERT officers "tipped everything upside down" with no apparent purpose.[990] The Second Applicant advised DS Robinson the day after the raid on her

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[985] ASF:318.

[986] T789.20-47.

[987] T1091.30-1092.18.

[988] Exhibit A197, p13 at 0906, 0920, 0925, and 0959.

[989] T282.35-283.21.

[990] T341.3-9.

home that her shower curtain had been damaged,[991] and SERT recorded that her bathroom door was damaged.[992]

554. The Applicants have pleaded that the following acts or omissions to act were "acts" for the purpose of section 9 of the RDA:

a. the ransacking of the home of the First and Third Applicants;[993]

b. the damage to property in the home of the Second Applicant.[994]

555. In paragraph 307 of the 3FASC, it is pleaded that the QPS thereby breached section 10.14 of the Code of Conduct. In the circumstances of the searches and entries into the homes of the Applicants submitted above, the Applicants submit that section 10.14 of the Code of Conduct was clearly breached.

G.6.4 Visible presence, militaristic conduct, other disrespectful and intimidatory behaviour

556. The Applicants have pleaded at paragraphs 290(c)-(d) of the 3FASC that the QPS "established a visible presence throughout the island and patrolled the island in a manner which resembled a military occupation force" and "otherwise behaved in a disrespectful and intimidatory manner towards the Applicants and Group Members". In paragraph 307 of the 3FASC, it is pleaded that the QPS thereby breached section 10.14 of the Code of Conduct.

557. The Applicants have pleaded that the following acts or omissions to act were "acts" for the purpose of section 9 of the RDA:

a. the pointing of guns at the children of the First and Third Applicants;[995]

b. the forcing of the children of the First and Third Applicants to lie face down with guns pointed at them;[996]

c. the commandeering of the St Michael's school bus;[997]

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[991] Exhibit A207.

[992] Exhibit A4, "Entry 14".

[993] 3FASC: 287(b), 290(b), 300, 303-305, 309(d)-(f).

[994] 3FASC: 290(b), 300, 303-305, 309(d)-(f).

[995] 3FASC: 288(c), 300, 309(d).

[996] 3FASC: 288(c), 300, 309(d).

d. the establishment by the QPS on Palm Island of a visible and militaristic presence;[998]

e. the behaviour by QPS members in a disrespectful and intimidatory manner.[999]

558. That the police operation was approached from the outset as a quasi-military operation is evident from the fact that the police actually requested military assistance on the afternoon of 26 November 2004, although it is noted that the military refused to be involved.[1000] After military support was denied, the police themselves set about performing quasi-military duties, such as allegedly securing critical infrastructure sites from attack, in relation to which there are no operational procedures in the OPM or powers in the PPRA, and which are manifestly outside of the scope of ordinary police functions and duties.[1001] In that regard, the Applicants refer to Mr Koch's evidence that his experience of the police presence on Palm Island in November 2004 compared unfavourably with his experiences soon after an actual military occupation on the Solomon Islands.[1002]

(a) Arbitrariness of SERT raids

559. The Applicants submit that the SERT raids were carried out in an entirely arbitrary fashion, in which residences on Palm Island could be entered at will, and every occupant was treated as a "dangerous criminal".[1003] In that regard, the evidence establishes that Mr Clumpoint's home was entered after he was arrested outside,[1004] Mr Blackman's home was entered after he was seen fleeing out the back,[1005] and Ms Barry's home was entered essentially on a whim in order to search for Jason Poynter without any basis to believe that Mr Poynter was there.[1006] As is apparent from SS

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[997] 3FASC: 309(f).

[998] 3FASC: 290(c); 307(a), 309(f).

[999] 3FASC: 290(d); 307(a), 309(f).

[1000] Exhibit A41, Items 1, 5, 18; T1292.32-1295.40; T467.20-468.2.

[1001] T920.30-36; T1421.1-33.

[1002] T462.30-463.40; T473.33-475.7.

[1003] *Bulsey & Anor v State of Queensland* [2015] QCA 187 at [127] (McMeekin J).

[1004] T1454.13.

[1005] T1462.49.

[1006] T480.30; T482.22-40; T518.10-519.45.

McKay's evidence[1007] and Mr Robinson's interview with Berna Poynter,[1008] Ms Poynter's home was entered in search of Jason Poynter because a person on the street told the police officers that he might have been there[1009]—yet the same level of force was used to enter her home as the other homes.[1010] Six residences in total were entered by SERT in search of Mr Poynter on the morning of 27 November 2004, none of which resulted in his arrest. In fact, the allegedly elusive Mr Poynter voluntarily handed himself in later that day.[1011]

560. In the Applicants' submission, for the following reasons, the arbitrary manner in which the raids were conducted was solely or substantially based on the race of the Applicants and Group Members.

561. SS McKay accepted that he was the person who was ultimately responsible for determining the SERT entry tactics.[1012] He gave evidence that SERT were briefed by DS Robinson on "the itinerant nature of some of the people that live on Palm Island", such that, when the person to be apprehended at a particular residence was apprehended outside the residence, "whilst that was the person … that was nominated for that address, it was more than possible there were other people there that were also needed to be apprehended".[1013] He also said that DS Robinson briefed SERT on the fact that innocent bystanders would be present,[1014] and that people would be sleeping with "edged weapons" under their pillows.[1015] SS McKay conceded that those were the cultural considerations that shaped the Action Plan.[1016] He further conceded that he understood Mr Robinson to be referring only to Aboriginal residents of Palm Island.[1017] It is also apparent that the threat of the allegedly missing police rifle had a substantial role in the formation of the Action Plan and the characterisation of the potential threat of violence from the persons who were to be arrested.[1018] Relevantly,

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[1007] T1485.26.

[1008] Exhibit A210 at X.

[1009] T1451.15.

[1010] T1451.36; T1457.5.

[1011] Exhibit A210 at X; Exhibit A197, p6 at 1533; Exhibit A41, Item 253.

[1012] T1385.40.

[1013] 1417.16-20; see also, T1426.9-17.

[1014] T1423.25-35.

[1015] T1423.37-40, T1426.19-24.

[1016] T1426.25-35.

[1017] T1429.27-1430.30.

[1018] T1496.29.

SERT were not told that the rifle had been abandoned without a magazine or ammunition, despite that fact making it more or less useless as a weapon.[1019]

562. In respect of the allegation about sleeping on weapons, it was conceded by each of the SERT officers who gave evidence that, over the course of the raids, not one person was found sleeping on a knife or an axe.[1020] It was not put to any of the three persons targeted in the raids (Mr Wotton, Mr Blackman, and Mr Clumpoint) that they habitually slept with knives or axes to protect against home invasion. Neither was it put to any of the other Palm Island residents who gave evidence that there was a culture on Palm Island of doing so.

563. In respect of the allegation that Palm Islanders were "transient", this may have been the case for a minority of unidentified residents. It was not the case for Mr Wotton or Mr Clumpoint, who were each arrested at their permanent residences, and neither was it the case for Mr Blackman, who would have been arrested at his permanent residence had he not fled from there as the SERT officers arrived. It was not put to Mr Wotton, Mr Clumpoint, Mr Blackman or to any of the other occupants of their respective residences who gave evidence, that they were "transient", that "transient" people habitually slept in the residence, or, in particular, that any of the other targets of the SERT raids habitually slept at their residence. There is simply no evidence to support the unfounded assertion of DS Robinson. .

564. DS Robinson was not called to explain the basis for making the allegations at the briefing about Palm Islanders being "transient" or about people sleeping on knives and axes. Both claims must be rejected as racially loaded and entirely baseless. The Applicants also note that, whilst the persons to be arrested were selected by the MIR,[1021] DS Robinson accompanied SERT in order to provide guidance and advice as to the circumstances of each residence and to identify each person to be arrested.[1022]

565. It follows that the SERT tactics employed in the raids and the selection of residences to raid were calculated by reference to a number of wholly unfounded and racially based assumptions about the nature of the Aboriginal community on Palm Island in general and the persons targeted for arrest in particular.

[1019] T1648.20-1949.27.

[1020] T1659.2; T1413.15.

[1021] T1115.25-1116.11.

[1022] T1116.13-17.

(b) SERT methodology

566. The methodology devised by SS McKay as a result of the factors referred to above is set out below. On arriving at a property, SERT were divided into two teams—a containment team and an entry team. The containment team, in conjunction with the dog squad and PSRT, would form a cordon around the perimeter of the property to prevent anyone from fleeing, whilst the entry team would enter the property.[1023] The entry team would be led by DS Robinson, who would knock on the door and ask the occupants to open up. If it was not opened within a very short period of time, SERT would make a forced entry.[1024]

567. On entering a dwelling, the SERT officers would have their primary weapon up to deal with or assess potential threats. SERT went through the house and entered each room in pairs, where possible.[1025] When a SERT officer saw a person in the house, the officer's gun would invariably be pointed at the person whilst the officer made an assessment of that person's potential threat.[1026] After encountering a person and pointing their weapon at the person, SERT officers would shout at the person words to the effect of "This is the police! Show me your hands! Get on the ground!".[1027] When persons were identified as not a threat, they were "secured" by placing them in a central location and keeping them there whilst SERT continued to "clear" the dwelling.[1028]

568. Referring to the treatment of Mr David Bulsey and Ms Yvette Lenoy during the SERT raid on their home, in which Mr Bulsey was taken outside wearing nothing around his waist but a towel, McMeekin J held in *Bulsey* that:

> This was not a case of human fallibility. A deliberate decision was made to make a dawn raid on a citizen's home by armed, masked men and to treat those found within as one would dangerous criminals with no regard whatever for their dignity or rights.[1029]

[1023] T1663.5-45.

[1024] T1428.20-30.

[1025] T1690.10-20.

[1026] T1415.24-47; T1625.10-14; T1661.44-1662.9; T1689.15-21; T1731.35-1732.6.

[1027] T1661.26-43; T1732.8-13.

[1028] T1416.40-1417.5; T1721.18-30; T1733.20-30.

[1029] *Bulsey & Anor v State of Queensland* [2015] QCA 187 at [127] (McMeekin J).

569. In adducing evidence not only of the raids on the Applicants' residences, but also on a number of other residences, the Applicants have sought to establish that McMeekin J's statement was applicable to SERT's conduct throughout the operation on Palm Island. Schanara Bulsey, Albert Wotton, Chevez Morton, Krysten Harvey and William Blackman Jnr were children or young teenagers at the time that the raids were conducted and each gave compelling evidence of their personal experiences of having been treated as dangerous criminals. Mr Blackman gave evidence that his mother convinced him to hand himself in because she was terrified that he would be shot by the police.[1030] This was corroborated by Mr Koch.[1031] Andrea Sailor[1032] and Collette Wotton[1033] both gave evidence as to the intimidating nature of the police search for Mr Blackman through Butler Bay. After he turned himself in, Mr Blackman was callously kept in the back of a police vehicle in handcuffs overnight.[1034]

570. Further to the above matters, the Applicants submit that there is evidence indicating that the SERT raids were in fact conducted deliberately in order to terrify the Applicants and Group Members. This inference arises from the following unexplained contradictions in the manner in which the raids were conducted.

571. First, during the raids, the SERT entry team was led by DS Robinson, who would knock on the door and ask the occupants to open up. If it was not opened within a very short period of time, SERT would make a forced entry.[1035] This was not normal SERT protocol. Generally, when conducting a raid, SERT would enter a property without warning.[1036] SS McKay gave evidence that the reason such a short interval of time was provided was to prevent persons inside the dwelling arming themselves.[1037] The variation in SERT's tactics in that regard apparently indicate that, to the officers involved, the occupants of the dwellings that were raided were less dangerous than ordinary SERT targets. It is highly improbable that a person would be able to reach the door faster than they could reach a weapon.

[1030] T185.19-46.

[1031] T438.12-23; T439.11-25.

[1032] T87.24-91.40.

[1033] T285.45-287.20; T299.10-302.30.

[1034] T186.20-187.2.

[1035] T1428.20-30.

[1036] T1622.10-15; T1624.35-47..

[1037] T1496.40.

572. Secondly, the Applicants note that DS Robinson went into the residences first, followed by the SERT officers.[1038] A number of the Applicants' witnesses gave evidence that DS Robinson did so in plain clothes.[1039] In the Applicants' submission, this clearly demonstrates that neither DS Robinson nor the SERT officers considered that the occupants of the dwellings posed a real danger.

573. Thirdly, Mr Blackman gave evidence that he attended the meeting at the police command post held by SS Dini on 27 November 2004.[1040] Later that day, SERT raided his home as though he and his family were violent and dangerous criminals.

574. Fourthly, there is evidence that the two primary suspects after the fire were Lex Wotton and Erykah Kyle.[1041] Mayor Kyle was later inexplicably removed from the list of wanted persons and was not arrested or charged at all in the course of the police operation.[1042]

575. Fifthly, the third target of the SERT raids was a 13 year old male. This was the only 13 year old that SS McKay could recall being sent to apprehend in his SERT career of some 24 years.[1043] The suggestion that this young person was a dangerous criminal beggars belief. The Respondents have advanced no explanation for why the young person in question could not have been apprehended by asking his parents.

(c) Dismissal of community concerns

576. In the Applicants' submission, the evidence establishes that the police operation caused significant alarm and discontent amongst the community, that these concerns were reported to the police by community members and leaders and that the concerns were ignored.

577. It is clear that, from the outset, the wellbeing of the community on Palm Island was not considered in the police response to the events of 26 November 2004. As DI Webber conceded, the community were not even properly informed of the emergency situation being in place.[1044] SS Dini was on the island in his capacity as the head of

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[1038] T1385.23-26.

[1039] T731.10-27; T217.36; T731.18

[1040] T183.24-33.

[1041] T1399.40-1340.5.

[1042] T1340.6.

[1043] T1448.7-1449.11; see T1372.30-35 in respect of the length of his career.

[1044] T1098.25-30; 3FASC: 277(b)-(c); ASF: 284.

the Cross-Cultural Liaison Unit. However, he was performing an administrative role and was not being utilised as a Cross-Cultural Liaison Officer.[1045] He was present at a briefing given by SS McKay, in which SS McKay outlined SERT's role and capabilities, but SS Dini did not have any input into the process and did not provide a briefing to SERT about cultural considerations.[1046] SS Dini had relevant knowledge, such as that firearms were not generally carried by police officers in Indigenous communities as they upset the residents,[1047] but he did not consider what the impact of the SERT raids might be on the community and neither was he asked by any of the other officers what that impact might be.[1048]

578. SS Dini gave evidence about a meeting that he and Inspector Kachel held at the primary school/police command post on Sunday 27 November 2004 with the Palm Island Council and other community members. He recounted that there was a great deal of anger towards the police at the meeting and that the Council members wanted the police to leave the island, but that, for their part, the police were mostly concerned with recovering the allegedly stolen rifle.[1049] The contemporaneous note of the meeting in the police log confirms SS Dini's evidence in that regard, and records that Mayor Kyle's concerns about "the scale of police presence", why the police had "occupied the school as a command post" and "how long the police would remain on the island".[1050] SS Dini conceded that the concerns raised by the Council were ignored, as the police were concerned only about "security" and not about the effect that the police operation was having on the community.[1051] Mr Blackman, who attended the meeting, expressed his dismay that all the police wanted to discuss was the allegedly missing rifle.[1052]

579. A video of a meeting of community elders, including Mayor Kyle and the Second Applicant, contemporaneously records substantial discontent at the depiction of the

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[1045] T802.5-803.7.

[1046] T805.12-37.

[1047] T781.33-35.

[1048] T811.1-15; T836.20-40.

[1049] T773.28-46; T816.10-30.

[1050] Exhibit A197, p5 at 1115.

[1051] T817.20-45.

[1052] T183.24-33.

community as violent and their treatment by the police as "terrorists", as well as the occupation of the school and the hospital.[1053]

580. There is evidence that at approximately midnight on 28 November 2004, when Mr Blackman turned himself in to police custody, Mr Brad Foster of the Carpentaria Land Council—who had been accompanying Mr Koch around the island—had a conversation with DI Webber, in which he expressed misgivings at the heavy-handed police conduct,[1054] reflecting matters which had been relayed to him and Mr Koch regarding the level of violence to which community members were being subjected.[1055] Mr Foster also expressed to DI Webber sentiments that he had expressed to Mr Koch to the effect that the SERT raids were entirely unnecessary and the police could have organised for wanted persons to be taken into custody by working through the community.[1056] DI Webber's evidence was that Mr Foster's concerns were discussed but not acted upon and Mr Foster never received any response from him or any other QPS officer.[1057]

581. Additionally, in the Applicants' submission, it is apparent on the face of the recorded interviews that DS Robinson conducted with the victims of the SERT raids, including the Second and Third Applicants, that he was entirely dismissive of their concerns at the way that they had been treated.[1058]

(d) Failure to comply with Code of Conduct

582. The Applicants have pleaded that the visible militaristic presence created by the QPS and the other disrespectful and intimidatory conduct breached section 10.14 of the Code of Conduct. In the Applicants' submission, it is self-evident that such conduct constitutes a failure to demonstrate high standards of professional integrity and honesty, perform duties in a manner that bears the closest public scrutiny or meets legislative, government and QPS standards, act with fairness and reasonable compassion, provide conscientious or courteous service. Further, in circumstances where community concerns and wellbeing were entirely ignored, the relevant officers were clearly not acting in good faith.

[1053] Exhibit A12 at 18:50 to 21:44.

[1054] Exhibit A197, p8 at 0005.

[1055] T436.10-41; T459.39-460.20.

[1056] T463.19-27.

[1057] T1128.7-1129.20.

[1058] Exhibits A5 and A205 to A211.

H. Unlawful discrimination in Further Failures

H.1. Further Failures

583. The Applicants have pleaded that the acts comprising the "Further Failures", as defined in the 3FASC, taken individually or as a whole, breached section 9 of the RDA.[1059]

H.1.1 22 to 25 November 2004

584. For the reasons set out above, having regard to all of the evidence adduced at trial, the Applicants submit that the following acts comprising the Further Failures and occurring between 22 to 25 November 2004 have been proven:

a. the failure to suspend SS Hurley from duty before the afternoon of 22 November 2004;[1060]

b. the failure to put in place or undertake special measures to preserve peace and good order on Palm Island in the period following the death of Mulrunji;[1061]

c. the failure of the QPS to provide appropriate responsive policing services on Palm Island;[1062]

d. the failure of the QPS to act in partnership with the community in a way that met or considered the cultural needs which existed within the community;[1063]

e. the increase of the police presence on the island with officers who were not appropriately trained in culturally sensitive policing;[1064]

[1059] 3FASC: 312, 313(a), 319, 323.

[1060] 3FASC: 309(a).

[1061] 3FASC: 295, 309(b).

[1062] 3FASC: 296(i)(i), 309(b).

[1063] 3FASC: 296(i)(ii), 309(b).

[1064] 3FASC: 296(a)(v) and (f), 309(b).

f. the failure of QPS officers stationed on Palm Island to take steps to diffuse the community's grief and anger;[1065]

g. the failure of QPS officers stationed on Palm Island to provide responsive and culturally sensitive policing in the community;[1066]

h. the failure to send a Cross Cultural Liaison Officer to Palm Island to assist the QPS in managing obvious tensions within the community which had arisen since the death of Mulrunji, until at or about midday on 26 November 2004;[1067]

i. the failure of QPS officers stationed on Palm Island to liaise with the members of the community who attended pupblic meetings and were apparently dissatisfied with the death of Mulrunji in police custody and the subsequent police investigation;[1068]

j. the failure of QPS officers stationed on Palm Island to issue or cause to be issued a public statement containing an apology for Mulrunji's death or an expression of regret or remorse for the death having occurred in police custody;[1069]

k. the failure of QPS officers stationed on Palm Island to issue or cause to be issued a public statement containing an explanation of the investigation into Mulrunji's death and the procedure that would then be followed;[1070]

l. the failure to make visible attempts to engage with the Aboriginal community on Palm Island in order to adequately address concerns amongst the community which had arisen since the death in custody of Mulrunji;[1071]

m. the failure of Insp Richardson to engage with the Palm Island Council or the community in a culturally appropriate and sensitive way;[1072]

[1065] 3FASC: 296(a)(v), 309(b).

[1066] 3FASC: 296(a)(v), 309(b).

[1067] 3FASC: 296(c), 309(b).

[1068] 3FASC: 296(a)(iii), 309(b).

[1069] 3FASC: 296(a)(iv) and b(ii), 309(b).

[1070] 3FASC: 296(a)(iv) and (b)(i), 309(b).

[1071] 3FASC: 296(d), 309(b).

n. the failure to adequately brief Insp Richardson on the contents of the Preliminary Autopsy Report;[1073]

o. the failure of the QPS to conduct strategic planning in response to the intelligence that the autopsy report was to be released to members of the public which took into account the fact that Mulrunji had sustained four broken ribs and his liver had been ruptured at or about the time of his death;[1074] and

p. the failure of the QPS officers on Palm Island to make special or other arrangements in response to the information that the autopsy report was to be released to the community.[1075]

585. The Applicants submit that the occurrences and characterisations of each of the acts comprising the Further Failures which occurred between 22 and 25 November 2004 are questions of fact common to the Applicants and the Group Members.

H.1.2 On and after 26 November 2004

(a) Acts relating to Applicants and Group Members

586. For the reasons set out above, having regard to all of the evidence adduced at trial, the Applicants submit that the following acts comprising the Further Failures and occurring on or after 26 November 2004 have been proven:

a. the declaration of an emergency situation;[1076]

b. the issuing of a Certificate in relation to the Declaration of an Emergency Situation without providing adequate particulars of the emergency situation;[1077]

c. the failure to issue a Certificate in relation to the Declaration of an Emergency Situation as soon as practicable after the emergency situation was declared;[1078]

[1072] 3FASC: 296(e)(ii), 309(b).
[1073] 3FASC: 296(e)(i), 309(b).
[1074] 3FASC: 296(g), 309(b).
[1075] 3FASC: 296(h), 309(b).
[1076] 3FASC: 299(a), 309(c).
[1077] 3FASC: 299(b), 309(c).
[1078] 3FASC: 299(e), 309(c).

d. the failure to revoke the declaration of an emergency situation on the afternoon of 26 November 2004 after any emergency situation that may have been in existence had ended;[1079]

e. the QPS officers on Palm Island proceeding to act as though an emergency situation was lawfully in place after any emergency situation that may have been in existence had ended on the afternoon of 26 November 2004;[1080]

f. the commandeering of the St Michael's school bus;[1081]

g. the establishment by the QPS on Palm Island of a visible and militaristic presence;[1082]

h. the behaviour by QPS members in a disrespectful and intimidatory manner;[1083]

i. the evacuation of teachers and other public sector employees from Palm Island on 26 November 2004;[1084]

j. the suspension of ferry services on Palm Island over the course of the purported "emergency situation";[1085]

k. the suspension of flights to and from Palm Island over the course of the purported "emergency situation";[1086]

l. the failure to permit the Applicants or Group Members to travel to Palm Island or to leave Palm Island over the course of the purported "emergency situation".[1087]

587. The Applicants submit that the occurrences and characterisations of those acts are questions of fact common to the Applicants and the Group Members.

[1079] 3FASC: 299(d), 309(c).

[1080] 3FASC: 299(d), 309(c).

[1081] 3FASC: 309(f).

[1082] 3FASC: 290(c); 307(a), 309(f).

[1083] 3FASC: 290(d); 307(a), 309(f).

[1084] 3FASC: 291; 307(b), 309(f).

[1085] 3FASC: 292; 307(b), 309(f).

[1086] 3FASC: 292; 307(b), 309(f).

[1087] 3FASC: 292; 307(b), 309(f).

(b) Acts relating to Applicants and Sub-Group

588. For the reasons set out above, having regard to all of the evidence adduced at trial, the Applicants submit that the following acts comprising the Further Failures and occurring on or after 26 November 2004 have been proven:

a. the formation of an Action Plan which required that DS Robinson identify the persons to be arrested;[1088]

b. the preparation of a list of persons to be arrested by DSS Miles in Townsville on the night of 26 November 2004;[1089]

c. the failure to obtain a warrant for the arrest of any person arrested in the presence of SERT and PSRT officers in connection with the events on Palm Island of 26 November 2004.[1090]

589. The Applicants submit that the occurrences and characterisations of those acts are questions of fact common to the Applicants and the Sub-Group.

(c) Acts relating to Applicants only

590. For the reasons set out above, having regard to all of the evidence adduced at trial, the Applicants submit that the following acts comprising the Further Failures and occurring on or after 26 November 2004 have been proven:

a. the entry and search by SERT officers of the dwelling of the First and Third Applicants on 27 November 2004;[1091]

b. the entry and search by SERT officers of the dwelling of the Second Applicant on 27 November 2004;[1092]

c. the use of unnecessary force and unnecessary disturbance of occupants in the entry and search of the home of the First and Third Applicants;[1093]

[1088] 3FASC: 284, 300, 309(d).

[1089] 3FASC: 285, 300, 309(d).

[1090] 3FASC: 286, 300, 309(d).

[1091] 3FASC: 283, 287(a), 300, 303-305, 309(d)-(e).

[1092] 3FASC: 283, 287(a), 300, 303-305, 309(d)-(e).

[1093] 3FASC: 303, 309(e).

d. the use of unnecessary force and unnecessary disturbance of occupants in the entry and search of the home of the Second Applicant;[1094]

e. the ransacking of the home of the First and Third Applicants;[1095]

f. the damage to property in the home of the Second Applicant;[1096]

g. the arrest of the Third Applicant; [1097]

h. the use in the arrest of the First Applicant of more force than was necessary;[1098]

i. the use in the arrest of the Third Applicant of more force than was necessary;[1099]

j. the subjection of the First Applicant to violence including the use of a taser;[1100]

k. the holding of the First Applicant at gunpoint whilst he was unarmed;[1101]

l. the holding of the Third Applicant at gunpoint whilst she was unarmed;[1102]

m. the forcing of the First Applicant to lie face down with guns pointed at him;[1103]

n. the forcing of the Third Applicant to lie face down with guns pointed at her;[1104]

o. the pointing of guns at the children of the First and Third Applicants;[1105]

[1094] 3FASC: 303, 309(e).
[1095] 3FASC: 287(b), 290(b), 300, 303-305, 309(d)-(f).
[1096] 3FASC: 290(b), 300, 303-305, 309(d)-(f).
[1097] 3FASC: 287, 288, 300, 309(d).
[1098] 3FASC: 300, 309(d).
[1099] 3FASC: 300, 309(d).
[1100] 3FASC: 287(d), 300, 309(d).
[1101] 3FASC: 288(a), 300, 309(d).
[1102] 3FASC: 288(a), 300, 309(d).
[1103] 3FASC: 288(b), 300, 309(d).
[1104] 3FASC: 288(b), 300, 309(d).

p. the forcing of the children of the First and Third Applicants to lie face down with guns pointed at them.[1106]

591. The Applicants submit that, for the purpose of this trial, the occurrences and characterisations of those acts are questions of facts relating to the claims of the Applicants only. It is noted that a number of those facts will also relate to the claims of discrete Group Members but not to the Group Members as a whole. That issue will be addressed after the Court has handed down judgment. Further, as discussed below, whilst the findings of fact in relation to these acts apply only to the Applicants, the findings of law in relation to these acts will be common to the claims of the Sub-Group.

H.2. Breach of section 9

H.2.1 Relevant context

592. In the breaches of section 9 of the RDA alleged in relation to the Further Failures, the Applicants rely on the same contextual factors as relied on in relation to the breaches of section 9 alleged in relation to the QPS Failures.[1107] The above submissions are relied on in that regard.

H.2.2 Distinction, exclusion, restriction or preference based on race

593. The Applicants have pleaded that the acts comprising the Further Failures constituted a "distinction, exclusion, restriction or preference" within the meaning of section 9(1) of the RDA, on the basis that the policing services provided to the Applicants or the policing services provided on Palm Island were not provided according to the same standard that they were provided in other areas of Queensland or to other communities in Queensland.[1108] In that regard, the Applicants have pleaded[1109] that, in November 2004, the QPS ordinarily complied with Orders, Policies, and Procedures, and all acts and laws required to be complied with in the provision of policing services to the residents of Queensland,[1110] and that the QPS ordinarily acted in part-

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[1105] 3FASC: 288(c), 300, 309(d).

[1106] 3FASC: 288(c), 300, 309(d).

[1107] 3FASC: 308, 310-311.

[1108] 3FASC: 312, 313(a).

[1109] 3FASC: 246.

[1110] 3FASC: 246(a).

nership with the community at large and provided policing services as required by the reasonable expectations of the community or as reasonably sought of officers by members of the community.[1111] The Applicants rely on their above submissions in relation to the Respondents' denials and qualified admissions of those allegations.

594. The Applicants submit that the evidence establishes the following inferences.

(a) Failures to comply with laws, police obligations, and police procedures

595. The Applicants rely on the above submissions in relation to the breaches of laws and of QPS obligations and procedures as a result of the acts comprising the Further Failures and say that these clearly amounted to a "distinction, exclusion, restriction or preference" within the meaning of section 9 of the RDA on the basis that the Court should assume that laws and QPS obligations and procedures are ordinarily adhered to.

(b) Failures to meet the cultural needs and expectations of the community

596. In relation to the acts comprising the Further Failures which are submitted above to constitute failures to cater to the cultural needs of the community, the Applicants rely on their submissions in relation to the QPS Failures on why this amounts to a "distinction, exclusion, restriction or preference" within the meaning of section 9 of the RDA.

(c) 22 to 25 November 2004

597. In relation to the period between 22 to 25 November 2004, the Applicants submit that the police operation on Palm Island was clearly a distinct operation and was not in accordance with ordinary procedure. The evidence establishes the following narrative.

a. a death of an Aboriginal man occurred in police custody;

b. an investigation was conducted by police into the death which lacked an appearance of integrity or impartiality;

c. as a result, there was widespread grief and anger within the community on Palm Island, which led to a confrontation between several hundred community members and the officer in charge of the police station;

[1111] 3FASC: 246(d).

d. the officer in charge of the police station was removed from the island and the overall police presence was almost tripled;

e. rising tensions between the police and the community resulted in increasing attacks on the police;

f. the police reacted with extraordinary measures such as taking their firearms to their sleeping quarters;

g. the police did not take measures to engage with the community or to diffuse tensions.

598. The Applicants submit that in the above circumstances, the manner in which policing was conducted on Palm Island was clearly distinct from the manner in which policing was conducted in other areas of Queensland, and this amounted to a "distinction" within the meaning of section 9 of the RDA.

(d) Conduct during emergency situation

599. In relation to the emergency situation, the Applicants submit that the police conduct would not conceivably have occurred in the majority of communities in Queensland. Palm Island is a rare example of a community which is on an island remote from the mainland, such that the community is entirely reliant on commercial flights and ferry services in order to be able to travel to anywhere else in Australia, including to access basic services. It is noted that this is not a coincidence. As submitted above, the selection of Palm Island as a location to which Aboriginal people were forcibly removed and confined was a direct result of its remoteness.

600. The Applicants submit that the same conditions that had previously facilitated Palm Island to act as the State of Queensland's prison colony for Aboriginal "troublemakers" facilitated Aboriginal Palm Islanders again being prevented from leaving the island. Further, it was the same conditions that permitted the police to declare an emergency situation over the entire island and then proceed to act as a quasi-occupation force.

601. It is not conceivable that, for example, an emergency situation could be declared over the suburb of Inala in Western Brisbane, resulting in the police causing all transport to and from that suburb to be cut off and then purporting to be able to exercise emergency powers in respect of any dwelling in the entire suburb. Similarly, it is extremely unlikely that the police would have seized a school bus from the local Catholic school in Inala and kept it for a week. Even in a disadvantaged community in Brisbane, the police would have been aware that their actions were subject to scrutiny. The Applicants submit that the acts in relation to the declaration of an emergency

situation clearly subjected the Applicants to a distinction within the meaning of section 9 of the RDA.

(e) SERT raids

602. As submitted above, all three of the SERT officers who gave evidence acknowledged that the operation that they conducted on Palm Island was not conducted in accordance with ordinary SERT protocol and was unusual in a number of respects. Most of the respects in which the operation diverged from ordinary SERT operations related to the presence of innocent civilians, including women, children and the elderly — including that SERT are not ordinarily sent to apprehend children.

603. Further, it is clear from the evidence of the briefings SERT received and the manner in which the Action Plan was formulated that the fact of the operation being conducted in an Aboriginal community and conjecture as to the "transient" nature of the residents and the propensity of the residents to sleep with weapons had a substantial bearing on the methodology deployed. Accordingly, the conduct of the SERT raids subjected the Applicants to a distinction based on their race.

H.2.3 Based on race

604. In the Applicants' submission, the evidence establishes an overwhelming inference that the distinctions, exclusions, restrictions and preferences in the acts comprising the Further Failures were based on the race of the Applicants. In relation to the failure to cater to the cultural needs of the community, this is self-evident. Otherwise, the Applicants rely on their above submissions in relation to the racially prejudiced nature of the QPS conduct and emphasise the following:

a. the matters in relation to the removal of SS Hurley submitted above in relation to the QPS Failures;

b. the use of the terms "ATSI" and "civilian" in the running log;

c. that the vehicles seized from Q-Build were returned after the emergency situation was revoked, but the St Michael's school bus was not returned;

d. the following matters evidencing a racially prejudiced view of Aboriginal people on Palm Island as violent and dangerous and an apparent propensity to resort to the use of force in order to attempt to calm the unrest within the community, rather than doing so through engagement with the community or its leadership:

   i. the direction that police officers take guns to their sleeping quarters;

ii. the comments made by Insp Richardson to Mr Flynn, such as that throwing rocks at police was a "culture" on the island;

iii. that SERT were deployed to apprehend the persons suspected of being involved in the events of 26 November 2004;

iv. the briefings provided by DS Robinson to SERT officers prior to the raids;

v. the manner in which the raids were conducted and, in particular, the manner in which innocent bystanders, including women, children and the elderly, were treated;

vi. that SERT were sent to apprehend a 13-year-old child;

vii. the duration of the declared emergency situation;

viii. that non-Aboriginal people were apparently encouraged to leave the island during the declared emergency situation because of supposed fears for their safety, whilst Aboriginal people were not permitted to leave the island;

e. the disregard for the community's concerns in relation to the death of Mulrunji shown by Insp Richardson and SS Whyte;

f. the disregard for the community's concerns in relation to the emergency situation and the SERT raids shown by SS Dini and Insp Kachel in the meeting with the Council on the Saturday and shown by DI Webber after his conversation with Brad Foster that night; and

g. the disregard shown by DS Robinson for the concerns of the persons whom he interviewed in relation to the SERT raids.

H.3. Breaches of rights: Group Members

605. The Applicants have alleged a number of breaches of rights in relation to the acts comprising the Further Failures which the Applicants say are questions of law common to the Applicants and the Group Members. These are pleaded in paragraph 316 of the 3FASC. The Applicants no longer press any allegation in relation to Article 5(e)(iv) of the ICERD.

H.3.1 Right to equality before the law and equal protection of the law

606. The Applicants have pleaded that the acts comprising the Further Failures nullified or impaired the recognition, enjoyment or exercise on an equal footing of their rights to equality before the law and equal protection of the law without any discrimination, under Article 26 of the ICCPR,[1112] their rights to equality before the law,[1113] and, their rights to go about their affairs in peace under the protection of the police services, under the common law.[1114] The Applicants rely on the submissions above in relation to the nature and content of these rights.

607. The Applicants have further pleaded that the acts comprising the Further Failures nullified or impaired the recognition, enjoyment or exercise on an equal footing of the equality before the law and in the enjoyment of their rights to equality before the law and in the enjoyment of the right of access to any service intended for use by the general public under Article 5(f) of the ICERD.[1115] The Applicants rely on the above submissions in relation to why policing services are "services" within the meaning of Article 5(f).

(a) 22 to 25 November 2004

608. In relation to the acts relied on which occurred between 22 to 25 November 2004 insofar as they concerned the investigation into Mulrunji's death, the Applicants rely on their submissions in relation to the QPS Failures.

609. As submitted above, the acts relied on which occurred between 22 to 25 November 2004 resulted in a wholesale failure of the police to meet the cultural needs and expectations of the community on Palm Island or to address the feelings of grief and anger in the community. Rather, the manner in which policing was conducted served to inflame tensions between the community and the police. The community's questions were derided as "not factual" and derogatory comments were made about the "violent" culture in the community. The police visibly increased their presence in an aggressive manner, including by beginning to carry firearms, and not in a productive manner involving engagement with members of the community. The few positive measures which were taken, including the removal of SS Hurley and the establish-

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[1112] 3FASC: 316(a).

[1113] 3FASC: 316(h).

[1114] 3FASC: 316(i).

[1115] 3FASC: 316(g).

ment of regular meetings between Insp Richardson, SS Whyte and Erykah Kyle, were not proactive, but reactive and belated.

610. In the Applicants' submission, this resulted in the administration of policing services, as authorised by statute and by the general law, in a manner which caused a wholesale failure to uphold the law, to maintain peace and good order, to provide services required of officers under the law or the reasonable expectations of the community, or to allow honest citizens to go about their affairs in peace. Accordingly, the recognition, enjoyment or exercise on an equal footing of the Applicants' rights to equality before the law was impaired, as were their rights to access policing services intended for the use of the general public.

(b) On or after 26 November 2004

611. As submitted above, the acts comprising the Further Failures which occurred on or after 26 November 2004 and the occurrences of which are questions of fact common to the Applicants and the Group Members were only feasible as a result of the unique circumstances of Palm Island as an isolated and disempowered Aboriginal community. It was these factors which permitted an emergency situation to be declared over the entire community, the transportation to and from the community to be cut off, a militaristic presence to be established by the police, and the police to engage in systemic disrespectful and intimidatory behaviour, including the conduct of the SERT raids, the utter dismissal of the community's concerns, and the utter lack of regard for the wellbeing of the community. Further, not only were those acts done contrary to laws and to police protocols, they were achieved through the abuse of laws which the police have the responsibility of administering.

612. In the Applicants' submission, this resulted in the administration of policing services, as authorised by statute and by the general law, in a manner which caused a wholesale failure to uphold the law, to maintain peace and good order, to provide services required of officers under the law or the reasonable expectations of the community, or to allow honest citizens to go about their affairs in peace. In those circumstances, the recognition, enjoyment or exercise on an equal footing of the Applicants' rights to equality before the law and to access policing services intended for the use of the general public were severely impaired.

H.3.2 Right to equal treatment before all organs administering justice

613. The Applicants have pleaded that the acts comprising the Further Failures nullified or impaired the recognition, enjoyment or exercise on an equal footing of their rights to equality before the law and equal treatment before all organs administering justice, under Article 5(a) of the CERD.[1116]

614. The Applicants rely on the above submissions in relation to why the police are an organ administering justice. In the Applicants' submission, in the circumstances of the distinctions, exclusions, restrictions or preferences to which the Applicants were subjected based on their race, as submitted above, that the Applicants did not receive equal treatment before the police in the administration of justice is self-evident.

H.4. Breaches of rights: Sub-Group

615. The Applicants have alleged a number of breaches of rights in relation to the acts comprising the Further Failures which the Applicants say are questions of law common to the Applicants and the Group Members. These are pleaded in paragraphs 319 to 320 of the 3FASC.

616. The Applicants do not allege that breaches of the rights of the Sub-Group can be established based on the pleaded facts and the evidence adduced at trial. However, as the SERT raids were conducted systematically and with a consistent methodology, the Court's findings of law in relation to the particular circumstances of the Applicants will be common to the claims of the Sub-Group. The individual facts of each Sub-Group member's case will then need to be considered and determined.

H.4.1 Right not to be subjected to unlawful interference

617. The Applicants have pleaded that the acts comprising the Further Failures nullified or impaired the recognition, enjoyment or exercise on an equal footing of their rights not be subjected to arbitrary or unlawful interference with their privacy, family, or home under Article 17 of the ICCPR,[1117] to enjoy their property under the common

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[1116] 3FASC: 316(c).

[1117] 3FASC: 319, 320(e).

law,[1118] and to go about their affairs in peace under the protection of the police services under the common law.[1119]

(a) General right to enjoy property

618. In the Applicants' submission, the right against interference with private property is a right under both Articles 38(1)(b) and 31(1)(c) of the ICJ Statute.

619. Similarly, Article 5(d)(v) of the CERD protects the right to equality before the law in the enjoyment of "[t]he right to own property alone as well as in association with others". Whilst the Applicants acknowledge that this Article appears to relate to the ownership of property as opposed to the right against interference with property, as noted above, Article 5 of the CERD is intended to protect not only the rights explicitly referred to, but also to "any similar rights".

620. Relevantly, Article 17 of the UDHR is in the following terms:

> (1) Everyone has the right to own property alone as well as in association with others.
>
> (2) No one shall be arbitrarily deprived of his property.

621. As noted by Golay and Cismas:

> The right to property has been enshrined as a human right in international law – both conventional and customary – through universal and regional treaties and national constitutions. The right to property recognizes everyone's right to peacefully enjoy their property, be it comprised of existing possessions or assets acquired by law or claims which raise a legitimate expectation of obtaining effective enjoyment. The right protects individual property, as well as, at least in the case of the Inter-American and African systems, communal property. Limitations of the right are permissible, provided that they respect the principles of legality and proportionality and that they are directed towards assuring or advancing the public or general interest. Human rights law recognizes both positive and negative state obligations related to the right to property. [1120]

622. Further, there can be no doubt that the right to enjoyment of property is recognised universally in the municipal laws of states. In particular, it is one of the most funda-

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[1118] 3FASC: 320(f).

[1119] 3FASC: 320(d).

[1120] Dr Christophe Golay and Iona Cismas, *Legal Opinion: the Right to Property from a Human Rights Perspective* (Geneva Academy of International Humanitarian Law and Human Rights, International Centre for Human Rights and Democratic Developmen), p28.

mental principles of the common law. In *Coco v The Queen*,[1121] Mason CJ, Brennan, Gaudron, McHugh JJ held that:

> Every unauthorised entry upon private property is a trespass, the right of a person in possession or entitled to possession of premises to exclude others from those premises being a fundamental common law right. In accordance with that principle, a police officer who enters or remains on private property without the leave or licence of the person in possession or entitled to possession commits a trespass unless the entry or presence on the premises is authorised or excused by law.[1122]

623. The Applicants otherwise rely on their above submissions in relation to the right under the common law against interference with property. In those circumstances, the Applicants submit that the entries and searches of their properties by SERT nullified or impaired the recognition, enjoyment or exercise on an equal footing of their rights to enjoy their property without unlawful interference.

(b) Article 17 of the ICCPR

624. Article 17 of the ICCPR provides that:

> No one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation.
>
> Everyone has the right to the protection of the law against such interference or attacks.

625. In its *General Comment 16*,[1123] the HRC provided guidance on the interpretation of Article 17. The comment clarifies the following:

a. The right is required to be guaranteed against interference and attacks from State authorities or from natural or legal persons;

b. "unlawful" means that no interference can take place except in cases envisaged by the law";

c. "arbitrary interference" can extend to interference provided for under the law;

[1121] (1994)179 CLR 427.

[1122] *Coco v The Queen* (1994)179 CLR 427 at 428 (Mason CJ, Brennan, Gaudron, McHugh JJ), references omitted.

[1123] Human Rights Committee, *General Comment 16*, UN Doc HRI/GEN/1/Rev.1 at 21 (Twenty-third session, 1988).

d. the purpose of introducing the concept of arbitrariness is intended to guarantee that even interference that is provided for by law, should be in accordance with the aims and objectives of the ICCPR and must be reasonable in the circumstances;

e. the term "home" is to be given a broad interpretation and is to mean the place where a person resides. Similarly the term "family" should be given a broach interpretation to include all those comprising family as understood by the particular society of the State party concerned.

626. Section 13 of the *Charter of Human Rights and Responsibilities Act* 2006 (Vic) provides that a person has the right "not to have his or her privacy, family, home or correspondence unlawfully or arbitrarily interfered with".

627. In *Director of Housing v Sudi*,[1124] Bell J (as President of VCAT) described that right as follows:

> Section 13 is based on article 17 of the International Covenant on Civil and Political Rights, which is expressed in almost identical terms. … The rights to privacy, family, home and correspondence in section 13 (a) are of fundamental importance to the scheme of the Charter. Their purpose is to protect and enhance the liberty of the person – the existence, autonomy, security and wellbeing of every individual in their own private sphere. The rights ensure people can develop individually, socially and spiritually in that sphere, which provides the civil foundation for their effective participation in democratic society. *They protect those attributes which are private to all individuals, that domain which may be called their home, the intimate relations which they have in their family* and that capacity for communication (by whatever means) with others which is their correspondence, each of which is indispensible for their personal actuation, freedom of expression and social engagement.[1125]

628. His Honour went on to explain the interpretation of the right against interference with the home:

> In human rights, identifying a person's 'home' is approached in a common-sense and pragmatic way. It depends on the person showing 'sufficient and continuous links with a place in order to establish that it is his home'. Manfred Nowak, speaking of article 17(1) of the ICCPR, says 'the home symbolises a place of refuge where one can develop and enjoy domestic peace, harmony and warmth without fear of disturbance.' If someone's links with the place where they live are 'close enough and continuous enough', that is their home. *The general approach is 'to apply a simple, factual and*

[1124] [2010] VCAT 328; reversed on unrelated grounds in *Director of Housing v Sudi* (2011) 33 VR 559.

[1125] *Director of Housing v Sudi* [2010] VCAT 328 at [28]-[29]; quoted with approval in *Castles v Secretary of the Department of Justice* (2010) 28 VR 141, 162-163 (Emerton J).

> *untechnical test, taking full account of the factual circumstances but with very little of legal niceties.' The concept of 'home' in human rights is autonomous and is not based on 'domestic notions of title, legal and equitable rights, and interests' In short, it is a question of fact, not law.* A home may be where a person or family is living in unlawful occupation. Where a tenant is living in social housing, the rented premises are their home for the purposes of s 13(a) of the Charter. This remains so where the tenant continues to live in the premises after the end of the tenancy, or continues to occupy the premises without consent. The same principle applies to other arrangements under which a person may be living in a place which is their home.
>
> *The Charter does not define 'family'. In this human rights context , it would not be narrowly interpreted or confined.* A father and his three year old son – Mr Sudi and Shire – are a family within s 13(a) (and s 17(1)).
>
> Likewise, the question of what amounts to an 'interference' with the rights in s 13(a) is approached in a 'simple and untechnical' manner. This is Manfred Nowak, again speaking of article 17(1) of the ICCPR: '*Every invasion of that sphere paraphrased by the term "home" that occurs without the consent of the individual affected... represents interference.*'[1126]

629. In the Applicants' submission, the dwelling of the First and Third Applicants was plainly their "home" within the meaning of Article 17 of the ICCPR, and likewise *mutatis mutandis* for the Second Applicant. Similarly, the family members present in the dwellings of the Applicants at the times of the SERT raids were "family" within the meaning of that provision.

630. Further, it is submitted that the entries and searches of the homes of the Applicants clearly constituted "invasions of that sphere paraphrased by the term 'home" which occurred without the consent of the individuals affected and, similarly, the treatment by SERT of the family members within the Applicants' homes constituted interference with "that domain which may be called their home, the intimate relations which they have in their family".

631. It follows that in order to establish a breach of Article 17, the Applicants must establish that these interferences were "arbitrary or unlawful".

632. In respect of the unlawfulness of the entries and searches of the Applicants' homes and the disturbance of the occupants, the Applicants rely on their above submissions.

[1126] *Director of Housing v Sudi* [2010] VCAT 328 at [32]-[34] (Bell J), emphasis added, references omitted.

633. The meaning of the term "arbitrary" in the context of international human rights jurisprudence was explained by Judge Cancado-Trinidade in *Diallo* as follows:

> The adjective "arbitrary", derived from the Latin "*arbitrarius*", originally meant that which depended on the authority or will of the arbitrator, of a legally recognized authority. With the passing of time, however, it gradually acquired a different connotation; already in the mid-seventeenth century, it had been taken to mean that which appeared uncontrolled (arbitrary) in the exercise of will, amounting to capriciousness or despotism. The qualification "arbitrary" came thus to be used in order to characterize decisions grounded on simple preference or prejudice, defying any test of "foresee-ability", ensuing from the entirely *free will* of the authority concerned, rather than based on *reason*, on the conception of the rule of law in a democratic society, on the criterion of reasonableness and the imperatives of justice, on the fundamental principle of equality and non-discrimination.[1127]

634. The ICJ also considered the concept of "arbitrariness" in *Elettronica Sicula* as follows:

> 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.[1128]

635. Similarly, in *R v Commissioner of Police of the Metropolis,*[1129] Lord Bingham of Cornhill described analogous requirements in the ECHR[1130] as follows:

> The lawfulness requirement in the Convention addresses supremely important features of the rule of law. The exercise of power by public officials, as it affects members of the public, must be governed by clear and publicly-accessible rules of law. *The public must not be vulnerable to interference by public officials acting on any personal whim, caprice, malice, predilection or purpose other than that for which the power was conferred.* This is what, in this context, is meant by arbitrariness, which is the antithesis of legality. This is the test which any interference with or derogation from a Convention right must meet if a violation is to be avoided. [1131]

636. In the same case, Lord Hope of Craighead made the following remarks with respect to when a police officer's use of extraordinary "stop and search" powers would be "arbitrary" in the context of anti-racial discrimination:

[1127] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 729 (Separate Opinion of Judge Cancado-Trinidade) at 763 [108], original emphasis.

[1128] *Elettronica Sicula SpA (United States of America v. Italy) (Judgment)* [1989] ICJ Rep 15, [128].

[1129] [2006] 2 AC 307

[1130] *European Convention for the Protection of Human Rights and Fundamental Freedoms, as amended by Protocols Nos. 11 and 14*, (entered into force 4 November 1950), ETS 5.

[1131] *R v Commissioner of Police of the Metropolis* [2006] 2 AC 307 at [34] (Lord Bingham of Cornhill), emphasis added.

> Where then does this leave the police officer when he is deciding whom to stop and search in the exercise of the section 44 power? The key must surely lie in the point which Baroness Hale made in her speech in the *Roma Rights* case, at p 59H, para 82, that *the object of the legislation is to ensure that each person is treated as an individual and not assumed to be like other members of the group. That* was the trap into which the immigration officers fell at Prague airport, as the evidence showed that all Roma were being treated in the same way simply because they were Roma. So a police officer who stops and searches a person who appears to be Asian in the exercise of the section 44 power must have other, further, good reasons for doing so. It cannot be stressed too strongly that the mere fact that the person appears to be of Asian origin is not a legitimate reason for its exercise.[1132]

637. In the Applicants' submission, the interference with their homes and families were "arbitrary" within the meaning of Article 17 of the ICCPR. The Applicants rely in that respect on the above submissions concerning the methodology by which homes were entered, and note in particular that the First Applicant was arrested outside his home and no reasonable cause to enter either the home of the First and Third Applicants or that of the Second Applicant has been shown.

H.4.2 Right to liberty and security of person

638. The Applicants have pleaded that the acts comprising the Further Failures nullified or impaired the recognition, enjoyment or exercise on an equal footing of their rights to security of person and protection by the State against violence or bodily harm within the meaning of Article 5(b) of the ICERD[1133] and to liberty and security of person under ICCPR Article 9. [1134]

639. Article 5(b) guarantees the right to the equal protection of the law in the enjoyment of:

> The right to security of person and protection by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution.

640. The Applicants submit that on an ordinary reading the QPS falls within the definition of "government officials, individual group or institution".

[1132] *R v Commissioner of Police of the Metropolis* [2006] 2 AC 307 at [45] (Lord Hope of Craighead), emphasis added; referring to *European Roma Rights Centre v Immigration Officer at Prague Airport* [2005] 1 All ER 527, [82] (Baroness Hale).

[1133] 3FASC: 320(b).

[1134] 3FASC: 320(c).

641. Article 9 of the ICCPR. Relevantly includes:

> 9.1 Everyone has the right to liberty and security of person. No one shall be subjected to arbitrary arrest or detention. No one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law.

642. In *Diallo*, the ICJ held that Article 9 of the ICCPR:

> appl[ies] in principle to any form of arrest or detention decided upon and carried out by a public authority, whatever its legal basis and the objective being pursued". The scope of these provisions is not, therefore, confined to criminal proceedings; they also apply, in principle, to measures which deprive individuals of their liberty that are taken in the context of an administrative procedure.[1135]

643. In *General Comment 8*,[1136] the HRC confirms that the application of Article 9 is not limited to criminal cases, but is applicable to all situations depriving liberty.

644. The following principles relating to arbitrary detention within the meaning of Article 9 of the ICCPR arise from international human rights jurisprudence:

a. lawful detention may become arbitrary when a person's deprivation of liberty becomes unjust, unreasonable or disproportionate to a legitimate aim of the Commonwealth;

b. arbitrariness is not to be equated with "against the law"; it must be interpreted more broadly to include elements of inappropriateness, injustice or lack of predictability;[1137]

c. a law permitting detention must be "sufficiently precise to allow the citizen - if need be, with appropriate advice - to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action might entail".[1138]

645. In relation to an analogous provision from the ECHR, the European Court of Human Rights has held that "in proclaiming the 'right to liberty' [the Article] is contemplat-

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[1135] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639, at [77].

[1136] Human Rights Committee, (Sixteenth session, 1982).

[1137] Manga v Attorney-General [2000] 2 NZLR 65 at 71 [40]-[42], (Hammond J). See also the views of the UN Human Rights Committee in Van Alphen v The Netherlands [1990] UNHRC 22, UN Doc CCPR/C/39/D/305/1988; A v Australia [1997] UNHRC 7, UN Doc CCPR/C/59/D/560/1993; Spakmo v Norway [1999] UNHRC 42, UN Doc CCPR/C/67/D/631/1995.

[1138] *HL v United Kingdom* (2004) 40 EHRR 761 at [114].

ing the physical liberty of the person; *its aim is to ensure that no one should be dispossessed of this liberty in an arbitrary fashion*." [1139]

646. The right should not interpreted in a way that allowed State parties "to tolerate, condone or ignore" threats made by public authorities to the personal liberty and security of non-detained individuals under the jurisdiction of the States parties" as this would render the guarantees of the Covenant ineffective.[1140]

647. The Applicants adopt the above submissions in relation to the unlawfulness and arbitrariness of the arrests of the First and Third Applicants and say that those matters establish that the recognition, enjoyment or exercise on an equal footing of the Applicants' rights under Article 5(b) of the CERD and Article 9 of the ICCPR were nullified or impaired.

648. It is noted that Article 5(b) of the CERD contains an additional guarantee to those in Article 9 of the ICCPR, being the "protection by the State against violence or bodily harm". In the Applicants' submission, as the First and Third Applicants were in fact subjected by the state to violence, this right was clearly breached.

H.4.3 Right not to be subjected to inhuman or degrading treatment

649. The Applicants have pleaded that the acts comprising the Further Failures nullified or impaired the recognition, enjoyment or exercise on an equal footing of their rights not be subjected to inhuman and degrading treatment or punishment within the meaning of Article 7 of the ICCPR.[1141]

650. Article 7 provides that "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment".

651. The effect and meaning of Article 7 is expanded on by the HRC in *General Comment 20*,[1142] which states that Article 7 applies to acts, whether carried out by people acting in their official capacity or outside their official capacity. The Committee goes on to state that even where there is a state of public emergency, no derogation from Article

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[1139] *Guzzardi v Italy* (1980) 3 EHRR 333 at [92]-[93], emphasis added; quoted in *R v Commissioner of Police of the Metropolis* [2006] 2 AC 307 at 342-343 [24] (Lord Bingham of Cornhill).

[1140] *Ahmadou Sadio Diallo (Republic of Guinea v Democratic Republic of the Congo)* [2010] ICJ Rep 639 at 765 [115].

[1141] 3FASC: 320(a).

[1142] Human Rights Committee, (Forty-fourth session, 1992), UN Doc HRI/GEN/1/Rev.1 at 30.

7 is allowed. It is an absolute right. Further, the comment confirms that the acts prohibited are not only acts that cause physical pain, but also acts that cause mental suffering to the victim and include excessive chastisement ordered as an "educative" or a "disciplinary" measure.

652. The principles of the analogous provision of the ECHR were explained by the European Court of Human Rights in *Soering v United Kingdom* as follows:

> Treatment has been held by the Court to be both "inhuman" because it was premeditated, was applied for hours at a stretch and "caused, if not actual bodily injury, at least intense physical and mental suffering", and also *"degrading" because it was "such as to arouse in [its] victims feelings of fear, anguish and inferiority capable of humiliating and debasing them and possibly breaking their physical or moral resistance"*. In order for a punishment or treatment associated with it to be "inhuman" or "degrading", the suffering or humiliation involved must in any event go beyond that inevitable element of suffering or humiliation connected with a given form of legitimate punishment. In this connection, account is to be taken not only of the physical pain experienced but also, where there is a considerable delay before execution of the punishment, of the sentenced person's mental anguish of anticipating the violence he is to have inflicted on him.[1143]

653. In the Applicants' submission, the treatment of the First Applicant in his being tasered, being handcuffed with his hands behind his back in circumstances where he had previous shoulder injuries, being handcuffed and shackled and made to sit in extreme discomfort in a helicopter, and being handcuffed and shackled in a helicopter without a life jacket, constituted "degrading" treatment or punishment within the meaning of Article 7 of the ICCPR.

654. The Applicants also submit that the treatment of the Third Applicant by SERT officers, particularly in the presence of her children and in her home in circumstances where their presence there was a violation of the other rights referred to above, constituted "degrading" treatment within the meaning of Article 7 of the ICCPR.

655. Accordingly, in the Applicants' submission, the recognition, enjoyment or exercise on an equal footing of the rights of the First and Third Applicants not to be subjected to inhuman or degrading treatment or punishment was impaired.

[1143] *Soering v United Kingdom* (1989) 11 EHRR 439 at [100], emphasis added, references omitted.

H.4.4 Rights to equal protection under the law and equal treatment before all organs administering justice

656. In addition to the above submissions in relation to Article 26 of the ICCPR, Article 5(a) of the CERD, and the customary right to equality before the law, the Applicants submit that the Court should make further findings of the nullification or impairment of the recognition, enjoyment or exercise on an equal footing of this right in relation to the acts common to the Applicants and the Sub-Group and those relating to the Applicants only.

657. In relation to Article 5(a) of the CERD, in the Applicants' submission, the powers extended to the police under the PPRA in particular relate to their capacity as an organ administering justice. The police are given the ability to determine who to arrest and who to prosecute, and are given powers in order to carry out those functions which allow the use of force against individuals and the interference with private property which would not otherwise be permissible.

658. The Applicants otherwise rely on their above submissions in relation to the unlawful and arbitrary interference with their persons and property.

I. Relief sought

659. There are two relevant statutory provisions that provide the regime for making final orders:

a. section 46PO(4) of the Australian Human Rights Commission Act 1986 (Cth) (AHRC Act); and

b. section 33Z of the Federal Court of Australia Act 1976 (Cth) (**FC Act**).

660. The various orders sought in these proceedings are set out below.

661. The fundamental findings of fact are addressed in Annexure A to these submissions and are not repeated here. Those findings are an exercise of the Court's power in section 33Z(1)(b) of the FC Act. They are the findings required for the Court to then exercise the power in section 46PO(4)(a) of the AHRC Act and section 33Z(1)(a) of the FC Act that the Respondents have committed various acts of unlawful discrimination in breach of section 9 of the RDA.

I.1. Declaratory relief

662. It is submitted that for the reasons set out in these submissions, the Court should make orders declaring that the Respondents have committed various acts of unlawful racial discrimination in breach of section 9(1) of the RDA in relation to the decisions and actions of the investigation team between 19 November and 24 November 2004, as set out above at paragraph 254.

663. It is submitted that for the reasons set out in these submissions, the Court should make the following orders declaring that the Respondents have committed various acts of unlawful racial discrimination in breach of section 9(1) of the RDA in relation to the decisions and actions of Inspector Richardson, SS Whyte, and othe QPS officers on Palm Island between 22 November and 25 November 2004, as set out above at paragraph 584.

664. It is submitted that for the reasons set out in these submissions, the Court should make the following orders declaring that the Respondents have committed various acts of unlawful racial discrimination in breach of section 9(1) of the RDA in relation to the decisions and actions of the QPS in organising and executing the raids conducted by the SERT and PSRT officers on 27 and 28 November 2004 and the other conduct during that period and the days immediately after, as set out above at paragraphs 586, 588 and 590.

I.2. Damages

665. Section 46PO(4)(d) of the *AHRC Act* provides that where the Court is satisfied that there has been unlawful discrimination, the Court may order damages by way of compensation for any loss or damages suffered because of the conduct of the Respondent.

I.2.1 General approach to Damages

666. The Full Federal Court discussed the approach to damages in the leading authority of *Hall v Sheiban*.[1144] Lockhart, Wilcox and French JJ delivered separate judgments and while there is no clear ratio on the issue of damages, the case has been regularly cited for the proposition that torts principles are a starting point for the assessment of damages under discrimination legislation, but those principles should not be applied inflexibly.[1145]

667. According to those tort principles, the aim of an award of compensation should be to place the applicant in the position the applicant would have been in if the unlawful discrimination not taken place.[1146]

668. To the extent that there may be other principles which are relevantly operative, apart from those of tort, they may be derived from the words of the statute itself and from the scope and purpose of the legislation.[1147] French J,[1148] in Hall v Sheiban,[1149] placed particular emphasis on the words of the statute and to a line of Trade Practices Act cases which supported primacy being given to the words of the relevant statute, in-

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[1144] (1989) 20 FCR 217.

[1145] See, for example *Hall v A&A Sheiban Pty Ltd* (1989) 20 FCR 217; *Commonwealth v Peacock* (2000) 104 FCR 464 at 483 [55] (Wilcox J); *Gilroy v Angelov* (2000) 181 ALR 57 at 76 [105] (Wilcox J). See also *Qantas Airways Ltd v Gama* (2008) 167 FCR 537 where the Full Federal Court held that in many cases "the appropriate measure (of damages) will be analogous to the tortious" at 568 [94] (French and Jacobson, with whom Branson J generally agreed at 573 [122]). The Court did not refer to the decision in *Hall v Sheiban*.

[1146] *Qantas Airways Limited v Gama* (2008) 167 FCR 537 at 568 [94] (French and Jacobson JJ); *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334 at 342-343 [27]–[28] (Kenny J) and 368 [126] (Besanko and Perram JJ); *Hall v Sheiban* (1989) 20 FCR 217 239 (Lockhart J)

[1147] *Stephenson v Human Rights & Equal Opportunity Commission* (1995) 61 FLR 134 at 142-143 (Beazley J).

[1148] As his Honour then was.

[1149] (1989) 20 FCR 217 at 281 (French J).

terpreted in view of the scope and purpose of the legislation, over the "rules" derived from the closest analogue from the common law.

669. In the current matter, the relevant words in section 46PO(4)(d) are as follows:

> If the court concerned is satisfied that there has been unlawful discrimination by any respondent, the court may make such orders (including a declaration of right) as it thinks fit, including any of the following orders or any order to a similar effect: ...(d) an order requiring a respondent to pay to an application damages by way of compensation for any loss or damage suffered because of the conduct of the respondent.

670. Section 46PO(4) was inserted into the AHRC Act by the Human Rights Legislation Amendment Act (No. 1) 1999 as part of amendments to the legislation which transferred the hearing function from the then Human Rights and Equal Opportunity Commission to the Federal Court.

671. The Explanatory Memorandum to the *Human Rights Legislation Amendment Bill* (No.1) 1999 states:[1150]

> Subsection (4) [of new section 46PO] *sets out a non-exhaustive list of orders which the Federal Court may make* if it is satisfied that there has been unlawful discrimination by any respondent. The list of orders is modelled on the list of determinations, in paragraph 103(1)(a) of the DDA, that HREOC may currently make, and *it is not intended to limit the Court's discretion to make any orders that it considers appropriate in the circumstances of the individual case before it.*

672. To the extent that there may be other operative principles (other than those relating to tort) for determining damages, these are to be derived from the scope and purpose of the legislation and the wording of the provision itself, in particular the phrase "because of" in section 46PO(4)(d) of the AHRC Act[1151] and the Courts special responsibility, when construing beneficial legislation designed to protect human rights (such as the RDA and AHRC Act), to take into account, and give effect to, the purposes and objects of the legislation.[1152]

[1150] Explanatory Memorandum at paragraph 200 (emphasis added).

[1151] *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334 at 369-370 [132] (Besanko and Perram JJ).

[1152] *Waters v Public Transport Corporation* (1991) 173 CLR 349. Subsequently endorsed in *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334 at 342 [26] (Kenny J).

I.2.2 Causation and Remoteness

673. The first element to be established in assessing damages is that of causation. In *Fleming's Law of Torts*,[1153] Beazley J writes that this inquiry involves the factual question of whether the relation between the respondent's breach of duty and the applicant's injury is one of cause and effect in accordance with the objective notions of physical sequence.

674. The second inquiry, according to Beazley J, involves the question of whether, or to what extent, the respondent should have to answer for the consequences to which the wrongful conduct has contributed. As the consequences of an act theoretically stretch into infinity, some limitation must be placed on legal responsibility in order to achieve a balance between the claim to compensation and the imposition of an excessive burden on human activity if a wrongdoer were held liable for all ensuing consequences.

675. Beazley J goes on to note that the "but for" test is a necessary but not always a sufficient condition of legal responsibility. The wrongful conduct must also pass an additional test as "proximate" or "legal" cause.

676. This view is supported by the High Court in *March v Stramare*,[1154] where the majority held that the "but for" test was neither an exclusive nor comprehensive test of causation but accepted that as a negative criterion, it had an important role to play. The Court adopted a "common sense" approach to causation. According to this approach, the cause of a particular occurrence is determined "by applying common sense to the facts of each case". The question to be asked was "whether a particular act or omission can fairly and properly be considered a cause of the accident?"

677. The statutory objects and purposes may also inform the proper approach to causation.[1155]

678. In *Clarke v Nationwide News Pty Ltd trading as The Sunday Times*, Barker J said:[1156]

[1153] 10th Edition, 2011 at 227 [9.20].

[1154] (1991) 171 CLR 506 at 508 (Mason CJ); at 522 (Deane J) at 524 (Toohey J) at 525 (Gaudron J).

[1155] *Richardson v Oracle Corporation Australia Pty Ltd* [2014] FCAFC 82 at [130] (Besenko and Perram JJ). See also *I&L Securities Pty Limited v HTW Valuers (Brisbane) Pty Limited* (2002) 210 CLR 109 at 119 [26] (Gleeson CJ), *Allianz Australia Insurance Limited v GSF Australia Pty Limited* (2005) 221 CLR 568 at 596-598 [96]-[100] (Gummay, Hayne and Heydon JJ), *Travel Compensation Fund v Tambree* (2005) 224 CLR 627 at 642-643 [45] (Gummay and Hayne JJ).

> It is generally accepted that an order for damages by way of compensation for loss or damage suffered "because of" the conduct of a respondent may be made under s46PO(4)(d) where actual loss or damage has been suffered and there is an appropriate causal relation between the loss or damage suffered and the conduct of the respondent.

679. In their text book, Pearce and Geddes write:[1157]

> To determine whether certain action has been taken or consequences have flowed 'by reason of' specific conduct, a practical application of ordinary causation principles is required: *Macabenta v Minister of State for Immigration and Multicultural Affairs* (1998) 90 FCCR 202 at 213; 159 ALR 465 at 475. 'The phrase implies a relationship of cause and effect'; per Lockhart J in *Human Rights and Equal Opportunity Commission v Mt Isa Mines Ltd* (1993) 46 FCR 301 at 321-2; 118 ALR 80 at 99. See also *Commonwealth v Stamatov* (1999) 58 ALD 15 at 25; *Republic of Croatia v Snedden* (2010) 84 ALJR 334 at 340; 265 ALR 621 at 629.

680. As noted above, the principals of remoteness of damages in the law of torts is the starting point.

681. It is trite law that damage must be foreseeable extends to the type of damage sustained, as well as to the manner in which the damage was caused.

682. Provided that the type of injury sustained by the applicant was foreseeable in the sense of not far-fetched or fanciful, the respondent will be liable for that damage even though the respondent could not have foreseen the particular damage or the extent of the damage that would be sustained.[1158]

I.2.3 Quantum

683. The courts have also emphasised that ultimately the amount awarded depends on the facts of each case and is a matter of judgment for the judicial officer hearing the matter. In *Hall v Sheiban*[1159], Wilcox J cited with approval the following statement of May LJ in *Alexander v Home Office*[1160]*:*

[1156] (2012) 201 FCR 389 at 441 [337].

[1157] "*Statutory Interpretation in Australia*" (2011, 7th ed) page 378.

[1158] *Tame v New South Wales* (2002) 211 CLR 317 at 332-333 [16] (Gleeson CJ); see also *Overseas Tankship (UK) Ltd v The Miller Steamship Co* or *The Wagon Mound (No 2)* [1967] 1 AC 617 at 643.

[1159] (1989) 20 FCR 217 at 256.

[1160] [1988] 1 WLR 968.

> As with any other awards of damages, the objective of an award for unlawful racial discrimination is restitution … For the injury to feelings however, for the humiliation, for the insult, it is impossible to say what is restitution and the answer must depend on the experience and good sense of the judge and his assessors. Awards should not be minimal, because this would tend to trivialise or diminish respect for the public policy to which the Act gives effect. On the other hand, just because it is impossible to assess the monetary value of injured feelings, awards should be restrained. To award sums which are generally felt to be excessive does almost as much harm to the policy and the results which it seeks to achieve as do nominal awards. Further, injury to feelings, which is likely to be of a relatively short duration, is less serious than physical injury to the body or the mind which may persist for months, in many cases for life.

684. Wilcox J also noted:[1161]

> damages for such matters as injury to feelings, distress, humiliation and the effect on the claimant's relationships with other people are not susceptible of mathematical calculation. The assessor of damages must make a judgement as to an appropriate figure to be allowed in respect of these figures. But to say this is not to denigrate the importance of such non-economic factors in the assessment of damages. It may be unfortunate that the law knows no other way of recognising, and compensating for, such damage; but this is the fact. To ignore such items of damage simply because of the impossibility of demonstrating the correctness of any particular figure would be to visit an injustice upon a complainant by failing to grant relief in respect of a proved item of damage.

685. Following *Hall v Sheiban*,[1162] a succession of discrimination cases have recited with approval the particular principles with respect to the assessment of damages. That damages for non-economic loss should not be minimal as this would tend to trivialise or diminish respect for the public policy behind anti-discrimination legislation.[1163]

686. In cases where the medical or expert evidence demonstrates significant psychological trauma, the awards for damages have been much higher than those were there is no medical or expert evidence of damage or where the damage does not result in signif-

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[1161] (1989) 20 FCR 217 at 256.

[1162] (1989) 20 FCR 217.

[1163] This is a concept which originally came from *Alexander v Home Office* [1988] WLR 968 at 975; see also: *Wattle v Kirkland* [2002] FMCA 135 (Driver FM); *Evans v National Crime Authority* [2003] FMCA 375 (Raphael FM); *Mayer v Australian Nuclear Science and Technology Organisation* (2003) FMCA 209 (Driver FM); *Phillis v Mandic* [2005] FMCA 330; and *Frith v The Exchange Hotel* (2005) 191 FLR 18 (Rimmer FM).

icant psychological trauma.[1164] As Kenny J noted in *Richardson v Oracle*, these cases assisted and gave guidance to the appropriate assessment of damages.[1165]

687. Black CJ and Tamberlin J[1166] considered that there was no unstated limitation on the entitlement to damages under section 46PO(4)(d) of the AHRC Act in relation to what a reasonable person would have anticipated.

I.2.4 Aggravated damages

(a) Availability

688. In *Hall v Sheiban*[1167] the Federal Court held that aggravated damages may be awarded in discrimination cases. In that case, Lockhart J cited with approval the statement of May LJ in *Alexander v Home Office* that aggravated damages may be awarded where the respondent behaved "high handedly, maliciously, insultingly or oppressively in committing the act of discrimination."[1168]

(b) General Principals and purpose

689. Aggravated damages are damages awarded for a tort as compensation for the applicant's mental distress where the manner in which the respondent has committed the tort, or the respondent's motives in doing so, or the respondent's conduct subsequent to the tort has upset or outraged the applicant.[1169] Such conduct or motive "aggravates" the injury done to the applicant and therefore warrants a greater or additional *compensatory* sum. Used in this sense, aggravated damages are "compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like".[1170]

[1164] See *Tan v Xenos* (No 3) [2008] VCAT 584 (Harbison J); *Lee v Smith & Ors* [2007] FMCA 59 (Connolly FM); *Willett v State of Victoria* (2013) 42 VR 571 (Tata, Osborn and Priest JJA); *Swan v Monash Law Book Co-Operative* [2013] VSC 326; 235 IR 63 (Dixon J).

[1165] (2014) 223 FCR 334 at 340 [16] (Kenny J).

[1166] *South Pacific Resort Hotels Pty Ltd v Trainor* (2005) 144 FCR 402 at 411 [49]; see also *Richardson v Oracle Corporation Australia Pty Ltd* (2014) 223 FCR 334 at 366 [115] (Kenny J).

[1167] (1989) 20 FCR 217.

[1168] (1989) 20 FCR 217 at 239 (Lockhart J).

[1169] R P Balkin & J L R Davis, *Law of Torts* (4th ed, 2009), 757-758.

[1170] R P Balkin & J L R Davis, *Law of Torts* (4th ed, 2009), 757; see especially *Lamb v Cotogno* (1987) 164 CLR 1 at 8.

690. Windeyer J in Uren v John Fairfax and Sons Pty Ltd stated: [1171]

> aggravated damages are given to compensate the plaintiff where the harm done to him by a wrongful act was aggravated by the manner in which the act was done

691. In the often quoted classification of damages by Lord Diplock:[1172]

> aggravated damages were described as "additional compensation for the injured feelings of the plaintiff where his sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or the motive with which the defendant did it.

692. Aggravated damages may also be awarded when the respondent's conduct (after the complaint was made and up to the time of hearing) added to the applicant's distress and hurt.[1173]

693. In the case of *Elliott v Nanda*, Moore J explored a range of authorities, including discrimination cases, and stated that it is:

> ….generally accepted that the manner in which a defendant conducts his or her case may exacerbate the hurt and injury suffered by the plaintiff so as to warrant the award of additional compensation in the form of aggravated damages.[1174]

694. His Honour then stated that "a wide variety of matters may affect the decision to award aggravated damages in any particular case"[1175] and noted that an award of aggravated damages may be given where the respondent conducts "his or her case in a manner which is unjustifiable, improper or lacking in bona fides".[1176]

[1171] (1966) 117 CLR 118 at 149 (Windeyer J); cited with apparent approval in *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 4 [6]-[7] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[1172] *Cassell & Co v Broome* (1972) AC 1027, see, for example, *McDonald v State of New South Wales* [1999] NSWSC 350 at [47] (Grove J).

[1173] *Cross v Hughes* (2006) 233 ALR 108 at [30].

[1174] (2001) 111 FCR 240 at 297 [180] (Moore J).

[1175] (2001) 111 FCR 240 at 297 [181] (Moore J).

[1176] (2001) 111 FCR 240 at 297 [182] (Moore J).

I.2.5 Exemplary damages

(a) Availability

695. In *Uren v John Fairfax & Sons Pty Ltd,*[1177] the High Court affirmed that in actions for tort involving personal wrong, exemplary damages may be awarded for conduct of a sufficiently reprehensible kind.

696. Menzies J's summation of the law in Australia in relation to exemplary damages was:[1178]

> Where an action is based upon a personal wrong and the defendant has acted arrogantly, mindful only of its own interests and, to use the phrase of Knox CJ, 'in contumelious disregard' of the rights of the plaintiff, damages may be given of a vindictive and uncertain kind, not merely to repay the plaintiff for temporal loss but to punish the defendant in an exemplary manner for his outrageous conduct (see *Finlay v Chirney* (1888) 20 QBD at 504).

697. Windeyer J in the same case said, in relation to the expression "a conscious wrongdoing in contumelious disregard of another's rights" that:[1179]

> I select that particular phrase out of many, because it has been used more than once in this Court. It appears in the first edition of *Salmond on Torts*, p102. It is not much removed in meaning from the cynical disregard of a plaintiff's rights by a calculating defendant in Lord Devlin's illustration.[1180]

698. Basten JA remarked in *Nationwide News Pty Ltd v Naidu*[1181] in relation to the availability of remedies for similar conduct under the *Anti-Discrimination Act* 1977 (NSW) and the *Racial Discrimination Act* 1975 (Cth), that "the existence of statutory remedies was not necessarily inconsistent with a general law liability for intentional infliction of a recognisable psychiatric injury". This proposition suggests that the existence of a statutory remedy does not preclude actions at common law.

699. Further, the list of specified orders in section 46PO(4) is not exhaustive as demonstrated by the use of the words "including" and "as the court sees fit". This suggests

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[1177] (1965-1966) 117 CLR 118 (McTiernan, Taylor, Menzies, Windeyer and Owen JJ).

[1178] *Uren v John Fairfax & Sons Pty Ltd* (1965-1966) 117 CLR 118 at 47 (Menzies J).

[1179] (1965-1966) 117 CLR 118 at 154 (Windeyer J).

[1180] The phrase "conscious wrongdoing in contumelious disregard of another's rights" appears to have been used in case law originally by Knox CJ in *Whitfield v De Lauret & Co Ltd* (1920) 29 CLR 71 at 77.

[1181] (2007) 71 NSWLR 471 at 525-526 [380].

that the Court may, indeed, exercise the power to make orders for exemplary damages in appropriate cases.[1182]

(b) General Principles

700. Exemplary damages go beyond compensation and are awarded as a punishment to the guilty to deter from any such similar actions or decisions in the future.[1183]

701. Such damages are not compensatory in nature.

702. Windeyer J, in *Uren v John Fairfax and Sons Pty Ltd* noted the difference between aggravated and exemplary damages: [1184]

> aggravated damages are given to compensate the plaintiff where the harm done to him by a wrongful act was aggravated by the manner in which the act was done; exemplary damages, on the other hand, are intended to punish the defendant, and presumably to serve one or more of the objects of punishment – moral retribution or deterrence.

703. According to the full High Court in *Lamb v Cotogno*,[1185] the object or at least the effect of exemplary damages is not wholly punishment and the deterrence which is intended extends beyond the actual wrongdoer and the exact nature of his wrongdoing. It is an aspect of exemplary damages that they serve to assuage any urge for revenge felt by victims and to discourage any temptation to engage in self-help likely to endanger the peace. When exemplary damages are awarded in order that a respondent shall not profit from her or his wrongdoing or even where they are described as a windfall to the applicant, the element of appeasement, if not compensation, is nonetheless present beyond the respondent to other like-minded persons, and it also extends generally to conduct of the same reprehensible kind.

[1182] *McGlade v Lightfoot* (2002) 124 FCR 106 at 123 [80] (Carr J); see also *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389 at 442 [340] (Barker J).

[1183] *Lamb v Cotogno* (1987) 164 CLR 1 at 11 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ), quoting from *Wilkes v Wood* (1763) 98 ER 489 at 498-499; see also *Gray v Motor Accident Commission* (1998) 196 CLR 1 at [15] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[1184] (1966) 117 CLR 118 at 149. Walters FM also observed that this passage was quoted with apparent approval in *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 4 [6]-[7] (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[1185] (1987) 164 CLR 1 at 13 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

704. Exemplary damages may be awarded where the actual damage caused by the conduct is minimal. There is no necessary proportionality between compensatory damages and exemplary damages.

705. The considerations that enter in the assessment of exemplary damages are quite different from the considerations that govern the assessment of compensatory damages. While Brennan J was in the minority in *XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd,*[1186] the statement of the principles applicable to exemplary damages has been subsequently referred to with approval.[1187]

706. Brennan J was of the view that, although the amount awarded by the jury was large, it must be plain that no reasonable jury properly applying the relevant principles could have awarded so large a sum before an appellate court could interfere with the verdict.

707. As stated by Brennan J:[1188]

> As an award of exemplary damages is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again, the considerations that enter into the assessment of exemplary damages are quire different from the considerations that govern the assessment of compensatory damages. There is no necessary proportionality between the assessment of the two categories.

708. The social purpose to be served by an award of exemplary damage is, as Lord Diplock said in *Broome v Cassell & Co:*[1189]

> "to teach a wrongdoer that tort does not pay". The purpose of restraint looms large in the present case. The jury were entitled to take into account that Caltex and XL were competitors in an industry in which, notoriously, competition for markets and for outlet sites has been intense. The jury were therefore entitled to form the view that a risk of repetition of Caltex's conduct in spiking a competitors tanks was quite unacceptable, for the intensity of commercial competition might lead to violence and counter-violence amongst competitors if legal process proved inadequate to suppress the use of force. And if the jury formed the view that it was desirable to ensure that Caltex did not again spike the tanks of a competitor, the jury were entitled to assess exemplary damages in an amount that would be likely to have a deterrent effect – sufficient to make Caltex smart.

[1186] (1985) 155 CLR 448 at 471 (Brennan J).

[1187] *Lamb v Cotogno* (1987) 164 CLR 1 at 9 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

[1188] (1985) 155 CLR 448 at 471 (Brennan J).

[1189] [1972] AC, at p 1130.

709. Where exemplary damages may properly be awarded to deter a tortfeasor, evidence of his means is material not only to show that he can afford to satisfy a substantial judgment or to show that he has acted on contumelious disregard of the plaintiff's rights by taking advantage of his wealth, but to show what sum will be a sufficient deterrent against repetition of the conduct that attracts the award.

710. The focus of the inquiry in considering whether to award exemplary damages is on the wrongdoer, not on the party who was wronged.[1190]

711. Exemplary damages can be awarded even where the respondent's conduct is not malicious. The High Court in *Lamb v Cotogno*[1191] said that, while there could be no malice without intent, the intent or recklessness necessary to justify an award of exemplary damages may be found in contumelious behaviour which falls short of being malicious or is not aptly described by the use of that word.

712. As Wilcox, O'Loughlin and Lindgren JJ explained in *Sanders v Snell*,[1192] exemplary damages will only be awarded if a Court is satisfied that the quantum of the compensatory damages awarded has insufficient punitive force. Exemplary damages will be awarded "if, but only if", the sum awarded as compensatory damages is inadequate to punish the wrongdoer for his or her conduct.

I.2.6 Quantum of damages claim

(a) Ordinary damages

713. As set out in the Annexure, the three Applicants have suffered extensive psychological stress and distress which is directly attributable to the events on Palm Island in November 2004, as identified by the psychologist, Mr Stephen Ralph.[1193]

714. Mr Wotton has experienced high levels of psychological distress following his arrest in 2004. He reported experiencing periods of depression, anxiety and chronic sleep problems following his arrest up until his release from prison in 2010".[1194]

[1190] *Gray v Motor Accident Commission* (1998) 196 CLR 1 at 7 (Gleeson CJ, McHugh, Gummow and Hayne JJ).

[1191] (1987) 164 CLR 1 at 13 (Mason CJ, Brennan, Deane, Dawson and Gaudron JJ).

[1192] (1997) 73 FCR 569 at 601.

[1193] Exhibit A9 and A10.

[1194] Exhibit A9, page 19.

715. Mrs Agnes Wotton has continued to suffer and "the experience of the emotional upheaval and trauma associated with the riot and its aftermath remained firmly imprinted upon her".[1195]

716. Ms Cecelia Wotton "displays a range of symptoms consistent with post-traumatic stress disorder. These symptoms include recurrent depressed mood, suicidal ideation, intrusive thoughts, and chronic anxiety as evidenced by a fear of being alone and recurrent nightmares. She presented as suffering from guilt and low self-esteem as a result of her difficulties in caring for her children, in circumstances where she has been burdened by a level of psychological distress that has significantly undermined her capacity to parent her children".[1196]

717. The three Applicants gave incontrovertible evidence about the ongoing trauma that they have suffered and it is exactly this type of loss and damage that the compensation provisions of section 46PO(4)(d) were designed to acknowledge, recognise and compensate. They have received no treatment or acknowledgement of their suffering and each has a lengthy, entrenched condition.

718. In light of the principles set out above and the degree and longevity of the untreated trauma of all three Applicants, it is submitted that consistent with the recent case law, an amount of $200,000 for each Applicant would be a suitable amount for general damages.

719. There is no claim for economic loss.

(b) Aggravated damages

720. In relation to aggravated damages, the conduct of the QPS during November 2004 towards the whole Palm Island community, including the three Applicants, showed a complete disregard for their rights and their expectations. There is a substantial basis for an award of aggravated damages.

721. It is submitted that the following events support a finding that it is appropriate to award aggravated damages in these proceedings:

[1195] Exhibit A9, page 29

[1196] Exhibit A9 at page 25.

a. the conduct of the second inquest by Acting State Coroner Christine Clements in September 2006 which led to the *Palm Island Review* being conducted and delivered to the CMC in November 2008;[1197]

b. contrary to recommendations of the CMC, no police officer faced any disciplinary action;[1198]

c. in August 2011, each of Inspector Williams, DI Webber, and DSS Kitching received managerial guidance and these processes were not revealed publicly until this hearing;[1199]

d. no member of the QPS was charged with criminal proceedings in relation to Mulrunji's death or the subsequent investigation, except for SS Hurley;[1200]

e. DS Robinson was awarded the top police bravery medal, the Queensland Police Valour Award, for his actions on Palm Island from 26 to 29 November 2004;[1201]

f. various other police officers received "meritorious service awards"[1202] from the Police Commissioner for their actions on Palm Island and some participated in a formal ceremony when the framed certificate was handed to them and they were publicly acknowledged for their contribution; [1203]

g. the speed with which the arrests and charges were brought against Mr Wotton and Mrs Agnes Wotton and the outcome of those processes compared with the dilatory process taken before SS Hurley was charged on 5 February 2007.[1204]

722. These matters have been compounded by the ongoing wilful blindness of the Respondents to their discriminatory actions and the ongoing loss and damage to the Applicants and the Group Members by their defence of these proceedings and re-

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[1197] 3FASOC: 326-330; ASF: 331.

[1198] 3FASOC: 331(a), 334-336; ASF: 347, 352.

[1199] 3FASOC: 337.

[1200] 3FASOC: 331(b).

[1201] 3FASOC: 331(c); ASF:345.

[1202] T1316.22-23.

[1203] 3FASOC: 336, Exhibit A60.

[1204] 3FASOC: 332-333.

quiring the Applicants and their witnesses to relive their trauma in a public forum with significant media attention. It is clear from the Applicant's evidence that their suffering has been compounded by the ongoing lack of accountability for the impugned actions demonstrated by the police, as well as the utter lack of contrition or remorse.

723. It is submitted that an appropriate amount for each Applicant in aggravated damages is $200,000.

724. In relation to the claim for exemplary damages,[1205] it is submitted that this is an appropriate case where such an award should be made because of the depth and degree of the continuous and contumelious behaviour by the QPS. They have continued to refuse to accept any external criticism of their conduct, including the CMC and the two Coroners. They have continued to disregard the rights of the Applicants and the Group Members. Their decision making processes continue to be inward looking and protective of their own interests leading to a lack of recognition of the rights of the Palm Islanders which they have wilfully abrogated and continued to deny the impact of their conduct on those people.

725. It is submitted that an appropriate amount for each Applicant in exemplary damages is $200,000.

726. The quantum of damages and the identity of the individuals of the Group Members will be addressed at the next stage of the proceedings.

I.3. Apology

727. The Applicants seek an apology.[1206]

728. As Mr Ralph explained, the Applicants' damage has been prolonged and exacerbated due to the absence of an apology which would enable "the parties and community members to feel that their grievances have, to some extent, at least been acknowledged as being correct and allow them to move on from that point".[1207]

729. The terms of the apology should include a formal recognition of the findings of this Court in these proceedings, that the Applicants and the Group Members were re-

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[1205] 3FASOC:325.

[1206] OA: Relief: Order #2.

[1207] T634.33-T645.39.

quired to pursue this litigation because of wilful blindness of the Respondents for over 11 years and that the residents of Palm Island were entitled to appropriate levels of protection as other citizens living in Queensland and subject to the actions of the QPS.

730. The apology should be made in a formal, public ceremony on Palm Island by an appropriate senior politician or politicians, ideally the Premier and the Minister for Police, accompanied by the Commissioner of Police. These reflect the status and standing of the three people who went to Palm Island on Sunday 28 November 2004, after the fire.

731. Further, it should be published in a full page advertisement in at least *The Australian*, *The Courier-Mail* and *The Townsville Bulletin* on a Saturday and in the first eight pages of each paper.

C Ronalds SC **J Creamer**

Counsel for the Applicants
11 April 2016