FEDERAL COURT OF AUSTRALIA

Pearson v State of Queensland [2017] FCA 1096

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| File number: | QUD 714 of 2016 |
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| Judge: | **MURPHY J** |
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| Date of judgment: | 14 September 2017 |
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| Catchwords: | **PRACTICE AND PROCEDURE** - representative proceedings – application to open the class – application allowed – application for a common fund order – application allowed – whether notice of a common fund application must be given to class members before making such an order |
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| Legislation: | *Federal Court of Australia Act 1976* (Cth)*Aboriginals Preservation and Protection Act of 1939* (Qld) *Aboriginals Regulations of 1945* (Qld)*Aborigines’ and Torres Strait Islanders’ Affairs Act of 1965* (Qld)*Aborigines’ and Torres Strait Islanders’ Regulations of 1966* (Qld)*Islanders Regulations, 1946* (Qld)*Torres Strait Islanders Act of 1939* (Qld)Explanatory Memorandum, *Federal Court of Australia Amendment Bill 1991* (Cth)*Federal Court of Australia Amendment Bill 1991*, Commonwealth, House of Representatives, 14 November 1991, Second Reading (M Duffy - Attorney-General) |
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| Cases cited: | *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* (2017) 343 ALR 476; [2017] FCA 330*Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433*Farey v National Australia Bank Ltd* [2014] FCA 1242 *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* (2016) 245 FCR 191; [2016] FCAFC 148*Pathway Investments Pty Ltd v National Australia Bank Ltd* (Supreme Court of Victoria proceeding SCI 2010 6249) Australian Law Reform Commission, “Grouped Proceedings in the Federal Court”, Report No 46, 1988  |
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| Date of hearing: | Heard on the papers |
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| Date of last submissions: | 11 August 2017 |
|  |  |
| Registry: | Queensland |
|  |  |
| Division: | General Division |
|  |  |
| National Practice Area: | Commercial and Corporations |
|  |  |
| Sub-area: | Corporations and Corporate Insolvency |
|  |  |
| Category: | Catchwords |
|  |  |
| Number of paragraphs: | 53 |
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| Counsel for the Applicant: | Mr W A D Edwards |
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| Solicitor for the Applicant: | Bottoms English Lawyers |
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| Counsel for the Respondent: | Mr C Murdoch QC and Ms G Dann |
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| Solicitor for the Respondent: | Crown Law |

ORDERS

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|  | QUD 714 of 2016 |
|   |
| BETWEEN: | HANS PEARSONApplicant |
| AND: | STATE OF QUEENSLANDRespondent |

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| JUDGE: | MURPHY J |
| DATE OF ORDER: | 25 AUGUST 2017 |

THE COURT ORDERS THAT:

**Class Opening**

1. Pursuant to s 33K of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**), the Applicant have leave to amend the group definition in this proceeding by deletion of subparagraph 10 of the group definition in the Second Amended Originating Application filed 17 March 2017 and subparagraph 2(l) of the Amended Statement of Claim filed 17 March 2017.

**Common Fund**

1. Pursuant to ss 23 and 33ZF of the FCAA and rule 1.32 of the *Federal Court Rules 2011* (Cth), the Applicant and Group Members shall pay from any amounts for which the claims are settled or judgment is given in favour of the Applicant and Group Members:
	1. the costs and expenses of the proceeding;
	2. 20% of the amount for which the claims are settled or judgment is given (or such lower percentage as the Court considers reasonable at that time); and
	3. GST.
2. The Funding Terms (being Annexure A to these orders) further define and specify the amounts to be paid pursuant to Order 2.
3. Order 2 is subject to the provision of an undertaking by each of Litigation Lending Services Ltd, the Applicant and BE Law (Bottoms English Lawyers) to each other and to the Court that they will comply with their obligations under the Funding Terms (being those in **Annexure A**).

**Notices**

1. The parties shall file an agreed form of opt out notice, or competing versions of the opt out notice, in accordance with Orders 18 to 20 of the orders made on 24 May 2017 (**24 May 2017 Orders**). Following Court approval of the form of the opt out notice, the notice is to be sent to all claimants whose details are recorded in the electronic data base called “CPH Reparation” (Community and Personal Histories) held by the State of Queensland (being all persons who made application for compensation, whether or not such application was accepted).
2. The notice will be sent by the Respondent which will utilise a mail out service provider to conduct the mail out. The Respondent will advise the Applicant’s legal representatives of the identity of the mail out service provider by 8 September 2017. By 15 September 2017 the Applicant will provide to the mail out service provider details of all persons who have agreed to LLS’s funding terms to avoid duplication of notices in the mail out.
3. The Applicant will pay the cost of the mail out of the notices, and such costs will be costs in the cause.
4. Further to Orders 18 to 20 of the 24 May 2017 Orders:
	1. by 6 October 2017, at the time the Applicant provides a draft opt-out notice to the Respondent in accordance with Order 18 of the 24 May 2017 Orders, the Applicant shall also provide draft orders under s 33Y(3) as to how, in addition to the mail out provided in paragraphs 5 and 6 of this Order, the notice is to be given to Group Members;
	2. by 20 October 2017, at the time the Respondent responds to the draft opt-out notice in accordance with Order 19 of the 24 May 2017 Orders, the Respondent shall also provide a response to the draft orders under s 33Y(3); and
	3. by 3 November 2017, in the event that the parties are unable to agree on the form of the orders under s 33Y(3), they shall file and serve their competing versions and short submissions (no more than three pages) in support. Unless a party objects, the Court will decide the issue on the papers.
5. The parties have liberty to apply to the Court to vary the time for compliance with Orders 18 to 20 of the 24 May 2017 Orders, so as to ensure that the notices are published as soon as reasonably practicable.

**Other**

1. Liberty to apply on at least 3 days’ notice.
2. Costs be reserved.

**Annexure A**

**Funding Terms**

**A. Definitions**

1. The following definitions apply in these Funding Terms:

* 1. “**Administration Expenses**” means the cost of the administration of any scheme for the distribution of any Resolution Sum, including fees charged by and expenses paid by the administrator (being the person or entity appointed to administrate a scheme for the distribution of any Resolution Sum), including court fees, barristers’ fees, external photocopying fees, IT project management fees, data processing fees, process service fees, expert report fees, external costs consultants fees, interstate agents’ fees, travel and accommodation fees;
	2. **“Adverse Costs Order”** means any Costs Order made in favour of the Respondent against the Applicant in the Proceeding or in any subsequent proceeding brought by any Group Member against the Respondent in reliance on the findings made in any judgment in the Proceeding, in respect of costs of the Respondent incurred during the Funding Period;
	3. “**Applicant**” means Hans Pearson, and any other person who is a lead applicant or representative party in the Proceeding;
	4. “**Claims**” means the claims the Applicant and/or Group Members have or may have against the Respondent, primarily the State of Queensland, for relief in relation to the State’s withholding of wages from the Applicant and/or Group Members;
	5. “**Costs Order**” means an order made by a court requiring one or more parties to the Proceeding to pay the costs incurred by another party or parties to the Proceeding;
	6. “**Funder**” means Litigation Lending Services Limited of Level 26, 1 Bligh Street, Sydney NSW 2000 (the address for service of which will be above, or sprice@litlend.com.au);
	7. “**Funding Agreements**” means the funding agreement between the Funder and the Applicant and any funding agreements between the Funder and Other Funded Persons in relation to the Claims;
	8. “**Funding Limit**” means the amount stipulated in the Funding Agreements;
	9. “**Funding Period**” means the period commencing on the date of these orders and ending on the date of the judgment in respect of any Settlement approval application or judgment in the initial trial of the Applicant’s claim and the common issues, whichever is first to occur;
	10. “**Group Members**” means all persons who are identified as group members in the Proceeding, and who do not opt out of the Proceeding by the time specified by the Court for doing so;
	11. “**GST**” means goods and services tax;
	12. “**Independent Counsel”** means a barrister with at least fifteen (15) years of experience in litigation similar to the Proceeding and who is not affiliated in any way with the Applicant, the Lawyers or the Funder;
	13. “**Lawyers**” means the lawyers, BE Law (Bottoms English Lawyers Pty Ltd) (ACN 158 295 768), or any firm of lawyers appointed in their place by the Applicant after consultation with the Funder;
	14. “**Legal Costs Agreement**” means the agreement or agreements entered into between the Lawyers and the Applicant and Other Funded Persons for the Lawyers to act as lawyers to investigate and prosecute the Claims.
	15. “**Legal Costs and Disbursements**” means fees and disbursements charged by the Lawyers under the Legal Costs Agreement and “Terms of Engagement” (the latter being schedule 1 to the Funding Agreements).
	16. “**Legal Work**” means such advice, legal and administrative services which the Lawyers consider reasonably necessary to investigate and prosecute the Proceeding, as defined in the Legal Costs Agreement;
	17. **“Other Claims**” means claims Other Funded Persons have or may have against the Respondent for loss and damage caused to those Other Funded Persons by the conduct of the Respondent which claims are the same, similar, or related to the Claims;
	18. “**Other Funded Person**” means any person who has entered into a Funding Agreement, and whose Funding Agreement has not been terminated;
	19. “**Proceeding**” means the representative proceeding, Hans Pearson v State of Queensland (QUD714/2016) filed on 22 September 2016 in the Queensland Registry of the Federal Court of Australia;
	20. “**Project**” means the Project Investigation and the conduct of the Proceeding in order to achieve Resolution of the Claims and the Other Claims;
	21. “**Project Costs**” means those costs and expenses incurred at any time prior to the conclusion of the Funding Period, being:

(i) the Legal Costs and Disbursements charged by the Lawyers for all Legal Work;

(ii) the costs involved in the provision by the Funder of any security for costs;

(iii) any Adverse Costs Order paid by the Funder;

(iv) all of the Funder’s out of pocket costs and expenses paid or incurred in relation to the Project (including in relation to any consultants engaged by the Funder other than those already referred to in this definition);

(v) any costs associated with any scheme for the distribution of any Resolution Sum, including the costs of any Administrator which is appointed;

(vi) the costs of any subsequent proceeding brought by any Group Member against the Respondent in reliance on the findings made in any judgment in the Proceeding;

(vii) any GST payable on any taxable supply made by any entity as a result of the above costs or expense being incurred.

* 1. “**Project Investigation**” means:

(i) the Lawyers’ Legal Work performed in connection with the investigation of the Proceeding, the Claims and the Other Claims, and includes without limitation the Lawyers’ investigation into whether the Proceeding may be brought, its strengths and weaknesses and prospects of success, and;

(ii) work done by the Funder in obtaining access to material documents and statements concerning the Claims and the Proceeding from the Lawyers, including any documents obtained by way of discovery, subpoena or any other coercive power of the Court which may lawfully be accessed by the Funder for the purpose of investigating the evidentiary basis for the Claims (documentary and oral), collating the material documents and statements, monitoring the progress of the Proceeding, evaluating any Settlement offer, investigating, designing and implementing any Alternative Dispute Resolution Process for the resolution of the Claims and the Other Claims, other than through legal proceedings, investigating any other matter that the Funder determines is relevant to its financial interest in the Claims and the Proceeding; and investigating the capacity of the Respondents to meet any award or order made against them relating to the Claims and or Proceeding;

* 1. “**Resolution**” means when all or any part of the Resolution Sum is received and, where the Resolution Sum is received in parts, a “Resolution” occurs each time a part is received;
	2. “**Resolution Sum**” means the amount or amounts of money or the value of benefits for which (a) the Claims are Settled, or (b) for which judgment is given in favour of the Applicant in the Proceeding or (c) any subsequent proceeding brought by any Group Member against the Respondent in reliance on the findings made in any judgment in the Proceeding is Settled or for which judgment is given in favour of the Group Member and including (but not limited to): (A) any interest and costs recovered pursuant to a Costs Order or by agreement; (B) any ex gratia payments and (C) any payments in respect of the Claims where any Respondent (or any property, assets or liabilities of any Respondent) is, or comes under, the control of an external controller.
	3. “**Respondent**” means the State of Queensland and any other person or entity which the Lawyers recommend be joined as respondent to the Proceeding and in respect of whom the Funder accepts, in its absolute discretion and in writing, exposure to an Adverse Costs Order;
	4. “**Settlement**” means any settlement, compromise, discontinuance or waiver, except where approval of the Court is required, in which case it means any settlement, compromise, discontinuance or waiver with the approval of the court and "Settle," “Settles” or “Settled” shall be construed accordingly.

**B. Obligations of the Funder**

2. The Funder must fund the Project Costs of the Applicant and Group Members, by:

(a) paying to the Lawyers the Legal Costs and Disbursements charged by the Lawyers for all Legal Work (whether incurred before or during the Funding Period), up to the Funding Limit;

(b) paying the costs of any insurance covering an Adverse Costs Order;

(c) paying any Costs Order which the Court makes in the Proceeding against the Applicant or other Group Member in favour of the Respondent, in so far as those costs were incurred either before or during the Funding Period; and

(d) providing any security for costs in the Proceeding, in the form that the Court orders, or in the absence of any order, in such other form as the Funder determines and the Respondent accepts.

**C. Receipt and Application of Resolution Sum**

3. Any Resolution Sum will be received by the Lawyers and paid immediately into a trust account kept for that purpose.

4. If the Applicant or any Group Member obtains any Settlement or obtains any judgment in respect of the Claims, it will:

(a) treat any money, other asset or benefit received from the Respondent in connection with the Settlement or judgment as the Resolution Sum; and

(b) cause the money, or an amount being the reasonable market value of the asset or benefit, to be delivered to the Lawyers to be dealt with as part of the Resolution Sum.

5. Subject to any Court order, the Lawyers will:

(a) first, pay to the Funder out of the account referred to in paragraph 3 above all payments referred to in paragraph 6 below;

(b) second, pay to themselves any unpaid portion of the Legal Costs and Disbursements (including any uplift fee payable on “Lawyers Professional Fees” pursuant to the Legal Costs Agreement) and any amounts in relation to GST;

(c) third, pay all Administration Expenses; and

(d) fourth, distribute the balance to the Group Members on a pro rata basis by reference to the Claims of all Group Members in accordance with any distribution scheme approved by the Court.

**D. Costs and Commission**

6. Upon Resolution, the Funder or its nominee shall be paid the following amounts from any Resolution Sum, prior to any distributions to Group Members:

(a) an amount equal to the Project Costs (including the monies paid, or payable by the Funder pursuant to paragraph 2 above); and

(b) an amount, as consideration for the funding of the Proceeding, being 20% of any Resolution Sum, or such other lower percentage as the Court considers reasonable.

(c) an additional amount, on account of GST, being the amount obtained by multiplying the prevailing rate of GST (currently 10%) by an amount equal to the consideration to be received by the Funder for any taxable supply by the Funder under or in connection with these Funding Terms.

7. The amounts referred to in paragraph 6 above will not become due or owing by the Group Members to the Funder unless and until Resolution.

**E. Relationship Between the Applicant, Lawyers and Funder**

8. The Lawyers’ professional duties are owed to the Applicant and not to the Funder.

9. Subject to paragraphs 10 and 11, the Funder will give the Lawyers day-to day instructions in respect of all matters concerning the Claims.

10. The Applicant has the right at any time to give instructions concerning the Claims which override any instructions given by the Funder.

11. Subject to paragraph 12 below, if the Lawyers notify the Funder and the Applicant that the Lawyers believe that circumstances have arisen such that they may be in a position of conflict with respect to any obligations they owe to the Applicant and those they owe to the Funder, then the Lawyers’ obligations to the Applicant prevail (and for the avoidance of doubt, the Lawyers can continue to offer advice to and take instructions from the Applicant in such circumstances).

12. The Lawyers will:

(a) keep the Funder fully informed of all matters concerning the Claims and the Project, including any mediation and settlement discussions (and, for the avoidance of doubt shall immediately inform the Funder of all Settlement offers or offers to engage in any alternative dispute resolution process received from the Respondent and allow the Funder the opportunity to attend any such alternative dispute resolution process agreed with any Respondent);

(b) promptly provide to the Funder any document or information reasonably requested by the Funder;

(c) ensure that the Applicant and the Funder are given all necessary information in order to facilitate informed instructions (including, for the avoidance of doubt any information which has or may have a material impact on the Claims, the Proceeding, or the potential for any judgment sum to be recovered);

(d) unless specifically prohibited by the terms of a Court order or another professional obligation, provide to the Funder a copy of any document obtained in any Proceeding by way of discovery, subpoena or any other coercive power of the Court, subject to the Funder’s, its officers and employees’, implied undertaking given to the Court.

13. The Funder will:

(a) implement its Conflicts Management Policy so as to comply with the *Corporations Amendment Regulation 2012 (No. 6)* (Cth);

(b) provide the Applicant with timely and clear disclosure of any material breach of the *Corporations Amendment Regulation 2012 (No. 6)* (Cth);

(c) not retain the Lawyers as their solicitors for any purpose connected with the Proceeding.

**F. Confidentiality**

14. The Funder shall strictly maintain the confidentiality of any information provided to the Funder by the Applicant or the Lawyers for a purpose connected to the Proceeding, and shall adopt proper and effective procedures for maintaining the confidentiality and safe custody of the information.

15. Where any information is provided to the Funder, the Funder shall:

(a) adopt proper and effective procedures for maintaining the confidentiality and safe custody of the information;

(b) ensure that access to the information is only provided to the Funder’s staff who are engaged in the functions for which the information was provided to the Funder;

(c) only use the information for purposes for which the information was provided; and

(d) not disclose the information contained therein to any person other than the Lawyers or counsel retained in the Proceeding.

**Dispute Resolution**

16. If there is a disagreement between the Funder and the Applicant as to whether the Proceeding should be Settled, or the appropriate terms for Settlement of the Proceeding the dispute will be referred to counsel for advice on whether, in counsel’s opinion, Settlement of the Proceeding or Claims on the terms and in the circumstances identified by the Applicant, the Funder or both, is reasonable in the circumstances, for the purposes of which:

(a) the Applicant must provide notice of any objection to the proposed Settlement within 5 business days of receiving advice from the Lawyers about a proposed Settlement, and:

(i) upon receiving the objection referred to in sub-clause, the Lawyers shall brief counsel within 5 business days of receiving the objection;

(ii) in the first instance counsel will be the most senior counsel of those retained by the Lawyers in respect of the Proceeding and/or Claims concerned (or, if no counsel has been retained, then Independent Counsel appointed and suitably briefed by the Lawyers);

(iii) counsel may proceed as he or she sees fit to inform himself or herself before forming and delivering his or her opinion, and shall have regard to the matters set out in the Schedule. Counsel may give his or her opinion orally or in writing;

(iv) if counsel’s opinion is that the Settlement is reasonable then the Applicant agrees that the Lawyers will be instructed to do all that is necessary to settle the Proceeding, provided that any necessary approvals from the Court to the Settlement are sought and obtained;

(v) the costs of counsel in providing an opinion under this sub-clause will be paid by the Funder and will form part of the Project Costs;

(b) if the Applicant does not provide notice of objection to the proposed Settlement within the time specified in sub-clause (b), the Lawyers shall take all action necessary to implement the Settlement.

17. If there is a disagreement between the Funder and the Applicant about any appeal of the Proceeding, the addition or removal of Respondents to or from the Proceeding, the termination of the Lawyers’ appointment, or the appointment of alternative Lawyers:

(a) a party will give the other notice of the existence of that dispute. Within 7 days of the receipt of that notice, each party, either personally or through their nominated representative, will meet and discuss the dispute with a view to agreeing a resolution to it;

(b) So long as the dispute does not give rise to a conflict between the interests of the Applicant and the interests of other Group Members, the Lawyers may act as representatives for the Applicant, but under no circumstances will the Lawyers act as representatives for the Funder;

(c) If, within 14 days of receipt of the notice of a dispute issued under sub-clause (a), that dispute has not been resolved, either party may refer that dispute to mediation, to be conducted by a mediator agreed by both parties or, failing agreement, a person nominated by the President of the Queensland Law Society;

(d) The mediation will be conducted in a manner and at a place specified by the person appointed as mediator, and must be completed within 14 days of the appointment of the mediator, or one month from the date on which the dispute was referred to mediation (whichever is later). The costs of the mediator will be shared by the parties equally;

(e) If the dispute is not resolved within the time specified above, then, within 40 days of the date on which the dispute was referred to mediation, either party to the dispute may issue a notice referring the dispute to an independent third party for determination, and the independent third party will be a person agreed between the Applicant and the Funder, or failing agreement, a person nominated by the President of the Queensland Law Society;

(f) the determination by the independent person will be final and binding, and the parties to the dispute will pay, in equal shares, the costs of the Determination.

18. If there is a disagreement between the Funder and the Applicant regarding the Claims and/or Proceeding other than in respect of matters the subject of clauses 16 and 17, the dispute will be referred to counsel, who will issue a binding Determination of the dispute, and:

(a) the Lawyers shall brief counsel within 5 business days of receiving notice of the dispute from any party;

(b) in the first instance counsel will be the most senior counsel of those retained by the Lawyers in respect of the Proceeding and/or Claims concerned. If no counsel has been retained, then independent counsel will be appointed and suitably briefed by the Lawyers;

(c) the determination will be final and binding; and

(d) the parties to the dispute will pay, in equal shares, the costs of the Determination.

**Termination**

19. The funding arrangements under these Funding Terms may only be terminated by order of the Court, granted on application made by the Applicant, the Funder or a Group Member, upon notice given to the Applicant, the Funder and such other persons as ordered by the Court.

20. If an application is made by the Funder under paragraph 19 above, and the Court grants that application, then (subject to any contrary order of the Court):

(a) the Funder will not be entitled to receive any payment from any Resolution Sum pursuant to paragraph 6(b) above;

(b) the Funder will continue to be entitled to receive payment from any Resolution Sum pursuant to paragraph 6(a) and 6(c) above;

(c) all obligations of the Funder under these Funding Terms will cease on the date the Funder’s termination becomes effective, save for the following obligations accrued to the date of termination:

(i) payment of any outstanding Project Costs incurred up to the date of termination;

(ii) indemnification of the Applicant and Group Members for any Legal Costs and Disbursements reasonably incurred and payable to the Lawyers up to the date of termination; and

(iii) payment of any quantified Costs Order against the Applicant and any Group Members in the Proceeding in respect of costs which arise in, or are attributed to, the period ending on the date the Funder’s termination becomes effective.

21. If an application is made by the Applicant or a Group Member under paragraph 19 above, and the Court grants that application, then (subject to any contrary order of the Court):

(a) the Funder will continue to be entitled to receive payment from any Resolution Sum pursuant to paragraph 6 above;

(b) all obligations of the Funder under these Funding Terms will cease on the date the Funder’s termination becomes effective, save for the following obligations accrued to the date of termination:

(i) payment of any outstanding costs pursuant to paragraph 2 above incurred up to the date of termination;

(ii) indemnification of the Applicant and Group Members for any Legal Costs and Disbursements reasonably incurred and payable to the Lawyers up to the date of termination; and

(iii) payment of any quantified Costs Order against the Applicant and any Group Members in the Proceeding in respect of costs which arise in, or are attributed to, the period ending on the date the Funder’s termination becomes effective.

**Funding Agreements and Legal Costs Agreements**

22. These Funding Terms prevail over any inconsistent provision in the Funding Agreements.

23. These Funding Terms prevail over the terms of the Legal Costs Agreements to the extent of any inconsistency.

**SCHEDULE**

**Criteria to be applied by Counsel in giving an Opinion on a Proposed Settlement**

1. In reviewing a proposed Settlement pursuant to sub-clauses 14(a) of the Funding Terms, counsel must be satisfied that the Settlement will be fair and reasonable, taking into account the Claims that will be the subject of the Settlement and any potential conflicts of interest between the Funder, the Lawyers and the group members whose Claims and are subject to the proposed Settlement.
2. In satisfying himself or herself that the proposed Settlement is fair and reasonable, counsel should take into account, among other things, the following factors:
3. the amount offered to each group member;
4. the prospects of success in the Proceeding (i.e. the weaknesses, substantial or procedural, in the case advanced by the Representative);
5. the likelihood of the group members obtaining judgment for an amount significantly in excess of the proposed Settlement sum;
6. whether the proposed Settlement sum falls within a realistic range of likely outcomes;
7. the attitude of the group members to the proposed Settlement;
8. the likely duration and cost of the Proceeding if continued to judgment;
9. the terms of the Funding Terms about the procedure to be applied in reviewing and deciding whether to accept any Settlement offer, including any factors that will and will not be taken into account in deciding to Settle;
10. whether the Funder might refuse to continue to fund the Proceeding if the proposed Settlement does not take place; and
11. whether the proposed Settlement involves any unfairness to any group member or any categories of group members for the benefit of others.
12. Counsel should also take into account the potential for conflicts of interest between group members in accordance with the test applied by Jessup J in *Darwalla Milling Co Pty Ltd* v *F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322 at [41], which relevantly states:

“*I propose to turn then to the question whether the settlement, including the distribution scheme, involves any actual or potential unfairness to any group members, or categories of group members, having regard to all relevant matters, including whether the overall settlement sum, even if reasonable as such, involves unfair compromises by some members, or categories of members, for the benefit of others, and whether the distribution scheme fairly reflects the apparent or assumed relative losses suffered by particular members, or categories of members. Any consideration of the fairness and reasonableness of the settlement in the present case must take into account not only the overall settlement sum and its relationship with the amount that might be considered a best possible outcome after a successful trial, but also the structure and workings of the scheme by which that sum is proposed to be distributed amongst group members. The fairness and reasonableness of the settlement, from the point of view of any one group member, will necessarily depend on both of these factors.*”

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

MURPHY J:

# INTRODUCTION

1. This matter is a class action brought by the applicant, Hans Pearson, under Part IVA of the *Federal Court of Australia Act 1976* (Cth)(the **Act**) against the respondent, the State of Queensland (the **State**). Mr Pearson brings the proceeding on his own behalf and on behalf of a “closed” class of persons. A class member is any person who, during all or part of the period from 12 October 1939 to 4 December 1972 (the **Claim Period**):
2. was or was deemed to be an Aborigine or a Torres Strait Islander (**Islander)** under one or other of *The Aboriginals Preservation and Protection Act of 1939* (Qld), *The Aborigines’ and Torres Strait Islanders’ Affairs Act of 1965* (Qld), *The Torres Strait Islanders Act of 1939* (Qld), *The Aboriginals Regulations of 1945* (Qld), *The Islanders Regulations, 1946* (Qld) or *The Aborigines’ and Torres Strait Islanders’ Regulations of 1966* (Qld) (the **control legislation**);
3. lived in an area proclaimed or deemed to be a District or on land defined to be missions or reserves under the control legislation;
4. was in paid employment arranged or entered into under the control legislation;
5. had the whole or part of his or her wages taken, retained or otherwise paid by the employer to the Protector of Aborigines (including the Protector of Islanders) or to the superintendent of the reserve or mission in which he or she lived;
6. has not been given the money so taken, retained by or paid to the Protector or superintendent as his or her wages;
7. claims equitable relief and/or the payment of compensation in that regard; and
8. as at the date of filing the Amended Statement of Claim (17 March 2017), has entered into a litigation funding agreement with the litigation funder, Litigation Lending Services Ltd (**LLS**).

The case is colloquially known as “the Stolen Wages case”.

1. Before the Court is an interlocutory application dated 4 July 2017 in which Mr Pearson sought:
2. an order pursuant to s 33K of the Act to amend the class definition so as “open” the class by deleting the requirement that each class member have entered into a litigation funding agreement with LLS (the **class opening order**); and
3. orders pursuant to ss 23 and 33ZF of the Act and rule 1.32 of the *Federal Court Rules* *2011* to apply litigation funding terms to the class (as opened), including to require the applicant and class members to pay LLS a pro rata share of the legal costs incurred and a funding commission rate set at 20% of the amount for which their claims are settled or judgment is given, from the common fund of any settlement or judgment in their favour (the **common fund order**).
4. The orders sought are interdependent in that Mr Pearson did not pursue the class opening order independently of the common fund order. That is because LLS will not continue to fund the action if the class is opened but no common fund order is made, such that class members can benefit through the litigation without being obliged to contribute to the litigation funding charges and legal costs incurred. In the alternative, Mr Pearson seeks orders to expand the closed class by amending the class definition to bring in additional claimants who register and sign a funding agreement.
5. Many of the disputed issues in the application were resolved at a case management conference on 14 August 2017. I made orders on 25 August 2017 and these are the reasons for those orders.
6. The orders differ in one significant way from the orders Mr Pearson sought, in that I declined to make a common fund order which set the funding commission rate at 20%. Instead I made orders that provide for a funding commission rate of 20% or *such lower percentage as the Court considers reasonable at that time*. The funding commission rate will be approved at a later point when the Court has more complete information in that regard.

# THE EVIDENCE

1. The following material was before the Court:
2. Mr Pearson relied on two affidavits of John Raymond Reis Bottoms, a principal in BE Law (Bottoms English Lawyers Pty Ltd), the solicitors for the applicant, the first affirmed on 4 July 2017 and the second on 11 August 2017, together with their annexures; and
3. the State relied on the affidavit of Zita Anne Beuth, a Principal Lawyer with Crown Law, the solicitors for the respondent, sworn 10 August 2017, together with annexures.

Neither deponent was cross-examined.

# THE CLASS OPENING ORDER

1. I am well satisfied that a class opening order is appropriate.
2. Unless there is some reason to refuse Mr Pearson leave to amend the class definition, it is a matter for him to define the represented class, and I can see no reason to refuse leave. I also note that, if leave were refused, it would be open for Mr Pearson or a class member to commence another class action on an “open” class basis, but carving out those persons who have already entered into a funding agreement with LLS. Any such case would likely be heard together with the present proceeding and would have the same effect as making the class opening order.
3. The State consents to the order (although not to the interdependent common fund order). It did not articulate the reasons underlying its position, but I infer that the reasons include that a closed class is likely to be a barrier to settlement. If the class remains closed and Mr Pearson is successful on the common issues, Aborigines and Islanders who are not class members could bring subsequent claims, individually or in another class action. That would mean that the State would not achieve finality of litigation through any settlement or judgment. That can also be seen in Mr Bottoms’ evidence that opening the class may facilitate settlement of the proceeding as it will enable finality to be brought to the “Stolen Wages” issue in one proceeding rather than through what he describes as piecemeal wage reparation schemes over the past 15 years.
4. This is a paradigm case to be conducted on an open rather than a closed class basis. Mr Bottoms deposed that there are approximately 8,700 Aborigines and Islanders who were subject to the control legislation during the Claim Period and who had their wages withheld. Many live in relatively isolated communities in Queensland and are elderly, poorly educated and lack commercial and legal sophistication.
5. Mr Bottoms and his staff have undertaken an extensive general outreach program to indigenous communities throughout Queensland, including Cairns, Kuranda, Mareeba, Mossman, Ravenshoe, Mount Garnet, Hope Vale, Wujal Wujal, Yarrabah, Palm Island, Innisfail, Tully, Cardwell, Townsville, Ayr, Bowen, Aurukun, Mapoon, Weipa, Napranum, Normanton, Burketown, Doomadgee, Camooweal, Cloncurry, Mount Isa, Dajarra, Boulia, Rockhampton, Woorabinda, Cherbourg, Murgon, Ipswich, Logan, Zillmere, Jagera, Horn Island, Mer/Murray Island, Darnley Island, Yorke Island (Masig), Badu Island, Saibai, Boigu, Warraber, Yam Island (Iama), Moa Island (Kubin and St Pauls) Mabuiag, Hammond Island and Thursday Island. Mr Bottoms, his staff, and sometimes counsel, visited these communities to explain the litigation and the litigation funding arrangements with LLS, and for potential class members to provide instructions and sign the funding agreement.
6. Mr Bottoms deposed that he and his staff have met with approximately 3,267 potential class members from those communities who qualify as class members and who have signed funding agreements. Because they had not signed funding agreements when the Amended Statement of Claim was filed they are not class members unless the class definition is opened or otherwise amended. He also estimated that there are approximately 3,000 to 4,000 further potential class members in Aboriginal and Islander communities throughout Queensland who he and his staff have been unable to speak to. If the class opening orders are not made these persons will not share in the benefit of any favourable result in the case or be bound in any adverse result.
7. The central aims of the Part IVA regime include enhancing access to justice by providing for an opt out representative procedure and improving judicial economy by allowing a common, binding decision to be made in one proceeding instead of in multiple proceedings: *Federal Court of Australia Amendment Bill 1991*, Commonwealth, House of Representatives, 14 November 1991, Second Reading, at 3174 (M Duffy - Attorney-General); Australian Law Reform Commission, “Grouped Proceedings in the Federal Court”, Report No 46, 1988, at [13]. In the Second Reading Speech the then Attorney General said:

The Government believes that an opt out procedure is preferable on grounds both of equity and efficiency. It ensures that people, particularly those who are poor or less educated, can obtain redress where they may be unable to take the positive step of having themselves included in the proceedings. It also achieves the goals of obtaining a common, binding decision while leaving a person who wishes to do so free to leave the group and pursue his or her claim separately.

1. Making a class opening order so that potential class members - many of whom are elderly, poorly educated, lack legal and commercial sophistication and live in relatively isolated locations - can participate without taking any positive step meets the access to justice aims of the Part IVA regime. It will also meet the aim of improving judicial economy by increasing the level of finality achieved through the case.
2. Further, it has become standard practice in closed class actions for respondents to request, as a precondition to settlement discussions, that the class be opened and then closed again through a class member registration process, often in a compressed timeframe: see *Money Max Int Pty Ltd (Trustee) v QBE Insurance Group Limited* (2016) 245 FCR 191; [2016] FCAFC 148 (***Money Max***)at [185]-[190] (Murphy, Gleeson and Beach JJ). If the class opening order is not made, it can reasonably be expected that to facilitate settlement the parties will make an application for orders to allow class opening and closing in the present case. In circumstances where many persons affected by the alleged wrong live in relatively isolated communities and are likely to be elderly, poorly educated and to lack legal and commercial sophistication, it is preferable that the class definition be opened now rather than later and that class members are included in the case without any requirement to register.
3. Finally, although neither party raised this issue, it is necessary to consider whether the class opening order is in the interests of existing class members. For example, it might be said that allowing further class members into the case may operate to dilute the amount that the present class members are likely to each receive. In such circumstances Mr Pearson and his solicitors, BE Law, may have a conflict of interest between their (understandable) interest in ensuring that more Aboriginal and Islander persons can participate in the case and their duty to act in the interests of existing class members.
4. There is little to indicate that a potential conflict of interests exists. Counsel for Mr Pearson submitted that this is a case in which the specific amount of money that has allegedly been withheld from each class member means that any settlement is unlikely to involve a global lump-sum such that class members’ individual recoveries may be diluted by additional class members. The parties have not entered into settlement discussions and there is no settlement in the offing. That is not to suggest that it would necessarily involve a conflict of interest to seek a class opening order that may have such a diluting effect. It is a factor to be weighed in the balance. It must be kept in mind that settlement offers are sometimes only made on the basis that a class opening order is sought. The authorities show that class opening orders have been made shortly prior to a global lump sum settlement on several occasions: see *Pathway Investments Pty Ltd v National Australia Bank Ltd* (Supreme Court of Victoria proceeding SCI 2010 6249) (Pagone J) (***Pathway***) and *Farey v National Australia Bank Ltd* [2014] FCA 1242 (***Farey***) (Jacobson J).

# THE COMMON FUND ORDER

1. The application for a common fund order is primarily grounded in s 33ZF of the Act which provides a broad power to make such orders as are “appropriate or necessary to ensure that justice is done in the proceeding”. The power is directed at enabling the Court to make orders to deal with the novel problems that might arise through representative proceedings. The expression “necessary to ensure that justice is done” requires that an order be reasonably adapted to the purpose of seeking or obtaining justice in the proceeding, not that an order will make certain that justice is achieved or injustice avoided: *Money Max* at [165].
2. The State did not object to a common fund order *per se.*  It took the position that whether to make a common fund order and the terms of any such orders are matters for the Court, taking into account the particular circumstances of the case, including the Court’s responsibility to protect class members’ interests.
3. For an order to be in the interests of justice in the proceeding requires consideration to be given to the interests of class members. As I said in *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433 at [145], s 33ZF is directed, at least in part, to the issue of judicial control of representative proceedings so as to protect class members’ interests.
4. It is plain that the Court has power to make a common fund order in an appropriate case: *Money Max* at [161]-[165]. The question is whether such an order is appropriate in the interests of justice in this proceeding. I am satisfied that it is.
5. *First*, the common fund order means that all class members will pay the same pro rata share of legal costs and funding commission from the common fund of any amounts they receive in settlement or judgment. It is in the interests of justice in the proceeding that the burden of the legal costs and litigation funding commission charges incurred in achieving any favourable result falls equally upon all class members who stand to benefit from the proceeding.
6. *Second*, the orders provide that the Court will approve the funding commission at a rate of 20% *or such lower percentage* *as the Court considers reasonable* at a point when the Court is armed with more complete information as to the quantum or likely quantum of any settlement or judgment. That is likely to be at the stage of settlement approval, or if there is no settlement, at the stage of distribution of damages. Class members will have the protection inherent in judicial oversight of the funding commission charged.
7. Existing class members have already agreed to a 20% funding commission rate and they get the benefit of a potentially lower rate. That said, without in any way attempting to bind the Court hearing the relevant application, unless there is a very large settlement it seems unlikely that the funding commission rate will be lower than 20%. I accept the evidence that a 20% rate compares favourably with the rates generally offered in the litigation funding marketplace and that, at least in part, LLS offered that rate because of its interest in the social justice aspect of the case.
8. “New” class members (those who became class members through the class opening order) must pay a litigation funding commission from any successful result and they have not agreed to do so. That can be seen as against their interests but I would not refuse the orders on that basis, when litigation funding charges have become a standard cost in class actions: *Money Max* at [71] and [179]-[184]. If such persons are to share in the benefits of the class action it is fair that they pay a pro rata share of a reasonable Court-approved litigation funding charge. Further, for new class members, the interdependence of the applications for the class opening order and common fund order means that, absent the common fund order, they are not class members at all. There is no real detriment to their interests when they may opt out if they are unhappy with the orders.
9. *Third*, class members will be informed of the requirement to pay a reasonable Court-approved funding commission (at a rate no higher than 20%) before they must decide whether to opt out. Existing class members are unlikely to opt out as they have already agreed to litigation funding terms and a 20% funding commission rate, and new class members who object to paying a reasonable Court-approved funding commission can opt out. Doing so means they will lose the benefit of the class action as a vehicle for vindicating their rights, but absent the interdependent class opening order they would not become class members anyway.
10. *Fourth*, the litigation funding terms (**Funding Terms**) which will bind LLS, Mr Pearson and BE Law are standard and they include appropriate protections. Apart from the lower funding commission rate, they are similar to the litigation funding terms which the Full Court accepted in *Money Max*. The Funding Terms include that:
11. LLS’s obligations to fund the Project Costs (as defined), including by paying BE Law’s legal costs and disbursements charged up to the Funding Limit (as specified in the funding agreements), paying the cost of any insurance covering an adverse costs order, paying any adverse costs order made and providing any security for costs, extends to all class members and not just those who have entered into a litigation funding agreement;
12. any settlement or judgment sum is paid into a trust account kept for that purpose;
13. subject to any order of the Court, BE Law is to pay from the trust account:
14. first, pay to LLS the Project Costs (as defined), plus 20% of the amount for which the claims are settled or judgment is given or such lower percentage as the Court considers reasonable, plus GST;
15. second, pay to itself any unpaid portion of the legal costs and disbursements (including any uplift fee payable on Lawyers Professional Fees pursuant to the Legal Costs Agreement) plus GST;
16. third, pay all Administration Expenses (being the cost of the administration of any scheme for the distribution of any settlement); and
17. fourth, distribute the balance to the class members on a pro rata basis by reference to their claims in accordance with any distribution scheme approved by the Court.
18. BE Law’s professional duties are owed to the applicant and not to LLS. If BE Law notifies LLS and the applicant that circumstances have arisen that they may be in a position of conflict with respect to any obligations they owe to the applicant and to LLS, then BE Law’s obligations to the applicant prevail.
19. LLS will give day to day instructions to BE Law concerning the claims but the applicant has the right at any time to give instructions to BE Law that override LLS’s instructions.
20. if there is a dispute between LLS and the applicant as to the appropriate terms of settlement, BE Law will brief the most senior counsel of those retained in the proceeding to advise on the reasonableness of the proposed settlement. If counsel’s opinion is that the proposed settlement is reasonable then the applicant agrees that BE Law will be instructed to do all that is necessary to settle the proceeding provided that Court approval is sought and obtained;
21. if there is a dispute between LLS and the applicant about any appeal, the addition or removal of respondents in the proceeding, the termination of BE Law’s appointment or the appointment of alternative solicitors, the dispute will go to mediation, and if not resolved at mediation it will be determined by an independent person. That determination will be final and binding; and
22. the Funding Terms can only be terminated by Court order granted on application by the applicant, LLS or a class member. They provide for what happens upon termination, but are expressly subject to “any contrary order of the Court”. If LLS applies to terminate the Funding Terms it is entitled to be reimbursed the Project Costs plus GST from settlement or judgment monies but is not entitled to be paid its percentage funding commission.
23. *Fifth*, absent the class opening order and the related common fund order there are likely to be at least three types of class members within the class: (a) those who have signed funding agreements and are deemed to have registered; (b) those who have not signed funding agreements but who register; and (c) those who have not signed funding agreements and do not register. The conflicts of interest which may arise between these different types of class members are avoided through a common fund order: see *Money Max* at [189]-[191] and [197]-[199].
24. *Sixth*, Mr Bottoms deposed that a common fund order will mean that the outreach program to class members will not need to involve as extensive an explanation of the details of the funding arrangements for the purpose of inviting class members to join the class action. It seems likely that “book building” costs will be reduced because of the orders and a reduction in that cost will reduce the amount deducted from class members’ possible recoveries.
25. It is unnecessary to impose a condition that class members not be “worse off” by reason of the common fund order, as with the rider in *Money Max*. That rider should not be decontextualized from the circumstances of that case. It was imposed in circumstances where the common fund application was made in a funded *open* class proceeding in which a substantial number of class members had signed funding agreements and many more class members had not. The respondent contended that if a common fund order was made class members would be worse off than if a funding equalisation order was subsequently made. The rider was a case specific tool, and in any event it did not necessarily require the counterfactual of a funding equalisation order: *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* (2017) 343 ALR 476; [2017] FCA 330 (***Blairgowrie*)** at [105]. The present case is different to *Money Max*, being a funded *closed* class proceeding, in which the only class members are those who have signed funding agreements.
26. Existing class members will be better off under the common fund order for the reasons already given. For new class members, they only come into the case through the class opening order and that order is only sought on the basis that the common fund order is also made. The counterfactual is not a funding equalisation order, but an ongoing closed class proceeding.
27. To the extent that the possibility of a future funding equalisation order can be said to be relevant, I agree with the remarks of Beach J in *Blairgowrie* at [102] where his Honour said that a funding equalisation order was first made as an “ad hoc innovation posited by practitioners” to expediently resolve a practical problem that had arisen in an early class action. By consent of the parties in various class actions that followed, the use of the funding equalisation mechanism grew. Such an approach is not the result of judicial evolution and exposition and there is no reason to treat it as suitable for all occasions or preferable to a common fund approach.
28. Finally,Mr Bottoms deposed that the Court should not defer approval of the funding commission rate to a later point, and urged that the rate should now be approved at 20%. He said that leaving the rate open may confuse class members given that many are elderly, poorly educated and lack commercial and legal sophistication. He said it will facilitate trust and participation in the process if BE Law can tell group members with certainty what their ultimate position will be. In my view orders which provide for a 20% rate or *such lower percentage as the Court considers reasonable at that time* are readily explainable to class members. One simple explanation may be: “If the case wins or settles and the Queensland government pays you money, you will pay a percentage commission of no more than 20% of that money to the company funding the case plus your share of the legal costs. You are only required to pay the level of commission and legal costs that the Court approves.”

# WHETHER NOTICE TO CLASS MEMBERS OF THE COMMON FUND APPLICATION IS REQUIRED

1. Mr Pearson contended that, in the circumstances, notice of the common fund application need not be provided to class members. The State disagreed.
2. The State argued that there was no reason in principle why notice of the common fund application should not be given before the class is opened in circumstances where class opening and common fund orders have been sought in the one application. It noted that in *Money Max* notice of the common fund application was given to all class members and the Full Court considered class members’ objections. It said that Mr Pearson had not advanced any persuasive basis why persons who were not presently class members, but who would become so through the class opening order, should not be notified of the common fund application and given the opportunity to make an objection prior to such orders being made.
3. On the basis that the State consented to the class opening order, it did not accept the contention that the notice provisions in ss 33X and 33Y of the Act only require notice of the application be given to existing class members. The State contended that the class opening order (to which it consented) could be made first, followed by a hearing of the common fund application made on notice to class members.
4. The State also submitted that any detriment to class members through a common fund order cannot necessarily be cured by a subsequent right to opt out. It relied on the Full Court’s statement in *Money Max* (at [114]) that “[s]ubject to class members being given proper notice and a right to object, a right to opt out can act to safeguard the interests of absent class members and can ‘cure’ a detriment.”
5. Mr Pearson contended that it was unnecessary for class members to be given notice of the common fund application. He submitted that:
6. s 33X only contemplates notices being given to class members and does not contemplate notices being given to persons who may become class members. There was no requirement that such persons be given notice prior to the making of a common fund order;
7. the common fund order does not detrimentally affect the interests of existing class members because they have already signed funding agreements in similar terms, and there is already a de facto common fund regime in place as between them. The orders do not change the financial position of existing class members because the proposed Funding Terms do not propose a funding commission rate higher than 20%;
8. notice of the common fund application was given to class members in *Money Max* because that proceeding was an open class action and the position of existing class members was going to change, particularly the position of the many class members who had not entered into a funding agreement. That is different to the present case, in which the class is closed; and
9. in previous closed class actions where class opening and common fund orders have been sought together, prior notice has not been given to class members: see *Pathway* and *Farey.* Instead, class members were given notice of the common fund order shortly after the orders were made, in an opt out and class member registration notice.
10. I accept Mr Pearson’s contention that s 33X is only concerned with notice to class members, rather than to persons who may become class members, but not much turns on that. Before a common fund order can be made under s 33ZF the Court must be satisfied that doing so is necessary or appropriate to ensure that justice is done in the proceeding. Depending on the circumstances, the appropriateness of such an order may hinge on notifying class members of the application and the Court considering any objections they raise. The Court should be cautious in protecting class members’ interests and it may be that class members have concerns or objections which the Court has not contemplated.
11. I accept that existing class members have already agreed to the Funding Terms and a de facto common fund, and the common fund order is plainly to their benefit rather than to their detriment. It is unnecessary for existing class members to be given notice of the common fund application. However, there is no reason in principle why new class members, who have not agreed to pay a litigation funding commission, should not be notified of the common fund application. Whether it is appropriate to provide class members with notice will depend on the circumstances.
12. Mr Pearson proposed that class members be given notice of the common fund order when they are informed of their right to opt out, which is shortly to occur. That was the approach taken in *Pathway* and *Farey.*
13. I take the same approach in the present case. I do so, *first*, because the common fund order benefits existing class members and is not detrimental to the interests of new class members.
14. *Second*, the time and expense associated with giving notice of the common fund application is not justified when any need for notice is marginal. Providing notice of the common fund application will be time-consuming and expensive when many of the new class members live in relatively isolated communities in Queensland. Many such persons are elderly, poorly educated and lack legal and commercial sophistication. They have not been reached through the general outreach program and I accept Mr Bottoms’ evidence that absent such a program they are unlikely to respond to notice of a common fund application. Many of them do not have access to email and because of their circumstances mass notices provided through radio, newspapers and internet are, on their own, unlikely to be sufficient notice.
15. *Third*, a notice in relation to the common fund application is likely to be confusing for class members because such a notice must either be combined with the opt out notice or it will be followed soon after by an opt out notice. The common fund application notice would only require a response from class members who want to stay in the case but who object to paying a litigation funding commission of not more than 20%. The opt out notice would only require a response from class members who do not want to stay in the case. It would be far from straightforward to make a combined notice clear for class members and, particularly in light of the characteristics of the class, the differing requirements for response seem apt to confuse.
16. In my view the preferable course is to notify class members of the common fund order through the opt out notice. That will inform them of their right to opt out if they do not wish to participate in the class action for any reason, including because they object to paying a reasonable Court-approved funding commission of not more than 20%.
17. Mr Pearson’s legal advisers accept that, having regard to the characteristics of the class, great care should be taken in drafting an opt out notice which is as simple and clear as possible. Such a notice, coupled with a further outreach program, should maximise the prospect that class members are properly notified.
18. I will deal with approval of the form of opt out notice in accordance with the timetable ordered.

## Use of the CPH Reparation database

1. There was a dispute as to whether Mr Pearson’s legal representative should have access to the contact details of Aboriginal and Islander claimants held by the State on the Community and Personal Histories electronic database (**CPH Reparation database**). The database records information about Aboriginal and Islander persons who submitted a Claimant Application Form under several State reparation schemes relating to the control legislation.
2. Mr Pearson sought an order under s 33Y(3)(c) of the Act directing the State to supply the identity and contact details of all claimants on the database to his solicitors. He argued that such information is the best data available and there is no good reason for it not to be used in providing notice to class members.
3. In response to requests from Mr Pearson’s solicitors, the State said it was prepared to develop a list of possible class members based on the CPH Reparation database, and to send a notice to them which has been agreed by the parties and approved by the Court, with the cost of distribution being paid in the first instance by Mr Pearson. In light of its offer the State said that claimants had not given permission for their identity and contact details to be so disclosed and contended that orders should not be made for it to provide the claimants’ contact details to Mr Pearson’s solicitors.
4. The purpose of s 33X is to give notice to class members “in the most efficient and effective way”: Explanatory Memorandum, *Federal Court of Australia Amendment Bill 1991* (Cth) at [33]. The CPH Reparation database contains the contact details of what is likely to be most class members, those details can readily and inexpensively be downloaded, and the identity and contact details of class members is otherwise largely unknown. It is plain that the database should be used to notify class members. An expansive view should be taken in preparing a list of possible class members from the database as the most important consideration is to maximise the reach of any notice.
5. It is unnecessary to decide whether to order that a list of claimants be provided to Mr Pearson’s solicitors. They would prefer to have such a list, but counsel accepted that it suffices if notice under s 33X is sent by a commercial mail house, on a confidential basis, to all claimants whose details are recorded in the database. The State also indicated agreement to that course. Any such notice should not appear to come from the State because it is the applicant’s notice, albeit Court approved, and because correspondence from the government may cause anxiety or confusion for some class members.
6. I will deal with any residual issues in relation to the manner in which the opt out notice is provided to class members in accordance with the timetable ordered.

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| I certify that the preceding fifty-three (53) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Murphy. |

Associate:

Dated: 14 September 2017