FEDERAL COURT OF AUSTRALIA

Jenkings v Northern Territory of Australia (No 4) [2021] FCA 839

File number:	NTD 64 of 2016
Judgment of:	**MORTIMER J**
Date of judgment:	26 July 2021
Catchwords:	**PRACTICE AND PROCEDURE** – representative proceeding – notification of settlement pursuant to s 33X of the *Federal Court of Australia Act 1976* (Cth) – interlocutory application seeking suppression orders over Deed of Settlement and/or settlement sum – application dismissed
Legislation:	*Federal Court of Australia Act 1976* (Cth), Part IVA *Youth Justice Act 2005* (NT)
Cases cited:	*AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; 364 ALR 202 *Caason Investments v Cao (No 2)* [2018] FCA 527 *CEU19 v Minister for Immigration, Citizenship and Multicultural Affairs* [2019] FCA 1050; 165 ALD 566 *Clark v National Australia Bank Ltd (No 2)* [2020] FCA 652 *Country Care Group Pty Ltd v Director of Public Prosecutions (Cth) (No 2)* [2020] FCAFC 44; 275 FCR 377 *DRJ v Commissioner of Victims Rights* [2020] NSWCA 136 *Dyczynski v Gibson* [2020] FCAFC 120; 381 ALR 1 *Earglow Pty Ltd v Newcrest Mining Limited* [2016] FCA 1433 *Fowler v Airservices Australia* [2009] FCA 1189 *Giddings v Australian Information Commissioner* [2017] FCAFC 225 *Harrison v Sandhurst Trustees Ltd* [2011] FCA 541 *Hogan v Australian Crime Commission* [2010] HCA 21; 240 CLR 651 *Hudson Ventures Pty Ltd v Colliers International Consultancy and Valuation Pty Limited* [2014] FCA 982 *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289 *Mid-Coast Council v Fitch Ratings, Inc* [2019] FCA 1261

	Santa Trade Concerns Pty Ltd v Robinson (No 2) [2018] FCA 1491 *University of Sydney v ResMed Limited (No 4)* [2010] FCA 1403; 120 ALD 16 *Wong v Silkfield* [2000] FCA 1421 *Wotton v State of Queensland (No 10)* [2018] FCA 915 *Pearson v State of Queensland (No 2)* [2020] FCA 619
Division:	General Division
Registry:	Northern Territory
National Practice Area:	Other Federal Jurisdiction
Number of paragraphs:	96
Date of hearing:	16 July 2021
Counsel for the Applicants:	Mr P Batley
Solicitor for the Applicants:	Maurice Blackburn
Counsel for the Respondent:	Mr T Moses
Solicitor for the Respondent:	Solicitor For The Northern Territory

ORDERS

NTD 64 of 2016

BETWEEN:	**DYLAN RILEY JENKINGS** First Applicant
	AARON HYDE Second Applicant
AND:	**NORTHERN TERRITORY OF AUSTRALIA** Respondent

AND IN THE INTERLOCUTORY APPLICATION

BETWEEN:	**NORTHERN TERRITORY OF AUSTRALIA** Applicant
AND:	**DYLAN RILEY JENKINGS** First Respondent
	AARON HYDE Second Respondent

ORDER MADE BY: **MORTIMER J**

DATE OF ORDER: **26 JULY 2021**

THE COURT ORDERS THAT:

1. The interlocutory application by the Northern Territory, filed on 15 July 2021, be dismissed.

2. Until 10.15am on 8 November 2021, Annexure KMP38 to the affidavit of Kerry Palmer sworn 4 June 2021 not be available for inspection by any third party without leave of the Court.

Suppression orders

3. The following orders be vacated:

   (a) Orders 1 and 10 of the orders of Justice Mortimer made on 9 June 2021; and

   (b) Order 2 of the orders of Justice Mortimer made on 16 July 2021.

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

REASONS FOR JUDGMENT

MORTIMER J:

1 The applicants in this proceeding have, by an interlocutory application filed on 14 July 2021, applied pursuant to s 33V(1) of the ***Federal Court*** *of Australia* ***Act*** *1976* (Cth) for orders preparatory to an application for the Court to approve a settlement reached between the parties in this proceeding. The Court has agreed to list the settlement approval application for hearing on 8 and 9 November 2021. The proposed preparatory orders centred on the giving of notice of the proposed settlement under s 33X of Federal Court Act to group members.

2 In the affidavit evidence supporting the interlocutory application and in some previous applications and evidence filed with the Court on 4 June 2021 for the purposes of a case management hearing, in the proposed preparatory orders, and in the proposed settlement notice and accompanying information, the core terms of the settlement between the parties are disclosed. Those core terms include:

(a) the payment of a sum of compensation to group members;

(b) the payment of costs to the applicants' legal representatives;

(c) the agreed inclusive sum representing the two payments above (described in the Deed of settlement as "**the settlement sum**");

(d) that the settlement has been reached with a denial of liability on behalf of the respondents, the Northern **Territory**; and

(e) the recognition, and reproduction, of an apology given on behalf of the Territory to those who have been detained while juveniles in the Territory.

3 The Territory largely agreed to the preparatory orders sought, and to the proposed terms of the settlement notice to group members. It proposed some minor changes which were substantively accepted by the applicants, and to which the Court agreed.

4 What remained in dispute was the disclosure of the settlement sum referred to at [2(c)] above. Counsel for the Territory informed the Court that after negotiations between the parties, no agreement could be reached in relation to this disclosure. Accordingly, the day before the case management hearing the Territory filed an interlocutory application seeking suppression of all references in documents and evidence filed to the settlement sum, and removal of the sum from the settlement notice and accompanying information. Alternatively, it sought suppression of

the whole of the settlement Deed (which was exhibited to a previous affidavit read at the 9 June 2021 case management hearing), and also suppression of any other references to the settlement sum and removal of the sum from the settlement notices and accompanying information.

5 The Territory sought these orders on a permanent basis, alternatively on an interim basis until the settlement approval hearing in November 2021.

6 For the reasons set out below the Territory's interlocutory application will be dismissed.

7 I am otherwise satisfied the proposed settlement notices, accompanying documents and proposed arrangements to publicise the settlement to group members give group members a reasonable and appropriate opportunity to become aware of the settlement, its terms, and the approvals process, so that they can make an informed decision whether to register for the payment of compensation, or whether to object, or whether they do not wish to take part in either process. The applicants' solicitors and those who have assisted them are to be congratulated on producing innovative proposals to notify a group of young people who face a number of particular challenges in accessing information about the legal proceeding brought on their behalf.

The orders sought by the Territory

8 In its interlocutory application, the Territory sought the following orders:

> 1. Pursuant to s 37AF, 37AG(1)(a) and 33ZF of the *Federal Court of Australia Act 1976* (Cth), in order prevent prejudice to the proper administration of justice, that:
>
> (a) Annexure "KMP38" to the Affidavit of Kerry Palmer dated 4 June 2021 remain confidential and its publication be prohibited.
>
> (b) Alternatively to (a), that the following parts of Annexure "KMP38" to the Affidavit of Kerry Palmer dated 4 June 2021 remain confidential and their publication be prohibited:
>
> (i) The definition of '*Settlement Sum*' in cl 1.1 of the Deed of Settlement.
>
> (ii) Clause 5.2(c)(iii) of the Deed of Settlement.
>
> (c) Annexure 2 to the interlocutory application filed on 12 July 2021 by the Applicants, Annexure KMP40 to the affidavit of Kerry Palmer dated 9 July 2021, and Annexure MP1 to the Affidavit of Maria Pikoulos dated 15 July 2021 remain confidential and their publication be prohibited.

9 During oral argument, and after inquiry by the Court about how the Territory submitted the legal representatives for the applicants were to convey information about the settlement (which

would need to include the settlement sum) to group members when individual group members contacted them in response to the settlement notice, counsel proposed an amendment:

> Your Honour raised with Mr Batley what potential – or that there would need to be some potential carve out to any – certainly interlocutory order, but generally any order relating – certainly to allowing publication of that information to group members. And what we would propose along those lines is that – and so if your Honour is looking at any of the formulations but where it ends "to remain confidential and publication be prohibited" there would be "except to group members, including for the purposes of those group members" – and this is a little clunky, but "realising any of the purposes contained in clause 5.7(a)(viii) onwards in the deed."

10 The Territory read and relied upon the affidavit of Maria Pikoulos, sworn 15 July 2021. The applicants objected to one sentence in that affidavit, and counsel for the Territory agreed not to read that sentence. Otherwise there was no objection to the affidavit being read, although counsel for the applicants submitted that several parts of Ms Pikoulos' evidence were properly characterised as submissions. I accept that is the case and have treated several passages in that way.

11 The settlement Deed is annexure KMP38 to the affidavit of Kerry Michele Palmer, sworn 4 June 2021. Pending the determination of the Territory's application, interim orders were made under s 37AI of the Federal Court Act, preserving the confidentiality of the evidence and documents which contain references to the settlement sum.

12 The applicants opposed the orders sought by the Territory. Both counsel were content to make oral submissions on the application, to refer to authorities, and then for the Court to determine the matter without further hearing. There is some urgency attached to the determination, given the largely agreed timetable in the preparatory orders and the November 2021 hearing.

13 As it is, the necessity to determine this application means some of the dates in the preparatory orders will need to be altered, but the parties have agreed on substitute dates, which will be reflected in the orders made.

Applicable provisions and principles

14 Section 17(1) of the Federal Court Act provides:

> Except where, as authorized by this Act or another law of the Commonwealth, the jurisdiction of the Court is exercised by a Judge sitting in Chambers, the jurisdiction of the Court shall be exercised in open court.

15 Section 37AE provides:

> In deciding whether to make a suppression order or non-publication order, the Court

must take into account that a primary objective of the administration of justice is to safeguard the public interest in open justice.

16 Section 37AF confers the power to make suppression or non-publication orders "on grounds permitted by this Part". The grounds for such orders are set out in s 37AG(1):

> (1) The Court may make a suppression order or non-publication order on one or more of the following grounds:
>
> (a) the order is necessary to prevent prejudice to the proper administration of justice;
>
> (b) the order is necessary to prevent prejudice to the interests of the Commonwealth or a State or Territory in relation to national or international security;
>
> (c) the order is necessary to protect the safety of any person;
>
> (d) the order is necessary to avoid causing undue distress or embarrassment to a party to or witness in a criminal proceeding involving an offence of a sexual nature (including an act of indecency).

17 The Territory relies only on the ground in s 37AG(1)(a).

18 Section 37AH(2) concerns a right to be heard of a number of non-parties, including a news publisher and any other person "who, in the Court's opinion, has a sufficient interest in the question of whether a suppression order or non-publication order should be made". Although there was no application to be heard by any non-party on the Territory's application (likely because of the short notice given in relation to it, rather than any lack of interest by media outlets), the terms of s 37AH(2) are relevant because they indicate the prominence given by Parliament to the principle of open justice, and they recognise that the principle of open justice operates more widely than the interests of the parties.

19 Section 37AH(5) indicates that any order made under s 37AF should be no wider than is necessary to achieve the purpose of the orders:

> A suppression order or non-publication order must specify the information to which the order applies with sufficient particularity to ensure that the court order is limited to achieving the purpose for which the order is made.

20 By s 37AJ, the Court has power to determine for itself the appropriate duration of a suppression order; again constrained by Parliament's clear intention that an order only operate for so long as the preconditions which justified its making continue to exist:

> (2) In deciding the period for which an order is to operate, the Court is to ensure that the order operates for no longer than is reasonably necessary to achieve the purpose for which it is made.

21 Contravention of a suppression order is a criminal offence punishable by 12 months imprisonment and/or a fine: see s 37AL(1). A contravention is also a contempt of court: see s 37AL(2).

General principles

22 I explained my understanding of the general principles applicable to an exercise of power under s 37AF and s 37AG in *CEU19 v Minister for Immigration, Citizenship and Multicultural Affairs* [2019] FCA 1050; 165 ALD 566 at [89]-[97], by reference to the Full Court's decision in *Giddings v Australian Information Commissioner* [2017] FCAFC 225, and the High Court's decision in *Hogan v Australian Crime Commission* [2010] HCA 21; 240 CLR 651. See also the recent decision in ***Country Care*** *Group Pty Ltd v Director of Public Prosecutions (Cth) (No 2)* [2020] FCAFC 44; 275 FCR 377, where the Full Court repeated these principles.

23 I adopt and apply that approach on the Territory's application, noting the following points as particularly relevant:

(a) The onus on the moving party for a suppression order is a "heavy" one;

(b) The statutory test for suppression is one of necessity;

(c) The relevant "necessity" is the necessity to prevent prejudice to the proper administration of justice;

(d) The administration of justice in this context is the exercise by the Federal Court of the judicial power of the Commonwealth under Ch III of the Constitution, which is a more specific objective than broader notions of the "public interest";

(e) The specific objective for which a suppression order must be necessary means that the Court should not engage in any general "balancing exercise" of various factors which might be described as falling within these broader notions of the "public interest".

24 To this can be added the observation of Nettle J in *AB (a pseudonym) v CD (a pseudonym); EF (a pseudonym) v CD (a pseudonym)* [2019] HCA 6; 364 ALR 202 at [21] that

> a primary objective of the administration of justice is to safeguard the public interest in open justice.

25 That is not the only objective of the administration of justice, but it is, as his Honour said, a primary one. Open justice is a premise of the exercise of this Court's jurisdiction, and of the judicial power of the Commonwealth, to which s 17 and s 37AE give express effect.

26 In *Country Care*, the Full Court said of this principle (at [29]):

> ... as s 37AE makes clear, the public interest in open justice is a primary consideration in deciding whether to make a suppression or non-publication order. The principle of open justice is "one of the overarching principles in the administration of justice" which "lies at the heart of the exercise of judicial power as part of the wider democratic process": *Minister for Immigration and Border Protection v Egan* [2018] FCA 1320 at [4]. The principle involves justice being seen to be done. While the principle is not an "absolute concept", an order restricting the ordinary open justice approach is "not lightly made": *Egan* at [4].

27 In *DRJ v Commissioner of Victims Rights* [2020] NSWCA 136 Leeming JA emphasised that the character of the proceeding is likely to be relevant to the exercise of power to make suppression orders. That judgment was given in the context of the *Court Suppression and Non-publication Orders Act 2010* (NSW), where the "primary objective" to which Nettle J referred as part of the common law principle is expressly stated. However, of the character of the proceeding, Leeming JA said (at [36]-[37]):

> It is clear that some species of litigation are inimical to the notion that anything that occurs in a court should be publicly available. Injunctions to prevent publication of confidential information, or a trade secret, or disputes as to privilege, are examples.
>
> Further, it is clear that the interests to which the Court may have regard when determining an application for a non-publication order include those beyond the immediate litigation. Orders which, if not made, will deter future applicants from coming forward are an example.

28 None of those kinds of factors exist in relation to the present proceeding. Rather, as I explain below, the principles of open justice loom large given the character of the present proceeding. I made a similar point in *CEU19* at [97].

Use of suppression orders in class actions

29 In Part IVA proceedings, different judges have taken different approaches to the use of suppression orders.

Cases upon which the Territory relied

30 In *Wong v Silkfield* [2000] FCA 1421, as part of the orders approving a Pt IVA settlement, the Court made a suppression order over the settlement deed. The proceedings concerned a contractual dispute over the sale of units in two apartment towers at Broadbeach on the Gold Coast. The making of the suppression order did not appear from the Court's reasons to have been contested, and the Court did not provide any reasoning supporting the order.

31 *Harrison v Sandhurst Trustees Ltd* [2011] FCA 541 was a class action on behalf of investors in secured debentures and unsecured notes issued by certain corporations, who then loaned the monies raised to related development companies. The group of companies subsequently collapsed, owing the investors around $201 million. The proceeding was brought against Sandhurst as the trustee for the note holders/investors. The settlement sum was disclosed in the Court's reasons: see [16]. The suppression order was made over what was described in the orders as a "Confidential affidavit" and annexures. It would appear this affidavit may have contained counsel's opinion on the settlement, which would usually be the subject of a suppression order. Again, the order appeared to have been an agreed order, and there is no reasoning in the Court's judgment about the making of the order.

32 *Hudson Ventures Pty Ltd v Colliers International Consultancy and Valuation Pty Limited* [2014] FCA 982 concerned damage alleged to have been suffered by reliance on a valuation provided by the respondent in January 2007 with respect to land and water areas, and associated improvements and facilities, at Rozelle Bay in Sydney. At [10], the Court stated:

> Notwithstanding the agreement of all group members, the hearing of the application for approval proceeded in what may be described as a "standard way". A number of confidential affidavits were filed and read. A number of confidential exhibits were tendered.

33 At [11], the Court referred to the provision of a detailed joint written opinion of counsel for the applicant. At [12], in describing the terms of the settlement, the Court did not disclose any specific figures. The Court's reasoning on the approval was brief, I infer because of the relatively straightforward nature of the settlement, the small number of group members, the absence of any objections and the agreed approach presented to the Court. Again, there is no specific reasoning relating to the making of the suppression orders.

34 The Territory placed specific emphasis on the Court's decision in ***Fowler*** *v Airservices Australia* [2009] FCA 1189. In that proceeding, in the course of making orders for the approval of the settlement of a Part IVA proceeding, the Court made two separate suppression orders. Both concerned exhibits to an affidavit read in support of the settlement approval application. One order stated that certain exhibits were confidential and were not required to be served on the respondent. The other stated that certain other exhibits, or parts thereof, were confidential and thus suppressed from all non-parties.

35 The principal claim in *Fowler* was by an individual, whose employment with the respondent had been terminated. The dispute concerned the applicant's entitlement to a bonus payment

under his contract of employment, and whether other entitlements (such as recreation and long service leave) should be calculated by reference to an amount including the bonus payment. Subsequent to the applicant instructing solicitors, another 33 former employees of Airservices Australia sought to make similar claims based on substantially similar contracts to that of the applicant. A settlement sum was agreed in the settlement, together with a proposed distribution scheme amongst the 34 applicants.

36 The applicant sought suppression orders over two categories of evidence, as I have noted above. The first category was documents the Court described as relating to arrangements (including costs) between the group members and their solicitors. The second category was described by the Court at [36]:

> A confidentiality order is sought in respect of a second class of documents but not that they be kept confidential from Airservices. The second class of documents was, initially, the Deed of Release and Confidentiality and the amended Deed of Release and Confidentiality in their totality, and the schedule setting out the proposed distribution of the global settlement sum to each Deacons client ('the distribution schedule'). At the hearing, the second class of documents was limited only to the distribution schedule and a specific clause of each Deed: clause 2.1. That clause sets out the global settlement sum to be paid by Airservices to the Deacons clients. That figure is the same in both the Deed and amended Deed. The amendment to the Deed relates to the withholding of tax from the settlement sum and is irrelevant for present purposes.

37 It is apparent from the following paragraph in the Court's reasons that the respondent joined in the application for a suppression order. It was the respondent which contended that

> publication of the global settlement sum would be embarrassing and misleading because there are other employees of Airservices, who are not part of the Deacons clients group, who may be subject to contracts of employment similar to the Contract but who do not allege representations by Airservices. Airservices emphasises that, from its perspective, the global settlement was reached by taking into account the contractual issue and the individual allegations of representations, the cost of litigation and the time involved in that litigation. Airservices submits that it is appropriate to keep the global settlement and the individual payments confidential, as it is prejudicial to Airservices to make public that settlement amount. Further, Airservices says that it is reasonable to assume that one of the factors taken into account in determining the settlement was the fact that the settlement would be accompanied by a deed of confidentiality.

38 The Court's reasoning is brief, perhaps again because of the joint position put to it by the parties:

> The Deed and amended Deed provide that the Deacons clients must not disclose the content of the Deed (which includes the global sum), or any discussions or correspondence relating to the negotiation of the Deed or the subject matter of the proceedings without the consent of Airservices. That clause, agreed between the parties, would be put at naught if the documents that set out the payments were made

> public. The requirement of confidentiality forms part of the settlement of the proceeding. In my view, it is appropriate that the confidentiality order be made.

Conclusion on these authorities

39 While it is the case that the Court must itself be satisfied that the preconditions to the exercise of power under s 37AF are met, a not insignificant matter in any given case may well be the agreement of the parties that suppression of evidence or documents is necessary for one of the reasons set out in s 37AG(1). Relevantly to the present reason advanced, if the parties join in or agree to the making of such orders, then this may well be an important factor in the Court's consideration, in the context of adversarial litigation, about what is necessary to prevent prejudice to the proper administration of justice. The latter concept includes the administration of justice in the particular proceeding before the Court, although the concept is not confined to that matter. However, giving effect to agreements reached to resolve a proceeding, especially a resource-intensive proceeding, may generally be seen as an important aspect of the proper administration of justice. Thus while the parties' agreement by no means compels or authorises the exercise of the power in s 37AF, it is a material factor.

40 In contrast, in some circumstances, one might say rare circumstances, the parties' agreement to suppression orders may be seen as positively contrary to the proper administration of justice and that is one reason why the parties' agreement must be considered in the particular context in which it is given.

41 All of the authorities relied on by the Territory involved an agreed position being put to the Court, and orders were made in the context of the final hearing for approval of a settlement under s 33V. That is quite a different context from the Territory's application. Further, none of the authorities involved subject matter of the kind covered by this proceeding; being subject matter in which there is an inherent public interest.

42 As the Court's reasons in *Fowler* make clear, much might also depend on the particular terms of the settlement agreement reached between the parties. Again, in a Part IVA proceeding, the parties cannot by their contractual agreement to confidentiality necessarily negate or frustrate the public and open process of settlement approval for which Part IVA provides. Orders made to give effect to such attempts would themselves prejudice the proper administration of justice.

43 However, *Fowler* provides an example of a situation where, because of the contractual nature of the claims made in the proceeding, the small number of group members, the particular terms of the Deed and the parties' united position put to the Court, the Court was persuaded to the

requisite standard that the making of suppression orders was "necessary". Reasonable judicial minds might differ on whether certain circumstances justify the making of a suppression order, and what weight should be given to the systemic features of Court approved settlements in Part IVA proceedings. Some of those factors have certainly weighed heavily with other judges, as I discuss below.

44 For present purposes, it is sufficient to find that the circumstances in *Fowler* are far removed from the circumstances in the present proceeding. Each case turns on its own facts and I am not persuaded that any particular weight should be given to the fact that the Court in *Fowler* determined a settlement sum should be suppressed.

Other authorities

45 The applicants relied in particular on the decision of Lee J in *Liverpool City Council v McGraw-Hill Financial Inc* [2018] FCA 1289 (***Liverpool CC***). In those reasons, Lee J emphasised the particular nature of class actions, and the role of the Court in approving settlements. As to the former factor, after noting law reform and academic commentary to similar effect, his Honour said at [107] that Part IVA settlements

> are not just private bargains between parties resolving the disputes between them. The settlement of a class action has an important public dimension. Not only is it appropriate that the community have access to relevant information about the operation of class actions and how public resources are being used by private commercial enterprises but also, as Professor Legg explains, there is a legitimate interest in the community having access to information as to the operation of the "underlying laws" relevant to the present cases, being the statutory norms prohibiting misleading and deceptive conduct which constituted the primary basis upon which relief was sought in these proceedings.

46 His Honour also explained (at [111]) why the parties' mutual position on confidentiality would not be sufficient to make a suppression order "necessary":

> Importantly, in the circumstances of this case, the mere fact that the parties to the proceeding have agreed between themselves that certain documents are to be kept confidential is not determinative. The dispute transcends those parties as does the binding nature of the settlement. In any event, it is when both sides agree that information should be kept from the public that the Court will be "most vigilant": see *R v Legal Aid Board; ex parte Kaim Todner (a firm)* [1999] QB 966 at 977. The need for vigilance also arises "from the natural tendency for the general principle to be eroded and for exceptions to grow by accretion as the exceptions are applied by analogy to existing cases". This accretion can be seen by the common sight of class action applicants agreeing to broad confidentiality clauses and then seeking to have the Court give them curial sanction.

47 In *Liverpool CC*, Lee J refused to make suppression orders over the heads of agreement, deeds and the settlement distribution scheme: see [112]. At [113], Lee J referred to a number of cases where the total value of the settlement sum had been disclosed.

48 Lee J has expressed similar opinions in subsequent cases, see especially *Santa Trade Concerns Pty Ltd v Robinson (No 2)* [2018] FCA 1491; *Mid-Coast Council v Fitch Ratings, Inc* [2019] FCA 1261 and ***Clark*** *v National Australia Bank Ltd (No 2)* [2020] FCA 652. In *Clark* at [15], his Honour made the following observation:

> In a sense, one cannot be overly critical of practitioners in circumstances where it appears that mixed messages may have been received by differing approaches being adopted by the Court to making confidentiality orders on these applications. But one hopes that recognition of the importance of the primary objective of the administration of justice and the need to ensure transparency (particularly in relation to Pt IVA proceedings) will find wider acceptance and be reflected in a more careful approach to seeking such orders.

49 I respectfully agree, in particular with his Honour's reference to transparency. While the word "transparency" might be seen as no more than a description of the effect of the open justice principle, the word conveys a particular feature of Part IVA proceedings. Their representative character, and the fact that group members do not actively participate in the proceeding but will be bound by its outcome as to common issues of law and fact, imposes an obligation on the parties, and on the Court, to ensure how and why judicial power is exercised as it is in a settlement approval process is apparent to all. That is just as important in relation to the process leading to the determination of whether or not to approve a settlement, as it is to the Court's deliberations on that ultimate question.

50 Lee J is not the only judge of this Court to express concern with the seeking of suppression orders over evidence relating to Part IVA settlement approvals: see *Caason Investments v Cao (No 2)* [2018] FCA 527 at [8]-[9].

51 In my respectful opinion, the authorities to which I have referred in this section recognise the particular features of Part IVA proceedings, and the role of the Court in approving settlement of such proceedings. These are important factors to bear in mind in the exercise of the power in s 37AF, and in assessing the ground in s 37AG(1)(a).

What is really in dispute on the Territory's application

52 Although the Territory's proposed orders were in the alternative over the entire Deed, or over two clauses which refer to the settlement sum (together with other specific references in other

documents), it is clear from the whole context of the application and the submissions made by the Territory that it is in substance only the settlement sum over which suppression is sought. The other key terms, which I have set out at [2] above, all appear in the settlement notice and accompanying information, without objection from the Territory. Indeed, the Territory positively advanced a submission at the case management hearing that there should be *more* references to the term of the settlement involving a denial of liability by the Territory. None of these terms are in my opinion genuinely seen by the Territory as needing to be suppressed. Nor could they be, in a process under Part IVA.

53 Thus, and subject to what I say about third party inspection at the end of these reasons, there is no real basis for the suppression of the entirety of the Deed. The real issue in dispute revolves around suppression of the settlement sum. I consider the matter accordingly below.

The three strands of the Territory's contentions

54 The Territory advanced three strands of argument supporting the proposition that the making of suppression orders (whether to the settlement hearing or permanently) were in the interests of the administration of justice:

(a) The orders would preserve the confidentiality of the settlement, in circumstances where the Territory is a respondent or defendant to other litigation by people who have been held in juvenile detention, and where confidentiality was an important component of the Territory's agreement to settle the proceeding.

(b) There was a real prospect that if the settlement sum were publicly available, it would be reported in a way which was sensational and out of context.

(c) The insertion of the settlement sum into the settlement notice and accompanying information does not provide sufficient context for group members to understand the role of the settlement sum, and is likely to mislead or confuse group members. While this argument focussed on the presence of the settlement sum in the settlement notice, counsel for the Territory accepted in argument that it was a submission which went to the suppression of the settlement sum generally, and he could not advance a separate basis for it not being in the notice if otherwise no suppression order was made.

RESOLUTION

55 I am not persuaded that any of the bases advanced by the Territory demonstrate that there is any prejudice to the proper administration of justice if the settlement sum is not suppressed.

56 Further, I am positively persuaded that it is in the interests of the proper administration of justice that the settlement sum be publicly available, and that it form part of the information given to group members in the settlement notice and accompanying information.

The confidentiality argument

57 The terms of the Deed between the parties impose no absolute obligation to keep the settlement sum confidential. The terms are more nuanced than that, and I infer that is because of the parties' mutual recognition of the role of the Court in approving Part IVA settlements, and the exceptional requirements for suppression orders under the Federal Court Act.

58 There are three bases articulated in the Deed for the settlement: payment of the settlement sum is one of them. The settlement sum is a single sum, defined to incorporate the applicants' legal costs of the proceeding and the costs of the scheme for the distribution of the settlement sum. The latter sums are not yet quantified in the evidence and counsel for the applicants informed the Court during the hearing on 16 July that they were not yet able to be quantified, even in terms of a range. It is fair to say that the settlement sum as expressed will be reduced by a material amount, even if that amount cannot yet be quantified.

59 The Deed imposes a number of express obligations on the applicants, including what needs to be included in the settlement notice. The applicants relied on this clause in their submissions supporting the inclusion of the settlement sum in the settlement notice. I accept their submissions that this obligation is relevant to the question of whether the settlement sum should be suppressed. Without that sum being disclosed, it is at least arguable the applicants are not complying with their obligations under the Deed. The Territory appears to submit this obligation can be discharged in a substitute way by one-to-one conversations between Maurice Blackburn lawyers and individual group members pursuant to the Territory's proposed carve-out to the suppression orders. For reasons I explain below, I do not consider that proposal is practicable, nor reasonable.

60 The Deed also imposes a number of express obligations on the Territory. One of these, referred to in submissions, is not in substance an "obligation" but the preservation of an entitlement: namely, to apply for confidentiality in respect of the whole or part of the Deed. The presence of this clause is important in characterising the approach of the parties in the Deed to suppression of the settlement sum, and suppression of the Deed as a whole. It is clear there was no agreement as to such suppression. Rather, the applicants agreed to the preservation of the

Territory's ability to ask the Court to make suppression orders. The Territory did not surrender, in a contractual sense, its ability to make such an application.

61 It can be seen at once that in substance this is a different situation from *Fowler*. In any event, as I have explained, even if the parties had made a positive agreement about the confidentiality of the settlement sum, that agreement is no more than a factor in the Court's consideration whether a suppression order is necessary on the identified ground in s 37AG(1)(a).

62 There is however a specific clause in the deed headed "Confidentiality obligations of the parties". There are two substantive obligations to which the parties have agreed. One of those obligations relates to personal information about group members and is not presently relevant. The second is expressed to be an obligation to keep the Deed confidential. Both obligations are subject to another clause, headed "permitted disclosure", which sets out the circumstances in which information covered by the confidentiality clause might be disclosed. It is sufficient to find that these circumstances encompass what might be necessary and appropriate in the course of the settlement approval process, including to ensure group members (and those supporting or advising them, including their families) are aware of, and understand the settlement.

63 Plainly the parties have sought to clothe the Deed itself with a level of confidentiality. Bearing in mind the Deed was signed in May 2021 and there was no public announcement of even the fact of the settlement until 16 July 2021, at the joint request of the parties, the confidentiality obligations have to this point had real work to do. However, as the approval process moves forward, there will be an inherent tension between terms of this kind and the operation of the principles of open justice in the settlement approval process. As I have noted above, the Territory has in fact, and in substance, not expressed particular concern over many of the key provisions in the Deed being disclosed, and has positively requested they be prominent in the settlement notice and accompanying information. That is, I find, a recognition that maintaining operative confidentiality over key aspects of the Deed is incompatible with the settlement approval process under Part IVA, especially in relation to a cohort of group members such as the cohort in the present proceeding, and taking into account the subject matter of the proceeding.

64 I accept, as Lee J did in *Liverpool CC* at [117], that in general terms there is an important public interest in the settlement of litigation, and that it can be said that the proper administration of justice comprehends this general interest. The emphasis on mediation and negotiation in this Court's constituting legislation, Rules and practices bears this out. However, the context in

which parties agree to settle a Part IVA proceeding is a specific one. The agreement is reached on the premise, and with the knowledge, that the Court – which performs its functions in public – must approve the settlement. The premise of open justice is thus introduced expressly into the settlement negotiations of any Part IVA proceeding. In my respectful opinion, more would generally be required to make suppression orders in relation to settlement sums (or like terms) "necessary" in the interests of the proper administration of justice than the general interest in encouraging settlement of litigation without trial. More would also be required than the generalised, and qualified, kinds of confidentiality terms apparent in this particular Deed.

65 I emphasise again however, that the parties to a Part IVA settlement cannot bind the Court's hands to make suppression orders by the way they express the terms of settlement in a Deed, in particular the terms as to confidentiality. Suppression, and compromise of the open justice principle, will always be a matter for the Court to determine.

The media argument

66 Ms Pikoulos deposed:

> [T]here is likely to be considerable media interest and reporting of the terms of the Settlement Notice and information contained in it. In recent years, youth crime and justice has attracted considerable media interest in the Northern Territory.

67 There is no doubt that is the case. Contrary to the Territory's submissions, this fact tends against the making of suppression orders over the settlement sum.

68 Having annexed a bundle of media articles to her affidavit, Ms Pikoulos then deposes:

> The headlines and content of those articles are generally reflective of the reporting of youth crime and justice in the Northern Territory. The inclusion of the settlement amount in the Settlement Notice is likely to attract disproportionate media attention. Divorced from other information about the claims not contained in the Settlement Notice which would allow its proper evaluation, and in the context of the plain English and drafting conventions of the terms of the Settlement Notice, it is likely that media reporting will be sensationalist and inflammatory, generally fixated on the settlement amount and highly critical of the settlement and the Respondent.

69 Ms Pikoulos also annexes a media article about the Territory's earlier settlement with Dylan Voller and Jake Roper and describes the article as one which "fixates on other monetary amounts".

70 Putting to one side the opinion character of this evidence, without any basis disclosed, the obvious response to this evidence, and the submissions which went with it, is that it is no part of the Court's role to use suppression orders to police the reporting of Court proceedings by

the media. There are a range of regulatory mechanisms concerning fair reporting of legal proceedings. Whether or not one person considers reporting "sensationalist" says nothing about the basis in s 37AG(1)(a) for a suppression order.

71 Further, as I explain below, it is appropriate that the outcome of this proceeding, and the conduct of the proceeding, be fully reported. It concerns a subject matter of considerable public importance, subject matter which was considered by a Royal Commission less than 4 years ago.

72 This contention has no merit.

The group members argument

73 It is imperative that the notice given to group members, and information which might accompany it either at the same time as the notice, or during the time leading up to the approval hearing, allows group members to understand the settlement which is proposed, and to make an informed decision about their views on it, including (but not limited to) whether they wish to object to the settlement. The notice imperative in s 33X(4) is "an important safeguard to protect the interests of group members who may be ignorant of an application which may affect their rights": *Dyczynski v Gibson* [2020] FCAFC 120; 381 ALR 1 at [303].

74 In her affidavit in support of the preparatory orders, Ms Palmer describes the characteristics of the approximately 1200 group members, and deposes that this description is consistent with the experience of the Maurice Blackburn team with Group Members and with the documentary evidence obtained by Maurice Blackburn in the proceeding. She deposes:

> The Maurice Blackburn Team took into account the following characteristics of the Group Members in preparing the proposed content and form of the Settlement Notice:
>
> (a) Approximately 95% of Group Members are Aboriginal.
>
> (b) A substantial proportion of Group Members are from remote Aboriginal communities, noting that approximately 80% of the Northern Territory's Aboriginal population live in remote or very remote communities.
>
> (c) English is not the first language of a substantial proportion of Group Members.
>
> (d) Group Members' literacy is generally poor, having been adversely affected by many factors, including:
>
> (i) poor access to education, especially for Group Members from remote or very remote communities;
>
> (ii) poor school attendance;
>
> (iii) the effects of socio-economic disadvantage and high rates of trauma,

neglect, homelessness and family violence; and

(iv) disruption of education resulting from time in youth detention.

(e) Amongst Group Members, there is a high instance of learning difficulties such as Attention Deficit Hyperactivity Disorder and cognitive and intellectual disabilities, particularly Fetal Alcohol Spectrum Disorder which:

(i) directly affect Group Members' comprehension; and

(ii) exacerbate the literacy issues referred to in paragraph 14(d) above.

75 These are also, broadly, the assumptions that Dr Diana Eades, who has provided an expert report on the settlement notice and accompanying information, has used in expressing her opinions about how the settlement notices and accompanying information should be worded and presented.

76 Dr Eades is a consultant sociolinguist and Adjust Professor of the School of Humanities, Arts and Social Sciences at the University of New England, and holds a PhD in linguistic anthropology and sociolinguistics. Her report describes her significant number of publications specialising "in language in the legal process, especially in the English spoken by, to and about Aboriginal people". The applications of her research have included workshops on communication with Aboriginal people, especially in the legal process, and a range of advices and expert reports in legal and other setting regarding Plain English communication.

77 I should make it clear that I completely accept Dr Eades' expert evidence: she is highly qualified and experienced, and I have found her report of considerable assistance in considering the appropriateness of the content of the settlement notices and accompanying information. Her opinions are also of relevance to the issue of the suppression of the settlement sum, as I explain.

78 Ms Palmer's affidavit also deals with the challenges of conveying appropriate and complete information to group members about the proposed settlement, including the fact that some group members will be held in custody, and some will be living in the community in a range of circumstances, including in remote communities, and interstate. She deposes (at [31(e)]) that to reach group members, it is proposed to distribute briefing packs about the settlement, including the settlement notices across the Northern Territory, at places such as

(i) advocacy organisations;

(ii) Land Councils;

(iii) Danila Dilba Health Service;

(iv) community centres;

(v) casework and community services;

(vi) drug and alcohol rehabilitation services;

(vii) employment services;

(viii) youth services; and

(ix) local councils.

79 One of the points made by Dr Eades is the need to make messages in the settlement notice and accompanying documents "more explicit on key points": see 3.4.17 of her report. Dr Eades' report states:

> The need for Group Members to register now in order to claim compensation money, even if they have previously registered, is a crucial point, and it may be counter-intuitive.

80 This kind of insight, if I may say so with respect, is telling about matters which lawyers and judges (and indeed those with the privilege of full secondary and/or tertiary education) may otherwise take for granted. The settlement notices and accompanying information, even as well drawn and presented as they are, require group members to embark on a thinking and discussion process about future decision-making that may be outside their usual life experiences and activities. In that context, it is critical, as Dr Eades explains, to make "the message" explicit on key points.

81 One way to achieve that is to insert the settlement sum. It is a very large sum of money indeed, even assuming material deductions for legal and distribution costs. It is likely to grab the attention of group members. At this stage of the process, that is a critical advantage and benefit. Of course, through all of the careful and varied methods outlined in Ms Palmer's affidavit, once the attention of group members is secured, to some extent the detail cannot be avoided, including how individual group members' shares of the settlement sum will be worked out. However, the first and most significant achievement would be to secure the attention of those intended to benefit from this settlement. It is important not to lose sight of the fact that the intention of the settlement is that the settlement sum be distributed fairly amongst as many group members as possible. Getting the attention of this particular cohort is a vital first step.

82 Dr Eades makes another point in dealing with that section of the settlement notice about objections to the settlement. In explaining what she sees as the problems with the document informing group members that they have a right to object to the settlement, Dr Eades states (at 3.5.1):

> further, it is very likely that in everyday talk among Group Members and their communities the word "settlement" in relation to this class action will come to refer to compensation money (if this has not already happened)

83 I do not understand this statement to be mere conjecture by Dr Eades: rather it is based on her long experience in dealing with people living in the circumstances of the group members, and her knowledge of how their communities function, and how people communicate. It is a reasonable inference to draw, which I do, that there has already been discussion in the communities of the group members, and in their families, about possible "compensation money". That discussion will intensify once the settlement is more widely known, the settlement notices are distributed, and there is media reporting. In my opinion, it is unrealistic and impractical to imagine that any kind of confidentiality regime between individual group members and the applicants' lawyers can operate in any functional way. To use a colloquial expression, "word will get out".

84 I reject the submissions of the Territory that the inclusion of the settlement sum in the notice and accompanying information will be so misleading that it is necessary in the interests of the administration of justice not to include it. In the present proceeding, the administration of justice requires that as many group members as possible are reached by the notice process, and that they are as well and completely informed about the key aspects of the proposed settlement as is reasonably practicable. Inclusion of the settlement sum is a core component of the settlement; indeed it is the core component. This is a proceeding about compensation for personal injury and deprivation of residual liberty. The primary remedy sought was damages. While the settlement is made with a denial of liability by the Territory, there is no getting away from the fact that the principal relief in the proceeding was compensation. To withhold the settlement sum from group members in the very documentation designed to inform them is not compatible with the administration of justice in this proceeding. While it will be necessary to explain how the settlement sum will be distributed, group members should be told, in the very documentation designed to inform them, what the Territory has agreed to pay. Doing so maintains clarity, consistency and certainty about what they are being told, and avoids perhaps inaccurate word of mouth descriptions of what the Territory has agreed to do.

85 I reject the submissions of the Territory that the belated "carve out" to the proposed suppression orders is an appropriate way to address the obvious need of group members to know the settlement sum when they are being asked to understand how the settlement affects them. The challenges faced by many individuals within this cohort, the likely way they communicate with

those they rely on for decision-making in their lives, their relative youth, for some the fact they are incarcerated, for others, the fact they live remotely in circumstances where legal obligations of confidentiality are unlikely to play any role in their daily lives, all mean that it is likely the objective of any suppression orders (if made) would be frustrated, and word would spread of the settlement sum in any event. As I have noted above, relying on word of mouth means the information may spread in inaccurate form. To say as much is not to criticise group members, but rather to recognise the realities of their lives, and the way that people communicate within families and communities. In those circumstances, no group members, nor their families or other key people they might speak to, should be exposed to the risk of prosecution for a criminal offence for discussing the settlement sum. Further, it is not appropriate for the Court to make orders which it reasonably anticipates might not be able to be complied with in practical terms: *University of Sydney v ResMed Limited (No 4)* [2010] FCA 1403; 120 ALD 16 at [30]. All that does is undermine the Court's authority and the force of its orders.

86 If group members sought to adhere to the suppression orders, it is likely they may well refrain from speaking to people they may need to speak to in order to understand the settlement, and to make an informed decision. Either way, the proposed suppression orders are more likely to have an adverse effect on the proper administration of justice in this proceeding than if there were none made.

87 The approach I have taken is consistent with other Part IVA proceedings involving First Nations people, and large compensation sums. In *Wotton v State of Queensland (No 10)* [2018] FCA 915 and *Pearson v State of Queensland (No 2)* [2020] FCA 619, the settlement sums of $30 million and $190 million respectively were made public and formed part of the settlement notice information. Each of those cases involved a State as a respondent. The speculation by the Territory of the deleterious effects of disclosing the settlement sum do not appear to have been put forward by the State of Queensland in either case, and there is no evidence of any deleterious consequences for the administration of justice in those proceedings, or more broadly, from the disclosure of those (large) settlement sums.

The interests of the administration of justice clearly favour disclosure

88 Looking at the other aspects of the administration of justice, and contrary to the Territory's submissions, in my opinion disclosure of the settlement sum is a positive benefit to those interests in relation to other litigation which currently exists, or may be brought, about the same subject matter as this proceeding. The interests of justice may well be better served if all parties

are aware of what the Territory has been prepared to agree as a settlement sum, with a denial of liability. Circumstances may or may not be completely comparable, but there will be similarities by reason of the subject matter. In this sense, the settlement sum is not unlike the funding fee rates which might be levied in class actions. Murphy J has explained why it may be in the interests of the administration of justice that those rates be disclosed:

> It is difficult to see why the funding commission rate and quantum should be treated as confidential when the funding commission is a standard cost and in funded class proceedings it is usually the single largest deduction from the settlement.

Earglow Pty Ltd v Newcrest Mining Limited [2016] FCA 1433 at [176].

89 It is likely that other litigation may also involve court approval, especially for example where the plaintiff or applicant remains a minor. Disclosure of the settlement sum in this case, and disclosure of evidence about the distribution method once that evidence is available, may well assist other courts in determining if other settlements are fair and reasonable.

90 Finally, and importantly, the approach I have taken gives proper effect to the principles of open justice on which the exercise of judicial power is based. The Court will be able to conduct the settlement approval hearing in a way which fully and publicly examines the appropriateness of the settlement, by disclosure of the settlement sum and then by referring in detail to how the settlement sum is to be distributed. To be able to set those matters out in its reasoning is part of the public exercise of judicial power under Part IVA.

91 This proceeding is itself *about* the administration of justice. It is about the exercise of public powers in respect of minors held in juvenile detention in the Northern Territory. It concerns the treatment of those minors while deprived of their liberty. There are allegations that the applicants and group members retained a right of "residual liberty" while detained, so that the way they were detained, and the way they were treated, was capable of constituting wrongful imprisonment. There were also a number of allegations that particular circumstances or conduct within the facilities where the applicants and group members were detained constituted assault and battery. There are alleged contraventions of various aspects of ss 151AA, 153 and 161 of the ***Youth Justice Act*** *2005* (NT). There are allegations concerning the validity of appointment of Commissioners of Correctional Services in the Northern Territory, allegedly invalidating a series of delegations under the Youth Justice Act, including the positon of Superintendent at "old Don Dale", "new Don Dale" and Holtze Youth Detention Centre, whose authorisation was required for the treatment and restraint of juveniles detained in Northern Territory correctional facilities under the Youth Justice Act.

92 The characteristics of group members to which Ms Palmer deposes (and which I have extracted above) are taken in large part from the final report of the Royal Commission into the Protection and Detention of Children in the Northern Territory. The Royal Commission investigated, and reported on, many of the matters which are the subject of allegations in this proceeding. It is difficult to conceive of a piece of litigation which is more centrally concerned with the administration of justice than this one.

93 Putting to one side the disclosure of the settlement sum in the settlement notices as being in the interests of group members, it is also the case, in my opinion, that members of the Australian community are entitled to know and understand the core components of the settlement reached by the parties, including the amount the Territory has agreed (with a denial of liability) to pay for compensation and legal costs. The Territory is expending public funds on making that payment, and in defending this proceeding. The Court expends public funds in approving the settlement, and performs a supervisory role given to it by Parliament, because the settlement of a Part IVA proceeding affects the rights and interests of all those within the class as defined. Here, those individuals were mostly Aboriginal, were minors, and were deprived of their liberty, when the impugned conduct occurred. In a civil society governed by the rule of law, those are additional reasons for a high level of transparency about how such a proceeding is proposed to be resolved. There should be informed public scrutiny of what has occurred, so that there may be informed public discussion of it – these are some of the proper consequences of open justice.

Making some accommodation for the confidentiality arrangements between the parties

94 Despite the conclusion I have reached about disclosure of the settlement sum, I consider that the public interest in encouraging settlement of complex litigation has a limited role to play in a Part IVA proceeding such as this one, especially in the lead up to the settlement approval hearing. So too the consideration of not setting at naught the agreement reflected in the Deed about the confidentiality of the Deed itself.

95 At least in the short term, those considerations lead me to conclude that there should be orders preventing third party inspection of the Deed of settlement in Annexure KMP38 of the affidavit of Kerry Palmer affirmed 4 June 2021 until the commencement of the settlement approval hearing. Given that all core components of the settlement are to be publicly disclosed, it is necessary to prevent prejudice to the ability of parties to carefully negotiate and agree specific terms of a Deed, which requires Court approval and has not yet been approved. In this interim

period in particular, parties are entitled to expect that the Deed itself should not be pored over by whomsoever pleases. If either or both parties wish to apply to extend that order, they can apply to do so at the hearing.

CONCLUSION

96 The Territory's interlocutory application for suppression orders will be dismissed, but there will be orders preventing the inspection of the Deed of settlement contained in Annexure KMP38 to the affidavit of Kerry Palmer affirmed 4 June 2021, until 10.15 am (NT time) on 8 November 2021.

I certify that the preceding ninety-six (96) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Mortimer.

Associate:

Dated: 26 July 2021