FEDERAL COURT OF AUSTRALIA

Jenkings v Northern Territory of Australia (No 5) [2021] FCA 1585

File number:	NTD 64 of 2016
Judgment of:	**MORTIMER J**
Date of judgment:	15 December 2021
Catchwords:	**PRACTICE AND PROCEDURE** – application for approval of settlement of a Part IVA representative proceeding pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) – where terms of settlement remain confidential – where large class of vulnerable young people represented – application granted.
Legislation:	*Federal Court of Australia Act 1976* (Cth), ss 33V, 33ZF, 33ZB
Cases cited:	*Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 *Binsaris v Northern Territory* [2020] HCA 22; 380 ALR 1 *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 *Campbell v Northern Territory (No 3)* [2021] FCA 1089 *Hobbs Anderson Investments Pty Ltd v Oz Minerals Ltd* [2011] FCA 801 *Jenkings v Northern Territory of Australia (No 3)* [2021] FCA 621 *Jenkings v Northern Territory of Australia (No 4)* [2021] FCA 839 *Lifeplan Australia Friendly Society Limited v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Company Incorporated in New York)* [2018] FCA 379 *LO v Northern Territory* [2017] NTSC 22 *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104; ATPR 41-678 *Skeen v Northern Territory* [2018] NTLC 008
Division:	General Division
Registry:	Northern Territory
National Practice Area:	Other Federal Jurisdiction

Number of paragraphs:	122
Date of last submissions:	1 November 2021
Date of hearing:	8 November 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

ORDER MADE BY: **MORTIMER J**

DATE OF ORDER: **15 DECEMBER 2021**

THE COURT ORDERS THAT:

Settlement Approval and appointment of the Claims Administrator

1. Subject to these orders, and pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) (the **Act**), the settlement of this proceeding be approved on the terms set out in:

   (a) the settlement deed made on 28 May 2021, being Annexure KMP38 to the affidavit of Kerry Palmer sworn on 4 June 2021 (the **Deed**); and

   (b) the Settlement Scheme (the **Settlement Scheme**), set out in Annexure KMP51 to the affidavit of Kerry Palmer sworn on 1 November 2021, including the proposed methodology to determine the compensation payable to each participating Group Member (**methodology**) that is confidential annexure BJS18 to the Second Confidential Affidavit of Ben Slade affirmed on 5 November 2021.

2. Pursuant to s 33ZF of the Act, the Applicants are authorised *nunc pro tunc*, on behalf of the Group Members (as defined in the Seventh Statement of Claim) (**Group Members**), to enter into and give effect to the Deed and conduct the transactions and take the steps contemplated by the Deed for and on behalf of the Group Members.

3. Pursuant to s 33ZB(a) of the Act, the persons affected and bound by these orders are the Parties to the Deed and the Group Members.

4. Pursuant to s 33ZF of the Act, Maurice Blackburn is appointed as the Claims Administrator of the Settlement Scheme and is to act in accordance with the Settlement Scheme, subject to any direction of the Court.

Registration

5. The date fixed by order 10 made on 27 July 2021 as the date on or before which any Group Member who wishes to receive Compensation (as defined in the Deed) in the proposed settlement should register for Compensation (**Register**) is extended to 31 July 2022.

Costs and deductions from the Settlement Distribution Fund

6. Pursuant to s 33ZF of the Act, the amount of $20,000 is approved as the amount to be deducted from the Settlement Distribution Fund (as defined in the Deed) (**Settlement Distribution Fund**) and paid to the Applicants in the amount of $10,000 each to reimburse them for the time spent and other costs borne by them providing instructions and evidence, for the purposes of clause 4.1(a) of the Deed.

7. Pursuant to s 33ZF of the Act, the amount of $9,400,000 (including GST) is approved as the amount to be deducted from the Settlement Distribution Fund and paid to Maurice Blackburn in payment of the Applicants' Costs and Administration Costs (as defined in the Deed), for the purposes of clauses 4.1(b) and 4.1(c) of the Deed.

8. Pursuant to s 33ZF of the Act, the amount of $600,000 (including GST) is approved as the amount of the 'Financial Capability Reserve' to be held in reserve in the Settlement Distribution Fund for payment as necessary to agencies for the provision and/or co-ordination of financial counselling and/or financial capability training services to Group Members and is to be managed and distributed by the Claims Administrator in accordance with the terms of the Settlement Scheme.

9. All previous costs orders made in this proceeding be vacated.

Conclusion of the Proceeding

10. Within 28 Business Days of concluding the final distribution to the Group Members from the Settlement Distribution Fund (as defined in the Deed), the Applicants and/or Claims Administrator shall apply to the Court for orders dismissing this proceeding with no order as to costs.

Amended Settlement Notice

11. Pursuant to s 33Y(2) of the Act, the form and content of the following be approved: The Settlement Notice Summary, which is Schedule 1 to these orders, be amended such that:

    (a) the following words be added under the words: "Settlement Notice" and the identification of the language: "This letter is to tell you that the last date to register has been changed to 31 July 2022. If you have already registered you do not need to register again."; and

    (b) the words "You must register before 16 November 2021" be amended to "You must register before 31 July 2022."

    (**Amended Settlement Notice**).

12. Maurice Blackburn is to have the text to be added into the Amended Settlement Notice in accordance with order 11 above translated into Kriol, Yolŋu Matha, Warlpiri and Pitjantjatjara.

13. Pursuant to s 33Y(3) of the Act, the Amended Settlement Notice be provided to Group Members in the proceeding according to the following procedure:

    (a) from no later than 22 December 2021, Maurice Blackburn is to publish the English version of the Amended Settlement Notice on its website;

    (b) in the period commencing on the date when Maurice Blackburn complies with Order 12 above and ending no later than 27 May 2022, Maurice Blackburn is to cause the Amended Settlement Notice to be sent by the following means to all Group Members who, as at 17 November 2021 have not Registered:

        (i) by post to the latest postal addresses in the Group Member Contact Information provided by the Respondent to Maurice Blackburn and/or otherwise known to Maurice Blackburn as postal addresses for Group Members; and/or

        (ii) by SMS containing a link to the page of Maurice Blackburn's website referred to in order 13(a) above, sent to the mobile telephone numbers in the latest Group Member Contact Information provided by the Respondent to Maurice Blackburn and/or otherwise known to Maurice Blackburn as the mobile telephone numbers for Group Members; and/or

(iii) by email to the email addresses in the latest Group Member Contact Information provided by the Respondent to Maurice Blackburn and/or otherwise known to Maurice Blackburn as the email addresses for Group Members; and/or

(iv) by mail and/or hand delivery to each Group Member identified as being in a youth detention centre or a correctional centre, according to the information provided to Maurice Blackburn by the Respondent pursuant to notification to the Respondent in accordance with clause 6(f) of the Deed, together with:

A. the 'Legal Call Request Form', substantially in the form of Schedule 3 to the orders made on 27 July 2021; and

B. a postage-paid envelope addressed to Maurice Blackburn.

14. Pursuant to s 33Y(3) of the Act, between 17 November 2021 and 31 July 2022, Maurice Blackburn is to conduct an advertising campaign on Facebook with that advertising providing a link for a direct telephone call to Maurice Blackburn on the telephone number provided in the Amended Settlement Notice and/or the page of Maurice Blackburn's website referred to in order 13(a) above.

15. The Amended Settlement Notice may be amended by Maurice Blackburn as it determines before being posted or emailed in order to insert relevant contact information as indicated.

16. The Amended Settlement Notice may be amended by Maurice Blackburn as it determines before being posted or emailed, or before or after first being displayed on Maurice Blackburn's website, in order to correct any contact information (including postal, website, email address or telephone number), any typesetting or typographical error or any other formatting issue.

Liberty to apply

17. The parties have liberty to apply with 3 days' notice.

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

SCHEDULE 1

9

SETTLEMENT NOTICE
Kriol Summary

Dat bigiswan kotaus, gulum Federal Court ob Australia, alabat bin dalim Maurice Blackburn Loiya mob bla dalim dijan stori. Dijan stori im bla tubala blakbala hu bin git loktap langa wanbala Youth Detention Centre blanga NT Gabmen, laik Don Deil.

Dat Maurice Blackburn Loiya mob, alabat wekwek garra Munanga lo. Alabat bin nyal bla tubala blakbala la wanbala kot keis. Dat kot keis im agens NT Gabmen. Langa dijan kot keis, det tubala blakbala, Dylan Jenkings en Aaron Hyde, dubala bin tok that NT Gabmen bin breigi lo en NT Gabmen bin ardim yang pipul wen dei bin jidan langa Don Deil. Bat dat NT Gabmen reken dei nomo bin breigi dat lo.

Dat Aaron en Dylan dubala bin aski NT Gabmen bla peiyim compensation mani la ola yang pipul weya thei bin jidan la Don Deil enitaim from 1st ob Ogis 2006, raitap 27th ob Novemba 2017. If yu bin jidan la Don Deil la Darwin o la Alice Springs dat taim na, wal NT Gabmen garra pei dat compensation mani la yu.

If yu wandi gaji that compensation mani burru gabmen, yu garra gibit yu neim langa detmob loiya. Wen yu gibit yu neim, munanga gulum 'register'. Dijan im min yu garra dalim that loiya mob yu wandi that compensation mani. Bla register en gibit yu neim, yu gin kol that loiya mob. O yu gin gu la that loiya mob websait en burrum bla yu diteils ja. Dijan na that websait: im https://classaction.mauriceblackburn.com.au/NTYouthJustice/registration.

Dijan na that namba bla kol that loiya mob: **1800 226 211**. Im fri kol dijan.

Meiksho yu gibit yu neim bifo 16 November 2021. If yu nomo gibit yu neim langa that loiya mob, yu gaan gaji eni compensation mani.

Bla faindat mo bla dijan stori, yu gin kol langa that loiya mob en tok garra alabat. That loiya mob gin gaji inteprita wen alabat toktok garra yu. If yu wandi irrim dijan stori yu gin irri rikoding garra Kriol en najalot langgus langa alabat website. Iya na that loiya mob website: mauriceblackburn.com.au/ntyouthjustice.

Dat loiya mob nomo dalimbat laiya. Yu gin luk la Federal Court websait en luk dijan stori im trubala. Dat websait im: https://www.comcourts.gov.au/file/Federal/P/NTD64/2016/actions.

SETTLEMENT NOTICE
Yolŋu Matha Summary

Walal Federal Court Australia-puyyu ḻakaram Maurice Blackburn Lawyers-kal walal dhu dhäwu dhuwal nhumalaŋ gurrupan. Dhuwandja dhäwu yuṯaw yolŋuw ŋunhi ŋayi gärrin nhinan Youth Detention Centre-ŋur.

Maurice Blackburn Lawya-ny mala dhuwal ŋunhi walal ŋuli ga djäma Balandawal romŋur. Dhiyaŋ bala walal ga ŋurru-ŋupa'ŋupan gunyambi lawya-ny mala märramaw' yolŋuw ga Northern Territory Government-ku. Dhiyaldja court case-ŋur maṉḏa ḻakaram Dylan Jenkings-thu ga Aaron Hyde-dhu. Ga bitjan maṉḏa waŋany ŋunhi NT Government-thu bakmaram rom ga yatjuyam djäka djamarrkuḻiw' Youth Detention (wäṛa). NT Government-thu yuraman walal dhu bäka-bakmaram rrupiya ŋunhiŋuwuyi.

Ga wiripuny maṉḏa ŋaŋ'thun NT Government-nha walal dhu rrupiyan ŋunhiŋuwuyi bäka-bakmaram ŋunhi walal gan yaka djäka manymakkurŋal djamarrkuḻiw' Youth Detention-ŋur. Ṉunhi nhe ga nhina dhiyaŋ bala Youth Detention-ŋur beṛŋur 1st-ŋur August ga bala 2006-lil ga 27th- ŋur November 2017-lil. Dhuwal NT Government-thu ga gurrupan bäka-bakmaranhawuy rrupiyaw nhuŋany.

Ṉunhi nhe djäl nhe dhu märram rrupiya walalaŋguŋ government-kal nhe dhu registering ga yäku nhirrpanmirr. Mayaliny' ŋayi, nhe dhu ḻakaram lawyers-kal ŋunhi nhe djäl ŋurikiyi bäka-bakmaranhawuy rrupiyaw. Nhe dhu registering yäku nhirrpanmirr ring-up lawyer-wal. Wiripuny nhe dhu yäku nhirrpanmirr registering ga dhäwu nhuŋuwuy galkan lawyer-wal website-lil: https://classaction.mauriceblackburn.com.au/NTYouthJustice/registration.

Free call dhuwal number lawyer-wal **1800 226 211**.

Registering nhe dhu lawyer-wal, ŋunhi bäyŋu before 16th November 2021 walal dhu bäyŋun nhuna gurrupan rrupiyany.

Ṉunhi nhe djäl bulu dhäwuw nhe dhu märram, marrtji ga buni lawyaw mala ga waŋi walalaŋgal. Ga walal dhu wiripuny märram nhuŋu interpreta-ny (dhäruk wanaŋgunhamirriny). Nhe mak dhu wiripuny ga ŋäma dhäwu Yolŋu mathawurr ga Kriol-gurr. Dhuwal dhäwu recordings malany ŋunhiyi website-ŋur walalaŋgal lawyer-wal: mauriceblackburn.com.au/ntyouthjustice.

Dhäwuny dhuwal märr-yuwalk ga yaka waliwaliŋu. Ṉunhi nhe djäl nhe dhu nhäma dhuwaliyi mala dhäwu dhiyal website-ŋur: www.comcourts.gov.au/file/Federal/P/NTD64/2016/actions.

SETTLEMENT NOTICE
Warlpiri Summary

Federal Court wirijarlu Australia-rla ngarrurnulu-jana lawyer-wati Maurice Blackburn yilyanjaku nyampu notice nyurrulaku. Nyampuju legal rights jalangu warnu patuku kujalaparlu nyinaja NT Government Youth Detention Centre-ngka.

Nyuntuju nyampula jinta NT Youth Justice Class Action legal case-kirli, kujalpanpa nyinaja youth detention-rla 1 August 2006 manu 27 November 2017. Dylan Jenkings manu Aaron Hyde wangkaja-pala NT Government-rli-jana ngawungku nyayimirli mardarnu-jalangu warnu-patu youth detention-irla.

NT Government wangkajarlu kulalu rdilyki-pungu law. Wangkajarlu kapulu nyarra compensation yinyi, yangka kujalpanpa nyinaja youth detention nyampu-puru 1 August 2006 manu 27 November 2017.

Register mantarlu nyanu maninjaku compensation talaku, manu ringiyi mantarlu nganpa.

Register manta-rlu-nyanu maninjaku compensation-iki, nyampurla 16 November 2021 lawaju kulanpa mani talaju.

Milki wangkanjaku ringiyi-manta-ngalpa. Nyampu kurluju Kriol, Pitjantjatjara, Warlpiri manu Yolŋu Matha-kurra manurlu purdanyanjaku. Kaji karnalu interpreter mani phone-rla kajinpa nganpa wangkami nganimpaku.

Nyampu ringiyi-manta number-ju **1800 226 211** free nganta.

Nyampuju yijardu – kaji kanpa-panu nyanyi nyampu class action-kurlu nyampurla Federal Court's website: https://www.comcourts.gov.au/file/Federal/P/NTD64/2016/actions.

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SETTLEMENT NOTICE
Pitjantjatjara Summary

Federal Court-pangku wangkangu Maurice Blackburn Lawyers tjuṯangku tjukurpa nyangatja tjakultjunkunytjaku.Tjukurpa nyangatja yangupala jail-angka panya NT Government Youth Detention Centre-angka nyinanytja tjuṯatjara.

Maurice Blackburn Lawyers panya Piṟanpaku law-wanu warkaripai. Munu tjana kuwari Northern Territory Government-anya court-kutu katira wangkanyi aṉangu kutjaraku tjukurpatjara. Aṉangu kutjara Dylan Jenkings-tu pula Aaron Hyde-tu wangkanyi panya NT Government-angku kunyu law katantaṟa yangulapa tjuṯa pikantanangi youth detention-pangka kanyiṟa. Palu panya NT government-pangku putu kulini tjana law katantankunytja.

Ka Aaron-tu pula Dylan-tu ngatjiningi NT Government-angku payamilantjaku yangupala tjuṯa youth detention-angka nyinanyangka 1 August 2006-nguṟu munu 27 November 2017-kutu. Ka nyuntu youth detention-angka nyara palula-aṟangka nyinanyangka NT Government-angku nyuntunya mani ungkuku kura panya palyantjitjanguṟu.

Nyuntu mani panya mantjintjikitjangku mukuringkulampa register-milanma. Uti nyuntu nganmanytju lawyer-ngka wangka maniku mukuringkula. Nyuntu lawyer-kutu ringamilaṟa register-milantjaku. Ka aṟa kutjupa lawyer-ku website nyakula tjarpatjura ini nyuntumpa munu nyuntumpa tjukurpa tjuṯa kulu: https://classaction.mauriceblackburn.com.au/NTYouthJustice/registration.

Lawyer-kutu mani wiyangku free ring-amilala nampa nyangangka – **1800 226 211**.

Nyuntu 16 November 2021-pangka kuwaripangka register-milala. Ka nyuntu register-milantja wiyangku wantinyangka nyuntu compensation mani mantjintja wiya.

Nyuntu tjukurpa nyanga palunyatjara piruku kulintjikitja mukuringkula nyanga tjananya arkala: Lawyer-kutu ringamilaṟa wangkara kulila. Ka paluṟu tjana interpreter ngurilku nyuntu tjukaṟurungku kulintjaku. Tjukurpa kulila recording-pangka – wangka kutjupa tjuṯa ngaṟanyi: Yolngu Matha, Kriol, Warlpiri, munu Pitjantjatjara. Tjukurpa nyanga tjuṯa lawyer-ku website-pangka ngaṟanyi: mauriceblackburn.com.au/ntyouthjustice.

Lawyer nyanga paluṟu tjana mulamulangku wangkanyi nyuntunya ngunti wangkanytja wiya. Nyawa Federal Court website-pangka tjukurpa nyangatja mulamulangku kulintjikitjangku: https://www.comcourts.gov.au/file/Federal/P/NTD64/2016/actions.

SETTLEMENT NOTICE
English Summary

The Federal Court of Australia told Maurice Blackburn Lawyers to share this story. This story is about young people that stayed in an NT Government Youth Detention Centre.

Maurice Blackburn Lawyers are people that work with non-Indigenous law. These lawyers speak for two people on a court case against the Northern Territory Government. In this court case, two people, Dylan Jenkings and Aaron Hyde, said that the NT Government broke the law and gave pain to young people in youth detention. But, the NT government do not think they broke the law.

Aaron and Dylan asked the NT Government to pay compensation money to young people who were in youth detention between 1 August 2006 and 27 November 2017. If you were in Youth detention at this time, the NT Government will pay compensation money to you.

If you want to get that compensation money from the government, you must 'register'. This means you must tell the lawyers that you want this compensation money. You can register by calling the lawyers. You can also register by going to the lawyers' website and putting in your information: https://classaction.mauriceblackburn.com.au/NTYouthJustice/registration.

Call the lawyers for free. Use this number – **1800 226 211**.

You must register before 16 November 2021. If you do not register with the lawyers, you will not get any of the compensation money.

This is what you can do to find out more information about this story. You might call the lawyers and talk with them. The lawyers can arrange an interpreter when they talk with you. You might listen to the audio recording in Yolngu Matha, Kriol, Warlpiri, and Pitjantjatjara. These recordings are on the lawyers' website: mauriceblackburn.com.au/ntyouthjustice.

These lawyers are not trying to trick you. You can look at the Federal Court website: https://www.comcourts.gov.au/file/Federal/P/NTD64/2016/actions to see that this is a true story.

Maurice Blackburn Lawyers WE FIGHT FOR FAIR

NT YOUTH JUSTICE CLASS ACTION

Dylan Riley Jenkings & Aaron Hyde v Northern Territory of Australia, Federal Court of Australia, NTD64/2016

REASONS FOR JUDGMENT

MORTIMER J:

INTRODUCTION

1 In this matter, Mr Jenkings and Mr Hyde (the applicants) have brought proceedings on behalf those young people who were at any time after 1 August 2006 detained in a youth detention centre of the Northern Territory, and who allegedly suffered assaults, battery and/or false imprisonment at the hands of certain staff and officers of those detention centres. Most of the allegations concern conduct occurring at "Old Don Dale", being one of the correctional facilities which was the subject of the 2017 *Royal Commission into the Protection and Detention of Children in the Northern Territory*.

2 The parties have resolved this proceeding by an agreement which has as one of its principal terms that the respondent, the Northern Territory, will pay the sum of $35 million, inclusive of costs.

3 I previously considered the background to this proceeding, and the applicants' causes of action, in ***Jenkings*** *v Northern Territory of Australia* ***(No 3)*** [2021] FCA 621, and *Jenkings v Northern Territory of Australia (No 4)* [2021] FCA 839. These reasons should be read together with those decisions.

4 For the reasons which follow, I am satisfied the settlement should be approved.

THE SETTLEMENT APPROVAL APPLICATION

5 On 1 November 2021, and following the Court being informed of the in-principle settlement of the proceeding, the applicants filed an interlocutory application seeking orders approving the settlement of the proceeding agreed between the parties. An amended interlocutory application was filed on 5 November 2021. The application sought settlement approval orders pursuant to ss 33V, 33ZF and 33ZB of the ***Federal Court*** *of Australia* ***Act*** *1976* (Cth), and orders as to the date for registration by group members, as well as deductions for legal costs and other payments from the settlement fund. It sought the appointment of Maurice Blackburn as the claims administrator, which the Territory did not oppose. The Court accepts that appointment is appropriate in the circumstances of this case, in particular by reason of the familiarity that the Maurice Blackburn team has built up with group members and their situations. The application also sought suppression orders over two affidavits of Mr Ben Slade

affirmed on 1 November 2021 and 5 November 2021. Finally, the application sought an order about how the proceeding was to be concluded following the final distribution of the settlement monies to the group members. Provision of an amended settlement notice, and the distribution of that notice to the group members, were also sought.

6 The settlement notice, an amended version of which was annexed to the amended settlement application, provides information in English and several languages spoken by the group members as to what the settlement meant, and how to register to receive compensation money. The notice provides a telephone number and website to facilitate registration, and advised that group members should register before 16 November 2021. This date will be further amended to 31 July 2022 as a consequence of the Court's orders today.

7 Among the deductions sought to be made from the settlement fund is the sum of $10 million in costs to be paid to Maurice Blackburn, including the applicants' costs of the proceeding and the costs of administering the settlement scheme.

8 The sum of $200,000 is proposed to be reserved for payment as necessary to agencies for the provision of financial counselling and/or financial capability training services to group members. It was unclear whether the proposal was that this sum come out of the $10 million or the remaining $25 million. My view is that the reserve should come out of the $10 million rather than the $25 million available for distribution. I describe those agencies in more detail below.

9 The applicants read and relied on the following affidavits filed:

(a) Two affidavits of Mr Ben Slade affirmed 1 November 2021 (**first Slade affidavit**) and 5 November 2021 (**second Slade affidavit**) in respect of which confidentiality orders were sought and made after the hearing. The first Slade affidavit deposed as to matters in support of the settlement approval application, including the confidential opinion of counsel retained by the applicants, Mr Paul Batley, as to the proposed settlement. The second Slade affidavit explained and annexed the proposed methodology to determine the compensation payable to each participating group member, and included a supplementary confidential opinion of Mr Batley. After the Court raised concerns about the breadth of the suppression orders sought, the parties proposed more confined orders, limited to matters which I am satisfied justify suppression in accordance with s 37AG(1)(a) of the Federal Court Act, namely those aspects of the affidavit and

annexures which expressed opinions about the applicants' prospects of success in the proceeding for the purposes of the Court being satisfied the settlement was in the bests interests of group members.

(b) Four affidavits of Ms Kerry **Palmer** sworn on 4 **June** 2021, **1 November** 2021, **4 November** 2021 and **5 November** 2021. The Palmer June affidavit deposed to the fact of the in-principle settlement of the proceeding between the parties, and was subject to a confidentiality order at the time it was filed. Annexure KMP38 to the June affidavit remains the subject of a confidentiality order pursuant to ss 37AF and 33ZF of the Federal Court Act, by reference to the ground set out in s 37AG(1)(a). That annexure contains the settlement deed. The Palmer 1 November affidavit deposed to group member registrations, the response of the group members to the terms of the proposed settlement, and steps taken by Maurice Blackburn to inform group members of the settlement and facilitate their registration. The Palmer 4 November affidavit provided information about responses received from group members after the filing of the 1 November affidavit. The Palmer 5 November affidavit deposed to information about group members produced by the Northern Territory, which is said to be relevant to the assessment of those group members' compensation.

(c) An affidavit of Ms Nicole Lees affirmed on 1 November 2021, deposing Ms Lees' opinion that many group members are either not yet sufficiently informed, trusting of the settlement, or have not had the opportunity to register. Ms Lee set out the steps taken by Maurice Blackburn to notify members of the proposed settlement and to facilitate registrations, and the basis for her opinion above.

(d) An affidavit of Ms Elizabeth Mukherji affirmed on 1 November 2021 made in support of the parties' proposed timetable to the hearing for the approval of the settlement notice. Ms Mukherji deposed to the processes required for the preparation and distribution of settlement notices, the proposed development of an administration database and registration portal, and the benefit of these processes.

(e) An affidavit of Ms Elizabeth Harris, a principal consultant of Ovid Consulting, affirmed on 1 November 2021. Ms Harris was appointed by the Court as an independent costs assessor to provide a report as to the reasonableness of the applicants' legal and administrative costs. That report appears as annexure EMH1 to Ms Harris' affidavit.

10 The Northern Territory relied on three affidavits of Ms Maria Pikoulos. They were sworn 28 April 2021, 1 November 2021 and 5 November 2021 respectively.

11 The first Pikoulos affidavit was made in relation to an interlocutory application to intervene in the proceeding made by two individuals, Dylan Voller and Jake Roper, who are expressly excluded from the group description. The Court dismissed that application: *Jenkings (No 3)*.

12 The second Pikoulos affidavit deposed to the significant volume of evidence that would have been adduced if the proceeding had gone to trial, the lengthy conduct of similar or related matters in this and other Courts and their poor record of success, and the prospect of legislative reform to reduce the Northern Territory's liability in relation to these claims.

13 The third Pikoulos affidavit was filed in response to references to difficulties in using the prisoner telephone system reported in Ms Palmer's evidence about group members who are presently detained (more than 200 are in this position). Ms Pikoulos described how those difficulties had been addressed.

14 The applicants and the Northern Territory each filed submissions in support of the settlement approval application. Neither the applicants nor the Court received any objections to the proposed settlement from group members.

THE HEARING

15 The approval application was heard on 8 November 2021. Due to ongoing interstate border restrictions relating to the COVID-19 pandemic, the hearing proceeded in a "hybrid" remote/in-person format. The arrangements made were so as to promote the accessibility of the hearing to not only the parties' legal representatives and the Court, but also to allow participation by some group members and to provide for ready public access to observe the hearing.

16 The Court was convened in a courtroom in the Victorian registry, with video conferencing links to a courtroom in the Northern Territory registry and to the applicants' legal representatives remotely. By the consent of the parties, orders were made on 5 November 2021 granting leave for five group members to address the Court in support of the settlement approval application. Ultimately the Court heard from six group members. To facilitate this, the Court directed that each of the Alice Springs Correctional Centre and the Darwin Correctional Centre, where the individuals seeking to address the Court are presently detained, facilitate audio visual links from those facilities to the Court. A further group member who did not address the Court was able to observe the hearing from the Alice Springs Correctional Centre, sitting with those group members who addressed the Court.

17 The hearing of the application was also "live streamed" with the link provided on the Court's daily list for access by group members, members of the public and media.

APPLICABLE PRINCIPLES

18 There is no dispute about the applicable principles in an application under s 33V of the Federal Court Act for approval of the settlement of a Part IVA proceeding. The role of the Court in this process has been described as an "important and onerous" one: *Australian Securities and Investments Commission v* ***Richards*** [2013] FCAFC 89 at [8], citing *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104; ATPR 41-678 at [16]. The task of the Court and applicable authorities are set out in *Lifeplan Australia Friendly Society Limited v S&P Global Inc (Formerly McGraw-Hill Financial, Inc) (A Company Incorporated in New York)* [2018] FCA 379 at [12]-[14] (Lee J):

> As is well known, any settlement of a representative proceeding under Part IVA of the Act requires approval of the Court. In that regard, s 33V provides:
>
> **33V Settlement and discontinuance – representative proceeding**
>
> (1) A representative proceeding may not be settled or discontinued without the approval of the Court.
>
> (2) If the Court gives such an approval, it may make such orders as are just with respect to the distribution of any money paid under a settlement or paid into the Court.
>
> The fundamental question arising on an application made pursuant to s 33V of the Act is whether the settlement is "*a fair and reasonable compromise of the claims made on behalf of the group members*". This formulation derives from the judgment of Finkelstein J in *Lopez v Star World Enterprises Pty Ltd* [1999] FCA 104; (1999) ATPR 41-678 at 42,670, and what has also been described as the "foundational analysis" of Goldberg J in *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925; (2000) 180 ALR 459 at 465-466 [19]: see *Foley v Gay* [2016] FCA 273 at [7] per Beach J.
>
> There are many examples where courts have sought to give an exposition of the relevant principles, both in this Court and in the Supreme Court of Victoria in exercising its identical jurisdiction under s 33V of Part 4A of the *Supreme Court Act 1986* (Vic). From this long line of cases it is possible to draw out a number of key principles or themes. In this regard, the role of the Court in considering whether to approve a proposed settlement pursuant to s 33V of the Act has been described in various ways:
>
> (a) In *Williams*, Goldberg J stated at 465 [19] that:
>
> > Ordinarily the task of a court upon an application such as this, is to determine whether the proposed settlement or compromise is fair and reasonable, having regard to the claims made on behalf of the group members who will be bound by the settlement. Ordinarily in such circumstances the court will take into account the amount offered to each group member, the prospects of success in the proceeding, the likelihood of the group members obtaining judgment for an amount

significantly in excess of the settlement offer, the terms of any advice received from counsel and from any independent expert in relation to the issues which arise in the proceeding, the likely duration and cost of the proceeding if continued to judgment, and the attitude of the group members to the settlement.

(b) In *Australian Securities and Investments Commission v Richards* [2013] FCAFC 89 at [8], the Full Court (Jacobson, Middleton and Gordon JJ) said:

> The role of the Court is important and onerous… It is protective. It assumes a role akin to that of a guardian, not unlike the role a court assumes when approving infant compromises.
>
> (Citations omitted)

(c) In *Hodges v Waters (No 7)* [2015] FCA 264; (2015) 232 FCR 97 at 112 [70], Perram J said:

> Insofar as s 33V is concerned, the authorities are clear. Approval will be granted to a settlement where it is just to do so and that will be so where the settlement is fair and reasonable having regard to the claims made by the group members who are bound by it. In carrying out the assessment called for by s 33V the Court's function is protective, recognising, as it must, that the interests of the parties before it and those of the class members as a whole may not wholly coincide…As *Richards* itself demonstrates, some care must be taken to ensure that the settlement is not only fair as between the parties but also as between individual class members.
>
> (Citation omitted)

(d) In *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468 at [40]-[51], Moshinsky J set out, with some detail, the principles relevant to an assessment of whether or not a proposed settlement distribution scheme is fair and reasonable among group members inter se:

> [40] In this case, as in many representative proceedings, the manner in which the settlement sum is to be distributed requires assumptions to be adopted and judgment calls to be made. There are different classes of claimants within the body of group members here, and it is necessary to arrive at some model that fairly and reasonably divides the settlement sum between those classes, recognising the differences in their respective claims. There is no single approach which alone can qualify as reasonable for sharing the fixed pool of funds among the claimants. Inevitably, adjustments in a given approach will be favourable for certain group members at the expense of others.
>
> [41] The question, therefore, can only be whether the model is within the bounds of fairness and reasonableness in its attempts to balance what are, unavoidably, conflicts between the interests of the different claimants.
>
> [42] As mentioned above, the applicants' solicitors have constructed the SDS for managing the distribution of the settlement funds among the claimants. The SDS, including the Loss Assessment Formula, reflects various 'judgment calls'. There is no doubt that other permutations of the distribution scheme could have been adopted. The question on this application is whether the SDS, as presented now, is

> within the bounds of reasonableness in achieving a broadly fair, 'rule of thumb' distribution between the claimants.
>
> [43] The cases indicate a number of factors relevant to the assessment whether a proposed distribution scheme is fair and reasonable having regard to the interests of the group as a whole. Some of these factors are as follows:
>
> (a) whether the distribution scheme subjects all claims to the same principles and procedures for assessing compensation shares;
>
> (b) whether the assessment methodology, to the extent that it reflects 'judgment calls' of the kind described above, is consistent with the case that was to be advanced at trial and supportable as a matter of legal principle;
>
> (c) whether the assessment methodology is likely to deliver a broadly fair assessment (where the settlement is uncapped as to total payments) or relativities (where the task is allocating shares in a fixed sum);
>
> (d) whether the costs of a more perfect assessment procedure would erode the notional benefit of a more exact distribution;
>
> (e) to the extent that the scheme involves any special treatment of the applicants or some group members, for instance via 'reimbursement' payments – whether the special treatment is justifiable, and whether as a matter of fairness a group member ought to be entitled to complain.
>
> [44] There are also procedural factors which relate to the fairness of a proposed distribution process, such as:
>
> (a) whether appropriate individuals have been nominated to administer the scheme;
>
> (b) whether the procedures for lodging and assessing claims are appropriate and to be conducted in a timely manner;
>
> (c) whether the scheme incorporates appropriate 'checks and balances', such as procedures for ensuring consistency between assessments and meaningful opportunities for review (and objection) by group members.

19 In summary, the Court must be satisfied that:

(a) the proposed settlement is in the interests of all group members and not just the interests of the representative applicant or applicants: ***Hobbs*** *Anderson Investments Pty Ltd v Oz Minerals Ltd* [2011] FCA 801 at [3].

(b) the proposed settlement is fair and reasonable, having regard to the claims made by group members who will be bound by the settlement: *Hobbs* at [3]; *Richards* at [7]; and

(c) Any distribution scheme will be administered in a fair and reasonable way, and will be implemented in a timely fashion.

CONSIDERATION

Factors to be considered by the Court in deciding whether to approve

20 There was no real dispute that the discretionary factors overwhelmingly favoured approval of the settlement.

21 At the time of the settlement approval application:

(a) the trial was listed for 8 weeks' duration;

(b) it was scheduled to involve 107 lay witnesses and 3 expert witnesses;

(c) it was likely to involve some kind of view of the facilities involved;

(d) some of the lay witnesses, being group members, may have required interpreters and other supports;

(e) some of the group member witnesses are in custody, and others would have been travelling from communities;

(f) large numbers of correctional staff were to be called;

(g) the proceeding had already displayed a number of legal complexities, which had been the subject of a number of interlocutory judgments; and

(h) there is little doubt the process of giving evidence was likely to be challenging for group members, and would have revived in detail memories and experiences of times they found traumatic, irrespective of the outcome of the trial.

22 There were a number of risks in establishing liability for the applicants. Core aspects of the allegations – such as the nature and content of the right to residual liberty – were relatively novel, at least in Australian law. Some of the allegations about lack of statutory authority were complex. The Territory is correct to point to other decisions where persons in the circumstances of these group members have not been successful, or have been only modestly successful: see ***Skeen*** *v Northern Territory* [2018] NTLC 008; *Binsaris v Northern Territory* [2020] HCA 22; 380 ALR 1; and ***Campbell*** *v Northern Territory (No 3)* [2021] FCA 1089. The settlement occurred when the proceeding was well advanced and each party was able to assess the advantages of settlement, and the risks of proceeding in an informed way.

23 The prospects of appeals were tangible on both sides. This litigation would have been long running, and resource intensive, all the while dealing with a subject matter which was likely to be, to a greater or lesser extent, traumatic for group members involved, and those supporting them. It would have been a difficult process for correctional officers as well.

Claims administration

24 The affidavit of Elizabeth Mukherji affirmed 1 November 2021 was read in support of the appointment of Maurice Blackburn as the claims administrator. Ms Mukherji deposes to the experience of the dedicated settlement administration team at Maurice Blackburn, the systems which will be established and maintained to support the administration of the settlement, and the time frames for concluding the distribution. At [31]-[32] she deposes:

> The focus will be on making first payments to Participating Group Members who registered by the 16 November 2021 registration deadline in around March 2022.
>
> If the registration deadline is extended until 30 June 2022, it is anticipated that final compensation payments to all Participating Group Members will be made in around October 2022.

25 For the reasons set out at [89]-[95], I am satisfied it is appropriate to extend the registration deadline, and given the judgment was reserved for approximately a month, the Court will extend the deadline to 31 July 2022 rather than 30 June 2022.

26 On the basis of Ms Mukherji's affidavit, I am also satisfied it is appropriate to appoint Maurice Blackburn as the claims administrator. The Territory did not oppose this course.

Statements in support of the settlement

27 This is an aspect of the evidence to which the Court attaches significant weight. Ms Palmer deposes (at [90] of her 1 November affidavit) that the responses of group members to the proposed settlement have been "universally supportive". At [92], she describes the "consistent themes" in the responses received:

> The consistent themes of Group Members' responses to the main elements of the Proposed Settlement have been:
>
> (a) $35 million total Settlement Sum, for Compensation to Group Members and the costs of running the class action: Group Members have expressed surprise at how high the Settlement Sum is and appreciation for the opportunities any Compensation amount represents for them;
>
> (b) How individual Group Members' Compensation will be calculated, as explained in the Settlement Notice (the Maurice Blackburn Team has not given any further information to Group Members on this): this is a fair way of assessing the individual Group Members' Compensation; and

(c) Apology in the Settlement Notice made on behalf of the Northern Territory: mixed reactions, generally either:

(i) glad to receive this apology and say that it has helped them emotionally; or

(ii) put little or no weight on the apology and/or say the apology does not change the way they feel.

28 The Court heard oral statements from the following group members, all of whom are presently in custody:

(a) Mr Aaron Hyde, who appeared from the Alice Springs Correctional Centre;

(b) Mr Brendan Green-Robinson, who appeared from the Alice Springs Correctional Centre;

(c) Mr Josiah Binsaris, who appeared from the Alice Springs Correctional Centre;

(d) Mr Lee Martin, who appeared from the Darwin Correctional Centre;

(e) Mr Peter Isaac, who appeared from the Darwin Correctional Centre; and

(f) Mr Zane Pascoe, who appeared from the Darwin Correctional Centre.

29 Adduced in evidence as annexures to the affidavits of Ms Palmer of 1, 4 and 5 November 2021 were 17 statements from other group members, and written statements of Mr Pascoe and Mr Binsaris. Some were handwritten. Some were typed. Ten were produced with the assistance of the Maurice Blackburn team because, as Ms Palmer deposes, those group members felt they did not have the literacy skills to do so or had practical difficulties and requested assistance writing down what they wanted to say. Ms Palmer deposes that Maurice Blackburn team members provided this assistance by recording what the group members wanted to say entirely in their own words, and reduced this to writing.

30 The statements from group members wholly supported the settlement, but did so in the context of a narrative about their individual experiences while in juvenile detention, especially their experiences at Don Dale. Their accounts described some of the treatment which features in the allegations in this proceeding – handcuffing, strip searching, being placed in isolation. As I made clear during the hearing, these statements were not admitted in evidence as they might have been in a contested trial. The Court makes no findings of fact about the contents of the statements in terms of the experiences described. The statements were admitted for the purpose of proving the level of support for the settlement, and *why* group members felt supportive of the settlement.

31 Those who made written and oral statements were courageous to do so. What they spoke about, in terms of the effect of their experiences on them, was a deeply personal subject matter and the Court acknowledges the strength of each individual in deciding to stand up and make statements in this way.

32 I am satisfied from the statements received in evidence that the payment of compensation is seen by a number of group members as an important outcome of this proceeding. Many of those who made statements, and according to Ms Palmer's evidence, many of those group members to whom Maurice Blackburn staff spoke, also emphasised their hope that the payment of compensation in settlement of this proceeding might assist in bringing some positive changes to the system of juvenile detention in the Northern Territory, so children in the future would not have to go through the experiences that these group members went through.

33 Some group members also spoke about the apology made by Mr Gunner, the then Chief Minister for the Northern Territory, on 17 November 2017, after the publication of the report of the Royal Commission. That apology was, by agreement with the Territory, placed on the settlement notices distributed to group members, and highlighted in blue. In that apology, Mr Gunner said:

> I am sorry for the stories that live in the children we failed. Youth justice is supposed to make kids better, not break them.

34 While neither that apology, nor any other apology, was formally repeated in the settlement approval application, nor given as part of the terms of settlement of this proceeding, its inclusion in the settlement notice by agreement does signify an intention by the parties that group members be reminded that the Chief Minister has made such an apology. In their statements to the Court in this proceeding, those group members who referred to it appeared to consider Mr Gunner's statement of importance to them. The presence of that apology in the settlement material, together with the compensation scheme, is capable of encouraging group members to participate in the settlement scheme and to start to come to terms with what has happened to them. In that sense, these matters weigh in favour of the Court approving the settlement.

The settlement sum

35 At the time of the hearing, over 400 group members had registered, out of a class known to comprise approximately 1,193. Registration was well below the expectation, and this is

proposed to be addressed by an extension of the registration date into mid-2022, which I discuss in more detail below.

36 The settlement structure, which I discuss in broad terms below, is appropriate to ensure that group members are compensated according to the conditions in which they were incarcerated during the relevant period. For the reasons explained in submissions by the applicants, that is a fair and reasonable way to calculate payment in circumstances such as the present, albeit that it does involve some assumptions and some broad categorisations. However, the nature of the allegations made in the proceeding focussed on conditions of incarceration, and some of the alleged treatment which was likely to accompany those conditions, and the centrality of those allegations to the causes of action is reflected in the way the settlement is structured.

37 As noted at [22] above, I have taken into account the decided cases brought by individuals in comparable circumstances to the group members. They are set out in the Territory's submissions, and include decisions such as *LO v Northern Territory* [2017] NTSC 22 at [273]-[367] and *Campbell*. Where the plaintiffs did succeed, the damages awarded were modest. Another matter has been remitted for re-trial: *Skeen*. The individual cases brought by detainees Dylan Voller and Jake Roper were settled for confidential sums: see my reasons in *Jenkings (No 3)*.

38 In all the circumstances of this proceeding, I consider the settlement sum of $35 million is fair and reasonable, and even though almost $10 million is to be deducted for the costs of Maurice Blackburn, I consider each of the group members will be able to secure compensation which is proportionate to their experiences in terms of the conditions of their incarceration and the likely level of force, isolation and instances of conduct such as handcuffing and strip searching that they may have experienced.

The settlement structure

39 The details of the settlement structure are contained in the second affidavit of Ben Slade, and in the second opinion of counsel attached to that affidavit. They are subject to a suppression order. However, the overall structure, and the rationale for it, is set out in the applicant's open submissions, and this account is taken from that source.

40 At [11], the applicants' submissions describe the settlement scheme in the following way:

> The key features of the compensation methodology are:
>
> 11.1. A daily compensation amount for each of the following categories of

detention:

11.1.1. Low security classification;

11.1.2. Medium security classification;

11.1.3. High security classification; and

11.1.4. Isolation.

11.2. A minimum payment amount.

11.3. A calculation of the number of days each Group Member spent in each of the above categories.

11.4. A first stage compensation amount calculated on the assumption that 100% of eligible Group Members will register for compensation.

11.5. A reserve of 10% of the first stage compensation amount.

11.6. Notice to registered Group Members of the first stage compensation amount (less the reserve) and the security classification and isolation information on which it is based.

11.7. An opportunity for registered Group Members to seek review of the first stage compensation amount if the security classification and isolation information is incorrect.

11.8. Review of the first stage compensation amount for each Group Member who seeks review.

11.9. Payment of the first stage payment amount (less the reserve) to registered Group Members.

11.10. After closure of registration, calculation and payment to Group Members of a final payment giving a pro rata distribution of the remaining settlement fund.

41 The applicants have been dependent on further, more detailed information being provided by the Territory which will, in particular, enable Maurice Blackburn as claims administrator to reconstruct with more accuracy the length of time spent by any given group member in isolation while incarcerated, and also the security classifications of a given group member, including how they may have changed during the period of incarceration. Time spent in isolation, and various security classifications, are important measures in the structure and administration of the settlement scheme because detention in those conditions is, on the evidence presented, more likely to have involved some of the conduct which is the subject of the applicants' allegations (such as handcuffing and strip searching), and more likely to have had deleterious impacts on individual group members (for example, from being held in isolation). Some of that information was provided before the settlement hearing, and more information was to be provided after the hearing, by order of the Court. The Territory has been seeking to co-operate in the provision of this material.

42 I consider the proposed settlement structure is fair and reasonable. In a proceeding where assessment of individual damages would have been extremely complex, this structure is reasonably likely to deliver a just outcome, by reasons of its focus on the conditions in which individuals were kept, and the likely treatment, based on evidence gathered for the purposes of the trial, which individuals received in those conditions. The structure will mean harsher conditions, with more intrusive measures (such as strip searching) are weighed more heavily. In a broad sense, the outcome will be that those who are likely to have experienced harsher conditions, and those whose experiences were spread over longer periods of time, will receive greater sums of compensation. In the context of an agreed settlement with a denial of liability, I consider that is a fair and just way to measure appropriate compensation.

43 Added to this is the capacity for individuals to seek review of their individual compensation amounts – this will allow for some more factually particularised calculations, and for the more generalised assumptions in the settlement structure to be adjusted in individual cases if sufficient information is provided. The review mechanism enhances the fairness of the settlement structure in this particular way, as well as more generally.

44 The applicants' proposal is that the distribution occur in two stages, mostly because of the delays in group members registering, as well as the additional time needed to assist group members to establish bank accounts, secure appropriate identity documents to open bank accounts, and have the proposed compensation payments explained to them in a careful and appropriate way. In her affidavit at [118], Ms Palmer explains the proposed two stage process:

> (a) An initial payment of 90% of the Group Member's compensation entitlement, assuming that 100% of Group Members Register, referred to as the Compensation Assessment; and
>
> (b) A second payment after registrations close, referred to as the Compensation Top Up - this payment is the Group Member's share of the settlement funds remaining after accounting for the Compensation Assessments of all Group Members Registered on the Amended Registration Date (30 June 2022 as per Proposed Order 5). Each Group Member's share of the remaining settlement funds is calculated on a pro rata basis by reference to the initial payment to each Group Member.

45 Ms Palmer explains further at [120]-[121]:

> Group Members' Compensation Assessments are calculated as 90% of their entitlements, as described in paragraph 118(a) above, to allow a 10% provision for changes in Compensation Assessments arising from the review process. Each Group Member recovers their portion of this provision in the Compensation Top Up.
>
> The unused portion of the Financial Capability Reserve and all interest on the reserve

> form part of the pool of funds distributed to Group Members in the Compensation Top Up.

46 I accept this two stage method is appropriate in the circumstances of this proceeding and the particular challenges in registration and distribution of the settlement sum to which I refer elsewhere in these reasons. It is appropriate for Maurice Blackburn as the Claims Administrator to take a cautious approach, and to ensure that there are sufficient funds to meet the claims of all group members who register, including any different assessment of their entitlements on any review.

Claims on behalf of group members

47 There are specific provisions in the settlement scheme for claims to be made on behalf of group members, if they cannot make them themselves. This includes group members who are still minors, and those under a legal incapacity.

48 Tragically, it also includes group members who have passed away. The Court was informed by the Palmer 1 November affidavit that "at least" 20 group members have passed away. That is a distressingly high number of young human lives lost, when it is recalled that all group members were under the age of 18 when the impugned conduct occurred, so that most of them are now in their 20s and early 30s. Some of those who made oral statements to the Court mentioned the passing of their friends who were also group members. Provision is made in the settlement scheme is made for claims to be made on behalf of executors or those representing the person who has passed away.

Payments to the applicants

49 Another component of the settlement scheme is an additional payment to the two applicants who have brought the proceedings. This was the subject of specific agreement in the settlement deed. This payment is to compensate them for their additional responsibilities in the conduct of the proceeding, and the time they have spent performing those responsibilities. They are to receive the sum of $10,000 each and I consider that is appropriate.

Steps to ensure the settlement is effective

50 Whatever the theoretical operation of a settlement scheme, in my opinion the Court should only be satisfied that a settlement of this nature is fair and reasonable for group members if the administration of the scheme is adequately equipped to ensure that first, the widest possible range of group members are reached and able to make an informed choice whether to register

for compensation; and second, group members have available to them appropriate and effective financial counselling services to provide them with advice and assistance on receiving the compensation monies and what should then be done with those monies.

51 On the first matter, if an insufficient number of group members is reached, then the overall fairness of the settlement could be affected. Further, it is possible that resentment could build amongst those who missed out on registration, and amongst those within group members' wider communities.

52 On the second matter, subject to issues of legal minority and incapacity, group members can make their own choices about what to do with any compensation monies received. The critical step is that they make informed choices, having had assistance and advice in making what could be a very important financial decision for them. The challenges and disadvantages facing this cohort of young people have been well documented in the evidence, as have the challenges of simply contacting them. In her 1 November 2021 affidavit Ms Palmer summarises the characteristics of many group members:

> I refer to paragraphs 14 and 15 of my 9 July Affidavit, in which I set out characteristics of the Group Members which impact communication about the Proposed Settlement and Registrations. In summary, approximately 95% of Group Members are Aboriginal, a very substantial proportion of whom live in remote communities across the Northern Territory and for whom English is a second or more distant language. Group Members' literacy is generally poor due to a range of factors affecting their access to education and high rates of learning, cognitive and intellectual disabilities.

53 To this might be added the sadly notorious disadvantages which continue, disproportionately, to face many First Nations communities: poverty, compromised health, disproportionate interactions with the criminal justice system. The evidence also establishes that there is poor access to resources many Australians take for granted: internet access, access to hardware to use the internet, and access to services such as banking services. In the real world of life in remote communities for group members, all these matters are likely to affect the capacity of group members to first, have notice of the settlement and understand it, and then to make informed choices about whether to register and how to manage any compensation they receive.

54 Ms Lees deposes to the potential impacts in communities of group members receiving compensation:

> [The financial and legal agencies I have extracted above] advised me that significant injections of money into communities can create social issues if not managed properly and that cultural protocols may result in Group Members sharing the entirety of their settlement monies with family, leaving little to use for their own futures. I was advised

during these meetings that it was important to engage with financial counsellors and capability workers as early as possible, ideally many months before settlement funds are paid to Group Members.

55 The difficulties in reaching group members are well described in Ms Lees' affidavit, when she explains the process she undertook at each of the remote communities identified after a careful analysis of group member data: namely Tennant Creek and Ali Curung, Mutitjulu; and Yuendumu.

> I followed the same process during each remote community visit, this being:
>
> (a) Identifying key community workers and service providers in each community prior to travel to introduce myself and set up meetings. This was done by speaking with our partner organisations in Alice Springs listed in paragraph 10;
>
> (b) Reaching out to the Aboriginal Corporations/ Aboriginal Councils in each region prior to travel to introduce myself and set up meetings;
>
> (c) Upon arriving in each community, I would meet with the above-mentioned key contacts to help locate individual Group Members. These key contacts also provided language assistance when speaking with Group Members;
>
> (d) Often Group Members would not be present in the community at the time that I was there. As such, each trip involved training up these key contacts, and any additional community leaders, in how to register Group Members after my departure;
>
> (e) I also held meetings with elders and other community leaders to ensure that they understood the class action and the registration process, and asked their permission to put up posters promoting the class action registration process around each community; and
>
> (f) In Mutitjulu, I was able to speak at a Central Land Council meeting for elders and other community leaders from across the wider region.

56 There were communities Ms Lees could not visit, but which a team from Lutheran Care did visit: Kintore, Finke, Docker River, Papunya, Mt Liebig, Haasts Bluff, and Hermannsburg. Lutheran Care also conducted an outreach visit to Yuendumu. Mutitjulu, Imanpa, Ampilatwatja and Arlparra were scheduled to be visited after the time of Ms Lees' affidavit. In respect of those communities, Ms Lees deposes:

> On 28 October 2021, I discussed these outreach trips with Peter Cowley, manager of the Lutheran Care financial capability team. He informed me that the Lutheran Care team spent 5 days in each community looking for group members and providing financial capability workshops. He further informed me that the team has found it a challenge to locate the number of Group Members they were initially hoping to. Peter Cowley informed me that he believed this was for the following reasons:
>
> (a) The Group Members he located in these communities often didn't receive, or weren't aware of the Settlement Notice sent to them by Maurice Blackburn;

(b) Some of the Group Members were not in the communities when Lutheran Care visited and either their current location was not known by others, they were in prison or they had moved to Alice Springs. He informed me that the only way of obtaining this information was by having individual conversations with local community members, which is a very time-consuming process.

Despite this, Lutheran Care has been able to register a number of Group Members from the visits completed to date and have advised me that they are committed to continuing to work with the local communities to find as many Group Members as possible.

Peter Cowley advised me during our conversation on 28 October 2021 that some Group Members call him to register for the class action a number of days or weeks after he has visited a community because they have either wanted some time to consider what they would do or they have just returned to the community and learnt about the class action.

57 The personal challenges for group members in coming forward and speaking to the Maurice Blackburn team, or those acting on their behalf, are also described by Ms Lees at [49]:

> A number of Group Members told me during our conferences of how hard it was for them to speak with me. One Group Member informed me on 22 October 202[1]that he still has nightmares whenever he thinks about what happened to him in Youth Detention so he was really nervous about registering for this reason. Another Group Member informed me during a conference on 12 October 2021 that speaking to me brought up "bad things". I learnt the importance of not rushing these conversations and taking the time to ensure that the Group Member felt comfortable in speaking with me and were aware of referral options for mental health care (if available).

58 Finally, I accept and give weight to Ms Lees' opinion expressed at [50] of her affidavit:

> My work locating and registering Group Members, as outlined in this affidavit, has led me to the conclusion that this class action involves a transient and vulnerable cohort, who are eager to register for the class action but require individualised engagement through trusted and familiar sources, and significantly more time, to do so.

59 The evidence makes it abundantly clear that the administration of this settlement scheme, to be effective, will have to be carefully managed and tailored to the particular needs of this cohort of group members. On the evidence, I find that Maurice Blackburn are aware of the needs, and have put in considerable efforts to secure advice and assistance from organisations and individuals best placed to understand the most effective ways to reach group members, and to inform them about the settlement and about their options in terms of managing any compensation they receive. This will take time, and a considerable effort, not to mention human and other resources, but as the above evidence indicates and I find, primarily human resources. The evidence shows that multiple face to face, person to person communications are required, sometimes repeated over weeks, and sometimes the result of quite a lot of detective work to find where group members might be. It is the cornerstone of the effectiveness of the settlement and must not be under resourced.

60 Overall, I consider the steps proposed to be taken by Maurice Blackburn represent more than reasonable proposals to reach as many group members as possible, and to provide them with financial advice and assistance if they wish to have it. However there are two matters of concern which should be addressed separately:

(a) access to group members in custody; and

(b) the amount of financial support available for the other agencies to do their work with group members, which will be the key work in both reaching group members not in custody and in providing financial advice and assistance.

The role of other agencies

61 I accept that the steps taken to reach group members have been significantly affected by the COVID-19 pandemic, and border restrictions. That has meant the Maurice Blackburn team from Sydney have been unable to travel. Ms Lees, (who is currently residing in Alice Springs) was asked to step in to assist, including by meeting with group members in custody in Alice Springs, organising community meetings and meetings with group members, and liaising with a large number of organisations that had direct and regular access to the communities where the group members lived, and/or had family.

62 The affidavit material also makes it clear that group members are sometimes reluctant to speak to strangers from outside their communities, but may be more ready to be approached by, and to talk to, people they have interacted with before, in other service provider contexts. Hence the importance of the role of people working for other agencies in these communities.

63 The organisations and agencies Ms Lees mentions in her evidence are:

(a) NAAJA;

(b) NT Legal Aid Commission;

(c) Central Land Council;

(d) Central Australian Women's Legal Service;

(e) Central Australian Aboriginal Family Legal Unit;

(f) Aboriginal run organisations:

(i) Tangentyere Council

(ii) Mutitjulu Community Aboriginal Corporation; and

(iii) Warlpiri Youth Development Aboriginal Corporation.

(g) Organisations which provide financial support services to communities

throughout the Northern Territory:

(i) Catholic Care;

(ii) Lutheran Care; and

(iii) Money Mob.

64 There is a longer list of organisations at [33] of Ms Palmer's 1 November 2021 affidavit. At [38] of that affidavit, Ms Palmer identifies a number of agencies she describes as "financial capability agencies" that are likely to be in a position to assist with two broad aspects of the settlement scheme, namely:

(a) raising awareness of the settlement and assisting with registration of group members; and

(b) providing financial counselling, financial capability training and related support services to group members ahead of receipt of any compensation.

65 The second kind of assistance, Ms Palmer deposes, will include activities such as opening a bank account in a group member's own name that no one else has access to, and obtaining adequate identity information to provide for the purposes of registration, but also for opening a bank account. These steps are especially challenging for those in remote communities, for the reasons set out earlier.

66 As I have explained, I see such assistance as critical to the fairness and reasonableness of the settlement, and critical to the Court's approval of it. The agencies to which Ms Palmer refers are:

(a) Catholic Care;

(b) Lutheran Care;

(c) Anglicare NT;

(d) HKTC Training & Consultancy; and

(e) Money Mob.

67 Agencies which Maurice Blackburn propose will be involved, and who have been contacted are Financial Counselling Australia (**FCA**), ASIC's Indigenous Outreach program, and the Australian Bankers' association. Ms Palmer deposes at [43]-[44]:

> Peter Gartlan of Financial Counselling Australia did the vast majority of the work establishing the network of Financial Capability Agencies to assist Group Members and the system to overcome the barriers referred to in paragraph 42 above. All of this

> work has been done under Financial Counselling Australia's existing funding arrangements, at no cost to the Applicants or Group Members.
>
> To date, there has also been no cost to the Applicants or Group Members for any work of the Financial Capability Agencies' in connection with this Proceeding. All of this work has been undertaken within these agencies' existing funding arrangements.

68 At the date of her affidavit, Ms Palmer deposes that 147 group members had been referred for this kind of assistance. This is positive, but the numbers are low compared to the known number of group members: only about 10%.

69 At [68]-[77], Ms Palmer deposes to the creation of a "community champions" program by Maurice Blackburn, identifying particular staff members of North Australian Aboriginal Justice Agency (**NAAJA**), Northern Territory Legal Aid, support workers and youth workers, as well as some staff of the financial capability agencies. The idea of the program is to use people trusted and known in communities to provide information and assist group members to register. It is a constructive initiative, and one the Court supports and sees as important in ensuring the settlement scheme reaches as many group members as possible. Other initiatives include the use of hard copy registration forms to work around poor online access, and promoting the settlement and the distribution scheme to relevant agencies such as NAAJA. Ms Palmer also deposes that the financial capability agencies, NAAJA and NT Legal Aid have told her they expect group members who are not yet registered to register at accelerated rates when they see compensation payments are being made to others, so that they will believe the settlement scheme is not a scam or otherwise detrimental for them.

70 Annexed to Ms Palmer's 1 November affidavit is a letter dated 31 October 2021 from Mr Gartlan, of FCA. FCA provides national coordination for financial counselling agencies involved in bushfire recovery. Mr Gartlan is also the Independent Chair of the Consumer Advisory Panel at the Australian Financial Complaints Authority, and had previously worked on the administration of the National Redress Scheme lump sum compensations payment for survivors of child sexual abuse in institutions. Mr Gartlan states:

> My experience is in coordinating program responses that assist claimants who receive lump sum payments in order to maximise the benefit of the payment and minimise any potential harm.

71 He describes the seven organisations presently providing financial counselling and capability services across the Northern Territory: Anglicare NT, Sommerville Community Services, CatholicCare, MoneyMob Talkabout, Lutheran Community Care, HKTC and Bawinanga Aboriginal Corporation. Mr Gartlan describes what these agencies have done so far in

promoting the compensation scheme, assisting group members to register and have appropriate banking arrangements, and providing advice on any implications of a lump sum compensation payment on an individual's Centrelink income, Centrelink Assets test, social housing assets test, and any debt recovery processes that may be on foot or may occur.

72 In his letter, Mr Gartlan states that:

> Financial counselling agencies will continue to support class members. Resourcing of this support will be met under the existing funding arrangements with the federal Department of Social Service. FCA will similarly continue to assist as necessary as part of its general remit to support the financial counselling sector.
>
> However, there is also merit in considering a reserve for any additional costs that might be incurred to meet increases in demand at particular periods. Such a provision could cover the costs of additional staffing, travel, overall coordination, stakeholder management and training.

73 He continues to describe the employment costs for an experienced financial counsellor, stating that they are approximately $155,000 per staff member annually. This includes entitlements and overheads. He then also notes that travel costs in the region are expensive, that a flight from Nhulunbuy to Groote Eylandt typically costs $1000 return. When accommodation, travel allowance and food costs are added, the cost for a staff member to spend a week in a remote community is about $3000. These costs are additional to the $155,000.

74 Mr Gartlan concludes:

> As a guide, a provisional amount of $200,000 would cover approximately 15 months of additional staff time to cover peak periods, such as assistance with registrations, or the time upon which payments are made to class members. This could, for example, mean that some organisations could employ a locum for two months, or increase existing hours of employment.

75 Ms Palmer's evidence suggests it is likely that registration and inquiry rates will accelerate. One consequence of this is the need for additional resources to be applied, in a more intensive way than they have been to date, to services assisting inquiries and registrations and the associated tasks outlined above. One proposed solution to the slow registration rate is to distribute a hard copy registration form, but obviously this may intensify the human resources necessary to distribute it, and fill it in. This is but one example of how difficult it is to predict the level and nature of the human resources that may be required.

76 Ms Palmer's evidence (at [112]-[114] of her 1 November affidavit) is that the applicant proposes to establish a financial capability reserve which will be available for these agencies

to access to perform the work they need to do, if their existing funding is insufficient. The proposed order is:

> Pursuant to s 33ZF of the Act, the amount of $200,000 (including GST) is approved as the amount of the 'Financial Capability Reserve' to be held in reserve in the Settlement Distribution Fund for the for payment as necessary to agencies for the provision and/or co-ordination of financial counselling and/or financial capability training services to Group Members and is to be managed and distributed by the Claims Administrator in accordance with the terms of the Settlement Scheme.

77 Ms Palmer deposes that after the registration and the two rounds of distributions are complete, any remaining funds in the Financial Capability Reserve and all interest on the reserve will be distributed to group members as described in the extracts from her affidavit at [44]-[45] above. The figure of $200,000 is, I infer, based on the estimate provided by Mr Gartlan.

78 It will be clear by this point in these reasons that I consider the role of what are described as the "financial capability agencies" to be critical to the approval of the settlement by the Court. That being the case, it is imperative that the agencies be sufficiently resourced. From the evidence is appears they are all dependent on government funds. Their remit is large, and in all their work their staff must operate in challenging conditions across remote parts of the Northern Territory. Their participation in the administration of the settlement scheme flowing from this proceeding is to be commended, but it can be inferred that before they were approached, these agencies were already working at capacity. The applicant's proposal provides only for a full time equivalent position of one extra experienced financial counsellor. The evidence discloses that the human resources of many people will be consumed by the tasks in implementing the settlement scheme, and that aspects of it may be somewhat painstaking – for example, the evidence about how long, and how complex, it may be to locate group members and communicate with them, suggests human resources will be stretched.

79 Given the weight I place on this aspect of the settlement structure in terms of its approval by the Court, I consider it would be appropriate for a larger sum of money to be held in reserve in the Settlement Distribution Fund. I propose to order that $600,000 should be held in reserve – that is enough, on the evidence, to fund three additional staff members, and I consider that is more realistic. The proposed $200,00, as well as the extra $400,000 should be deducted from Maurice Blackburn's costs, and *not* be reserved or deducted from the $25 million to be allocated to the settlement scheme. The evidence discloses that on any view the administration of the settlement scheme is being substantially supplemented through the public funds of all the organisations and agencies to which I have reserved, and all that supplementary but wholly

critical implementation assistance is being provided at no cost to Maurice Blackburn. It is therefore reasonable in my opinion that the amount of $600,000 – a modest sum when compared to the total costs which are being deduced from the settlement sum in favour of Maurice Blackburn – be deducted from Maurice Blackburn's costs rather than held back from the $25 million available to the group members.

80 If the $600,000 is not used, then as Ms Palmer's evidence describes, it will be available for distribution to group members, together with the interest earned on that amount.

Access to group members in custody

81 Ms Palmer's evidence is that at the time of the approval hearing approximately 220 group members were in custody in the Northern Territory, detained in one of six facilities. Ms Palmer's evidence is that the largest numbers of group members are detained at Darwin Correctional Centre (around 116) and Alice Springs Correctional Centre (around 82). In her evidence, Ms Palmer described in detail the difficulties in contacting detained group members, and using the telephone systems of the correctional facilities, because of the restrictions imposed on prisoners about how they can make telephone calls, and to which numbers. Her evidence also points out that unless the call is classified as a "legal" call, it is recorded, and group members are charged between $6 and $7.50 per call, even if the call goes to voicemail.

82 Ms Palmer describes a number of impediments encountered by group members utilising the ordinary prison telephone system as a way to communicate with Maurice Blackburn and other members of agencies and organisations assisting them. She also deposes to an agreed proposed solution with the Territory in August 2021 by providing access to a "registration hotline" through a 1800 number, but also deposes to some problems with this solution – such as a failure to characterise the calls as legal calls and therefore not to be recorded, and a failure to add the number to all group members' phone lists. Ms Palmer deposes to no solution to these problems having been reached at the time of her affidavit, but at this point it is necessary to refer to the affidavit of Ms Pikoulos on behalf of the Territory.

83 At [7] of her 5 November affidavit Ms Pikoulos deposes that by 20 September 2021 (and after having secured the approval of the Commissioner for Corrections, which Ms Pikoulos deposes was necessary) the Maurice Blackburn phone numbers were added to each of the phone accounts of the group members identified by Maurice Blackburn. She also confirmed that none of the calls had been recorded. Ms Pikoulos also addressed specific complaints about specific group members' ability to make calls to Maurice Blackburn.

84 Ms Pikoulos deposed to an instruction issued by the Commissioner for Corrections as a more systemic solution to any discrepancies in providing access which might have occurred, or might occur in the future, at the local level:

> "All prisoner are entitled to have access to their chosen legal representative this is irrespective of their legal status, security classification and current regime.
>
> All staff are to process PTS applications and on forward to the intelligence section for assessments and completion without delay.
>
> Maurice Blackburn lawyers are working with a large cohort of prisoners regarding a class action matter, prisoners involved in that action will be permitted to add their legal representative to their personal PTS account."
>
> (Typographical errors in original.)

85 The Territory relied on this instruction, together with other evidence about the ability of Maurice Blackburn lawyers and those assisting them to visit group members in person, and to be equipped with laptops and other appropriate technology, as evidence that it was not necessary for the Court to make any specific orders concerning access of group members in custody to Maurice Blackburn. The applicants did not propose any further orders, and I accept there is a solid foundation in the evidence to be confident that the correctional authorities, and staff at each of the correctional facilities will ensure that group members have reasonable and effective access not only to Maurice Blackburn but to the staff of agencies and organisations assisting Maurice Blackburn in the administration of the settlement.

86 As I noted during the oral hearing, it is vital that group members in custody are not treated less favourably in terms of their access to, and participation in, the settlement scheme, than other group members, by reason of the fact that they are in custody.

87 Since the applicant did not submit to the Court there was any ongoing risk of this occurring, I am satisfied it is not necessary to make any additional orders in relation to those group members who are detained. The parties have asked for liberty to apply on 3 days' notice and this will suffice to reserve to the applicants an ability to seek the assistance of the Court if required.

Extending the registration time

88 I have broadly described the registration process earlier in these reasons, the relatively low numbers of group members who had registered as at the date of the trial, and some of the challenges which have been encountered.

89 The evidence about the need for a longer registration period is found in Ms Lees' affidavit, some of which I have extracted above.

90 In her 1 November affidavit, Ms Palmer describes some of the factors which, based on the experience of the Maurice Blackburn team and those organisations and agencies assisting Maurice Blackburn, have become apparent to them:

(a) fear that negative public comment about the settlement and compensation scheme is being or will be directed at group members;

(b) shame associated with having been in youth detention, and an unwillingness to recount their experiences there;

(c) fear of retribution from members of their communities who do not consider group members should be receiving compensation; and

(d) belief that the scheme might be a sham.

91 Ms Palmer also deposes to the difficulties which have been encountered in the registration process, even in relation to the group members who had registered by the time of the hearing (being over 400 of a total of 1,193):

> I am informed by the Lawyer managing Registrations, Sarah Avery, that many Registrations have involved significant follow-up from the Maurice Blackburn Team due to the following matters:
>
> (a) At least 66 Registered Group Members have issues that need to be resolved regarding inconsistencies between their name as it appears in the Group Member Information produced by the Northern Territory (including records of their time in youth detention) and their identification and/or their bank account statements, including arising from (as reported to myself and other members of the Maurice Blackburn Team by Group Members and NAAJA Lawyers):
>
> (i) Cultural factors, including a practice of people changing their names if they are the same or similar to the name of a family or community member who has passed away and a practice of people being known by their Indigenous name rather than their legal name, which may be different;
>
> (ii) Family factors, including a practice of using the surname of different parents at different stages of life, or a combination of the two;
>
> (iii) Life circumstances, including adoption or change of child custody resulting in informal name changes while the Group Member was in that person's care;
>
> (iv) Mistakes and misspelling of Group Members' names as they were entered into the Respondents' systems, which then attached to the identification number used in those systems and carried through to future instances in which they have been in detention;
>
> (b) 426 Group Members who have commenced their Registration have needed to be contacted regarding providing copies of their identification, bank account statements and/or resolving another issue, as required to complete their

Registration;

(c) 50 Group Members who commenced Registration provided bank statements that do not show all of the information required to verify the bank account - Maurice Blackburn has sought to resolve these issues by means other than by requesting action from the Group Member, such as through the assistance of Capability Agency staff wherever possible;

(d) At least 12 Group Members have legal capacity concerns affecting their ability or willingness to engage with Maurice Blackburn (as distinct from their willingness to be Registered), such as severe mental illness or cognitive issues. These often present with a combination of practical and personal factors contributing to their difficulty engaging with the Maurice Blackburn Team, including remoteness, poverty, lack of a telephone, homelessness, incarceration including in youth detention, illiteracy, and/or English language difficulty.

(e) 30 Group Members are under the age of 18, or were at some stage during the Registration Period. Of these, 16 have Registered, including six who are under the care or protection of the Northern Territory and/or in Youth Detention. In most instances, this requires that the Maurice Blackburn Team liaise with the relevant agencies to Register the Group Member in co-ordination with their Support Worker and/or legal guardian;

(f) At least 20 Group Members have passed away. Many of these Group Members had complex family environments, including having been removed from the care of their parents, necessitating multiple contacts with family members to understand who may be entitled to make a claim on behalf of the estate and obtain their contact details;

(g) Registrations of Group Members who accept the offer of an interpreter often involves multiple calls with the Group Member due to matters affecting the availability of interpreters, including difficulty finding an appropriate interpreter.

92 Ms Palmer then deposes to a number of strategies that Maurice Blackburn and those assisting them have employed to overcome these factors. I accept Maurice Blackburn are taking all reasonable steps to try and reach as many group members as possible, and to assist them to make informed choices about registration for the settlement scheme. I also accept that a longer registration time is appropriate, and I find this will enhance the fairness of the settlement by increasing the potential for access to the settlement fund.

93 The need to balance a timely distribution of compensation to those group members who have registered, against the need to attempt to reach as many group members as possible, is what has led the applicants to propose the two stage distribution process to which I have already referred.

94 The Court took some time to consider whether to approve the settlement and the terms on which it should be approved. Approximately a month passed between the hearing and judgment.

Given that extra time, it is appropriate to extend the registration deadline to 31 July 2022 rather than 30 June 2022.

Amended settlement notice

95 In the amended interlocutory application, the applicants seek leave to distribute to unregistered group members an amended settlement notice. The amendments are designed to build on experiences the Maurice Blackburn team, and those assisting them, have had so far in assisting group members to understand the settlement. In particular, Ms Palmer deposes to the need for translations of the English text, and a smaller volume of text which is likely to be more compatible with literacy levels amongst some group members.

Costs

96 The agreed settlement sum is $35 million, inclusive of any costs, expenses and taxes. Thus, both Maurice Blackburn's legal costs incurred in running the proceeding, and the costs of administering the settlement scheme, must be paid out of the $35 million.

97 Maurice Blackburn seeks orders that the sum of $10 million (including GST) be approved as the amount to be deducted from the Settlement Distribution Fund and paid to Maurice Blackburn in payment of the applicants' legal costs and in payment of expected administration costs.

98 No submissions were advanced on behalf of the applicants about costs, in writing or orally.

99 By orders made on 27 July 2021, the Court appointed an independent costs assessor pursuant to s 33ZF(1), Ms Elizabeth Harris, as a special referee to inquire into and express a reasoned opinion about the reasonableness of the legal costs claimed by Maurice Blackburn in relation to the proceeding, and the reasonableness of the proposed settlement administration costs. Ms Harris is an experienced costs consultant who is regularly retained to prepare reports of this kind in respect of the settlement of class action proceedings.

100 The Territory made no submissions about the reasonableness or otherwise of the costs Maurice Blackburn proposed be deducted from the settlement sum.

101 As Ms Harris notes in her report, the deed of settlement defined the "applicants' costs" as legal costs and disbursements of and incidental to the investigation and prosecution of the claims the subject of the proceeding, calculated in accordance with the applicants' retainers with Maurice Blackburn on a "solicitor and own client" basis. The deed defines "administration costs" as

being "costs and disbursements incurred in administration of the Settlement Scheme calculated on a full indemnity basis in accordance with the rates (if any) approved by the Court".

102 The approach taken has not been to ask the Court to approve any rates for the settlement administration, but rather to ask the Court to approve an entire lump sum, calculated to cover both the applicants' legal costs and the administration costs. Ms Harris states in her report that she was informed by Ben Slade of Maurice Blackburn that Maurice Blackburn will cap the costs of the proceeding and the administration at $10 million inclusive of GST.

103 Having undertaken her inquiries, Ms Harris' opinion is that, taken together, actual costs to 31 August 2021, the estimated costs to settlement approval and the estimated administration costs are likely to substantially exceed $10 million. For this reason, Ms Harris states that she did not undertake a comprehensive assessment of the costs to settlement approval or the administration costs. Instead, she has confined herself to the costs of the proceeding to 31 August 2021, as well as explaining why she considers the total costs would exceed $10 million. Ms Harris observes, correctly, that her task is not a costs taxation, but is rather a global cost assessment, where a more "broad-brush" approach is acceptable.

104 In *Camilleri v The Trust Company (Nominees) Ltd* [2015] FCA 1468 at [53]-[54], Moshinsky J discussed the general approach to be taken to the assessment of a claim for costs. I respectfully adopt those observations.

105 It is not necessary to rehearse in these reasons the method adopted by Ms Harris in assessing Maurice Blackburn's actual costs, nor her explanations for it. The method included sampling over peak periods where work was conducted, with a focus on Maurice Blackburn's solicitors' fees across the team of employees who worked on the file which constituted the bulk of the claimed costs. I am satisfied it was an appropriate method.

106 Ms Harris' assessment covered an appropriate sample of different kinds of work performed, and has focussed on categories of costs which in her view were most likely to involve duplication or include work that does not meet the solicitor/client test. That was appropriate. She also identified particular events where she considered costs were unreasonable, such as the mediation where she considered only two rather than three solicitors should have attended.

107 Ms Harris also closely considered disbursements paid for counsel's fees, travel expenses, expert fees and other disbursements, and found them all to be reasonable.

108 At [122], Ms Harris concludes:

> Table 1 in paragraph 9 above, sets out my allowance in respect of the costs to 31 August 2021 and the estimated costs of future work and the Administration. These total between $11,760,375.54 to $12,021,843.54. Given that I have assessed the fair and reasonable costs to 31 August 2021 (inclusive of GST and uplifts) at $9,781,247.20 and having regard to fact that the likely costs of the Administration will exceed $1million, it is my opinion that the total costs, even without an allowance for any additional costs to settlement approval, will exceed the $10 million costs proposed by MB.

109 Ms Harris then explains the expenditure incurred after 31 August 2021, and also discusses a draft administration budget provided to her by Maurice Blackburn. Based on these figures, she characterises the administration budget as "tight and streamlined". Ms Harris concludes at [128]-[129]:

> As a Special Referee, I reviewed the costs of the settlement administrations in the Palm Island and Queensland Stolen Wages class actions. There are many similarities between those proceedings and this:
>
> - The challenges associated with contacting group members,
> - The approach to the assessment of damages and the need to obtain accurate information from group members in order to undertake that assessment,
> - The need to ensure that funds are securely distributed to members.
>
> In both of those matters, the total Administration costs exceeded the amount originally approved. MB's proposal to cap costs at $10 million inclusive of GST and uplift therefore removes the risk that costs will exceed the current estimate. It passes all risk to MB and therefore benefits group members.

110 I agree with Ms Harris' conclusion about the risk being passed to Maurice Blackburn, and in a matter such as this, that is appropriate. I also accept that Maurice Blackburn have capped their costs, which provides additional benefit and certainty to the group members in terms of what will be available for distribution.

111 I have found that the $10 million should be reduced by $600,000 which I consider is the sum appropriately allocated to the Financial Capacity Reserve Fund. This is a separate matter from the content of Ms Harris' report, but will nevertheless affect the total amount payable to Maurice Blackburn. However, Maurice Blackburn will still receive a very substantial sum indeed for their costs, over a quarter of the overall settlement sum. Reasonable minds might different on whether it is fair and reasonable that Maurice Blackburn receive such a high proportion of the settlement sum. However, this litigation was conducted with Maurice Blackburn assuming the risk it would not be successful, and the litigation has been complex and long running, involving many interlocutory steps and arguments, and an enormous amount of preparation for trial. The thorough and careful preparation of the material to support the

settlement approval application, and the content of that material in terms of its description of the engagement with group members, illustrates that Maurice Blackburn have taken a close and careful approach to the discharge of their professional responsibilities and that is appropriate in the circumstances of this case.

112 Taking a global view, I am prepared to accept that despite the $9.4 million representing over a quarter of the total settlement sum, it is fair and reasonable for this sum to be payable for Maurice Blackburn's costs and disbursements.

113 I accept Ms Harris' opinions and I am prepared to approve the payment of costs to Maurice Blackburn in the sum of $9.4 million.

114 Ms Harris herself agreed to charge a fixed fee of $16,500 (including GST) for her report, which I find is a reasonable fee, and as I understand is to be treated as a disbursement within the $9.4 million costs figure.

CONCLUSION

115 Counsel for the Territory referred in his oral submissions at several places to the Royal Commission, and its report. It was appropriate for the Territory to recognise the interrelationship between the subject matter of this proceeding and the subject matter of the Royal Commission, and its findings. The parties have agreed to resolve the proceeding without any admission of liability on the Territory's behalf in terms of the precise allegations of law and fact as pleaded. Nevertheless, as counsel for the Territory recognised in his closing submissions, the Royal Commission and the apology by Mr Gunner on behalf of the Territory after the Commission's report form part of the overall circumstances this Court can consider, together with the individually litigated cases, as part of the approval process.

116 In concluding that the proposed settlement is a fair and reasonable compromise of the claims made on behalf of the group members, I consider it is appropriate for the Court to recognise that this proceeding sought to bring into a litigated forum some, but not all, of the allegations about mistreatment which had been aired before the Royal Commission. If the matter had gone to trial, the overlap would have been more acute.

117 In its "Overview" chapter of the Report, the Commission gave this summary of its findings about detention:

> In **detention**, the Commission has found that:

- youth detention centres were not fit for accommodating, let alone rehabilitating, children and young people
- children were subject to verbal abuse, physical control and humiliation, including being denied access to basic human needs such as water, food and the use of toilets
- children were dared or bribed to carry out degrading and humiliating acts, or to commit acts of violence on each other
- youth justice officers restrained children using force to their head and neck areas, ground stabilised children by throwing them forcefully onto the ground, and applied pressure or body weight to their 'window of safety', being their torso area, and
- isolation has continued to be used inappropriately, punitively and inconsistently with the *Youth Justice Act* (NT) which has caused suffering to many children and young people and, very likely in some cases, lasting psychological damage.

(Emphasis original.)

118 In the section of the "Overview" describing the Commissioners' conclusions about what should change, and what they recommend, the Commission relevantly to what the Court has heard on this settlement approval application, stated:

> Over 10 years, some children in detention were mistreated, verbally abused, humiliated, isolated or left alone for long periods of time. In some cases they may have been assaulted by staff. Staff ignored the rules, or did not know the rules and the broke the law. Senior people in Government knew about this and did nothing. There are young people that have been damaged because of their time in detention.
>
> Locking kids up does not stop them breaking the law and does not make the community safer. Many kids that end up in detention suffer from trauma and other social and emotional issues. The current system does not help kids with special needs or problems to change their behaviour.
>
> ….
>
> In the future, these places should be made especially for young people, with a focus on healing and rehabilitation.

119 A representative proceeding such as this is intended to present the Court and the public with a broader and more holistic picture of the subject matter of the litigation than what might occur in the conduct of an individual claim. The bringing of a representative proceeding can have objectives which are intended to be vindicatory for the class covered by the litigation, including provision for greater accountability and greater transparency about what is alleged to have occurred. Those characteristics are important features of open justice. Having heard and read the statements of some group members, it is clear that these objectives were important to them as participants in this proceeding. The public approval of the proposed settlement by the Court, including by the publication in these reasons of the material supporting the settlement approval

application and the position of the parties, is capable of contributing to continuing transparency about the administration of youth justice in the Northern Territory.

120 In his oral submissions on behalf of the Territory, having acknowledged some overlap between the subject matter of this proceeding and the matters investigated by the Royal Commission, counsel for the Territory described the settlement the Court was being asked to approve in this way:

> From the Northern Territory's point of view with the resolution of these proceedings, of course being subject to approval, the intention is to lay to rest the various allegations of mistreatment relating to the claim period.

121 The evidence before the Court suggests that at least those group members who came forward see a prospect of securing some formal and tangible recognition of the harm they feel they suffered in youth detention, through both the Territory's agreement to resolve the proceeding without a trial, and the compensation it has agreed to pay (albeit with a denial of liability). I infer that at least a proportion of other group members are likely to feel the same way; how many, it is impossible to tell. That is a significant reason in favour of the approval of the settlement, given the meaningful amount of compensation that will be made available.

122 The approval of the settlement may "lay to rest" the allegations in the proceeding, and counsel for the Territory was correct to confine his submissions in this way. However all group members will carry their experiences of youth detention with them for the rest of their lives. No amount of money can change that.

I certify that the preceding one hundred and twenty-two (122) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Mortimer.

Associate:

Dated: 15 December 2021