FEDERAL COURT OF AUSTRALIA

Yasmin v Commonwealth of Australia [2023] FCA 1661

File number(s):	VID 328 of 2020 VID 664 of 2020
Judgment of:	**HORAN J**
Date of judgment:	22 December 2023
Catchwords:	**REPRESENTATIVE PROCEEDINGS** – application for approval of settlement by Court pursuant to s 33V of the *Federal Court of Australia Act 1976* (Cth) – whether proposed settlement is fair and reasonable as between group members and the respondent – whether proposed settlement distribution scheme is fair and reasonable as between group members – whether lead applicant's compensation payment claim is reasonable having regard to interests of group members as a whole – settlement approval granted
Legislation:	*Federal Court of Australia Act 1976* (Cth) s 33V *Migration Act 1958* (Cth) *Racial Discrimination Act 1975* (Cth) *High Court Rules 2004* (Cth)
Cases cited:	*Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250 *Blairgowrie Trading Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330 *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 *Camilleri v The Trust Company (Nominees) Limited* [2015] FCA 1468 *Commonwealth v AJL20* (2021) 273 CLR 43 *Darwalla Milling Co Pty Limited v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322; [2006] FCA 1388 *Davis v Quintis Ltd (subject to deed of co arrangement)* [2022] FCA 806 *Hassan v State of Victoria* [2023] VSC 478 *Kamasaee v Commonwealth of Australia* [2017] VSC 537 *Kelly v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323 *Kuterba v Sirtex Medical Ltd (No 3)* [2019] FCA 1374

	Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3) [2018] FCA 1842 *Smith v Commonwealth of Australia (No 2)* [2020] FCA 837 *Somers v Box Hill Institute* [2022] VSC 730 *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459; [2000] FCA 1925 Australian Human Rights Commission, "An Age of Uncertainty", report of the Inquiry into the treatment of individuals suspected of people smuggling offences who say that they are children, July 2012
Division:	General Division
Registry:	Victoria
National Practice Area:	Administrative and Constitutional Law and Human Rights
Number of paragraphs:	96
Date of hearing:	6 December 2023
Solicitor for the Applicant:	Ken Cush & Associates
Counsel for the Applicant:	Mr A T Strahan KC, Mr P A Tierney, Mr T K Jeffrie, Ms S C B Brenker, Ms H L Canham and Ms E A Brumby
Solicitor for the Respondent:	Australian Government Solicitors
Counsel for the Respondent:	P Knowles SC and A Batrouney

ORDERS

VID 328 of 2020
VID 664 of 2020

BETWEEN:	**ALI YASMIN** Applicant
AND:	**THE COMMONWEALTH OF AUSTRALIA** Respondent

ORDER MADE BY: **HORAN J**

DATE OF ORDER: **22 December 2023**

THE COURT ORDERS THAT:

Approval of Settlement

1. Pursuant to ss 33V and 33ZF of the *Federal Court of Australia Act 1976* (the **Act**) and subject to order 5 below, the Court approves:

   (a) the settlement of the consolidated proceedings between the Applicant and the Respondent upon the terms set out in the Deed of Settlement executed by the Applicant, on his own behalf and on behalf of the Group Members, and the Respondent dated 4 October 2023 (being Exhibit MGB-1 to the affidavit of Mark Geoffrey Barrow affirmed 5 November 2023) (**Deed of Settlement**); and

   (b) the scheme for the distribution of money paid under the settlement among Group Members filed by the Applicant (being Exhibit AJH-5 to the affidavit of Arabella Jorgensen-Hull affirmed 4 October 2023) (**Settlement Distribution Scheme**),

   (together, the **Settlement Documents**).

2. Pursuant to s 33ZF of the Act, the Court authorises the Applicant *nunc pro tunc* for and on behalf of the Group Members (as defined in [5] and [6] of the Consolidated Statement of Claim dated 19 February 2021 and who did not file an opt out notice in accordance with the orders made on 15 December 2022) to enter into and give effect to the Settlement Documents and the transactions contemplated for and on behalf of the Group Members.

3. Pursuant to s 33ZF of the Act, Mark Geoffrey Barrow be appointed Administrator of the Settlement Distribution Scheme (**Administrator**) and is to act in accordance with the rules of the Settlement Distribution Scheme, subject to any direction of the Court.

4. Pursuant to ss 33ZB and 33ZF of the Act, the persons affected and bound by the settlement of the proceedings be the Applicant, the Respondent and the Group Members (as defined in [5] and [6] of the Consolidated Statement of Claim dated 19 February 2021 and who did not file an opt out notice in accordance with the orders made on 15 December 2022).

Registration of Group Members

5. Pursuant to s 33ZF of the Act:

   (a) the Registration Deadline as defined in the Settlement Distribution Scheme be extended to 31 December 2024; and

   (b) those persons who have been added to the Register of Group Members by the Registration Deadline be considered Participating Group Members for the purposes of the Settlement Distribution Scheme.

Settlement Distribution Scheme

6. Pursuant to ss 33V and 33ZF of the Act, for the purposes of cl 36 of the Settlement Distribution Scheme, the Applicant's Compensation Amount, as defined in the Settlement Distribution Scheme, be approved for distribution from the Settlement Sum in the sum of $40,000.

7. Despite anything to the contrary in the definition of Settlement Fund in the Settlement Distribution Scheme, the Settlement Sum paid by the Respondent pursuant to cl 3.1 of the Deed of Settlement be paid into an account held and administered by Australian Unity Trustees Limited (ACN 162 061 556 / ABN 55 162 061 556) as trustee as contemplated by the definition of Settlement Trust Account in the Deed of Settlement.

8. Pursuant to ss 33V and 33ZF of the Act, for the purposes of cl 56 of the Settlement Distribution Scheme, the amount of $700,000 is approved to be paid from the Settlement Fund (as defined in the Settlement Distribution Scheme, and as provided for in order 7 above) to the Administrator on account of Administration Costs (as defined in the Settlement Distribution Scheme) to be incurred, or expected to be incurred.

9. The Administrator may apply to the Court for approval of his claims for payment of Administration Costs or Additional Administration Costs (as defined in the Settlement

Distribution Scheme) in accordance with the procedure in cll 52 to 55 of the Settlement Distribution Scheme. Any such application must be supported by an affidavit disclosing:

(a) the invoice or invoices for which approval for payment is sought, pursuant to cl 52(a) of the Settlement Distribution Scheme; and

(b) the report of an independent costs consultant, as contemplated by cl 52(b) of the Settlement Distribution Scheme;

(c) whether the claim constitutes Administration Costs or Additional Administration Costs for the purposes of the Settlement Distribution Scheme, as contemplated by cl 52(c) of the Settlement Distribution Scheme.

10. The Administrator has liberty to apply in relation to any matter arising under the Settlement Distribution Scheme.

Dismissal of consolidated proceedings on and from the date of Final Distribution

11. The consolidated proceedings be dismissed, with no order as to costs and with all previous cost orders vacated, on and from the date of completion of the administration of the Settlement Distribution Scheme, being the date on which the Final Distribution of the Settlement Sum occurs under the Settlement Distribution Scheme, following the making of a Final Distribution Application by the Administrator and orders made by the Court approving a Final Distribution (as defined in the Settlement Distribution Scheme).

Assessment of costs

12. Until further order, the Administrator shall not exercise his power under the Settlement Distribution Scheme to make any Authorised Deductions (as defined in the Settlement Distribution Scheme) in relation to a claim for costs or disbursements.

13. By 4.00pm on 25 January 2024, the parties are to confer and where possible, reach agreement on any matters relating to the Applicant's Party/Party Costs (as defined in the Deed of Settlement) to be paid by the Respondent pursuant to the Deed of Settlement.

14. Any amounts claimed as costs that cannot be agreed pursuant to Order 13 (**Applicant's Outstanding Claimed Party/Party Costs**) are to form part of the reference to the Referee set out in Orders 15 and 16.

15. Pursuant to s 54A of the Act, an independent costs consultant nominated jointly by the parties or determined by the Court (the **Referee**) is to inquire into and report on the following questions (the **Reference**):

    (a) the reasonableness and recoverability of the Applicant's Outstanding Claimed Party/Party Costs; and/or

    (b) the reasonableness and recoverability of the Applicant's Other Solicitor/Client Costs (as defined in the Deed of Settlement) to be deducted from the Settlement Fund (as defined in the Settlement Distribution Scheme) (**Applicant's Outstanding Claimed Solicitor/Client Costs**).

16. The Reference will commence as soon as reasonably practicable after 25 January 2024, and for the purposes of the Reference:

    (a) the Referee is to conduct the Reference in accordance with Div 28.6 of Part 28 of the *Federal Court Rules 2011* (Cth), and subject to the following directions;

    (b) the Applicant's solicitors shall as soon as reasonably practicable deliver to the Referee a copy of this order and make available all information and records that the Referee advises are relevant to the Reference (with a copy to the Respondent);

    (c) the Referee is to consider and implement the Reference to enable a just, efficient and cost-effective resolution of the Reference, which may include, as the Referee considers it appropriate or necessary:

        (i) inquiries by telephone and direct communication with any person who the Referee believes may have relevant information, on notice to the parties; and

        (ii) the making of directions to a party, or any interested third party, on notice to the other parties, including but not limited to directions to provide:

            A. submissions;

            B. evidence, which must be provided orally on oath or affirmation or in writing by way of affidavit; or

            C. copies of any documents;

    (d) the Referee is not bound to conduct the Reference in accordance with the rules of evidence;

(e) the Referee may submit any question arising during the Reference in relation to the inquiry for the decision of the Court and shall thereafter conduct the Reference with any answer or direction by the Court;

(f) by 1 March 2024, the Referee shall submit the Report (on a confidential basis) to the Court and to the parties. Subject to further order, the Report shall not be published or disclosed to any person or entity other than the Referee, the parties and their legal representatives, and the Court;

(g) if, for any reason the Referee is unable to comply with the order for delivery of the Report to the Court by 1 March 2024, the Referee is to communicate that fact to the chambers of the Honourable Justice Horan as soon as it becomes apparent to the Referee that they will be unable to do so;

(h) subject to further order, the costs of and incidental to the appointment of the Referee and the conduct of the Reference, including the Referee's reasonable costs, shall be paid in the first instance by the Respondent, with the question of where those costs ultimately fall to be reserved for the decision of the Court; and

(i) the Referee and the parties have liberty to seek direction with respect to any matter arising under the Reference upon 24 hours' notice, or such other notice ordered by the Court.

Further Hearing on Costs

17. By 4.00 pm on 15 March 2024, the Applicant file and serve any written submissions and evidence concerning the adoption of the Referee's Report and any proposed deduction of the Applicant's Outstanding Claimed Solicitor/Client Costs from the Settlement Fund.

18. By 4.00 pm on 28 March 2024, the Respondent file and serve any evidence and written submissions concerning the adoption of the Referee's Report and any proposed deduction of the Applicant's Outstanding Claimed Solicitor/Client Costs from the Settlement Fund.

19. By 4.00 pm on 8 April 2024, the Applicant file and serve any written submissions and evidence in reply.

20. The matter be listed for a further hearing at 10.15 am on 19 April 2024 to determine any outstanding issues related to the adoption of the Referee's Report and any proposed

deduction of the Applicant's Outstanding Claimed Solicitor/Client Costs from the Settlement Sum.

Confidentiality

21. Pursuant to ss 37AF and 37AG of the Act 1976, to prevent prejudice to the proper administration of justice, annexure SAT-1 to the affidavit of Samuel Alexander Tierney affirmed 6 November 2023 is to remain confidential until further order.

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

REASONS FOR JUDGMENT

HORAN J:

INTRODUCTION

1 This is an application for approval of a settlement of a consolidated representative proceeding under s 33V of the *Federal Court of Australia Act 1976* (Cth) (**FCA Act**).

2 The representative proceeding is brought under Part IVA of the FCA Act and r 21.09.1 of the *High Court Rules 2004* (Cth) against the respondent, the **Commonwealth** of Australia, in respect of claims arising from the detention of Indonesian children who arrived in Australia unaccompanied over a six-year period between 2007 and 2013 and who were investigated for alleged people smuggling offences under the ***Migration Act** 1958* (Cth). The applicant alleges that he and the other group members were incorrectly assessed by the Commonwealth to be adults, largely on the basis of unreliable wrist x-ray analyses, as a consequence of which they were detained and imprisoned as adults for people smuggling offences rather than being promptly removed to Indonesia shortly after their entry interviews pursuant to ss 198(1) or 198(2) of the Migration Act. This gives rise to claims of damages for unlawful detention and negligence, together with claimed contraventions of ss 9(1) or 9(1A) of the *Racial Discrimination Act 1975* (Cth) (**RDA**).

3 The parties have agreed upon terms of settlement of the proceeding. Under s 33V(1) of the FCA Act, the settlement agreement must be approved by the Court. Accordingly, by interlocutory application dated 6 November 2023, the applicant seeks orders for the approval of:

(1) the **Deed of Settlement** dated 4 October 2023;

(2) the scheme for the distribution of the Settlement Sum among Group Members (**SDS**); and

(3) pursuant to cl 36 of the SDS, payment to the applicant of a "compensation amount" of $100,000.

4 The applicant also seeks various other orders in connection with the approval of the Deed of Settlement and the SDS.

5 In broad terms, the Deed of Settlement sets out the parties' agreement that the Commonwealth will pay, without any admission of liability or wrongdoing, a total compensation sum of

$27.5 million to resolve the claims of the applicant and the group members, together with an amount up to $2.5 million by way of contribution towards the administration costs of the settlement (**Settlement Sum**). In the event that the administration costs exceed $2.5 million, any additional amount of such costs will be subject to approval by the Court and will be deducted from the Settlement Sum. In addition, the Commonwealth will pay the applicant's legal costs of these proceedings as agreed or assessed on a party-party basis. In so far as the applicant's solicitor-client costs and disbursements exceed the agreed or assessed party-party costs, the excess amount will be subject to approval by the Court and will be deducted from the Settlement Sum. The SDS also provides for payment to the applicant from the Settlement Sum of an approved compensation amount "in recognition of the risk, time and costs incurred" in pursuing the consolidated representative proceeding on behalf of group members.

6 For the reasons that follow, I consider that the proposed settlement is fair and reasonable and in the interests of the group members as a whole, and accordingly I approve the Deed of Settlement and the SDS pursuant to s 33V(1) of the FCA Act.

7 However, the proposed compensation amount of $100,000 to be paid to the applicant is, in my view, too high and would be neither fair and reasonable nor in the interests of the group members as a whole. Instead, having regard to all the circumstances, I approve payment to the applicant of a compensation amount of $40,000.

8 There are some outstanding issues as to certain amounts to be deducted from the Settlement Sum under the Deed of Settlement and the SDS, including issues relating to the assessment of the applicant's solicitor/client costs in excess of its party/party costs (the latter having been agreed to be paid by the Commonwealth). Those issues will be addressed in subsequent approval processes pursuant to orders made by the Court.

BACKGROUND

The representative proceeding

9 The proceeding is brought by the applicant, Ali **Yasmin**, against the Commonwealth on his own behalf and on behalf of persons who:

(a) are persons of Indonesian race, national and ethnic origin;

(b) arrived in Australia between 1 January 2007 and 31 December 2013 as unlawful non-citizens in circumstances where they were:

(i) apprehended by officers of the respondent on suspected illegal entry vehicles (**SIEV**s) and brought to Australia;

(ii) suspected by the respondent of being involved in an offence under s 232A of the Migration Act;

(iii) under 18 years of age; and

(iv) unaccompanied by any adult who was able to act as their guardian;

(c) were detained by or on behalf of the respondent;

(d) were not immigration cleared for the purposes of the Migration Act;

(e) did not apply for a visa or to otherwise remain in Australia;

(f) were investigated for alleged offences under the Migration Act;

(g) remained without a guardian while in Australia;

(h) were ultimately removed to Indonesia by the respondent; and

(i) are not any of the persons mentioned in s 33E(2) of the FCA Act,

(**Group Members**).

10 The consolidated proceeding is both factually and legally complex. It is sufficient for present purposes to outline the key aspects of the claims advanced by the applicant on behalf of himself and the Group Members, as set out in the Consolidated Statement of Claim filed on 19 February 2021 and the Reply to the Amended Defence filed on 7 September 2022.

11 The applicant's claims arise from events occurring over a period of approximately six years during which it is alleged that Indonesian children who arrived in Australia by boat between 1 January 2007 and 31 December 2013 were incorrectly assessed by the Commonwealth to be adults, and as a consequence were detained and imprisoned as adults for people smuggling offences contrary to s 232A of the Migration Act. It is alleged that these Indonesian children were transferred into the custody of the Australian Federal Police (**AFP**) for the purposes of being investigated for such offences, and were subsequently charged, indicted, prosecuted, convicted and/or imprisoned in adult correctional facilities in respect of those offences.

12 The underlying circumstances from which these claims arise were the subject of an investigation and report by the Australian Human Rights Commission in July 2012 titled "An Age of Uncertainty".

13 The applicant alleges that, at the material times, the Commonwealth did not follow its own policies with respect to the assessment and treatment of unaccompanied minors arriving in Australia from Indonesia as unlawful non-citizens, in part due to the pursuit of an alleged "deterrence agenda" under which the Commonwealth sought to disrupt and deter the people smuggling business.

14 The applicant identifies a number of Commonwealth policies that are said to have governed how it would assess the age of unlawful non-citizens who were suspected of contravening s 232A of the Migration Act, and how it would treat such individuals depending on the outcome of that age assessment process.

15 Specifically, the applicant alleges that, where there was a question about whether a detainee was a child, the Commonwealth had in place a "benefit of the doubt" policy, pursuant to which the then Department of Immigration and Citizenship (**DIAC**) would conduct a holistic age assessment and, if there was a possibility that the individual was a child, it would accord the individual the benefit of the doubt by treating him or her as a child. Among other things, this engaged a policy (reflected in s 4AA of the Migration Act and in Article 37(b) of the Convention on the Rights of the Child) that minors would be detained in immigration detention only as a measure of last resort, for the shortest practicable time and in the least restrictive form appropriate to the circumstances. If the individual was a child, or was given the benefit of the doubt and treated as a child, it is alleged that the AFP and the Commonwealth Director of Public Prosecutions respectively had policies or practices to the effect that such individuals would not be prosecuted for people smuggling offences. Instead, those persons would be removed by DIAC back to Indonesia. Among other things, the applicant contends that this process was consistent with General Comment 6, "Treatment of Unaccompanied and Separated Children Outside Their Country of Origin", issued by the United Nations Committee on the Rights of the Child in September 2005.

16 The applicant alleges that each of the Group Members was born and grew up in remote fishing communities on the Indonesian coast in conditions of poverty, and had at the relevant times a low level of education and little or no English language ability. Each of the Group Members allegedly boarded a SIEV in Indonesia, unaccompanied by any legal guardian, and was informed that he or she would be paid to work as a crew member. After the relevant SIEVs were intercepted by the Commonwealth, the Group Members were transferred by the Commonwealth to Christmas Island for immigration processing.

17 The applicant alleges that DIAC performed entry interviews during which the Group Members told Commonwealth officers that they were under the age of 18, in circumstances where each had an appearance that was not obviously inconsistent with being a minor under 18 years old, and that they wanted to return to Indonesia. Instead of performing holistic age assessments, DIAC instead transferred the Group Members into the custody of the AFP in connection with suspected people smuggling offences. The applicant contends that, in many cases, the AFP performed an x-ray procedure on their wrists, purportedly to determine their likely age (**Wrist X-Ray Analysis**). However, the applicant contends that the Commonwealth knew at that time that Wrist X-Ray Analysis was incapable of reliably determining a person's age.

18 The Group Members were then allegedly kept in detention by the Commonwealth while the AFP investigated whether they had committed an offence under s 232A of the Migration Act. Following those investigations, a number of the Group Members (including the applicant) were charged as adults with offences under s 232A of the Migration Act. Some of those Group Members were convicted and sentenced to 5 years' imprisonment in an adult prison, being the minimum mandatory sentence pursuant to s 233C(2)(b) of the Migration Act (as in force at the relevant time).

19 The applicant contends that, shortly after the relevant DIAC entry interview, the Commonwealth should have removed him and the other Group Members to Indonesia pursuant to ss 198(1) or 198(2) of the Migration Act.

20 The applicant submits that these alleged facts give rise to the following causes of action on the part of each of the Group Members:

(a) the detention of Group Members after the point at which the Commonwealth should have removed them to Indonesia was unlawful, and neither s 189(3) nor s 250 of the Migration Act authorised their detention;

(b) the Commonwealth acted negligently and in breach of a duty to take reasonable care in the assessment of the Group Members' age, a duty to take reasonable care in assessing Group Members' requests for removal under s 198(1) of the Migration Act, and/or a duty arising to procure Group Members' access to independent legal advice about the circumstances of their detention before removing them to Indonesia; and

(c) that various acts by the Commonwealth — including decisions not to remove the Group Members, decisions not to properly assess their age, and decisions to charge, indict and

prosecute them — involved distinctions based on their race, ethnic origin or national origin in contravention of ss 9(1) or 9(1A) of the RDA.

21 The applicant also brings a claim, on his own behalf only, for misfeasance in public office by an officer of the AFP in signing a prosecution notice charging him with an offence under s 232A of the Migration Act.

22 The applicant and Group Members seek damages, including for loss of liberty for the time spent in detention or in prison after the date on which they should have been removed to Indonesia, namely as soon as reasonably practicable following their DIAC entry interview. The applicant and Group Members also claim aggravated and exemplary damages.

23 By an Amended Defence filed on 29 July 2022, the Commonwealth relevantly denies the allegations that it unlawfully detained the applicant or other Group Members, and says that the applicant's detention in particular was authorised and required by ss 189 and 196(1) of the Migration Act, either by themselves or in conjunction with s 250 of the Migration Act (which deals with the detention of suspected offenders for such period as is required for the making of a decision whether to prosecute the suspect or instituting such a prosecution, and such further period as is required for the purposes of any prosecution). The Commonwealth also denies that it owed the alleged duties of care or that it breached those duties. In broad terms, the Commonwealth has joined issue on many aspects of the claims advanced by the applicant on behalf of himself and the Group Members.

Procedural history

24 The applicant is represented by Ken Cush & Associates. On 18 May 2020, the applicant commenced a proceeding by an Originating Application filed in this Court (No VID 328 of 2020). On 14 September 2020, the applicant commenced a further proceeding against the Commonwealth in the original jurisdiction of the High Court of Australia, which was then remitted to this Court (No VID 664 of 2020). These two proceedings were consolidated by an order made by this Court on 30 November 2020.

25 On 19 February 2021, the applicant filed a Consolidated Statement of Claim. The Commonwealth filed an Amended Defence on 29 July 2022. The applicant filed a Reply to the Amended Defence on 7 September 2022. Further and better particulars have been exchanged. Pleadings have now closed.

26 No orders have been made for the filing of any lay or expert evidence in the proceeding and discovery has not commenced. The applicant has filed some of the evidence that he intends to rely on at trial; namely, an affidavit sworn by him on 2 December 2022 and an affidavit by the applicant's mother, Anisa Yasmin, sworn on 2 December 2022. The applicant also intends to rely on a medico-legal report of Professor Alexander McFarlane AO dated 8 March 2023, which diagnoses the applicant with post-traumatic stress disorder arising from his experiences in detention including an incident of sexual assault. The Commonwealth has not yet filed any evidence in support of its defence.

27 On 15 December 2022, the Court made orders approving the terms of an opt out notice and a procedure for giving that notice (and a translated version in Bahasa Indonesian) to Group Members, including by providing the notice to an Indonesian agent to be given to those Group Members for whom she has contact details by WhatsApp message; causing the notice to be displayed on the website operated by Ken Cush & Associates; requesting the notice to be displayed on the website of an Indonesian law firm; causing a translated executive summary from the notice to be published in a number of specific Indonesian newspapers; and causing the notice to be posted on this Court's website and available for inspection at each District Registry. The orders fixed 1 March 2023 as the "Class Deadline" by which a Group Member could opt out of the proceeding. The opt out notice was subsequently distributed and published in accordance with the 15 December orders. No notices of opting out pursuant to s 33J of the FCA Act had been received from any Group Member by the 1 March 2023 Class Deadline, nor by the date of the settlement approval hearing on 6 December 2023).

28 The parties participated in a Court-ordered mediation, in the course of which they reached an in-principle agreement on the proposed settlement of the proceeding. Following negotiations as to the terms of settlement, the parties subsequently executed the Deed of Settlement on 4 October 2023. The parties also agreed on the form of the SDS.

29 On 12 October 2023, the Court made procedural orders to facilitate the hearing of the applicant's settlement approval application. The orders included approval of the form and content of a Notice of Proposed Settlement to be given to Group Members pursuant to ss 33X and 33Y of the FCA Act, together with ancillary orders regarding the procedure for the distribution of the Notice of Proposed Settlement, and the filing of notices of objection to the proposed settlement on or before 1 December 2023.

30 The approved Notice of Proposed Settlement was set out in an annexure to the 12 October orders. Among other things, the Notice relevantly summarised the proposed settlement of the proceeding in the following terms:

> **PROPOSED SETTLEMENT**: The parties in the Ali Yasmin v Commonwealth of Australia Class Action have agreed to a proposed settlement of the proceeding, under which the Respondent will pay (without admission of liability or wrongdoing) a total settlement sum of $27.5 million (in Australian dollars) to resolve the claims of all group members (**Settlement Sum**).
>
> **Group members will need to register their claims in order to be entitled to receive a payment out of this money.**
>
> The settlement is recorded in a deed of settlement that was entered into by each of the parties on 4 October 2023 (the **Deed of Settlement**). A copy of the Deed of Settlement can be provided to group members on request from Ken Cush & Associates.
>
> The proposed settlement must first be approved by the Federal Court of Australia as fair and reasonable before it is binding on the parties and group members.
>
> …
>
> **LEGAL AND OTHER COSTS**: Under the agreement reached, the Respondent will pay some of Ken Cush & Associates' legal costs involved in running the proceeding (known as party/party costs), in addition to the $27.5 million Settlement Sum. Ken Cush & Associates' other legal costs (known as solicitor/client costs) will need to be approved by the Federal Court and will be deducted from the Settlement Sum if approved. You will not need to pay any legal costs.
>
> The Respondent will also pay some of the costs involved in administering and distributing the Settlement Sum to group members, in addition to $27.5 million Settlement Sum, up to $2.5 million. If the costs of administering and distributing the Settlement Sum exceed $2.5 million, those additional administration costs will be deducted from the Settlement Sum if approved by the Federal Court.
>
> At the Approval hearing, Ken Cush & Associates will also seek that a payment of no more than $100,000 (in Australian dollars) be deducted from the Settlement Sum to be paid to the Applicant, Mr Ali Yasmin, for his time, inconvenience and any expenses incurred in conducting the class action on behalf of all group members. Again, this payment is subject to approval by the Federal Court.
>
> If the Court approves the proposed deductions, the amount available for distribution to group members will be approximately $27.4 million (in Australian dollars) less the deductions approved by the Court for additional legal and administrative costs as referred to above.
>
> **OBJECTION TO THE PROPOSED SETTLEMENT**: If you are a group member, you have the right to make submissions as to why the Court should not approve the proposed settlement (or any particular aspect of it).
>
> To lodge an objection, you must return the attached 'Notice of Objection Form' as soon as possible, and at least by **4.00 pm (AEDT) on 1 December 2023** to:
>
> - the Federal Court at vicreg@fedcourt.gov.au; and
> - Ken Cush & Associates at admin@kencush.com.au.

…

INDIVIDUAL SETTLEMENT PAYMENTS: Subject to approval by the Court, the amount of the Settlement Sum which is ultimately available for distribution to group members (after the deduction of any approved legal and administration costs and separate payment to the Applicant) will be distributed in accordance with a Settlement Distribution Scheme.

The Settlement Distribution Scheme will include a proposed apportionment formula which will determine how each group member's individual entitlement to a share of the Settlement Sum will be calculated. The apportionment formula will take into account the number of days a group member was detained in immigration detention and gaol detention.

A copy of the Settlement Distribution Scheme can be provided to group members on request from Ken Cush & Associates.

It is not presently possible to provide an estimate of how much each individual group member may receive following a distribution of the Settlement Sum. This is because the size of each settlement payment will depend, in part, on the number of group members who register and the number of days each registered group member was detained in (i) immigration detention; and (ii) gaol detention.

(Emphasis in original)

31 The Notice of Proposed Settlement also provided details of the process by which Group Members could register to participate in the representative proceeding if they had not already done so. The stated deadline for such registration is 30 November 2024.

32 No objections to the proposed settlement have been received. It is estimated that there are likely to be approximately 240 Group Members, around 80 of whom are currently known by Ken Cush & Associates to whom they have provided their contact details. Those Group Members currently reside in a range of overseas locations, mostly in remote areas of Indonesia.

Overview of proposed settlement

33 The settlement is contained in a Deed of Settlement executed on 4 October 2023 between the applicant, the Commonwealth and Ken Cush & Associates. The settlement is conditional on the making of approval orders by this Court.

34 As mentioned above, the Deed of Settlement provides for the Commonwealth to pay, in full and final settlement of the consolidated representative proceeding, the Settlement Sum, comprising the **Compensation Sum** of $27.5 million and an amount, approved by the Court, up to $2.5 million for **Administration Costs**. If the applicant seeks and the Court approves an amount more than $2.5 million for Administration Costs, the excess amount will be deducted from the Compensation Sum. Accordingly, the Settlement Sum will be an amount up to a maximum of $30 million. All of these amounts are in Australian dollars.

35 The Settlement Sum does not include the applicant's party/party legal costs, as agreed or taxed, which the Commonwealth agrees to pay within 14 days after such agreement or taxation.

36 The Deed of Settlement makes provision for the application and distribution of the Settlement Sum: first, by payment of the applicant's other solicitor/client costs and disbursements which exceed the party/party costs, as approved by the Court; secondly, by payment of Administration Costs from time to time on an ongoing basis as approved by the Court; thirdly, by payment of any other amount approved by the Court; and finally, by payments to the applicant and Group Members in relation to their claims in accordance with the SDS.

37 The Deed of Settlement also contains releases by which the applicant, on his own behalf and on behalf of all Group Members, releases and discharges the Commonwealth (and related persons) jointly and severally from the claims and any future claims or suits in relation to the same subject matter as the consolidated representative proceeding whether arising at common law, in equity, under statute or otherwise.

38 The recitals to the Deed of Settlement include a denial by the Commonwealth of liability to the applicant and Group Members, and the Deed of Settlement contains a clause that provides that the Deed of Settlement and the payment of the Settlement Sum are not an admission of liability by the Commonwealth.

39 The proposed SDS establishes a procedure for distributing the Settlement Sum. It provides for the appointment of Mark Geoffrey Barrow as the Administrator of the SDS, and sets out a process for the registration of Participating Group Members, the calculation of Participating Group Members' entitlements or estimated entitlements, the notification and review of entitlements, the initial distribution to Participating Group Members of a proportion of their estimated entitlement, and the payment of a final distribution to Participating Group Members following the Registration Deadline on 30 November 2024.

40 The SDS includes a methodology for the Administrator to assess and calculate the amount that each Participating Group Member is entitled to be paid from the Settlement Sum. At a high level, the methodology involves each Group Member being allocated a specified number of points based on the number of days spent in detention in either a police facility, gaol or prison, (referred to as arrest/remand/gaol detention) or in immigration detention. The former is allocated three points per day, and the latter is allocated one point per day – in other words, the allocation is weighted 3:1 as to days spent in arrest/remand/gaol detention compared with days

spent in immigration detention. The qualifying criteria require that the Group Member must have spent 30 days or more in immigration detention or arrest/remand/gaol detention. Each Participating Group Member's entitlement is then calculated as proportion of the Settlement Sum net of any authorised deductions (referred in the SDS to as the "Distribution Sum") based on the total number of points allocated to that individual using the following formula:

> each Participating Group Member will be entitled to a proportion of the Distribution Sum based on their Total Points Allocation, as follows:
>
> | | | | | |
> |---|---|---|---|---|
> | Participating Group Member Entitlement ($) | = | (Distribution Sum ($)) *divided by* the total number of points allocated across all Participating Group Members | x | Total Points Allocation for a Participating Group Member |
>
> such that the dollar value of each point is equal to the Distribution Sum divided by the sum of the Total Points Allocation of all Participating Group Members.

41 The SDS provides for initial payments from the Settlement Sum in respect of any Administration Costs then approved for payment, the compensation amount (that is, the amount approved by the Court to be paid to the applicant), and any other Authorised Deductions. Those initial payments are to be made by the Administrator as soon as practicable after the Court makes any approval order. The Administrator may then make an initial distribution to each Participating Group Member of up to 50% of that person's estimated entitlement, if an assessment has been undertaken for that Group Member. After the Registration Deadline of 30 November 2024, the Administrator must determine each Participating Group Member's entitlement, determine the outstanding Administration Costs, and make an application to the Court for approval of a Final Distribution.

42 The SDS also provides for the payment to the applicant of "compensation amount", being "an amount approved by the Court to be paid to the Applicant out of the Settlement Sum, in recognition of the risk, time and costs incurred by the Applicant in pursuing the Consolidated Representative Proceeding on behalf of Group Members". The applicant's settlement approval application dated 6 November 2023 seeks approval for payment to the applicant of a compensation amount of $100,000.

APPLICABLE PRINCIPLES

43 Under s 33V of the FCA Act, a representative proceeding may not be settled or discontinued without the approval of the Court. Section 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.

44 The central question in determining whether to approve a settlement under s 33V(1) is whether the proposed settlement is a fair and reasonable compromise of the claims made on behalf of the group members who will be bound by the settlement: *Williams v FAI Home Security Pty Ltd (No 4)* (2000) 180 ALR 459; [2000] FCA 1925 at [19] (Goldberg J); ***Kelly** v Willmott Forests Ltd (in liquidation) (No 4)* [2016] FCA 323 at [3], [62], [68] (Murphy J).

45 The Court's task in considering an application for approval of a proposed settlement is an onerous one, and attracts the Court's protective jurisdiction, particularly in relation to the interests of unrepresented group members: ***Smith** v Commonwealth of Australia (No 2)* [2020] FCA 837 at [7], [9] (Lee J). As the applicant submits, the Court approaches this task by asking two questions:

(a) first, whether the proposed settlement is fair and reasonable as between the parties, having regard to the claims of the Group Members (*inter partes* fairness); and

(b) secondly, whether the proposed settlement is fair and reasonable as between the Group Members and not just in the interests of the applicant and the respondent (*inter se* fairness).

See, for example, *Kamasaee v Commonwealth of Australia* [2017] VSC 537 at [7] (Macauley J); *Australian Competition and Consumer Commission v Chats House Investments Pty Ltd* (1996) 71 FCR 250 at 258 (Branson J).

46 The principles applicable to a settlement approval under s 33V of the FCA Act were conveniently summarised by Moshinsky J in ***Camilleri** v The Trust Company (Nominees) Limited* [2015] FCA 1468 at [5]:

> (a) the central question for the Court is whether the proposed settlement is fair and reasonable in the interests of the group members considered as a whole;

(b) there will rarely be one single or obvious way in which a settlement should be framed, either between the claimants and the defendants (*inter partes* aspects) or in relation to sharing the compensation among claimants (the *inter se* aspects) – reasonableness is a range, and the question is whether the proposed settlement falls within that range;

(c) it is not the task of the Court to 'second-guess' or go behind the tactical or other decisions made by the plaintiff's legal representatives, but rather to satisfy itself that the decisions are within the reasonable range of decisions, having regard to: the circumstances which are 'knowable' to the plaintiffs and their representatives; and a reasonable assessment of risks, based on those circumstances;

(d) the list of factors typically relevant to an assessment of the reasonableness of a proposed settlement, set out in *Williams v FAI Home Security Pty Ltd (No 4)* [2000] FCA 1925 at [19], is a useful guide but is neither mandatory nor necessarily exhaustive – it is just a guide ... and additional consideration needs to be given to factors relevant to the fairness of the settlement *inter se*;

(e) in relation to the *inter se* fairness, a particular concern of the Court is to confirm that the interests of the lead plaintiff, or signed-up clients of a given firm of solicitors, are not being preferred over the interests of other group members. The arrangement should be framed to achieve a broadly fair division of the proceeds, treating like group members alike, as cost-effectively as possible;

(f) an important consideration will be whether group members were given timely notice of the critical elements, so that they had an opportunity to take steps to protect their own position if they wished. Once appropriate notice is given, the absence of objections or other response action from group members is a highly relevant consideration in support of a settlement, and all its elements;

(g) where a group member does object to the settlement, an important further question is whether the objector is prepared to assume the role − and risks – of being lead plaintiff;

(h) in relation to provisions for costs-sharing among the successful group members, again an important consideration is where the group members were alerted at an early stage to the potential costs-sharing consequences of subsequent participation in the action. It is not, thereafter, the role of the Court to go behind the costs agreements, but rather to satisfy itself that the agreements have been applied reasonably according to their terms;

(i) further, the level of detail which the Court will require in order to be satisfied that costs have been calculated in accordance with the applicable agreements will vary, depending on factors such as whether the group members are all clients, or include non-client claimants, and the proportion of the settlement funds to be applied to costs.

(Citations omitted.)

47 The factors that may be taken into account in considering whether a proposed settlement is fair and reasonable and in the interests of the group members include (see, *e.g.*, ***Blairgowrie Trading*** *Ltd v Allco Finance Group Ltd (Receivers & Managers Appointed) (In Liq) (No 3)* [2017] FCA 330 at [84] (Beach J)):

(a) the complexity and duration of the litigation;

(b) the stage of the proceedings;

(c) the risks of establishing liability, establishing damages, and maintaining the class action;

(d) the ability of the respondent to withstand a greater judgment than the prospective settlement sum;

(e) relatedly, the range of reasonableness of the settlement in light of the best recovery;

(f) the range of reasonableness of the settlement in light of all the risks of litigation; and

(g) the reaction of the class to the settlement.

48 The principles and guidance established in previous decisions of the Court as to settlement approvals are now reflected in the Court's Class Actions Practice Note (GPN-CA), which relevantly states:

> 15.3 When applying for Court approval of a settlement, the parties will be required to persuade the Court that:
>
> (a) the proposed settlement is fair and reasonable having regard to the claims made on behalf of the class members who will be bound by the settlement; and
>
> (b) the proposed settlement has been undertaken in the interests of class members, as well as those of the applicant, and not just in the interests of the applicant and the respondent(s).
>
> …
>
> 15.5 The material filed in support of an application for Court approval of a settlement will usually be required to address at least the following factors:
>
> (a) the complexity and likely duration of the litigation;
>
> (b) the reaction of the class to the settlement;
>
> (c) the stage of the proceedings;
>
> (d) the risks of establishing liability;
>
> (e) the risks of establishing loss or damage;
>
> (f) the risks of maintaining a class action;
>
> (g) the ability of the respondent to withstand a greater judgment;
>
> (h) the range of reasonableness of the settlement in light of the best recovery;
>
> (i) the range of reasonableness of the settlement in light of all the attendant risks of litigation; and

(j) the terms of any advice received from counsel and/or from any independent expert in relation to the issues which arise in the proceeding.

49 These considerations are a useful guide but should not be treated as a "checklist" nor necessarily as mandatory or exhaustive. In approving a settlement of a representative proceeding under s 33V of the FCA Act, the Court is instead tasked with making a broad, evaluative and impressionistic decision: *Smith* at [12] (Lee J).

CONSIDERATION

The proposed settlement is fair and reasonable

50 In addressing the critical questions concerning whether the proposed settlement is fair and reasonable both as between the parties and in the interest of the Group Members as a whole, I have been greatly assisted by a confidential joint opinion provided by senior counsel and three junior counsel representing the applicant dated 6 November 2023 (**Joint Opinion**).

51 As set out in paragraphs 25 and 26 above, the proceedings are still at a relatively early stage. While the pleadings have closed, there has not yet been any discovery and the parties have not filed their evidence in support of the claims and defences respectively (with the exception of two affidavits filed on behalf of the applicant and the expert report of Professor McFarlane intended to be relied on at trial). There are numerous factual issues which remain in dispute on the pleadings, giving rise to a number of contested legal issues.

52 Some of the key factual issues that are in dispute are:

(a) whether the Commonwealth conducted an age assessment of the applicant (and other Group Members), and the scope of any such assessment;

(b) whether the applicant (and other Group Members) made a request to be removed to Indonesia within the meaning of s 198(1) of the Migration Act;

(c) whether the Commonwealth knew at the relevant time that Wrist X-Ray Analysis is incapable of reliably determining a person's age; and

(d) the purpose of the applicant's (and other Group Members') detention under the Migration Act.

53 Further, each of the causes of action on which the applicant relies will require the determination of a number of legal issues including:

(a) whether the Commonwealth was under an obligation to remove the applicant and the Group Members as soon as reasonably practicable following their DIAC entry interviews;

(b) how any failure by the Commonwealth to perform a duty to remove the applicant and Group Members as soon as reasonably practicable would affect the authority to detain under ss 189 and 196(1) of the Migration Act (see generally *Commonwealth v AJL20* (2021) 273 CLR 43);

(c) whether the detention of the applicant and the Group Members at the relevant times was authorised by ss 189, 196(1) and 250 of the Migration Act;

(d) whether the Commonwealth owed one or more of the alleged duties of care, including whether or not such alleged duties are coherent or consistent with the statutory scheme under the Migration Act;

(e) whether loss of liberty is a form of harm that is capable of being the subject of a claim in negligence;

(f) whether the Commonwealth's conduct in relation to the detention, investigation, charging and prosecution of the applicant and the Group Members involved distinctions based on race, ethnic origin or national origin in contravention of ss 9(1) or 9(1A) of the RDA;

(g) whether the prosecution notice against the applicant was unlawful and, if so, whether the AFP officer who signed the prosecution notice against the applicant knew or was recklessly indifferent to the fact that the prosecution notice was unlawful; and

(h) whether the claims for unlawful detention, negligence or misfeasance in public office are statute-barred by the operation of applicable statutes of limitation.

54 These factual and legal issues are likely to be highly complex, involving forensic challenges and potential evidentiary disputes and requiring extensive legal arguments. As the Commonwealth submits, the pursuit of the claims to judgment would entail considerable time and involve significant costs, and would carry some risk that the applicant and Group Members would be unsuccessful in establishing liability or would receive an unfavourable assessment of the quantum of any damages payable. It may be necessary to assess any damages separately for each Group Member. Further, there would be the prospect of an appeal by the unsuccessful

party. In such circumstances, there is a benefit to the applicant and Group Members in achieving the certainty and finality of the proposed settlement. The alternative would involve a lengthy trial some time into the future, involving substantial liability risk and quantification risk, and some likelihood of appeals. In this regard, the applicant relies on the affidavit of Mr Barrow affirmed on 5 November 2023 (**Barrow affidavit**) at [38]-[39], who estimates the likely duration of the trial as two to three weeks, and expects that the proceedings would not be fully litigation to conclusion for another two to three years. Further, the conduct of the litigation would involve a number of complexities arising from the location of Group Members, most of whom reside in remote areas of Indonesia.

Fairness inter partes

55 In considering fairness *inter partes*, it is relevant to consider the reasonableness of the proposed settlement in the light of the "best case" outcome for the applicant and Group Members viewed in the context of the litigation risks referred to in the preceding paragraphs: see, *e.g.*, *Camilleri* at [32] (Moshinsky J). In addition to the risks faced by the applicant in establishing liability on the part of the Commonwealth, the present value of the potential "best case" outcome is affected by the inevitable delays of the trial and potential appeals. Putting to one side any possible damages for personal injuries suffered by the applicant or the Group Members, the principal head of damage in respect of which compensation is sought is in respect of the alleged unlawful deprivation of liberty. The assessment of general damages for false imprisonment is at large, and cannot be approached as if it involved the application of a mathematical "tariff": see, *e.g.*, ***Hassan*** *v State of Victoria* [2023] VSC 478 at [50]-[51] (Dixon J). However, comparative awards indicate that damages awarded for prolonged or longer-term imprisonments generally fall in the vicinity of around $1,000 to $1,500 per day. It is conceivable that any damages awarded for unlawful detention in immigration detention would be somewhat less than those awarded for unlawful imprisonment in a jail or other correctional facility.

56 It is not yet known precisely how many Group Members will meet the qualifying criteria and participate in the settlement, nor precisely how many days of immigration detention or arrest/remand/gaol detention will be factored into the total points allocation for all participating Group Members. Nevertheless, the size of the potential class of Group Members is not completely unknown, and many Group Members have already been identified. In this regard, the applicant provided to the Court a schedule setting out information that will inform the

calculation of Group Members' entitlements, while noting that additional Group Members will be identified as part of the settlement administration process. Based on such information, the entitlement of each Group Member under the proposed settlement is likely to reflect an amount of approximately one-third of the estimated damages that might be payable to the Group Member upon establishing an unlawful deprivation of liberty, at least putting to one side any interest that might be payable on any such damages.

57 The deductions to be made from the Compensation Sum are largely subject to the Court's approval, and are within the range of reasonable outcomes. The Commonwealth will meet the costs of administration of the proposed settlement up to $2.5 million, and any additional administration costs to be deducted from the Settlement Sum must be approved by the Court. I was informed by the applicant's counsel that it is likely and expected that the costs of administration of the SDS will exceed $2.5 million, and that there may therefore ultimately be an application for approval of Additional Administration Costs of up to $1.5 million. The Commonwealth agrees to pay the applicant's party/party legal costs of the proceedings as agreed or taxed. To the extent that the applicant's solicitor/client costs exceed such party/party costs, they must be approved by the Court before deduction from the Settlement Sum. As discussed further below, it is anticipated that an application will be made in due course for approval of the deduction of up to $2.2 million in respect of such excess solicitor-client costs.

58 The experience of Mr Barrow as Administrator and of Ken Cush & Associates, together with their contacts in Indonesia, is likely to aid in the efficient administration of the SDS. The proposed engagement of a professional trustee, Australian Unity Trustees Limited, to manage and distribute the Settlement Sum will also advance the efficient administration of the SDS, and the fee for the establishment and management of the funds will constitute part of the Administration Costs and will not be deducted from the Compensation Sum.

59 Any potential surplus following the Final Distribution will be either redistributed to Participating Group Members or, at the discretion of the Administrator, may be paid as a donation to a charitable organisation or cause (for example, if it would not be cost-efficient or practical to recalculate and redistribute the residual entitlement of each Group Member according to the SDS assessment methodology).

60 In the circumstances, having regard to the considerable litigation risks and the inevitable delays that would be involved in taking the case to trial, I consider that the proposed settlement is fair and reasonable as between the parties.

Fairness inter se

61 In relation to fairness as between the Group Members, I must be satisfied that the SDS achieves a fair and equitable division of the settlement sum, and that the interests of the representative party or any represented Group Members are not being preferred over the interests of other Group Members, in the absence of any compelling reason for such preferential treatment: see *Blairgowrie Trading* at [85] (Beach J).

62 In *Camilleri* at [43], Moshinsky J noted that addressed some of the factors relevant to fairness *inter se*:

> 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.

63 In the present case, while the manner in which the Settlement Sum is to be distributed may require some assumptions to be adopted and "judgment calls" to be made, the classes of claimants among the Group Members are readily identifiable by reference to relatively objective criteria: *cf. Camilleri* at [40]. The primary differentiation is based on whether the Group Member was detained in immigration detention or in arrest/remand/gaol detention, and then based on the length of the period for which the Group Member was detained. In the circumstances, I consider that the methodology for the distribution of the Settlement Sum subjects claims by Group Members to consistent principles and procedures, aligns with the case that was to be advanced by the applicant at trial, and is capable of being supported as a rough proxy for the harm suffered by each Group Member and the likely compensation amount. In this regard, it is justifiable to give a higher weighting to arrest/remand/gaol detention, which may be regarded in general as harsher than immigration detention. While the assessment of

entitlements will inevitably be imperfect in some respects, including that it does not have regard to any particular aggravating circumstances in each individual case, the methodology nevertheless strikes an appropriate balance between efficiency, consistency and fairness of individual assessments.

64 I note that, under the SDS, a Group Member who was detained for less than 30 days will not meet the "Qualifying Criteria" and will therefore not be entitled to any distribution from the Settlement Sum. This differentiation between Group Members, by exclusion of Group Members who were detained for less than 30 days from participation in the settlement, may raise a question whether the proposed settlement is fair and reasonable as between the Group Members. Nevertheless, I accept that it is not unreasonable to impose a practical limit by reference to a minimum period of detention to give rise to an entitlement to participate in the distribution of the Settlement Sum, in the interests of the practicality and efficiency in the identification of Group Members and the assessment and distribution of payments. Further, it is reasonable to assume that most of the Group Members within the definition in the Consolidated Statement of Claim are likely to have been detained for periods in excess of 30 days. Thus, Mr Barrow deposes as to the average time spent in detention by various sub-categories of Group Members. This suggests that the average time spent in detention by group members who were not charged with an offence was 5.4 months; the average time spent in detention by group members whose prosecution for people smuggling offences was discontinued was 14.4 months, of which an average of 6.6 months was spent in an adult correctional facility; and the average period of detention for group members who were ultimately released on licence after conviction for a people smuggling offence (due to doubt about whether they were adults at the time of their apprehension) was 31.6 months, of which an average of 28.8 months was spent in an adult correctional facility : Barrow affidavit at [17]-[19]. On this basis, the number of Group Members who fail to meet the Qualifying Criteria is likely to be very small.

65 I also consider that the SDS contains a reasonable process by which Group Members can register and become eligible to participate in the settlement over the period until the Registration Deadline. This accommodates the challenges in locating Group Members, verifying their identity and eligibility, and assisting them to establish the bank accounts necessary in order to receive a distribution from the Settlement Sum. The applicant submits that most of the eligible Group Members are likely to be identified and located within a period of 12 months, if they have not already been identified, particularly in relation to those Group

Members who are likely to have larger distribution entitlements. Having regard to the time between the filing of the proposed SDS and the date of the Court's approval of the settlement, I consider that it is appropriate to extend the deadline for registration in order to give effect to the intention that there should be a 12-month period for this process to be carried out. Accordingly, the Registration Deadline under the SDS should be amended to 31 December 2024. In the interim, the SDS makes provision for initial payments to be made to Participating Group Members based on their estimated entitlements.

66 The SDS establishes a fair and transparent process for notifying each Participating Group Member of the assessment of his or her entitlement, and a right to seek review of that assessment by the Administrator. In the light of the assessment methodology by which entitlements are determined under the SDS, the absence of any further right of review by an independent assessor is neither unreasonable nor unfair, in circumstances where the costs of establishing any such independent review process are likely to outweigh any real benefit or utility.

67 Some further attention should be given to the scope of the releases contained in cl 6.1 of the Deed of Settlement. The assessment methodology under the SDS does not have regard to any personal injuries that might have been suffered by an individual Group Member while in immigration detention or arrest/remand/gaol detention. For instance, the applicant himself claims to have been sexually assaulted while he was imprisoned, and pleads this as part of his loss and damage suffered as a result of the Commonwealth's alleged negligence. The Consolidated Statement of Claim also alleges, as part of the risk of harm giving rise to the alleged duties of care, "a risk of bodily or psychological injury arising from children being detained with adults". It is not known whether or to what extent any Group Members other than the applicant might have suffered personal injuries during the period of their detention. However, the Deed of Settlement contains a release by the applicant on behalf of all Group Members in respect of "any future claims or suits in relation to the same subject matter as the Consolidated Representative Proceeding, whether arising at common law, in equity, under statute or otherwise". A question arises whether the scope of this release by Group Members is fair and reasonable, in circumstances where the entitlements calculated under the SDS do not include any amount in respect of any potential claims by individual Group Members in respect of loss and damage arising from personal injuries that might have been suffered while in detention.

68 In the circumstances, however, I consider that the terms of the releases contained in the Deed of Settlement do not take the proposed settlement outside the bounds of fairness or reasonableness. First, the scope and effect of the releases would be a matter for consideration if and when any particular claim were to be brought by a Group Member in respect of any personal injury suffered while in detention. Secondly, apart from the instructions given by the applicant in respect of the personal injury allegedly suffered by him while in the custody of the Commonwealth, the applicant's solicitors are not aware of any other Group Members who might claim to have suffered personal injury as a result of the Commonwealth's conduct while in detention, and any such claims for compensation would be likely to encounter significant obstacles including statutory thresholds and limitation periods. Accordingly, it is not unreasonable that the assessment methodology under the SDS does not account directly for any potential personal injury damages in respect of individual Group Members. Again, this strikes an appropriate balance between efficiency, consistency and fairness of individual assessments.

69 In terms of the reaction of the class to the proposed settlement, it is relevant that no objections have been received from any of the Group Members. Although I also take into account the undisputed challenges in giving notice to Group Members, particularly those who reside in remote locations in Indonesia or elsewhere overseas, I am satisfied that all reasonable steps have been taken to give such notice in accordance with the orders made on 12 October 2023. I also note that there is some evidence to the effect that the Group Members with whom the applicant's representatives have been in contact are in favour of the proposed settlement, and desire a resolution of the proceeding on the best terms that can be achieved so long as that can occur in a quick and just way: see Barrow affidavit at paragraphs [41]-[42].

70 For completeness, I mention that an interlocutory application was filed on 4 December 2023 by Ms Elizabeth Barbalina Hiariej, an Indonesian lawyer, who claims to represent 140 clients in Indonesia who may fall within the definition of Group Members. Ms Hiariej sought an adjournment of the settlement approval hearing until after the end of March 2024 to enable her to seek instructions from her clients in connection with this proceeding, including whether they should be given "standing" to join the proceeding. I refused this adjournment application at the commencement of the hearing on 6 December 2024, with reasons that were delivered orally. Among other things, the definition of Group Members is set out in the Originating Application and Consolidated Statement of Claim, and procedures for Group Members to opt out of the proceeding were established pursuant to the orders made by the Court on 15 December 2022. In so far as any of Ms Hiariej's alleged clients fall within the definition of Group Members,

they are already included in the proceeding and will be both bound by and entitled to participate under the proposed settlement. In so far as any of her clients are not Group Members as defined, they will be unaffected by the proposed settlement. Nothing in Ms Hiariej's affidavit or submissions to the Court suggested that any of her clients might have any objections to the proposed settlement.

71 Subject to the question of the compensation amount payable to the applicant, which is addressed separately below, I consider that the distribution model contained in the SDS is "within the bounds of reasonableness in achieving a broadly fair, 'rule of thumb' distribution between the claimants": see *Camilleri* at [42] (Moshinsky J).

Conclusion

72 In summary, balancing the litigation risks against the "best case" outcome, I consider that the proposed settlement is well within the range of reasonableness. It is fair and reasonable as between the parties, and is in the interests of the Group Members as a whole.

Applicant's compensation payment

73 As referred to in paragraph 42 above, the SDS provides for a compensation payment to the applicant, in an amount approved by the Court, that is to be paid out of the Settlement Sum "in recognition of the risk, time and costs" incurred by the applicant in pursuing the consolidated proceedings on behalf of Group Members. The applicant's interlocutory application dated 6 November 2023 seeks approval of a compensation amount in the sum of $100,000.

74 A compensation or reimbursement payment of this kind requires consideration of whether such special or preferential treatment is justifiable and in the interests of the Group Members as a whole.

75 The applicant submits that payments to representative applicants who have sacrificed time and incurred expenses in prosecuting an action on behalf of others are recognised as "compensation … for the time and expense attributable to the representative features of the applicant's involvement as a party in the litigation": *Caason Investments Pty Ltd v Cao (No 2)* [2018] FCA 527 at [176] (Murphy J).

76 The applicant accepts that the amount of $100,000 is higher than the average or median payment made to lead applicants in other representative proceedings: see, *e.g.*, *Kuterba v Sirtex Medical Ltd (No 3)* [2019] FCA 1374 at [23] (Beach J). However, the applicant submits that

the amount is appropriate when one has regard to the "unusual" degree of inconvenience and hardship experienced by the applicant in discharging his representative role in the proceedings, so as to warrant a reimbursement payment above that which may be appropriate in an ordinary case. The applicant in this regard relies on evidence of Mr Barrow (see Barrow affidavit at [10]-[13]), who deposes to the fact that the applicant has instructed Ken Cush & Associates for a period of more than nine years, during which he has maintained contact with other Group Members and undertaken "extensive" travel from his home in the remote village of Balauring in the district of Omesuri in the sub-province of Lembata in the province of Nusa Tenggara Timur in Indonesia, including obtaining a passport and travelling to Australia, for purposes associated with these proceedings. The applicant has also had to undergo a medical examination by an Australian psychiatrist and had to recount highly distressing events including, among other things, being strip searched and shackled as a child in an adult prison. The applicant further submits that the proposed compensation amount takes into account that the applicant foregoes any entitlement to compensation in connection with an assault alleged to have been perpetrated against him while detained in a maximum-security adult prison in Western Australia, and in connection with his individual claim for misfeasance in public office.

77 The Commonwealth does not oppose the proposed compensation payment being made to the applicant in the amount sought. Nevertheless, the consent or acquiescence of the Commonwealth is not determinative, particularly in so far as the proposed payment raises questions of fairness *inter se* between the Group Members. The proposed compensation payment is to be deducted from, rather than additional to, the Settlement Sum to be paid by the Commonwealth.

78 In ***Darwalla*** *Milling Co Pty Limited v F Hoffman-La Roche Ltd (No 2)* (2006) 236 ALR 322; [2006] FCA 1388 at [76], Jessup J considered that it was:

> ...prima facie reasonable that particular parties who have sacrificed valuable time and incurred expenses in the interests of prosecuting this proceeding on behalf of group members as a whole should be able to look to the corpus of the settlement sum for some degree of compensation and reimbursement.

79 Justice Jessup also considered that "group members who have benefited from the proceeding could not be heard to deny the reasonableness of such a proposition". Nevertheless, Jessup J expressed the view that the matter should be approached with some caution, "notwithstanding that the sums involved appear to be fairly modest in the context of the settlement as whole": *Darwalla* at [75].

80 Since *Darwalla*, it appears to have become increasingly common for settlements in representative proceedings to include such a compensation or reimbursement payment in respect of the time, expense and inconvenience attributable to the representative role conducted by the lead applicant or applicants. In *Smith* at [94], Lee J considered that such payments could be made not solely in relation to the time expended by the applicant, but also to reflect "a particular and special hardship proved in the evidence that may have been suffered by an applicant in discharging the representative role". In the particular circumstances of that case, Lee J awarded an increased payment of $50,000 to an applicant in one of the class actions (as opposed to a compensation payment of $20,000 under the proposed settlement distribution scheme) having regard to "the extraordinary circumstances recounted in the evidence" of the "particular distress and vexation in conducting his role", which had included "frequent and sustained abuse by disgruntled community members", and in circumstances where the administrator was prepared to recommend a higher amount if it were considered consistent with principle to do so: *Smith* at [104]-[106].

81 The approval of a compensation or reimbursement payment was recently considered by Dixon J in *Hassan* at [58]-[67] (referring to his earlier decision in *Somers v Box Hill Institute* [2022] VSC 730 at [53]-[56]).

(a) In *Hassan*, each of the plaintiffs sought an additional sum of $40,000 "to compensate them for the time spent prosecuting the proceedings and for the effect that their role as plaintiffs has had on them personally", in circumstances that were described in their confidential affidavits.

(b) The State of Victoria did not oppose "a modest reimbursement amount from the Settlement Sum, in recognition of the plaintiffs' unique role in the litigation".

(c) Dixon J observed that "[t]he plaintiffs' claim is the highest I have seen", referring to past cases in the Supreme Court of Victoria in which reimbursement payments were approved "in a range from $13,470.46 to $30,000" (citations omitted).

(d) While accepting that "it is appropriate to recognise in a modest way that the burdens assumed by a representative plaintiff can involve the discharge of not insignificant responsibility in acting as a representative party to achieve a corresponding benefit to the group as a whole", Dixon J noted that "the authorities indicate that a conservative approach should be taken to the quantification of compensation of this kind, and a distinction should be drawn between time devoted by the plaintiff to work activities

that benefit the group as a whole, as opposed to work that benefits the plaintiff's personal claim".

(e) Further, Dixon J stated that a claim for such a payment "must be based on adequate evidence". In *Hassan,* the plaintiffs had deposed in affidavits as to the adverse consequences of the proceeding on their lives, the significant time and effort expended on the proceedings, and the unique "ostracization and alienation" that the plaintiffs had experienced. In relation to the latter, Dixon J queried whether compensation for such matters should be paid by group members as opposed to the perpetrators of such behaviour.

(f) In *Hassan*, Dixon J ultimately approved a payment of $22,500 and $15,000 respectively to each of the lead plaintiffs. Dixon J considered that the plaintiffs had not provided adequate evidence as to the expense that they had incurred, and could not see how it could be put "that the personal toll they have borne, as distinct from litigation stress, is compensable in this way by reference to the principles identified". Nevertheless, Dixon J considered that it was "appropriate to recognise, in a modest way, the burden that the plaintiffs discharged for the benefit of others".

82 In the circumstances of the present case, I accept that it is appropriate for a compensation payment to be made to the applicant in respect of the burdens of his representative role in the proceedings. Such a payment is expressly contemplated by the SDS, and was referred to in the Notice of Proposed Settlement pursuant to the orders made on 12 October 2023 (see paragraph 29 above). While the evidence before the Court is fairly general in nature, the Barrow affidavit addresses the time, expense and inconvenience involved in the applicant's conduct of the proceeding on behalf of the Group Members.

83 However, I do not accept the applicant's submissions or Mr Barrow's evidence that the amount of the compensation payment should take into account any individual claims that might have been "foregone" by the applicant by entering the proposed settlement, such as his potential claim for personal injury or his own claim for misfeasance in public office. That is not the purpose of the kinds of compensation or reimbursement payments considered in the cases discussed above. Further, it is not the purpose of the compensation amount pursuant to the SDS, being an amount "in recognition of the risk, time and costs incurred by the Applicant in pursuing the Consolidated Representative Proceeding on behalf of Group Members".

84 In the present case, where there is no evidence to support a calculation of any specific costs and expenses or an estimate of the time committed by the applicant to the conduct of the proceedings, the assessment of the appropriate compensation payment to the applicant involves a broad evaluative judgment. Having regard to the interests of the group members as a whole, it is appropriate to adopt a conservative approach. While the amount sought by the applicant might be regarded as a relatively small proportion of the Settlement Sum, it may appear larger when compared to the individual entitlements of some of the Group Members to a distribution from the Settlement Sum.

85 Accordingly, in the circumstances, I consider that the appropriate sum of the compensation amount to be paid to the applicant under the SDS is $40,000.

Deduction of costs from the Compensation Sum

86 The Deed of Settlement provides for the Commonwealth to pay the applicant's party/party costs, as agreed or assessed. The applicant's other solicitor/client costs in excess of the party/party costs are to be deducted from the Compensation Sum, subject to the approval of the Court. In this way, the Deed of Settlement accommodates the need for judicial supervision of the solicitor-client costs to be charged by the applicant's solicitors and borne by the Group Members: see, *e.g.*, *Petersen Superannuation Fund Pty Ltd v Bank of Queensland Limited (No 3)* [2018] FCA 1842 at [87]-[89] (Murphy J); *Kelly* at [11] (Murphy J).

87 The parties have not yet reached agreement on the amount of the applicant's party/party costs. The applicant's submissions indicate that, depending on the final assessment of the party/party costs and solicitor/client costs, the applicant may ultimately seek approval for an amount of up to $2.2 million by way of other solicitor-client costs to be deducted from the Compensation Sum available for distribution to Group Members. I note that it is also foreshadowed that an application may be made for the approval of additional Administration Costs, which would also be deducted from the Compensation Sum.

88 Irrespective of the final outcome on the question of costs, it is clear that the proposed settlement is fair and reasonable and in the interests of the Group Members as a whole. In the circumstances, it is appropriate to approve the proposed settlement under s 33V(1) of the FCA Act, and to defer any outstanding issues concerning costs for subsequent determination. It is permissible to bifurcate the approval of a settlement under s 33V(1) and the making of ancillary orders with respect to the distribution of the settlement fund: see *Davis v Quintis Ltd (subject to deed of co arrangement)* [2022] FCA 806, [3]-[5] (Lee J).

89 Accordingly, orders should be made in the form proposed by the parties, with some modifications, for any dispute in relation to costs to be referred to a referee, and for the matter to be listed for a further hearing to determine any outstanding issues arising from the referee's report.

90 I note that the Commonwealth suggested that it might be appropriate for a contradictor to be appointed to represent the interests of Group Members in relation to a "novel" claim for the payment of costs in respect of services that were provided by a married couple in Indonesia, Ms Ibu Aat Kaswati and Mr Colin Singer, who have provided assistance with various steps in relation to the conduct of the representative proceeding. In my view, this question can be deferred until after the reference has been conducted by the referee, and in the light of the parties' evidence and submissions on the outstanding costs issues. If it becomes apparent that the interests of the Group Members in relation to the amount of the solicitor/client costs to be deducted from the Compensation Sum are not adequately represented, it may be appropriate at that time to consider the appointment of a contradictor to represent their interests in the further hearing to be conducted by the Court on that question.

Other orders

91 The applicant seeks an order to effect the "capitalisation" of the Settlement Fund under the SDS. Clause 56 of the SDS provides that, "[a]t the time of Settlement Approval, the Administrator may seek Court approval for funds in the Settlement Fund to be paid to him on account of Administration Costs to be incurred". The applicant seeks approval for the payment to the Administrator of an amount of $700,000 on account of expected future Administration Costs. That sum will provide initial working capital and essentially act as a "float" for the administration of the SDS, with further payments to be subject to Court approval based on invoices provided from time to time. I consider that it is appropriate to approve this initial payment of $700,000 pursuant to cl 56 of the SDS to ensure the efficient administration of the scheme.

92 I note that the parties submitted that I should make an order in the following terms in relation to the effect of the dismissal of the consolidated representative proceeding:

> The dismissal of the consolidated proceedings is on the basis that the dismissal is a defence and absolute bar to any claim (either directly or indirectly) or proceeding by the Applicant or any Group Member in respect of, or relating to, the subject matter of the two proceedings, without prejudice to:
>
> (a) the right of any party to the Deed of Settlement to make an application to

enforce the Deed of Settlement in a new proceeding; or

(b) the right of the Applicant or any Group Member to make application to the Court in accordance with the terms of the Settlement Distribution Scheme; or

(c) the right of the Administrator to refer any issues relating to the Settlement Distribution Scheme to the Court for direction or determination in accordance with the terms of the Settlement Distribution Scheme.

93 I do not consider that such an order is necessary or appropriate. In *Smith* at [144], Lee J characterised an order in similar terms as "mere surplusage", and was not disposed to make the order despite acknowledging "some force" in a submission made by the Commonwealth "that the statement that the orders will operate as a bar to the maintenance of any claim may operate as some form of clarification or operate in some educative way". Lee J stated at [145] that "[t]he reason why there is a settlement and quelling of the claims as between the group members and the respondent, is that by a combined operation of ss 33V and 33ZB a 'statutory estoppel' is created". In such circumstances, it was clear from his Honour's reasons for judgment that, upon the making of the orders under ss 33V and 33ZB, there was no ability for either the applicant or group members to maintain a claim against the Commonwealth with respect to the damages the subject of the class actions in which those orders were made.

94 Similarly, in the present case, there is no need for an order in the terms proposed by the parties as set out above. Notwithstanding the potential "educative" effect of an order in such terms, there is a danger in attempting to duplicate in different language the effect of statutory provisions such ss 33V and 33ZB, or the operation of releases given in the settlement documents, each of which operates according to its own terms.

95 Finally, the applicant seeks an order that the Joint Opinion remain confidential. In my opinion, it is appropriate for such an order to be made.

CONCLUSION

96 For the reasons set out above, I approve the proposed settlement contained in the settlement documents under s 33V(1) of the FCA Act, and make orders in the terms set out at the commencement of these reasons.

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

Associate: 

Dated: 22 December 2023