

NOTICE OF FILING AND HEARING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 12/07/2018 4:10:27 PM AEST and has been accepted for filing under the Court's Rules. Filing and hearing details follow and important additional information about these are set out below.

Filing and Hearing Details

Document Lodged:	Originating Application Starting a Representative Proceeding under Part IVA Federal Court of Australia Act 1976 - Form 19 - Rule 9.32
File Number:	QUD714/2016
File Title:	Hans Pearson v State of Queensland
Registry:	QUEENSLAND REGISTRY - FEDERAL COURT OF AUSTRALIA
Reason for Listing:	To Be Advised
Time and date for hearing:	To Be Advised
Place:	To Be Advised



Dated: 13/07/2018 8:41:42 AM AEST

A handwritten signature in blue ink, appearing to read 'Warwick Soden'.

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The Reason for Listing shown above is descriptive and does not limit the issues that might be dealt with, or the orders that might be made, at the hearing.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Forms 19 and 116
Rules 9.32 and 34.163(1)



**Fourth Amended application starting a representative proceeding
under Part IVA of the Federal Court of Australia Act 1976 and under
the Australian Human Rights Commission Act 1986**

(Amended on 12 July 2018 pursuant to the order of Murphy J dated 9 July 2018)

No. QUD714 of 2016

Federal Court of Australia
District Registry: Queensland
Division: General

HANS PEARSON

Applicant

STATE OF QUEENSLAND

Respondent

To the Respondent

The Applicant applies for the relief set out in this application.

The Court will hear this application, or make orders for the conduct of the proceeding, at the time and place stated below. If you or your lawyer do not attend, then the Court may make orders in your absence.

You must file a notice of address for service (Form 10) in the Registry before attending Court or taking any other steps in the proceeding.

Time and date for hearing:

Place:

Filed on behalf of	Hans Pearson, Applicant
Prepared by	John Bottoms
Law firm	BOTTOMS ENGLISH LAWYERS
Telephone	(07) 4051 5388 Fax (07) 4051 5206
Email	JohnBottoms@belaw.com.au
Address for service	63 Mulgrave Road, Cairns QLD 4870

[Form approved 01/08/2011]



Date:

Signed by an officer acting with the authority
of the District Registrar

Details of claim

On the grounds stated in the accompanying Third Amended Statement of Claim, the Applicant claims:

Account on the basis of wilful default

- 1A. an order for an account from the Respondent, on the basis that the Respondent (as a trustee and/or as a fiduciary) is in an accounting relationship with both the Applicant and Group Members (as defined in paragraph 2 of the Third Amended Statement of Claim).
- 1B. on his own behalf and on behalf of the Group Members, an order that an account on the basis of wilful default be taken of the accounts (as defined at paragraph 249A of the Third Amended Statement of Claim) from 12 October 1939 on the basis of the existence of the Respondent's wilful defaults pleaded at paragraphs 271A and 271B of the Third Amended Statement of Claim.
- 1C. if an account on the basis of wilful default is taken pursuant to paragraph 1B, the Respondent as trustee be charged with and accountable to the trust (as defined at paragraph 250 of the Third Amended Statement of Claim) for such monies as:
- (a) it received or wrongfully disbursed from the trust by the breaches of trust pleaded at paragraph 265 of the Third Amended Statement of Claim or as otherwise revealed in the taking of the account; and, or alternatively
 - (b) it ought to have received as trustee but for the wilful defaults pleaded at paragraphs 271A and 271B of the Third Amended Statement of Claim or as otherwise revealed in the taking of the account.

Common account

- 1D. on his own behalf and on behalf of the Group Members, and in the alternative to the account on the basis of wilful default pleaded at paragraphs 1B and 1C, an order that an



account in common form be taken of the accounts from 12 October 1939 on the basis of the Respondent's:

- (a) breaches of trust pleaded at paragraph 265 of the Third Amended Statement of Claim;
- (b) wilful defaults pleaded at paragraphs 271A and 271B of the Third Amended Statement of Claim,

and in aid of any of the other relief pleaded at sub-paragraphs 1, 2, 4, 9, 9A, 9B, 9C below.

- 1E. if a common account is taken pursuant to paragraph 1D, the Respondent as trustee be charged with and accountable to the trust (as defined at paragraph 250 of the Third Amended Statement of Claim) for such monies as it received or wrongfully disbursed from the trust by the breaches of trust pleaded at paragraph 265 of the Third Amended Statement of Claim or as otherwise revealed in the taking of the account.

Other relief

Further, or in the alternative to paragraphs 1A to 1E, the Applicant claims the following relief on his own behalf and on behalf of the Group Members:

1. a declaration that the Respondent is a trustee of money held in trust on behalf of the Applicant and Group Members from time to time as pleaded at paragraph 250 of the Third Amended Statement of Claim; (the trust);
2. a declaration that the Respondent breached the trust as a result of the matters pleaded at paragraphs 265, 271A or 271B of the Third Amended Statement of Claim has wrongfully failed to give effect to the trust;
- 2A. a declaration that any or all of ss. 6, 9(1), 10, 12(1) and 28 of the *The Aboriginals Regulations of 1945* (Qld) (as amended) (**1945 regulations**) were invalid or otherwise made without statutory authority, as pleaded at paragraphs 261, 261A, 261B, 261C, 261D, 261E, 261F or 261K of the Third Amended Statement of Claim;
3. further or in the alternative, a declaration that the Respondent:
 - (a) was in a fiduciary relationship with the Applicant and Group Members; and



- (b) as a fiduciary owed the Applicant and Group Members the duties identified at paragraph 257 of the Third Amended Statement of Claim ~~a duty to act in the best interests of the Applicant with regard to the care and control of money paid to the Respondent on behalf of the Applicant;~~
4. a declaration that the Respondent was in breach of the fiduciary duty owed to the Applicant as a result of the matters pleaded at paragraphs 270, 270A or 271A of the Third Amended Statement of Claim;
5. [blank]
6. [blank]
7. ~~[blank] in the alternative to the relief sought in paragraph 9, an order that an account be taken of all the monies received and disbursed by the Respondent as trustee of the trust or as fiduciary for the Applicant;~~
8. ~~[blank] an order requiring the Respondent to restore the trust fund and to repay to the trust any money that has been depleted from that fund;~~
9. an order that the respondent make by way of equitable compensation restitution of the trust estates of the Applicant and each Group Member on account of those breaches of trust and/or breaches of fiduciary duties pleaded at paragraphs 265, 270, 270A, 271A or 271B of the Third Amended Statement of Claim;
- 9A. in the alternative to paragraph 9, following an account pursuant to paragraph 1B or 1D, an order that the Respondent account to the trust and/or accounts in the amount charged pursuant to paragraph 1C or 1E;
- 9B. an order pursuant to ss 33Z(1)(f) and/or 33ZF of the *Federal Court of Australia Act 1976 (FCA)* awarding damages in an aggregate amount in order to give effect to the equitable compensation claimed at paragraph 9 in relation to those breaches of trust and/or fiduciary duties pleaded at paragraphs 265, 270, 270A, 271A or 271B of the Third Amended Statement of Claim that are capable of reasonably accurate assessment;
- 9C. in the alternative to paragraph 9B, an order pursuant to ss 33Z(1)(f) and/or 33ZF of the FCA awarding damages in an aggregate amount in order to give effect to the relief



claimed at paragraph 9A in relation to those defaults identified by account that are capable of reasonably accurate assessment;

- 9D. an order pursuant to ss 33Z(1)(f), 33Z(2) and/or 33ZF of the FCA for the distribution of any aggregate award of damages pursuant to paragraphs 9A or 9C:
- (a) first to the Applicant and Group Members in accordance with their individual entitlement to claim as determined by the fund administrators; and
 - (b) second, with respect to any undistributed residue, not to the Respondent but in a manner analogously to a *cy-près* scheme as determined by Court or the fund administrators;
10. further, a declaration pursuant to s.46PO(4) of the *Australian Human Rights Commission Act 1986* (Cth) that there has been unlawful discrimination by the Respondent against the Applicant and the group members who he represents;
11. ~~[blank] an order pursuant to s. 46PO(4) of the *Australian Human Rights Commission Act 1986* (Cth) requiring the Respondent to:~~
- ~~(a) — open or reopen the offers of reparation made to the Applicant and group members by the Respondent under a reparation scheme which was announced by the then Premier of Queensland on 16 May 2002 (**reparations scheme**);~~
 - ~~(b) — expand the persons who are capable of claiming under the reparations scheme to include all group members, including the estate of deceased persons who would otherwise be a group member if they were alive, or a beneficiary of such estate;~~
 - ~~(c) — increase the level of compensation payable under the reparations scheme to reflect the amount which the Respondent received as wages earned by group members together with interest to bring such sums up to a present day value;~~
 - ~~(d) — advise each group member of:

 - ~~(i) — the amount of money that was paid to the Respondent, its servants or agents, on account of wages earned by the group member;~~
 - ~~(ii) — where that money was paid;~~~~



- (iii) — how that money was used by the Respondent or any other party;
- (e) ~~provide each group member with independent legal advice regarding the Respondent's liability to repay or otherwise account for such money and the quantum of any such amount;~~
12. an order pursuant to s. 46PO(4)(d) of the *Australian Human Rights Commission Act 1986* (Cth) requiring the Respondent to pay to the Applicant and ~~g~~Group ~~m~~Members damages by way of compensation for the loss or damage suffered because of the conduct of the Respondent;
- 12A. aggravated damages for breaches of ss. 9 and 10 of the *Racial Discrimination Act 1975*;
- 12B. a declaration that the Respondent holds its interest in the benefit of any breach of trust or fiduciary duty subject to a constructive trust in favour of the Applicant and Group Members as pleaded at paragraphs 278A and 326 of the Third Amended Statement of Claim;
- 12C. an order for restitution by the Respondent as a consequence of its unjust enrichment pleaded at paragraph 278A and 326 of the Third Amended Statement of Claim;
13. exemplary damages;
14. interest calculated on a compound basis;
15. costs;
16. such further or other orders as the court may think appropriate.

Questions common to claims of group members

The questions of law or fact common to the claims of the group members are:

1. Did the provisions of *The Aboriginal Preservation and Protection Act of 1939* (Qld) (as amended) (**1939 Act**) apply to the Applicant and group members from 12 October 1939 until 28 April 1966.



2. In the alternative to (1), did the provisions of *The Torres Strait Islanders Act of 1939* (Qld) (as amended) (**Islander Act**) apply to group members from 12 October 1939 until 28 April 1966.
3. Did the provisions of *The Aboriginals Regulations of 1945* (Qld) (as amended) (**1945 regulations**) apply to The Applicant and group members from 23 April 1945 until 28 April 1966.
4. In the alternative to (3), did the provisions of *The Islander Regulations, 1946* (as amended) (**Islander regulations**) apply to group members from 3 August 1946 until 28 April 1966.
5. Did the provisions of *The Aborigines' and Torres Strait Islanders' Affairs Act of 1965* (Qld) (**1965 Act**) and *The Aborigines' and Torres Strait Islanders' Regulations of 1966* (**1966 regulations**) (collectively called the **1965 Act and regulations**) apply to the Applicant and group members from 29 April 1966 until 4 December 1972.
6. Is the estate of, or a person representing the estate of, a deceased person who would otherwise be a group member, or a beneficiary of such an estate, able to claim as a group member.
7. Whether the Director of Native Affairs (and his or her successors) and/or the protectors (including where relevant the protector of islanders) and superintendents appointed under the 1939 Act and the 1945 regulations (collectively called the **1939 Act and regulations**), the Islander Act and regulations (collectively called the **Islander Act and regulations**), or the 1965 Act and regulations acted for and on behalf of the Respondent.
8. Whether the Respondent is liable for the acts of the Director of Native Affairs and/or protectors and superintendents when undertaking their duties pursuant to the 1939 Act and regulations, the Islander Act and regulations and the 1965 Act and regulations.
9. Whether the employment of the Applicant was regulated by the 1939 Act and regulations and the 1965 Act and regulations during the period 12 October 1939 to 4 December 1972 (**Claim Period**).



10. Whether the employment of group members during the Claim Period was regulated by the 1939 Act and regulations, the Islander Act and regulations and/or the 1965 Act and regulations.
11. Whether during the Claim Period the Applicant and group members were required to enter into written employment agreements made in accordance with the provisions of the 1939 Act and regulations, the Islander Act and regulations or the 1965 Act and regulations with respect to any paid employment undertaken by them (**employment agreements**).
12. Whether the employment agreements entered into by the Applicant and group members included a provision directing an employer to pay the whole or a portion of the wages of an aborigine or islander directly to the protector or superintendent.
13. Whether the minimum wages payable to an aboriginal were prescribed in the 1945 and 1966 regulations.
14. Whether the minimum wages payable to an islander were prescribed in the Islander Act and regulations.
15. Whether there was an agreement between the Respondent and the Australian Workers Union which set the rate of pay of an aboriginal working in the pastoral industry at two-thirds of the rate applicable to a white employee under an equivalent State award.
16. Whether there was, at least since 1958, an agreement between the Respondent and the Pearl Shellers' Association which set the wages and working conditions for aborigines and islanders employed on vessels trading in Queensland.
17. Whether there was a practice by which a portion of an aboriginal or islander employee's gross wage was paid by the employer directly to the relevant protector or superintendent.
18. Whether there was a practice by which the portion of an aboriginal employee's wage paid by an employer directly to a protector or superintendent was about 70% of the gross wages owed to the employee.
19. Whether there was a practice by which a portion of an aboriginal or islander employee's gross wage was paid by the employer directly to the employee as "pocket money".



20. Whether the portion of an aboriginal employee's wages paid by an employer directly to an employee as "pocket money" was about 30% of the gross wages owed to the employee.
21. What systems were in place to account for any money paid directly by an employer to a protector or superintendent under the employment agreements.
22. Whether the money paid directly by an employer to a protector or superintendent was held in trust for the aboriginal or islander employee on whose behalf it was paid.
23. Whether the protectors and superintendents who had received money directly from an employer on behalf of an aboriginal or islander employee owed a fiduciary duty with regard to the money paid to them.
24. Whether banks accounts had been established for the purpose of depositing money received by protectors and superintendents directly from employers with regard to aboriginal and islander wages (**bank accounts**).
25. Whether the protectors and superintendents who had received money directly from an employer on behalf of an aboriginal or islander employee paid such money into the bank accounts.
26. Whether the money paid into the bank accounts was held in trust for the aboriginal or islander employee on whose behalf that money had been paid.
27. What systems were in place to account for the money paid into the bank accounts.
28. Whether money was paid on behalf of the Applicant and aboriginal group members either from the bank accounts or from the money received from an employer, to the Welfare Fund.
29. Whether the payment of money to the Welfare fund was valid or was in breach of trust or the fiduciary duty owed to aboriginal group members.
30. Whether the Respondent either itself or through its servants or agents was in breach of trust with regard to the management and operation of the bank accounts.
31. Whether any and what records have been kept with regard to the management and operation of the bank accounts.



32. Whether a failure by the Respondent to keep full records regarding the management and use of the money paid by employers was in breach of trust.
33. Whether a failure by the Respondent to keep full records regarding the management and use of the money paid by employers was contrary to the requirements of *The Audit Act of 1874* (Qld) (as amended).
34. Whether the Applicant and group members were at any time provided with documentation or information showing:
- (a) the amount paid to the protector or superintendent on account of the Applicant and group members' wages;
 - (b) the amount deposited into the bank accounts on behalf of the Applicant and group members;
 - (c) how money in the bank accounts was invested or otherwise used;
 - (d) the amounts paid to the Welfare Fund on behalf of the Applicant and group members who were aborigines;
 - (e) any amount withdrawn from the bank accounts and the reason for such withdrawal;
 - (f) the balance held in the said accounts on behalf of the Applicant and group members;

and if not whether such conduct was in breach of trust or a fiduciary duty owed to the Applicant and group members.

35. Whether there was a practice, policy or requirement that money could not be withdrawn from the bank accounts without the consent of the Director of Native Affairs or the protector or supervisor or some other person or entity.
36. Whether there was a practice, policy or requirement that the amount of money that could be withdrawn from the bank accounts was restricted and if so what was the amount that could be withdrawn and was that practice enforced.



37. Whether the Applicant and group members were paid the money taken, retained or paid to the protectors or superintendent and deposited into the bank accounts and if so what records show such payments.
38. Whether there is a formula which can convert Australian pounds (earned during the Claim Period) into an equivalent present day value in Australian dollars.
39. Whether the Applicant and group members were paid all or any part of accretions or interest earned from investments made with the money deposited in the bank accounts.
40. Whether the Respondent acted with reasonable care, diligence and prudence with regard to investing the money held in the trust fund.
41. Whether the Respondent invested money held in the trust fund in a manner which was to its own benefit rather than for the benefit of the aboriginal and islander workers whose wages made up that fund.
42. Whether payments to the Applicant and group members under the reparations scheme decrease any indebtedness of the Respondent.
43. Whether the Deed of Agreement signed by the Applicant and those group members who received a payment under the reparations scheme operates as a bar to, or prevents further or any legal action being taken against the Respondent.

Representative action

The Applicant brings this application as a representative party under Part IVA of the *Federal Court of Australia Act 1976*.

The ~~g~~Group ~~m~~Members to whom this proceeding relates are persons who ~~during all or part of the period from 12 October 1939 to 4 December 1972~~ (**Claim Period**):

1. during all or part of the period from 12 October 1939 to 4 December 1972 (**Claim Period**) were or were deemed to be “aboriginal” as that term is used in the 1939 Act; and/or



2. during all or part of the Claim Period were or were deemed to be an “islander” as that term is used in the Islander Act; and/or
3. during all or part of the Claim Period were an “aborigine” or a “part-aborigine” who fell within the category of “assisted aborigine” or an “Islander” who fell within the category of “assisted islander” as those terms are is used in the 1965 Act; and
4. during all or part of the Claim Period were subject to the 1939 Act and regulations and/or the Islander Act and regulations and/or the 1965 Act and regulations, in each case, as amended from time to time;
5. during all or part of the Claim Period lived in Queensland in one or more of the following areas:
 - (a) in an area which had been proclaimed as or was otherwise deemed to be a “District” for the purposes of the 1939 Act, the Islander Act or the 1965 Act;
 - (b) on land granted in trust or reserved from sale or lease by the Governor in Council as a “reserve” for the benefit of the aboriginals or islanders of Queensland;
 - (c) in a settlement built on a reserve; or
 - (d) in a mission operated by a religious institution on a reserve;
6. were ~~in paid employment~~ during all or part of the Claim Period, such employment being controlled or which was required to be controlled by ~~arranged or entered into pursuant to~~ the 1939 Act and regulations or the Islander Act and regulations and/or the 1965 Act and regulations;
7. during any period that the Group Member was in employment during the Claim Period, ~~had~~ the whole or part of their wages was directed to be taken or retained by, or otherwise paid by their employer to the protector or superintendent of the District, reserve or mission in which they lived or at the direction of the protector or superintendent (or district officer or manager, as the case may be);
8. have not been ~~re-paid or otherwise~~ given the money or the whole of the money taken, ~~retained or which was to be~~ paid to or at the direction of the protector or superintendent (or district officer or manager, as the case may be) as their wages;
9. by reason of the matters pleaded in the accompanying Third Amended Statement of Claim is entitled to equitable relief and/or the payment of compensation;



10. [blank]
11. if a person who would otherwise be a gGroup mMember has died, then a gGroup mMember also includes the executor, administrator or beneficiary of that deceased person's estate who has the capacity to claim on behalf of the deceased estate or (in the case of a beneficiary of a deceased person's estate) a person who has a right, equitable or otherwise, in respect of the administration of, or property forming part of, the estate of the deceased person.

Details of claim under the Australian Human Rights Commission Act 1986

The Applicant claims that:

1. [blank] The Respondent's conduct in connection with the reparations scheme pleaded at paragraph 338A of the Third Amended Statement of Claim was in breach of ss 9 and 10 of the *Racial Discrimination Act 1975 (Cth)*.
2. The Respondent's conduct referred to in paragraph 1 had the effect of nullifying or impairing the recognition, enjoyment or exercise of the rights and freedoms of the Applicant and Group Members eligible to apply under the reparations scheme, as pleaded in paragraph 338B of the Third Amended Statement of Claim.

~~since the implementation of the *Racial Discrimination Act 1975 (Cth)* (**RDA**), a failure by the Respondent to repay or otherwise account for money held in trust by it was an act which involved an exclusion based on race as only aboriginal people were the subject of a failure to repay such money.~~
3. The Applicant and eligible Group Members suffered hurt, humiliation and insult as a result of the Respondent's conduct.
4. The Respondent knew or ought to have known of the matters pleaded at paragraph 338D of the Third Amended Statement of Claim, including that the Applicant and Group Members had generally low levels of formal education and high levels of financial disadvantage, rendering them more likely to accept a payment under the reparation scheme, and therefore to execute the Deed of Agreement required by the Respondent as a pre-condition to payment under the reparation scheme.
5. Accordingly the Applicant and Group Members who were eligible to apply under the reparations scheme seek:



- (a) damages pursuant to s 46PO of the *Australian Human Rights Commission Act* 1986 (Cth); and
- (b) aggravated damages.

Legislation

The Applicant claims that the discrimination complained of is unlawful under s 9(1) of the RDA.

Remedy sought under the Australian Human Rights Commission Act 1986 (AHRC Act)

Under the **AHRC Act** and in addition to the claims sought in the representative proceeding, the Applicant asks the Court for:

1. a declaration pursuant to s.46PO(4) of the *AHRC Act Australian Human Rights Commission Act 1986 (Cth)* that there has been unlawful discrimination by the Respondent against the Applicant and the aboriginal group members who he represents;
2. ~~an order pursuant to s. 46PO(4) of the *Australian Human Rights Commission Act 1986 (Cth)* requiring the Respondent to:~~
 - (a) ~~open or reopen the offers of reparation made to the Applicant and group members under the reparations scheme;~~
 - (b) ~~expand the persons who are capable of claiming under the reparations scheme to include all group members, including the estate of deceased persons who would otherwise be a group member if they were alive, or a beneficiary of such estate;~~
 - (c) ~~increase the level of compensation payable under the reparations scheme to reflect the amount which the Respondent received as wages earned by group members together with interest to bring such sums up to a present day value;~~



~~(d) — advise each group member of:~~

~~(i) — the amount of money that was paid to the Respondent, its servants or agents, on account of wages earned by the group member;~~

~~(ii) — where that money was paid;~~

~~(iii) — how that money was used by the Respondent or any other party;~~

~~(e) — provide each group member with independent legal advice regarding the Respondent's liability to repay or otherwise account for such money and the quantum of any such amount;~~

3. damages by way of compensation for loss or injury suffered by the Applicant and ~~g~~Group m~~Members~~ pursuant to s. 46PO(4)(d) of the AHRC Act;
4. aggravated damages.
5. exemplary damages.

Accompanying documents

This application is accompanied by:

1. A copy of the representative complaint to the Australian Human Rights Commission dated 9 March 2016; and
2. The notice of termination of complaint given by the President of the Australian Human Rights Commission dated 31 August 2016.

**Applicant's address**

The Applicant's address for service is: Bottoms English Lawyers

Place: 63 Mulgrave Road, Cairns QLD 4870

Email: johnbottoms@belaw.com.au

Service on the Respondent

It is intended to serve this fourth ~~third~~ amended originating application on the Respondent.

Date: 12 July 2018

Signed by John Bottoms
Solicitor for the Applicant