Federal Circuit Court of Australia Decision: Wotton v State of Queensland (No 5) [2016] FCA 1457

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Body

Canberra ACT: Federal Circuit Court of Australia has issued the following decision 5 December 2016: FEDERAL COURT OF AUSTRALIA

Wotton v State of Queensland (***No*** 5) [2016] FCA 1457
SUMMARY

In accordance with the practice of the Federal Court in cases of ***public*** interest, importance or complexity, the following summary has been prepared to accompany the orders made today. This summary is intended to assist in understanding the outcome of this proceeding and is not a complete statement of the conclusions reached by the Court. The only authoritative statement of the Court's reasons is that contained in the published reasons for judgment which will be available on the internet at *www.fedcourt.gov.au* together with this summary.

This is a case about race discrimination. Its focus is on the conduct of officers of the Queensland Police Service (QPS) on Palm Island between 19 and 28 November 2004. The case has been brought by Mr Lex Wotton, his partner Ms Cecilia Wotton, and Mrs Agnes Wotton, who is Mr Wotton's mother. All three were living on Palm Island at the time and were affected by what occurred. The case is a representative proceeding, which means the three applicants bring the proceeding as representatives of a group of people affected, they allege, by unlawful race discrimination of QPS officers during that time. The 'group members' are people who were ordinarily resident on Palm Island on 19 November 2004 and who remained ordinarily resident there until 25 March 2010. The applicants also bring the proceeding on behalf of a 'subgroup' of people who were affected by an operation carried out by armed officers of the Special Emergency Response Team (SERT) on 27 and 28 November 2004. The subgroup includes children who were in or near the houses that were entered and searched by SERT officers. The respondents are the State of Queensland and the Commissioner of Police for Queensland. The individual police officers have not been named as respondents. However, the State of Queensland has accepted that all QPS officers were acting in the course of their duties as police officers and that the State of Queensland is liable for their conduct. On the morning of 19 November 2004, a 36-year-old Aboriginal man named Cameron Doomadgee died in police custody on Palm Island. He is now known, posthumously, as Mulrunji. He had been arrested by Senior Sergeant Christopher Hurley in a suburban street, not far from the police station, for yelling out what Senior Sergeant Hurley considered to be abuse directed at Senior Sergeant Hurley and an Aboriginal police liaison officer who was also on duty. Affected by alcohol, protesting and struggling, Mulrunji was brought into the Palm Island Police Station. Near the door to the police station, a struggle and fall with Senior Sergeant Hurley occurred. Mulrunji

was then dragged limp and unresponsive into a cell. Within an hour, this man, known to many people on Palm Island as an active and likeable person, was dead. Mulrunji's death, and the way QPS officers dealt with its aftermath, led to three coronial inquests, a review by the Crime and Misconduct Commission in Queensland, two reviews by the QPS, criminal proceedings against Senior Sergeant Hurley in which he was acquitted of manslaughter, and litigation by police officers about potential disciplinary action against them. There were a large number of criminal proceedings against Palm Islanders, including Mr Wotton and Mrs Agnes Wotton, concerning their conduct on 26 November 2004. What happened on Palm Island during this time has been examined from many perspectives and has damaged many lives, on all sides. This case is about the role played by race in the QPS response to Mulrunji's death. The Court has been asked to decide whether, in the police investigation into Mulrunji's death, in the management of community concerns, tensions and anger on Palm Island in the week after his death, and in the police responses to protests and fires that occurred on 26 November 2004, officers of the QPS contravened section 9(1) of the Racial Discrimination Act 1975 (Cth). The applicants claimed that the police officers conducted themselves differently because they were dealing with an Aboriginal community and the death of an Aboriginal man. The State of Queensland and the Commissioner denied all of the applicants' allegations. The trial was a fully contested one, on all factual and legal issues arising from the applicants' claims. The Court sat on Palm Island for the first week of the trial, and as part of the trial visited most of the key places referred to in the evidence. The remainder of the trial was conducted in Townsville. One of the central purposes of the Racial Discrimination Act is to enact into Australian law international obligations assumed by Australia in the International Convention on the Elimination of All Forms of Racial Discrimination. In broad terms, section 9(1) of the Racial Discrimination Act prohibits differential treatment of people based on race where that treatment has the purpose or effect of impairing or nullifying the recognition, enjoyment or exercise by them of identified human rights. In this case, those rights include the right to equality in the application of the law, the right to access police services that are impartial and independent, the right to liberty and security of the person, and the right not to have one's privacy, family and home interfered with in an unlawful or arbitrary way. I have decided that a number of the applicants' claims should succeed, but not all of them, and that they should be given some but not all of the relief they seek. In summary, I have found that the following conduct by QPS officers contravened section 9(1) of the Racial Discrimination Act:

(a) The QPS officers with command and control of the investigation into Mulrunji's death between 19 and 24 November 2004 did not act impartially and independently. Contrary to what would have occurred in an impartial, independent and effective investigation, Senior Sergeant Hurley picked up the investigators from the airport when they arrived and had a meal with them at his house that evening. He was never treated as a suspect, nor promptly removed from the island. The police officers discounted and ignored accounts from Aboriginal witnesses implicating Senior Sergeant Hurley. Incorrect and stereotypical information about Mulrunji and the circumstances of his death was passed to the coroner, while relevant information from Aboriginal witnesses was not passed on.

(b) During the week after Mulrunji's death and prior to the protests and fires that occurred on 26 November 2004, there were substantial failures by QPS officers on the island to communicate with the Palm Island community and defuse tensions, including by not proactively participating in community meetings and by not providing timely and accurate information about the cause of Mulrunji's death and the progress of the investigation, which the community was waiting to hear. The local Council and its members were scarcely consulted. Instead, there was a focus on increasing security and police numbers.

(c) An emergency declaration issued under the ***Public*** Safety Preservation Act 1986 (Qld) after the police station was set on fire had the consequence of shutting off the island from flights and ferry transport. It also triggered the evacuation of non-Aboriginal people from the island. I have found the emergency declaration was part of facilitating an excessive and disproportionate policing response, including the use of SERT officers. The declaration also meant local Palm Islanders could not travel to and from the island, although non-Aboriginal people, media, police and authorities could. Police behaved as if there were threats to non-Aboriginal people living on the island, when there were not.

(d) The use of SERT officers to arrest suspects on 27 and 28 November 2004, and to conduct entries and searches of 18 houses on Palm Island. Despite the entire population of Palm Island (including children) being less than 2000, between 88 and 111 police officers (including SERT and the ***Public*** Safety Response Team) were on the island over the period covered by the emergency declaration. I have not accepted evidence suggesting the people to be arrested were reasonably suspected of having any weapons nor that there were any acts or threats of violence after

the fires subsided on the evening of 26 November 2004. Yet, during the SERT operations, armed, masked SERT officers broke into the houses of 18 families on Palm Island, with assault rifles raised, confronting unarmed men, women and children in and around those houses. Mr Wotton was tasered in front of his family. I have found the use of SERT officers to effect the arrests was unnecessary, disproportionate and undertaken as a show of force against local people who had protested about the conduct of police. Women and children in and around the houses attended by SERT officers, who had nothing to do with the protests and fires, were terrified. Those women and children who gave evidence have suffered a lasting detrimental impact from the SERT operation. I have found that police acted in these ways because they were dealing with an Aboriginal community, and with the community of Palm Island in particular. I have found they conducted themselves, including Senior Sergeant Hurley while he was there, with a sense of impunity, impervious to the reactions and perceptions of Palm Islanders who were, in large numbers, distressed and agitated about the death of Mulrunji. Officers preferred confrontation to engagement and operated very much with an "us and them" attitude. I am comfortably satisfied QPS officers would not have taken a similar approach, in any of the respects I have outlined above, if a tragedy such as this had occurred in an isolated non-Aboriginal community in Queensland. The investigation would have been impartial. A person in Senior Sergeant Hurley's position would have been suspended and treated – at least initially – as a suspect. Eyewitnesses would have been taken seriously. Accurate information would have been passed to the coroner. There would have been engagement and good communication with the community and, if tensions and protests had erupted as they did on 26 November 2004, there would have been a more proportionate and regulated response. I do not consider an entire community would have been locked down in the way Palm Island was. I am satisfied that armed, masked SERT officers would not have forced their way into houses occupied by unarmed families, including young children, and pointed assault rifles at them, yelling at them to lie down and not move, making those families think they were in danger of being shot. There will be declarations reflecting the contraventions of section 9(1) I have found proven. I have also found the arrests, entries and searches were unlawful under Queensland law. I have awarded Mr Wotton $95,000 in damages for the way he was treated when arrested, and for the interference with his home, family and privacy. I have awarded Ms Cecilia Wotton $115,000 in damages for the way she was treated and the interference with her home, family and privacy. I have awarded Mrs Agnes Wotton $10,000 for the interference with her home. She was not present when SERT officers came to her house (although a young girl who gave evidence in this proceeding was at the house, as was a two-year-old boy). I have rejected the applicants' claims for aggravated damages and found the Court has ***no*** power to award exemplary damages under the Racial Discrimination Act. In my reasons, I have indicated that I will not order an ***apology***, but the Commissioner of Police should be required to consider whether it is appropriate to make an ***apology*** to the residents of Palm Island. I have given the parties an opportunity to make submissions on this issue. They also have an opportunity to make further submissions on some consequential issues such as costs, and the way the remainder of the proceeding should be dealt with, because any individual claims by group members and subgroup members are not finally determined by this judgment. In conclusion, there are three aspects of this proceeding I wish to emphasise. First, although these events have been examined before, in this proceeding the parties each made a series of choices about the evidence they put before the Court. They also made choices about which witnesses they called. The Court can only determine the claims made under section 9(1) on the basis of the evidence before it. Second, the SERT officers who were deployed to Palm Island are not the subject of any adverse findings. They performed their duties in the manner they had been trained to do: it was those who decided to use them to effect arrests of unarmed people at home with their families who are subject to adverse findings by the Court. Third, the parties and their legal representatives were cooperative and courteous in the conduct of this proceeding, although it was at times difficult for all concerned. The Court is grateful to them for that. The State of Queensland and the Commissioner, in particular, defended this proceeding in a commendable manner, making appropriate concessions and conducting themselves, through their legal representatives, with the kind of responsibility and sensitivity that should be a model for litigation on behalf of government.

MORTIMER J

5 December 2016 FEDERAL COURT OF AUSTRALIA

Wotton v State of Queensland (***No*** 5) [2016] FCA 1457

File number:
QUD 535 of 2013

Judge:
MORTIMER J

Date of judgment:
5 December 2016

Catchwords:

HUMAN RIGHTS – discrimination – racial discrimination – direct discrimination – s 9(1) of the Racial Discrimination Act 1975 (Cth) – police investigation of Aboriginal death in police custody – interactions between police officers and Aboriginal community following death – protests against police by some members of Aboriginal community – fires destroying police station and other ***public*** property – declaration of emergency situation under s 5 of the ***Public*** Safety Preservation Act 1986(Qld) – entries and searches of homes by officers of Special Emergency Response Team – arrests of persons identified as suspects in relation to protests and fires – rights to equality before the law and equal ***protection*** of the law – right to equal treatment before organs administering justice – right to access ***public*** services – right to enjoyment of property without unlawful interference – right not to be subjected to unlawful interference with privacy, family or home – right to liberty and security of person – right not to be subjected to inhuman or degrading treatment –International Convention on the Elimination of All Forms of Racial Discrimination – International Covenant on Civil and Political Rights

PRACTICE AND PROCEDURE – representative proceeding – racial discrimination – group comprising Indigenous community on Palm Island – subgroup comprising persons affected by arrests, entries and searches by officers of Special Emergency Response Team

STATUTORY INTERPRETATION – relationship between Australian statutes and international instruments – relationship between Racial Discrimination Act 1975 (Cth) and International Convention on the Elimination of All Forms of Racial Discrimination – consequences for interpretation of Racial Discrimination Act 1975 (Cth) – materials that may inform interpretation

STATUTORY INTERPRETATION – word and phrases – “act involving a distinction, exclusion, restriction or preference based on race” – “involving” – “distinction” – “based on race”

DAMAGES – orders under s 46PO(4) of the Australian Human Rights Commission Act 1986 (Cth) – appropriate basis for and quantum of damages for racial discrimination – whether aggravated damages available – whether exemplary damages available – whether appropriate to order an ***apology***

Legislation:

Aboriginals ***Protection*** and Restriction of the Sale of Opium Act 1897 (Qld)
Australian Human Rights Commission Act 1986 (Cth) ss 46PH, 46PO,46PO(4), 46PO(4)(b), 46PO(4)(d)
Constitution, ss 109, 117
Coroners Act 2003 (Qld) ss 5(2), 7(3), 15(2), 27, 29
Criminal Code Act 1899 (Qld) Sch 1, ss 61(1), 61(2), 63, 63, 65, 66, 398, 419, 461, 469
Disaster Management Act 2003 (Qld) s 13
Evidence Act 1995 (Cth) ss 54, 140, 144(1)(b), 191
Federal Court of Australia Act 1976 (Cth) Pt IVA, ss 22, 23
Police Powers and Responsibilities Act 2000 (Qld) ss 19, 198, 376, 447A
Police Service Administration Act 1990 (Qld) ss 2.3, 4.8, 4.9, 7.4, 10.5(2)

Public Safety Preservation Act 1986 (Qld) ss 5, 6, 8, 13, 46

Public Sector Ethics Act 1994 (Qld) s 15
Racial Discrimination Act 1975 (Cth) ss 3(3), 8, 9, 9(1), 10, 18A
Charter of the United Nations, Art 1(3)
Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Art 1
European Convention on Human Rights, Arts 3, 8
International Convention on the Elimination of All Forms of Racial Discrimination, Arts 1(1), 1(4), 2, 5(a), 5(b), 5(f)
International Covenant on Civil and Political Rights, Arts 2, 7, 9, 17, 26
International Covenant on Economic, Social and Cultural Rights
Universal Declaration of Human Rights, Art 7

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APLA Limited v Legal Services Commissioner (NSW) [2005] HCA 44; 224 CLR 322
Applicant A v Minister for Immigration and Ethnic Affairs [1997] HCA 4; 190 CLR 225
Ashby v Slipper [2014] FCAFC 15; 219 FCR 322
Attorney General v 2UE Sydney Pty Ltd [2006] NSWCA 349; 97 ALD 426
Attorney-General (SA) v Corporation of the City of Adelaide [2013] HCA 3;249 CLR 1
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Australian Securities and Investments Commission v Hellicar [2012] HCA 17; 247 CLR 345
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Brandy v Human Rights and Equal Opportunity Commission [1995] HCA 10; 183 CLR 245

Brown v West [1990] HCA 7; 169 CLR 195
Bulsey v State of Queensland (unreported, Sup Ct, Qld, North J, 20 February 2015)
Bulsey v State of Queensland [2015] QCA 187
Carson v John Fairfax & Sons Ltd [1993] HCA 31; 178 CLR 44
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Counsel for the Respondents:
Mr M Hinson QC with Mr S McLeod and Mr S Forrest

Solicitor for the Respondents:
Crown Law

Table of Corrections

21 December 2016
In paragraph 75, first sentence, “the conduct of the respondents” has been changed to “the conduct of QPS officers”.

21 December 2016
In paragraph 394, “has” has been changed to “have” in the first sentence and “it has” has been changed to “they have” in the second sentence.

21 December 2016
In paragraph 718, “three” has been changed to “there” in the second sentence and “DS Webber” has been changed to “DI Webber” in the fourth sentence.

21 December 2016
In paragraph 725, “respondents’ conduct” has been changed to “conduct of QPS officers”.

21 December 2016

In paragraph 738, “judgment” has been changed to “judgement”.

21 December 2016
In paragraph 739, “in” has been deleted after the words “critical to”.

21 December 2016
In paragraph 740, “has contributed” has been changed to “have contributed”.

21 December 2016

In paragraphs 1126 and 1358 and in the list of cases, the word “Commonwealth” has been deleted from the title of Eastman v Director of ***Public*** Prosecutions (ACT) [2003] HCA 28; 214 CLR 318.

21 December 2016

In paragraph 1468, “of” has been added to the phrase “members of the ***public***”.

21 December 2016
In paragraph 1568, second sentence, “Caroll” has been changed to “Carroll”.

21 December 2016
In paragraph 1579, a typographical error has been corrected in “referring”.

21 December 2016

In paragraph 1613, “ ***no*** such proportion” has been changed to “ ***no*** such proposition”.

21 December 2016
In paragraph 1734, a typographical error has been corrected in “Lockhart J”.

21 December 2016
In paragraph 1759, a typographical error has been corrected in “Spigelman CJ”.

21 December 2016
In paragraph 1768, “at first instance” has been deleted after “assault and battery claims”.

21 December 2016
In paragraph 1780, “Federal Circuit Court” has been changed to “Federal Magistrates Court”

18 January 2017

In paragraph 255, eighth paragraph of the quote, the letter “L” has been changed to “K”.

18 January 2017
In paragraph 274, seventeenth paragraph of the quote, “be” has been changed to “he”.

18 January 2017
In paragraph 344, penultimate sentence, “have” has been added before “wanted”.

18 January 2017
In paragraph 351, subparagraph (7), a typographical error has been corrected in “Berna”.

18 January 2017
In paragraph 359, last sentence before the quote, “impact” has been added before “munitions”.

18 January 2017
In paragraph 433, sixth sentence, “a” has been added before “stoic”.

18 January 2017
In paragraph 436, third paragraph of the quote, “10” has been deleted after “access”.

18 January 2017
In paragraph 441, penultimate sentence, “riots” has been changed to “strike”.

18 January 2017
In paragraph 461, last sentence, “the” has been added before “three”.

18 January 2017
In paragraph 760, first sentence of the quote, “anyway” has been changed to “away”.

18 January 2017
In paragraph 807, first sentence of the quote, “island” has been changed to “Island”.

18 January 2017
In paragraph 814, sixth sentence, “is” has been added between “exaggeration” and “in part”.

18 January 2017
In paragraph 861, last paragraph of the quote, the letter “L” has been changed to “K”.

18 January 2017
In paragraph 973, second sentence, “SS Leafe” has been changed to “Sergeant Leafe”.

18 January 2017
In paragraph 1000, penultimate paragraph of the quote, “5” has been deleted after “Aboriginality of”.

18 January 2017
In paragraph 1045, second sentence of the quote, a closing quotation mark has been added after “next one,”.

18 January 2017
In paragraph 1086, first sentence, “not” has been added before “employed”.

18 January 2017
In paragraph 1144, first sentence, “of” has been deleted before “the emergency”.

18 January 2017
In paragraph 1193, first sentence, “evening” has been changed to “morning”.

18 January 2017
In paragraph 1260, fourth sentence, “above” has been deleted after “As I have noted”.

18 January 2017
In paragraph 1346, second sentence, “attested” has been changed to “arrested”.

18 January 2017
In paragraph 1413, first sentence, “three” has been changed to “two”.

18 January 2017
In paragraph 1458, penultimate sentence, “of” has been deleted before “being shot”.

18 January 2017
In paragraph 1529, the text before the quote has been changed to correct a grammatical error.

18 January 2017
In paragraph 1660, last sentence of the quote, “In” has been changed to “in” and “Issues” has been changed to “issues”.

18 January 2017
In paragraph 1711, seventh sentence, “appellants” has been changed to “applicants”.

ORDERS

QUD 535 of 2013

BETWEEN:
LEX WOTTON

First Applicant

AGNES WOTTON

Second Applicant

CECILIA ANN WOTTON

Third Applicant
AND:
STATE OF QUEENSLAND

First Respondent

COMMISSIONER OF THE POLICE SERVICE

Second Respondent

JUDGE:
MORTIMER J
DATE OF ORDER:
5 DECEMBER 2016

THE COURT DECLARES THAT:

In relation to the applicants and group members as defined in the further amended originating application filed 25 August 2015, Detective Inspector Warren Webber, Detective Senior Sergeant Raymond Joseph Kitching and Inspector Mark Williams committed unlawful discrimination, in contravention of section 9(1)of the Racial Discrimination Act 1975 (Cth), by failing to treat Senior Sergeant Christopher Hurley as a suspect in the death of Cameron Doomadgee and by allowing Senior Sergeant Hurley to continue to perform policing duties on Palm Island between 19 and 22 November 2004. In relation to the applicants and group members, between 19 and 22 November 2004, Detective Inspector Webber and Detective Senior Sergeant Kitching committed unlawful discrimination, in contravention of section 9(1) of the Racial Discrimination Act, in their treatment of Aboriginal witnesses interviewed, and in their treatment of information supplied by those witnesses, for the purposes of the investigation by the Queensland Police Service into the death of Cameron Doomadgee. In relation to the applicants and group members, between 19 and 22 November 2004, Detective Senior Sergeant Kitching committed unlawful discrimination, in contravention of section 9(1) of the Racial Discrimination Act, in submitting inaccurate information to the coroner, and in failing to supply relevant information to the coroner, for the purposes of the coronial

investigation into the death of Cameron Doomadgee. In relation to the applicants and group members, the failure of any officer of the Queensland Police Service with appropriate command responsibilities, including Inspector Gregory Strohfeldt and Acting Assistant Commissioner Roy Wall, to suspend Senior Sergeant Hurley from active duty on Palm Island after the death of Cameron Doomadgee on 19 November 2004 constituted unlawful discrimination in contravention of section 9(1) of the Racial Discrimination Act. In relation to the applicants and group members, the failure of any officer of the Queensland Police Service with appropriate command responsibilities on Palm Island between 22 and 26 November 2004, including Inspector Brian Richardson and Senior Sergeant Roger Whyte, to communicate effectively with the Palm Island community and defuse tensions within that community relating to the death in custody of Cameroon Doomadgee, and the subsequent police investigation, constituted unlawful discrimination in contravention of section 9(1) of the Racial Discrimination Act. In relation to the applicants and group members, Detective Inspector Webber, in making at 1.45 pm on 26 November 2004 and continuing until 8.10 am on 28 November 2004 a declaration of an emergency situation under section 5 of the ***Public*** Safety Preservation Act 1986 (Qld) engaged in unlawful discrimination in contravention of section 9(1) of the Racial Discrimination Act. In using officers of the Special Emergency Response Team to carry out the arrest of the first applicant on 27 November 2004, officers of the Queensland Police Service with command responsibilities for the police operations on Palm Island at that time, including Detective Inspector Webber, Inspector Steven Underwood and Inspector Glenn Kachel, engaged in unlawful discrimination in contravention of section 9(1) of the Racial Discrimination Act. In using officers of the Special Emergency Response Team on 27 November 2004 to carry out the entry and search of the house of the first and third applicants, officers of the Queensland Police Service with command responsibilities for the police operations on Palm Island at that time, including Detective Inspector Webber, Inspector Underwood and Inspector Kachel, engaged in unlawful discrimination contrary to section 9(1) of the Racial Discrimination Act. In using officers of the Special Emergency Response Team on 27 November 2004 to carry out the entry and search of the house of the second applicant, officers of the Queensland Police Service with command responsibilities for the police operations on Palm Island at that time, including Detective Inspector Webber, Inspector Underwood and Inspector Kachel, engaged in unlawful discrimination contrary to section 9(1) of the Racial Discrimination Act. Pursuant to section 18A of the Racial Discrimination Act, the Racial Discrimination Act applies in relation to the first respondent as if the first respondent had engaged in the conduct of the officers of the Queensland Police Service referred to in paragraphs 1 to 9 above, and the first respondent is taken to have contravened section 9(1) of the Racial Discrimination Act in the manner there set out.

THE COURT ORDERS THAT:

The first respondent pay to the first applicant damages in the total sum of $95,000. The first respondent pay to the second applicant damages in the sum of $10,000. The first respondent pay to the third applicant damages in the total sum of $115,000. Paragraphs 1 to 3 of these Orders are stayed pending the determination by the Court of the matters set out in paragraphs 1 to 4 and paragraph 6 of the Directions given by the Court on 5 December 2016.

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

REASONS FOR JUDGMENT
MORTIMER J:

INTRODUCTION AND SUMMARY Section 9(1) of the Racial Discrimination Act 1975 (Cth) (RDA) provides:It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of ***public*** life. This is a representative proceeding brought under Pt IVA of the Federal Court of Australia Act 1976 (Cth) in which the applicants allege various contraventions of s 9(1) by reason of the conduct of members of the Queensland Police Service (QPS) on Palm Island, Queensland in November 2004. The applicants are Mr Lex Wotton, Mrs Agnes Wotton and Ms Cecilia Wotton. They have brought this proceeding on their own behalf and on behalf of Indigenous people who were ordinarily resident on Palm Island on 19 November 2004 and who remained ordinarily resident there until 25 March 2010. I will refer to the persons in this group as the group members. The three named applicants also represent a subgroup of the group members, constituted by those persons who were affected (in one or more of four ways set out at [4] of the applicants' third further amended statement of claim) by entries and searches conducted by members of the QPS, including members of the Special Emergency Response Team (SERT), on 18 homes on Palm Island during the period 27 to 28 November 2004. Those entries and searches led to the arrests of 11 people, including two arrests made at a place called Wallaby Point on 29 November 2004. The respondents are the State of Queensland and the Commissioner of the QPS, who is sued as Commissioner and as representing the members of the QPS who engaged in the conduct impugned by the applicants. For the reasons set out below, the applicants have established some but not all of the contraventions of s 9(1) of the RDA which they alleged. I set out a summary of my findings in favour of the applicants at [1540] below. The events and conduct with which this proceeding is concerned begin with the death in police custody of a 36-year-old man now known as Mulrunji at approximately 11 am on 19 November 2004. Before he died, Mulrunji was known as Cameron Doomadgee and in some of the contemporaneous evidence he is called by that name. Unless the context otherwise requires, it is appropriate to use his traditional name, Mulrunji. On the morning of 19 November 2004, Mulrunji had been arrested and placed in custody in what was called the "watchhouse" by Senior Sergeant Christopher Hurley, the Officer in Charge of the Palm Island Police Station. Police Liaison Officer Lloyd Bengaroo, an Aboriginal man employed by the QPS, assisted with the arrest. However, it was SS Hurley who brought Mulrunji into the watchhouse and it was SS Hurley's physical interactions with Mulrunji that would become the subject of scrutiny. The impugned events and conduct end approximately 11 days later when the large contingent of police officers who had come to the island over the course of that period returned to the mainland. The applicants allege contraventions by the respondents of s 9(1) of the RDA in the investigation of Mulrunji's death and the conduct of policing operations on the island during this 11-day period. The respondents have accepted that all the allegations of conduct by individual officers of the

QPS occurred in the course of the employment of those officers, alternatively in circumstances where those officers were acting as agents of the State of Queensland. Accordingly, vicarious liability under s 18A of the RDA was accepted if the applicants' allegations were otherwise proven. There have been a considerable number of proceedings and inquiries (including three coronial inquests) into the events with which this proceeding is concerned. Race, and the circumstances and treatment of Aboriginal people on Palm Island, may have featured in some of those previous proceedings and inquiries, but it was intermingled with many other matters. In this proceeding, the role of race in the events on Palm Island between 19 November 2004 and approximately 29 November 2004 is the central issue. At certain times during the course of the proceeding, it appeared the applicants concentrated on failures and shortcomings in police conduct in general (including the issue of its lawfulness), without a clear set of contentions regarding how that conduct contravened s 9(1) of the RDA. However, the Court's jurisdiction arises because this is a claim under s 9(1) of the RDA and a focus on the issues raised by the terms of that provision must be steadily maintained. The applicants' claims may be divided broadly into three groups of issues. The first involves the manner in which the QPS conducted the investigation into Mulrunji's death. The QPS officers with principal responsibility for the investigation were Detective Inspector Warren Webber and Detective Senior Sergeant Raymond Joseph ("Joe") Kitching. Inspector Mark Williams was a member of the Ethical Standards Command of the QPS and also participated in the investigation. I use the term 'investigation' in a broad sense, because this aspect of the applicants' claims really covers a number of events from very shortly after Mulrunji's death on 19 November 2004 until just before the civil unrest that saw the burning down of the Police Station and other buildings on Palm Island on 26 November 2004. The applicants allege that, in a number of specific ways, the conduct of the investigation was substandard, inadequate and flawed, and that these failures, omissions and inadequacies occurred because QPS officers were dealing with the death of an Aboriginal man, in an Aboriginal community, and more particularly the Aboriginal community of Palm Island. In the third further amended statement of claim these allegations are made in Parts H and I, and cover the period 19 to 24 November 2004. Many of these allegations begin with a premise that police conduct was unlawful, although in my opinion that premise is not as central to a potential contravention of s 9 as the applicants' approach suggested. The second group of issues involves the lead-up to events that have sometimes been described as the "riots" that took place on Palm Island on 26 November 2004, as well as the police reaction to those events. On that day, the wider community on Palm Island was given some information about a preliminary autopsy report regarding the injuries that caused Mulrunji's death. It was the provision of this information that triggered the events of 26 November 2004. The word "riot" is one I have decided to avoid, although on the evidence before me it was the description of choice used by the media at the time. The word "riot" also forms part of the criminal offences with which some Palm Islanders were charged. Some people were acquitted of those charges, some were convicted, and some had charges withdrawn. To use the word "riot" may indicate this Court has formed a view about those charges, which is not the case. It is the case that there were protests about Mulrunji's death, the police investigation and perceived police inaction and bias, and those protests became violent at some points through activities such as rock-throwing and yelling abuse. There were also fires, which were deliberately lit and caused serious property damage, although ***no*** individual was convicted of arson. To use the word "riot" to describe these events would be to convey an impression that does not reflect my view of the evidence before me. I have used the composite phrase "protests and fires" in these reasons to describe what happened on 26 November 2004. In like manner, I describe the conduct of QPS officers on 27 to 29 November 2004 as "arrests, entries and searches" rather than as "raids", which was a term used by the applicants and the media at the time. In this second group of issues about the lead up to the protests and fires, the applicants allege a series of failures, inadequacies and omissions by the QPS, including:(a) the failure to suspend SS Hurley from duty pending the outcome of the investigation;

(b) the making of an emergency declaration under s 5 of the ***Public*** Safety Preservation Act 1986 (Qld) (PSP Act);

(c) the entries and searches of the homes of subgroup members; and

(d) the arrests of subgroup members in relation to offences said to have been committed on 26 November 2004. It is alleged, broadly, that the police would not have conducted themselves as they did (including by deploying SERT officers to effect the arrests and conduct the searches of the homes) if this were not an Aboriginal community. In the third further amended statement of claim, these allegations are made in Parts J, K and L and cover the period 22

November 2004 to 28 November 2004. Again, many of these allegations begin with the premise that police conduct was unlawful, and again in my opinion that premise is not as central to a potential contravention of s 9 as the applicants' approach suggested. In their pleadings the applicants raised a third issue, concerning what was described in Part L of the third further amended statement of claim as "systemic and institutional discrimination". These allegations centred on the policies, orders and procedures issued or continued by the second respondent (the Commissioner) being, to borrow a phrase, not fit for the purpose of policing in an Aboriginal community, and specifically in the Aboriginal community of Palm Island. This aspect of the applicants' case was, ultimately, not pressed at trial. On the last day of evidence, senior counsel for the applicants informed the Court that these allegations were not pressed, along with a series of factual allegations which she then identified. Accordingly, those matters are not the subject of any express findings in these reasons. In final submissions, and with greater focus on s 9 of the RDA as I had requested, the applicants provided a short summary of their key contentions that somewhat reorganised the first and second groups of issues into four main categories of claims. I have adopted that structure in these reasons. The four categories of claims are:(a) the police conduct in the investigation of Mulrunji's death;

(b) the police conduct during the 'intervening week' after Mulrunji's death and prior to the protests and fires of 26 November 2004;

(c) the emergency declaration issued under the PSP Act;

(d) the use of SERT in the arrests, entries and searches carried out between 27 and 28 November 2004. The applicants seek declaratory relief, an ***apology***, compensation, and aggravated and exemplary damages.

THE COMPLAINT TO THE COMMISSION, THIS PROCEEDING AND ITS HISTORY Although this proceeding is brought as a representative proceeding pursuant to Pt IVA of the Federal Court Act, it comes to this Court pursuant to s 46PO of the Australian Human Rights Commission Act 1986 (Cth) (AHRC Act) after termination of a complaint made to the Australian Human Rights Commission. The applicants lodged a written complaint with the Commission on 25 March 2010 on behalf of themselves and the group members. In the complaint letter, the applicants alleged that the first respondent – the State of Queensland – contravened s 9 of the RDA through various acts and omissions after Mulrunji's death, and through the subsequent protests and fires and the police response to them. The applicants divided the police acts and omissions into four heads of discrimination. The matter did not resolve at the conciliation conference facilitated by the Commission on 16 February 2012 and a delegate of the President of the Commission issued a notice of termination under s 46PH of the AHRC Act on 13 June 2013. The applicants filed their originating application on 9 August 2013. On 20 November 2014, Dowsett J fixed the matter for trial for four weeks, to take place in two tranches from 31 August 2015 to 11 September 2015 and from 21 September 2015 to 2 October 2015. The matter was allocated to my docket in April 2015 and the parties appeared before me for a directions hearing on 28 April 2015. I made orders on this date varying the trial dates so that the trial would run from 7 September 2015 to 2 October 2015, to enable the trial to proceed in a single tranche, and requiring the respondents to discover certain documents by 5 May 2015. It is agreed between the parties that both the group members and the subgroup members as so defined number more than seven people. It is also agreed that, at all relevant times, the applicants and group members as identified by the applicants were Aboriginal or Torres Strait Islander persons. When referring to the community on Palm Island, the parties used the descriptor "Aboriginal" in their pleadings and submissions. Accordingly, that is the term I have adopted in these reasons. I accept there may be Torres Strait Islanders on Palm Island, but there was ***no*** specific evidence adduced on that issue, nor did the applicants submit it was necessary specifically to refer to Torres Strait Islanders. The applicants have made several changes to their pleadings throughout these proceedings. I summarised the changes made up until 21 August 2015 in Wotton v State of Queensland [2015] FCA 910 at [6]- [11], but will briefly repeat them here. The applicants filed the first version of their statement of claim on 22 October 2013. Throughout 2014, they filed three further iterations of the statement of claim: an amended statement of claim filed on 28 January 2014; a further amended statement of claim filed on 29 May 2014 (together with an amended originating application); and a second further amended statement of claim filed on 1 August 2014. The respondents filed a defence on 3 October 2014 and the applicants a reply on 24 October 2014. On 11 August 2015, less than a month before the trial was

scheduled to commence, the applicants filed an interlocutory application to make substantial amendments to their amended originating application and second further amended statement of claim. The application was heard on 19 August 2015 and, on 21 August 2015, I granted leave to the applicants to make some, but not all, of the amendments they had sought leave to make: see Wotton [2015] FCA 910. In order to provide the respondents with a proper opportunity to consider and respond to the amended pleadings, the hearing dates from 7 to 18 September 2015 were vacated. It was determined that the Court would sit on Palm Island on the week commencing 21 September 2015 and in Townsville in the week commencing 28 September 2015 and that a further tranche of trial would be scheduled at a later date as required. The applicants filed a further amended originating application and third further amended statement of claim on 25 August 2015. Further interlocutory applications were made after the commencement of the trial. The respondents objected to the admission of expert reports of Dr Rosalind Kidd and Emeritus Professor Jon Altman on the basis of relevance. On 23 September 2015, I made orders that the reports be admitted and delivered brief reasons for my decision. On 28 September 2015, I refused an application by the applicants for closed court orders and suppression orders in respect of evidence concerning the psychological condition of the first and third applicants. On 28 September 2015, the applicants applied to adduce further oral expert evidence from sociolinguist Dr Diana Eades about specific parts of the evidence given by four Aboriginal witnesses in an attempt to explain what the applicants seemed to consider might otherwise be seen as credibility issues with their evidence. On 29 September 2015, I refused that application for reasons given orally at the time which need not be rehearsed here. The first week of the trial was, as foreshadowed, conducted on Palm Island. The Court sat in the hall of the local school – the same school that was used as the police command post from 26 November 2004. During that week, the Court conducted, with the agreement and cooperation of the parties, a view of places on Palm Island which would feature in the evidence. Those places included the mall area in which community meetings took place during the week of 22 November 2004; the police station, which was destroyed in the protests and fires but has since been rebuilt in the same location; the hospital; the houses of the applicants and of certain members of the subgroup; and other locations at which events occurred which are the subject of this proceeding. A note of the view, which includes photographs of the locations visited by the Court, is an exhibit in the proceeding. I have drawn certain inferences from the view, as s 54 of the Evidence Act 1995 (Cth) contemplates. Those inferences are set out at various places in these reasons. The view was material to many of the findings I have made. An understanding of the nature of Palm Island, and its community, is critical to the resolution of many contested issues in this proceeding. The view also informed my understanding of the contemporaneous evidence, including (but not limited to) the contemporaneous video evidence.

PALM ISLAND The applicants' claims in this proceeding cannot be understood without first appreciating the particular history of Palm Island and its community. The particular features of this community form part of the circumstances which existed on the island in November 2004. They are not mere matters of history, consigned to the past without relevance to the present as it was in November 2004. My findings in this section are drawn from the agreed facts; from the report of Dr Kidd, an expert called on behalf of the applicants, together with the annexed historical documents upon which her report was based; and from the report by Professor Altman, which was co-written with Dr Nicholas Biddle. Professor Altman was another expert called on behalf of the applicants. I discuss the evidence given by Dr Kidd and Professor Altman, and their qualifications, at [441] and [450] below. In that section I have made some findings about Dr Kidd which affect the weight I give to parts of her report. Given my reservations, I have relied more on the source material than on the commentary in Dr Kidd's report. Where I have relied on Dr Kidd's summaries, these were aspects of her report that were not challenged in cross-examination. On the basis of the facts agreed between the parties, the population of Palm Island in 2006 was approximately 1,855 people, 93.5% of whom identified as Indigenous. The 2001 census recorded the population as being approximately 1,949 people, 90.8% of whom identified as Indigenous. I infer that in November 2004 the population, and the proportion of Indigenous people, was somewhere around or in between these two sets of figures. It was common ground between the parties that the overwhelming majority of non-Aboriginal people who lived on Palm Island were involved in providing goods or services to the Aboriginal community. It is also necessary to acknowledge, soberly, that the Palm Island community shares characteristics of disadvantage with other Aboriginal communities in Queensland and in other parts of Australia. Gageler J provided a useful overview of the governance history of Palm Island in Maloney v The Queen[2013] HCA 28; 252 CLR 168 at [255]:Palm Island comprises a group of ten islands forming part of Queensland situated about 70 km north of Townsville. Palm Island was established as an Aboriginal reserve under Queensland legislation in 1914 and retained that or a similar status under subsequent Queensland legislation until 1986. Title to Palm Island was then granted in trust under the Land Act 1962 (Qld) to the Palm

Island Aboriginal Council, an Aboriginal council under the Community Services (Aborigines) Act 1984 (Qld) (the Aboriginal Communities Act), and Palm Island became a "trust area" (subsequently redesignated a "community area") within the jurisdiction of the Palm Island Aboriginal Council under the Aboriginal Communities Act. In 2004, by force of the Local Government (Community Government Areas) Act 2004 (Qld) (the Community Government Areas Act), as well as being continued as a community area within the meaning of the Aboriginal Communities Act as then amended, Palm Island was declared to be a "local government area" and by virtue of that also became a "community government area" to which provisions of the Local Government Act 1993 (Qld) thereafter applied and the Palm Island Aboriginal Council was continued in existence as the Palm Island Shire Council.

(Footnotes omitted.) From 1897 until the early 1970s, the Aboriginals ***Protection*** and Restriction of the Sale of Opium Act 1897 (Qld) empowered the Queensland government to remove any Aboriginal person from rural and town areas and confine them to Aboriginal reserves. From approximately 1914, the government operated an Aboriginal reserve at what was known as Hull River on the northern coast of Queensland, now known as Mission Beach. This was the reserve to which Aboriginal people in northern Queensland were initially forcibly removed. Reasons included their unemployment and an assessment that they were in need of '***protection***'. Removals occurred in circumstances where the demands of expanding white occupation of land in Queensland rendered the occupation by Aboriginal people of their country incompatible or inconvenient for white settlers. Soon after its establishment, the Hull River reserve experienced sufficient problems that the Queensland government began to look for alternative locations for the reserve. In 1916, the government attempted to clear Palm Island of its original Aboriginal inhabitants, being the traditional owners of the land and waters at Palm Island. When the Hull River settlement was destroyed by a cyclone in 1918, John Bleakley, the then 'Chief Protector of Aboriginals', ordered that the salvaged building materials and the inmates who had not died or escaped during and after the cyclone be relocated to Challenger Bay on Palm Island. While there was little evidence in this proceeding about the descendants of the original inhabitants of the island, it is apparent that some of the traditional owners retained their connections and still comprise part of the Palm Island community: see, eg, The Manbarra People and Great Barrier Reef Marine Park Authority [2004] AATA 268; 82 ALD 573 at [10]. Thus, Palm Island was occupied by Aboriginal people before it was identified as a place for forced confinement and punishment. Dr Kidd reports that European awareness of the original Palm Islanders dates from a sighting by Captain James Cook in June 1770. She gives the following summary of what historical records say about these people, and how they came to be tricked into leaving the island (although a few of the original male inhabitants were transported back to assist in building the settlement for other Aboriginal people who were to be forcibly removed there):Reports survive of periodic attacks by Palm Islanders on traders in bêche-de-mer, trochus shell and sandalwood who visited Challenger Bay to recruit or kidnap men and women. In 1877 it was suggested that Great Palm Island be declared an Aboriginal reserve to prevent European incursions and ***protect*** Islanders from exploitation.

Around the turn of last century there were around 50 men, women and children living on Palm Island although others were said to be working on bêche-de-mer and fishing boats. Reports of the Northern Protector and Chief Protector of Aboriginals record similar populations in the years to 1914. Families on the island reportedly lived well having their own cutter and two dinghies, well built gunyahs of thatched grass, hunting dogs to catch wild pig, and ample supply of bush foods and fresh water.

In 1913 the Townsville protector described Great Palm Island as a 'regular native camp and hunting ground'[.] On his suggestion most of the area was gazetted an Aboriginal reserve in June 1914. 226;128;

In 1916 superintendent John Kenny, from the Hull River settlement reported that Challenger Bay would be a good site for a new settlement. 226;128;

The families on Palm Island were enticed to visit the Hull River settlement in 1916 with promises that they could return if they did not like it. Twenty-two men, women and children were removed, but refused permission to return.
(Footnotes omitted.) Palm Island's remote geographical location made it a convenient place for the government to send people considered problematic, including those who had completed jail sentences or deserted compulsory labour contracts. The island was described as a "punishment island", but it was used for other social and governmental purposes as well. This extract from Joanne Watson, Becoming Bwgcolman: Exile and Survival on

Palm Island Reserve, 1918 to the Present (PhD thesis, The University of Queensland, 1994) at 72, which Dr Kidd provided with her report, captures the thinking at the time:From 1897 the development of a punitive reserve on Badjala land at Fraser Island would serve as a prototype to the later institution on Palm. Murri ex-prisoners were sent to Fraser Island from Brisbane, Rockhampton, Roma, Townsville and Cardwell. By 1899 Roth, as Northern Protector, perceived Fraser Island as a place suited for the isolation of 'troublesome' or 'dangerous characters'. The island was under the surveillance of the armed physical presence of the Mestons and a lock-up and police force soon established there. Those who were removed from their homelands developed an earth-eating disease. Before its closure in 1905 the reserve had become 'a vast burial ground' where those who fell ill believed they were 'doomed to die'.

It was in the context of this historical background, combined with increasing numbers of removal orders, that Palm Island was gazetted for reserve purposes. By 1916 Bleakley as Chief Protector complained to the Under Secretary that neither Hull, Taroom nor Barambah could cope with the growing numbers of Murris under the Act, and that a reserve was needed 'suitable for use as a penitentiary', to confine 'the individuals we desire to punish'. Bleakley decided to take advantage of Kenny's removal of Wulgurugaba people to Hull River, to carry out an inspection of the island, and the following year he reported that in 'Being an island' Palm 'also provided the security from escape required with such characters'.

(Footnotes omitted.) Dr Kidd also included an extract from Bill Rosser, Dreamtime Nightmares (1985) at 144-45. In this extract, Fred Clay, who lived on Palm Island in the 1970s and was head of the island's Aboriginal Council, describes what happened when as a fifteen-year-old boy he tried to get off Palm Island to work in Cairns, and then to make his way elsewhere, but was recaptured. I refer to this extract because it is also a good example of the long and fraught relationship between Palm Island people and the Queensland Police Service:'When they first opened the settlement over there, they didn't have jails but, by gee, they used to handcuff them to a tree, you know. They used to have them in a chain-gang. In the early days,' [Fred] explained, 'they used to do all the clearing of the scrub by hand. There were ***no*** machines in those days'. He gave a short laugh. 'Only a pick and shovel and the axe, grubbing trees out. They cleared all the settlement there'. He was silent again, probably thinking of the harsh conditions which he and his mates suffered in those far-off days. He stirred and said, 'I wasn't conscious of the Act until I left school. I was old enough to go to jail. That's when I realised that we had ***no*** hope on the island. It was then that I realised the superintendent's powers.'

'And you rebelled against it, even at that age?'

'Yes, I did. Yes. I took off from Palm when I was fifteen. I went to work in Cairns under an agreement. I had my money sent to Palm. We didn't see the amount, they just filled it in – the Superintendent. We signed it. Each week I worked in Cairns, I got twenty-five shillings [$2.50] pocket money. So, I worked there for a year, then I jumped a train down to Ingham. I got in with a contractor, cutting cordwood for a sugar mill there. I was going bloody good, too, for about two months. Then, one dinner hour, a bloody big cop turned up.' Fred winced at the memory, shrugged his shoulders and then continued with his story.

'The cop was looking for a "Fred Clay". I said, "I'm Fred Clay". He said, "Ah, I've got a warrant for your arrest and an order from the Department of Native Affairs to escort you back to Palm Island". This is when I was fifteen! I was going to go "bush", but I saw this bloody big pistol handle sticking out of his pocket and I wasn't going to give the bastard a chance to shoot me. ***No*** way! He would have, I think. So, he took me to Ingham and put in the jail there, to wait for an escort to take me to Palm Island.'

'They put you in jail – at fifteen?'

'Yes. On the third day, this tracker turned up from Palm Island – my escort. He took me down to the railway station and handcuffed me to the seat. They didn't give him a key for the handcuffs. The police in Townsville had it. They were waiting for us.'

Fred interrupted his story to look for a cigarette and was still wandering around when he resumed speaking. 'When we got to Townsville a big cop came and released me from the seat and led me by the handcuffs. I stayed back in the watchhouse for three or four days before I was taken back to the island. There, I went to jail first for fourteen days, for absconding from the job in Cairns where I was under agreement with the Department of Native Affairs. After the fourteen days, I was given another six months punishment in the timber camp; that's around the back of the island. I wasn't allowed to come into the settlement for six months.'

'That was a bit rugged', I remarked.

'Yes, it was rugged all right,' Fred agreed. 'When I came back to the settlement, I was put to work on the wood camp, cutting wood for the white people on the island.'

'What pay did you get for that?' I asked.

'Heck! I wasn't on pay.'

'***No*** pay. Only rations?'

'Yes, only rations. I didn't go on wages for about three years, I think, when I was eighteen. ...' In 1919, a magistrate from Ingham was called to Palm Island following an assault by the Superintendent of the island, Robert Curry, on a German storeman. The magistrate reported on the terrible conditions he observed on the island and made a number of recommendations. Reference to one of them suffices to indicate the extremity of the living conditions, and attitudes, on the island at that time:That provision be made for such free issue that will allow unfinancial natives a change of clothing. As it is the gins at least some of them and some of the children have only what they stand up in and often after remaining unadorned while the said garment is being washed they put it on before it is properly dry thus leading to colds, pneumonia and other chest complaints. Dr Kidd provides an overview of the layout of the settlement in the 1920s, including the poor living conditions:By 1923, after five years' development, the Palm Island population was around 730, including 200 children. Over half the children were kept in 'dormitories' comprising two tin sheds; there was neither school nor school teacher. Nor was there a qualified medical practitioner, and even the monthly visits by the Ingham doctor had ceased. When the Queensland's Governor Thatcher visited Palm that year, inmates protested their entrapment on poor rations comprising flour, occasional sweet potato, and 450 grams of meat weekly. Governor Thatcher criticised the policy of sending 100 able-bodied men to external employment to bring in revenue instead of using them for building and farming. He supported their complaints in a letter to the minister, but nothing changed.

By 1929, despite continuing substandard conditions and chronic illnesses on the Island, the government's aggressive removal policy had increased the population to almost 1000 people.

(Footnotes omitted). The conditions on the island were deplorable and substandard in many areas of life over several decades. Dr Kidd's report identifies, for example, a critical shortage of food and resulting malnutrition, which was particularly dire during the second world war; limited education and other opportunities for youth; widespread lethal diseases; very high infant mortality rates; chronic overcrowding in houses and dormitories; unsafe water and defective sanitation; poor and oppressive management and policing by authorities on the island; and very poor quality medical facilities. Although an education system was eventually established on the island, and children received schooling until the age of 14 years, their life and employment prospects remained extremely limited after they finished their schooling. Teenage boys were sent back into the community without trades or other practical skills and teenage girls were either contracted to work on remote properties or, if unmarried, confined in dormitories for decades. Mrs Agnes Wotton's own history, as recounted in her evidence, is an example. In the 1920s, Robert Curry, an ex-serviceman, was in charge of the Palm Island settlement as Superintendent. Curry imposed and enforced strict curfews for the community and, armed with a revolver, patrolled the island with "native police" who were authorised to dispense punishments and break up meetings. Curry worked groups of "troublemakers" in chain gangs clearing scrubs and trees. There were allegations that he interfered with Aboriginal girls and he was officially

reprimanded for severely flogging an Aboriginal girl. In 1930, a few months after his wife died in childbirth, Curry killed his son and stepdaughter, shot the local doctor and his wife, set fire to several staff homes, and blew up administrative buildings. An Aboriginal man named Peter Prior shot Curry and fatally wounded him during this rampage, acting under the instructions of state police. Incredibly, Prior was later arrested for murder and jailed in Townsville for several months before the charges against him were dropped. In the 1940s, regulations were introduced to legitimise intensive control of Aboriginal people. Dr Kidd reports that:Inmates could be ordered to any section of a reserve or to another settlement, they had to obey all orders, cease dancing or card playing if commanded, surrender to the superintendent any property which might 'disturb the harmony, good order or discipline of the reserve'. It was an offence 'to commit a nuisance', to act 'in a manner subversive to the good order' of the reserve, to be on a reserve or leave a reserve without permission, to refuse to work 32 hours per week. Superintendents could censor mail and demand any correspondence be given to him. Superintendents appointed, dismissed, and made the rules for, community police who had powers to arrest and imprison those who breached the regulations. Superintendents could pass sentence, and dictate behaviour and work of gaol inmates. There were significant interferences with residents' personal autonomy and freedom of movement. In her report, Dr Kidd discusses a 1948 petition from a Palm Island woman which highlights the plight of the girls and women kept in dormitories:[The petition] implored the government to save her from her imprisoned existence where girls and women were locked up from 5 pm until 6 am, their only freedom a small patch of fenced grass. They could not shop or go to the weekly film show unless under police escort. For this 'free' show two shillings was deducted from the ten shillings ($18.30) earned by the few dormitory monitors. While single girls were allowed 45 minutes once a week to speak to boyfriends under police supervision, this small privilege was denied the writer, a widow. She blamed the suffocating confinement for girls becoming 'unbalanced' and running away after which, she said, 'the rope is tightened all the more' for those who remained trapped for life. (She didn't raise this with the visiting justice, declared the deputy director of Native Affairs, therefore 'she has ***no*** grounds for complaint'.) Nothing changed.

(Footnotes omitted). Dr Kidd's summary of this source document is slightly inaccurate in parts. For example, the petition itself, poignantly written by one of the women living in the dormitory in 1948, states that the author was "a divorced woman" rather than a widow. Nonetheless, the 1948 petition, the role of Robert Curry and other "Superintendents" on the island, and the role of the "native police" give a flavour of the overwhelming, controlling and at times abusive role of the police in the lives of Palm Islanders: in this case, they were operating as guards to the young women. After noting in detail the appalling restrictions imposed on the women, and the quarantining and expropriation of the paltry sums they earned for working, the author of the petition notes that any transgressions (such as stepping past lines intended to impose constraints on where the girls could move outside the dormitory buildings) would result in jail. She then states:Sir, being Minister for Health and Home Affairs, do you consider these rules all above board, or do you think them a little inhuman, which is my point of view. We look to the white officials for advice, help and ***protection***. When we are in trouble we go to our Superintendent and he does try to right our wrong, yet I blame these rules over us girls which make some of them unbalanced and which cause them to break out of the Dormitory and run away.

When one girl runs away the rope is tightened all the more. It is the ones that do try to live by the rules and help the staff on this Island who suffer most. I myself have done my best, but as these rules stand I'm afraid I will break them by running away too.

One girl at this moment has been gone now for a fortnight. When they get her she will get 6 weeks jail or maybe more, on bread and water, but the girl is not at all to blame. Should we get a little more freedom without having the police over us all the time I'm sure the girls will be more contented. This is all I am going to say. I hope you will do something for us. Thanking you. The poor medical facilities on Palm Island were documented in 1944 when, given the infant mortality rate on the island was 15 times the infant mortality rate for Queensland generally at that time, a senior Health Department officer was sent to investigate the facilities and conditions on the island. Dr Kidd summarises the officer's findings, as well as the findings of other Department staff who visited the island around this time in the following terms:He reported hospital practices were so defective that several child patients developed septic sores; the diet was grossly deficient in milk, vegetables, and fruit. He said the resident doctor's belligerent treatment of Aboriginal mothers was a major factor in the non-reporting of illness. (A visiting magistrate confirmed the doctor had struck a female patient but said action against him would not succeed.) Perhaps seeking an

acceptable internal assessment, the department sent the matron from its Cherbourg settlement. She reported the hospital was in a filthy and neglected condition with many patients sleeping on old and soiled mattresses. Children's cots and mattresses were filthy and crawling with cockroaches, the food store rooms were unventilated and full of flies and uncovered slops, and the labor ward was cramped and unhygienic.

(Footnotes omitted). Once again, this summary embellishes somewhat upon the source document. In it, the officer does not state that the diet on the island was "grossly deficient in milk, vegetables, and fruit", although he does recommend that the matron should exercise vigilance to make sure each patient receives an adequate diet. Nevertheless, the document clearly shows the deficiencies in health care and practice that existed on the island. The chief state health officer, Dr Abraham Fryberg, visited the island in July 1945 and gave the following summary of living conditions, which starkly illustrates how Aboriginal people were forced to live. I leave the language in its original form.DEPARTMENT OF ***PUBLIC*** HEALTH, QUEENSLAND

BRISBANE

13th July, 1945.

The Deputy Director-General.

Re Palm Island

As directed I visited Palm Island arriving there on June 15th and leaving Fantome Island on June 19th.

Palm Island was built as the result of a cyclone demolishing the settlement – at the mouth of the Hull River. 150 natives were transferred there and this number has grown to approximately 1200 by –1. natural increase

2. transfer of natives of New Guinea

3. transfer of incorrigibles from all over QueenslandAccommodation

Varies from the type made from pandanus leaves to up to date cottages. The poorest type of hut is occupied by the poorest type of native. As many as five people live in a room 10 x 12 ft. There is ***no*** space for furniture nor is there a kitchen in the poorer type.

Every encouragement should be given to the inhabitants to improve their positions; many of the natives do make something out of their poor cottages. In such cases the authorities should assist them to get a better house. This would give the natives something to strive for and would improve the general morale on the Island.

Kitchens

Only provided in the better type of cottage. Cooking is carried out in the open. Cooking utensils are not provided. Equipment such as stores and pans are bought by natives who are earning money. ***No*** provision of safes to keep food.

Latrines.

Daily pan service. Practically ***no*** latrines are fly-proof. The burial ground is situated at the waterfront a short distance from the jetty. There is a native sanitary squad under the command of a native overseer. At the time of inspection the work for the day had been completed but faeces in big trenches had not been covered. A new burial ground has been selected and will be put into use when a road has been made.

Ablutions.

The sea. ***No*** bath houses as water supply is inadequate.

Laundry facilities. Nil

Water supply

From shallow wells. ***No*** treatment. Hospital has tanks which will not hold water. Iron tanks holding 4470 gallons which originally cost 163;220 are available for 163;75. in Townsville from the Army Disposals Board. The Director of Native Affairs will inspect these tanks when he goes North on his next visit. In the dry season fresh water is in short supply.

Hospital

Consists of a male, female and maternity ward and operating theatre which is only used in extreme urgency. It is an old building and is far too small. It is suggested a new hospital might be erected from the Fantome Island buildings. In fairness to the staff I must report the building was clean. I did not see sufficient of the staff to comment on their efficiency.

Dairy.

The dairy is a worthy institution but the hygiene is of a low standard, even though the utensils are clean. The utensils are stored in the open; the brass strainers are worn out and I was advised brass gauze could not be procured.

A building is required to house the utensils.

The resting yard and bales have an earth floor and in the wet weather become a quagmire. ***No*** drains are provided. The floor of the bales and part of the resting yard should be concreted.

Farm.

There is a super-abundance of vegetables at this time of the year but in the summer they will not grow on account of the heat.

A few acres of land grown tomatoes, sweet potatoes and other vegetables are now under cultivation.

The farm, which is under the supervision of Mr. Sturgess, who is doing an excellent job, is irrigated.

Unfortunately Mr. Sturgess can only give a limited amount of time to it as he has too many other duties.

Medical

A matter of concern on the medical side is the infantile mortality rate, as is seen by the following figures.

The deaths include 12 from prematurity, excluding still births.

Total Deaths – 78.

Regular ante-natal treatment is not carried out. Facilities for child welfare are not provided as a regular thing. Poor health issues continued. In 1973, there was a severe outbreak of gastroenteritis amongst the children on Palm Island, leading to about 40 children being affected and many being hospitalised in Townsville. Doctors treating the children likened them to Biafran children in Africa. State police were permanently stationed on Palm Island from 1968, with one sergeant and one constable. In a 1980 report, Patrick Killoran, the director of the Department of Aboriginal and Islander Advancement, stated that it was "common gossip at Palm Island that the Police Station was totally ineffective", with the station being shut on weekends and police officers taking extended weekends for fishing trips and spending long hours playing chess in ***public*** view while on duty. Killoran also commented that problems were caused by quick promotions within the police force, which resulted in reasonably junior officers being promoted to sergeant positions when posted to Palm Island, quite often leading to personality clashes, culture shock, and other forms of discord between the inexperienced officers and the community. Dr Kidd reports that from the early years of the Palm Island settlement, an Aboriginal community police force played a central role in policing the island. They assisted in controlling ***public*** disorder and drunken violence and in identifying and locating people the state police were looking for in relation to various civil matters. The existence of such a "native" force is apparent from the source documents to which I have already referred. However, Dr Kidd notes that Aboriginal police officers often had difficult relationships with their own communities, and this was reflected in a 1981 report titled 'The Position of Aboriginal Police on Queensland Reserves'. That report also found that the state and Aboriginal police did not operate as a cohesive unit and that Aboriginal police officers were regarded as a separate and inferior agency. Dr Kidd states that:Aboriginal police received ***no*** training, and were limited by poor literacy. Unlike state police who were supplied with a private home, and 'all of the police benefits, allowances, overtime etc', the native police were on call nights, weekends and ***public*** holidays on minimum wages while denied penalty rates, and were housed on Palm Island in a small poorly furnished room behind the cells. These detrimental conditions underlay the lack of job experience expressed in a turnover of 62 workers for the nine positions. Native policing was 'fraught with danger' and their positions often untenable given 'problems of inter-family relationships and long-standing friendships' from childhood. These conflicts would not be faced by a state police officer, who would 'not normally' be assigned to serve 'in the country town of his birth and upbringing.'

(Footnotes omitted.) Dr Kidd reports that a 1991 review of the Community Services (Aborigines) Act 1984 (Qld) revealed that community complaints about the behaviour of state police were extensive and longstanding at that time. The community was frustrated that police were not accountable to them and that there was ***no*** way they could effect changes to inappropriate police behaviours. There has also been a long history of interference with workers' rights on Palm Island, including rights to equal pay. Dr Kidd's report describes how, pursuant to regulations in 1919, every able-bodied person on Palm Island was required to work. However, ***no*** wage was set for government workers. Aboriginal workers usually worked long hours with poor conditions for ***no*** or very little pay. The poor working conditions and unequal pay for Aboriginal workers on Palm Island resulted in a strike in 1957, where all workers (except those providing essential services) ceased work for approximately five days. Some witnesses in this proceeding gave evidence about their parents having been involved in the strike. While new regulations were introduced in 1972 which declared that all Aboriginal workers must be paid an award wage, these regulations did not apply to workers on government reserves such as Palm Island, where payment was labelled a "training allowance", despite many employees having worked for decades. Other legal reforms in the 1970s did not improve conditions for Aboriginal workers. Dr Kidd reports that:After the 1975 ... federal Racial Discrimination Act made it illegal to underpay workers on the basis of race, the Queensland government continued its policy. Correspondence in mid-1978 put the state's profit at the expense of community workers at $3.6 million ($11 million) compared to the state mandatory minimum wage and $6.85 ($21 million) if award wages were paid where due. Finally, in 1986, facing numerous union-funded wage challenges, the Queensland government agreed that award rates would be paid within existing budget levels. Further constructive changes occurred on Palm Island in the 1980s. After the Community Services (Aborigines) Act signalled the transfer of local government functions to community councils after a three-year training period, the Palm Island community Council assumed local government functions in 1986. The local Council gained title to Palm Island under a Deed of Grant in Trust, but at the same time the community

lost the benefit of government infrastructure such as shops, a timber mill and farming equipment. Palm Island's history also manifested itself in continuing socioeconomic disadvantage. Professor Altman and Dr Biddle's report provides some information about the socio-economic circumstances of Palm Islanders at times close to November 2004. Professor Altman and Dr Biddle used ABS census data from 2006 as the basis of their analysis – the 2006 national census being the census closest to 2004. Professor Altman explained this use in his evidence:The way that the census data is presented in community profiles ... is a summation of information for all the individuals on that community that have been counted during the census collection day or period. It depends on which methodology is used, and so what I've, in fact, referred to quite correctly is a – some summary statistics about that community which – which constitutes a summation, and then median information on – on Indigenous and non-Indigenous members of that community.

Yes. The report uses data obtained from the 2006 census. Is that correct?---Yes. I chose to use the 2006 census because I thought this was an appropriate census to use, given that the issues that were under discussion occurred in 2004. I could have used the 2001 census, or the 2006 census, or the 2011 census, but the 2006 census appeared the most proximate.

All right. And do I take from that you considered using the 2001 census, but you thought that was perhaps a little too early in time for 2004; 2006 was closer in time. Is that the thinking?---Yes, it was a lot closer. Yes.

Yes. All right. And did you, in fact, look at the - - -?---Would it – I would add one other thing.

Sure?---Is that experience tells us that census collection is – is continually improving, and so in some ways the later the census one uses, the better, although if I had used 2011 I think that would have been too far away from 2004. In an analysis of the geographic distribution of socioeconomic outcomes for the Indigenous population Australia-wide, Palm Island was ranked 475th out of 531 areas. With 1 being the most advantaged area and 531 the most disadvantaged, this put Palm Island in the 89th percentile, and therefore one of the most disadvantaged Indigenous communities in Australia in 2006. Professor Altman and Dr Biddle commented on the "marked disparity" in 2006 between median individual cash income for Indigenous people aged over 15 years on Palm Island ($216 per week) compared to $911 per week for non-Indigenous Palm Island residents, who were mostly professionals, teachers, police, and health services providers. Professor Altman and Dr Biddle report that the unemployment rate in 2006 for Indigenous people on Palm Island was 17%, compared with 0% for non-Indigenous Palm Island residents, 13.1% for Queensland Indigenous people generally, and 4.7% for Queenslanders generally. The employment/population aged over 15 years ratio (35.7%) and the labour force participation rate (43.1%) for Indigenous people on Palm Island were also low compared to 83.3% and 83.3% respectively for non-Indigenous Palm Island residents, 48.9% and 56.2% respectively for Queensland Indigenous people generally, and 58.9% and 61.8% respectively for Queenslanders generally. Professor Altman and Dr Biddle concluded that:These statistics despite arguments that they inevitably highlight Indigenous deficits because they reflect western norms reflected in social indicators, nevertheless indicate that Indigenous residents of Palm Island are as a group among the most socioeconomically disadvantaged in Australia. Disparities are most clearly evident in a comparison between Indigenous and non-Indigenous residents of Palm Island which can be an acute source of community tension.

But equally compared to Indigenous people elsewhere in Australia, Palm Islanders appear to be relatively badly off (ranking 475 out of 531 regions in 2006) an outcome that cannot just be explained by isolation and locational disadvantage given Palm Island's relative proximity to the city of Townsville.

(Footnotes omitted). In November 2004, the matters which I have described were in the living memory of many residents of Palm Island. In the contemporaneous video evidence adduced in this proceeding, the number of elderly people in the Palm Island community is easily visible. In 2004, people such as Agnes Wotton had personal, lived experience of some of the events, living conditions, and police behavior that is the history of Palm Island. Those people knew, through their parents and grandparents, of the earlier abuses and deprivations inflicted on Aboriginal people on Palm Island, to which I have referred. In November 2004, the children and grandchildren of people such as Agnes Wotton were the young people one sees in the contemporaneous video evidence. The history of the Palm Island community was a living history. Places around the island still went by names which resonated with that

history – many witnesses called the area in which the mall, police station, Council building and store were located "the Mission", because that is where the dormitories were located. The area where Mr Wotton and his family lived is called "The Farm", because that is where, in the early days of forced settlement on Palm Island, a dairy farm was established. The historical experiences of families on the island with the police is informed by the kinds of matters to which I have referred. Police were the ones who acted as guards, who placed locals in jail for minor infringements of rules applying only to Aboriginal people, who sought out those who fled the island and brought them back to be placed in jail. Control and subordination on a racial basis was central to the way this community had always been compelled to function. These matters were part of their lives, not simply entries in the history books and archives. The pattern of arrests for minor infringements was, on the evidence, still occurring in 2004. My overwhelming impression of the (current or former) QPS members who gave evidence in this proceeding was that they knew little or nothing about the history of Palm Island. Most freely admitted this. They also paid ***no*** real attention to the particular history and characteristics of Palm Island and its people in the approach they took to the investigation of Mulrunji's death and their subsequent interactions with local people, with elders and with the Council. Yet it is clear in the contemporaneous video evidence that the palpable sense of powerlessness and injustice felt by people attending the community meetings is connected with the history of Palm Island, and the histories of their own families. If content is to be given to the obligation, contained in sections of the QPS Operational Procedures Manual (OPM) as it applied in November 2004, to consider "cultural needs", then in the case of Palm Island those cultural needs could not possibly be understood or met in any genuine way without a good working appreciation of the racism and oppression that characterised the island's history.

THE PARTIES' COMPETING CONTENTIONS Before descending into the resolution of the significant number of factual and legal issues in this proceeding, it is necessary to make some preliminary comments on the parties' competing contentions on both facts and law, as they were developed in final submissions. It is also convenient to address a number of connected issues, including the scope of the applicants' case on the pleadings, the standard of proof to be applied in assessing the evidence, the nature of the findings I make regarding the conduct of SS Hurley, and the matters that are not in contest between the parties.

The approach I have taken to the parties' competing contentions, as expressed in final submissions It is easy to get lost in the detail of a proceeding such as this, and to pay insufficient attention to the real controversy between the parties. In the present case, and almost despite the detail, the real controversy between the parties, while acute, is not difficult to summarise: see [7]-[12] above. At this point, the approach taken by Allsop J in Baird v Queensland [2006] FCAFC 162; 156 FCR 451 should be recalled. Dealing with issues of ambiguity and lack of clarity in the pleadings in that case, his Honour said at [17]:The pleading is to be understood in its context. It is not to be read divorced from counsel's opening and how the case was otherwise litigated. This is not to say that the pleadings are other than central to understanding what was fought below and thus what can be raised on appeal. But to the extent that context may cure or ameliorate ambiguity or lack of clarity, it is not to be ignored. When his Honour then came to identify the allegations made in relation to s 9 of the RDA in that case, he took the following approach (at [25]-[29]):A number of matters appear to flow from, and can be said in consequence of, the above outline of the presentation of the case. First, read in their context, the amended application and the Consolidated Statement of Claim contain a case based on s 9 of the RD Act not dependent upon any finding that the appellants were employed by the State.

Secondly, the case put forward was in effect that determining and paying the grants in the amounts that were fixed had the effect of at least impairing the enjoyment of a relevant human right (the right to equal pay for equal work, by reference to applicable award rates) because the grants did not permit or did not enable the Church to pay award rates or because the grants effectively determined the amount to be paid in wages by the Church.

Thirdly, the reference to the payments of the grants as the "acts" for s 9 incorporated, from time to time, notions of decisions concerning how the grants were calculated. The primary case of the appellants was to the effect that the State in fact and in practical reality calculated the amount of the wages to be paid in the calculation of the grants. This threw up for consideration, as a central issue in the case, how the grants were calculated and the relationship between the calculation and payment of the grants and the payment of below award-wages.

Fourthly, there was a degree of imprecision and confusion in the identification of the distinction, exclusion, restriction or preference for the purposes of s 9(1) and the relationship of such with race. What can be said, it

seems to me, is that within the pleading and submissions can be found the assertions that the acts of calculating and paying the grants involved taking into account that the funds would be required to fund below-award wages as distinct from award wages and that the calculation of the grants was made on that basis. This occurred, so it was said, because the ultimate recipients of the below-award wages were Aboriginals.

Fifthly, in fairness to the pleader, some of the difficulty in enunciating how the case fits into s 9 on the hypothesis that the State was not the employer of the appellants can be seen to flow from the almost elusive simplicity of s 9(1), the content of which can be described as “vague and elastic”: see Gibbs J in Gerhardy v Brown [1985] HCA 11; (1985) 159 CLR 70 at 86. Nevertheless, what was thrown up for debate and consideration were the calculation of the grants, the relationship between the amounts of the grants fixed upon and paid, the payment of below-award wages, the reasons why the appellants were paid below-award wages, and why the amounts of the grants were calculated as they were. I have extracted these paragraphs in their entirety to make good the following proposition. Although, especially in a large and wide-ranging proceeding such as this, it is important to hold a party to the party’s ‘case’ (including, as a cornerstone, the pleadings), in order to do justice between the parties, the Court must strive to ascertain, as Allsop J put it, what is “thrown up for debate and consideration” by the case as it has been framed. At times, the respondents’ approach in final submissions was, in my opinion, too narrow and sought to have the Court quarantine and assess in isolation the applicants’ factual allegations. In my opinion, the approach taken by the applicants in final submissions remained broadly consistent with their pleadings and properly grouped the conduct of QPS officers into four categories. Within each category there may be several “acts” for the purposes of s 9 of the RDA, but it is appropriate to deal with the applicants’ allegations in a more holistic way than the respondents’ submissions suggested. For example, the respondents submitted, on the basis of the Full Court’s decision in Iliafi v The Church of Jesus Christ of Latter-day Saints Australia [2014] FCAFC 26; 221 FCR 86 at [44], that there were a number of “elements” to s 9(1), and in their written submissions, set out what they said the applicants had to prove in the following way:(a) the officer did an act;

(b) the act:-(i) involved a distinction, exclusion, restriction or preference;

(ii) based on race, colour, descent or national or ethnic origin; and(c) the act:-(i) had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing of a right of the applicants;

(ii) which right was a human right or fundamental freedom in the political, economic, social, cultural or any other field of ***public*** life. It is correct that this is how Kenny J (with whom Greenwood J and Logan J agreed) in Iliafi set out what the appellants had to prove in the case before her. I do not understand this paragraph of her Honour’s reasons as doing more than that. In particular, I do not read her Honour’s reasons as suggesting that the division of s 9(1) into a series of smaller elements is a necessary part of s 9(1). In Iliafi, the respondent, the Church of Jesus Christ of Latter-day Saints Australia, had discontinued its Samoan-speaking worship groups so that the appellants were ***no*** longer able to worship publicly as a group in their native Samoan language at services conducted by the Church. As Kenny J observed at [46] the central issue was whether or not the appellants had in fact identified a right that could be properly described as “a human right or fundamental freedom in the political, economic, social, cultural or any other field of ***public*** life”, within the meaning of s 9. Her Honour held that the three rights in Arts 5(d)(iii), (vii) and (viii) of the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD) neither separately nor together gave rise to a right to worship publicly as a group in the appellants’ native language at the Church’s services of ***public*** worship. Therefore, the appellants failed to establish that there was a “human right or fundamental freedom ... of a kind referred to in Article 5 of the Convention” that engaged s 9: at [110]. There was ***no*** dispute in Iliafi about what constituted the “act” for s 9 purposes. The appellants submitted that the “act” was the Church’s decision to cease Samoan language services, or alternatively to require services to be conducted in English (see [21]), and the Full Court did not have cause to comment on the correctness of that characterisation in its reasons. In the present case, the respondents’ submissions respond to the applicants’ case at the level of itemised conduct of each individual QPS officer. Such a narrow and granular focus is not always required. The applicants’ case, as disclosed through the pleadings and final submissions, takes the conduct of QPS officers at both a broad and a particular level. The applicants’ factual contentions traverse a wide range of conduct by QPS officers. Sometimes the contentions do descend into great detail, and examine police conduct at quite a

minute level, including by copious references to sections of the OPM and alleged non-compliance by QPS officers with those sections. In circumstances such as these, it is likely (and has proven to be the case in my opinion) that contraventions of s 9 will not be made out at such a detailed level, measuring each individual piece of conduct against s 9. It is also true that where there is a serious allegation of individual conduct it may well sustain a contention that the conduct contravenes s 9, and this has also proven to be the case in this proceeding. The detail in the applicants' allegations and arguments tended to overwhelm the general narrative and thrust of their case. To that extent, the respondents cannot fairly be criticised for taking the plethora of allegations of individual conduct and dealing with them one by one. Rather, the point I am making is that a more holistic approach to s 9 is required, if it is to be properly understood. Prior to final submissions, and in order to ascertain what was really "thrown up for debate and consideration", I asked the parties to provide a summary, limited to 3 pages, of their contentions on the specific contraventions of the RDA alleged by the applicants (with cross-references to the pleadings and submissions). This was to encourage closer focus on how it was that conduct of QPS officers was said to contravene the RDA, rather than how it was said to be generally substandard, or non-compliant with various procedural requirements such as those set out in the OPM. Those summary documents proved most helpful in re-focusing the parties' arguments on contraventions of the RDA and in identifying the principal conduct impugned by the applicants. In that regard, I note that the applicants pleaded that the second respondent, the Commissioner, had a general "prescribed responsibility" pursuant to subs 4.8(1) and (2) of the Police Service Administration Act 1990 (Qld) (PSA Act) for the efficient and proper administration, management and functioning of the QPS, including its "priorities" and the conduct and discipline of its members. However, in final submissions the applicants did not press this as an independent ground of liability, focusing instead on the actions of individual officers for whose conduct the first respondent is vicariously liable.
Two aspects of the legal contentions There are two aspects of the legal contentions which should be summarised here. The first is the nature and scope of the general legal duties and responsibilities said by the applicants to be applicable to the conduct of the police officers during the events in November 2004. The second is the parties' respective contentions about the operation and application of s 9 of the RDA.

Nature and scope of the legal duties of QPS officers The applicants contend the impugned conduct of QPS officers should be viewed through the prism of the general legal duties and responsibilities of police officers, at an individual and a systemic level, to members of the Queensland community whether individually or in relation to the whole community. These duties are identified by the applicants as having their source in the common law and the provisions of the PSA Act, read with the OPM and the QPS Human Resource Management Manual (although the Manual barely featured in evidence or submissions). As I develop below, many of the applicants' allegations identified non-compliance by QPS officers with their duties as the "distinction" involved in their conduct for the purposes of s 9. As the respondents submit, the applicants did not plead any common law duties informing or governing the conduct of QPS officers in the events in November 2004. In any event, it is difficult to see what the existence of common law duties (assuming some could be identified) could add to the wide-ranging duties imposed on the QPS officers by, and pursuant to, statute. It may well be that the statutory functions and powers of QPS officers operate "in the milieu of the common law" (see Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59; 200 CLR 1 at [26] (Gaudron J)) but the applicants did not develop any submissions about the content of that "milieu". The respondents admit that at all material times the functions of the QPS included those set out in s 2.3 of the PSA Act, namely:(a) the preservation of peace and good order—(i) in all areas of the State ...(b) the ***protection*** of all communities in the State and all members thereof—(i) from unlawful disruption of peace and good order that results, or is likely to result, from—(A) actions of criminal offenders;

(B) actions or omissions of other persons;(ii) from commission of offences against the law generally;(c) the prevention of crime;

(d) the detection of offenders and bringing of offenders to justice;

(e) the upholding of the law generally; ... The respondents also accept that those officers involved in the investigation into Mulrunji's death had the following legal obligations:(a) to expeditiously conduct an impartial investigation;

(b) to perform their duties in such a manner that ***public*** confidence and trust in the integrity and impartiality of the QPS is preserved; and

(c) to perform their duties impartially and in the best interests of the community of Queensland without fear or favour. These obligations can be described as a synthesis of what is found in s 2.3 of the PSA Act, ss 2.5.1 and 2.5.3 of the OPM (set out at [166] and [167] below), and a range of obligations imposed by the QPS Code of Conduct. Although the respondents contended in their defence that the Code of Conduct was not legally enforceable, the concession described at [77] above recognises what is inherent in s 2.3 of the PSA Act. Although this is expressed in the respondents' submissions by reference to the investigation into Mulrunji's death, in my opinion there can be ***no*** meaningful distinction between the existence of those obligations in relation to a death in custody, and the existence of those obligations in relation to the subsequent conduct of the QPS on Palm Island until approximately 28 November 2004 (which is the end point of the applicants' allegations). In other words, the requirement to act impartially which the respondents accept attached to the investigation of Mulrunji's death is a general requirement to act impartially attaching to all relevant conduct of QPS officers. I did not understand the respondents' submissions to cavil with that proposition, although senior counsel for the respondents did submit that the way the "impartiality duty" was pleaded was something of an artificial construct. I agree with that submission. The important point, however, is that, in their conduct as police officers in all circumstances (for example, during an investigation, during ***public*** policing duties, when searching for and apprehending persons suspected of committing offence, when detaining suspects, and when dealing with the general ***public*** and communities in relation to law and order issues) it is clear that QPS officers, like all other police officers, have a duty to act in the manner described at [77] above. The applicants submitted the "impartiality duty", as they described it, could be approached from the standpoint of the authorities on apprehended bias (Isbester v Knox City Council [2015] HCA 20; 255 CLR 135)and procedural fairness (Annetts v McCann [1990] HCA 57; 170 CLR 596), and then also referred to Beckett v State of New South Wales [2015] NSWSC 1017, which is a malicious prosecution case. The respondents also referred to Isbester, mostly to submit it was of little assistance. This is one of several areas in which the parties' submissions did not assist the Court. Isbester is a decision dealing with apprehended bias as a component of the rules of procedural fairness in the exercise of a statutory power (to destroy a dog), and dealing in particular with the question whether a person who has previously performed a role as an "accuser" or "prosecutor" can be involved in the making of a decision. The circumstances of Isbester are far removed from the circumstances of the present proceeding. Beckett is a case to which I return later in these reasons in relation to damages. I outline the circumstances of Beckett at [1751] and [1763] below. Like most successful malicious prosecution cases, Harrison J recognised there needed to be a finding that a police officer (or prosecutor, but both exercising ***public*** powers to maintain the rule of law) in commencing or continuing a prosecution did so for a dominant purpose other than the proper invocation of the law – namely, an illegitimate or "oblique" motive: see A v New South Wales [2007] HCA 10; 230 CLR 500 at [91] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ). Although the language of impartiality is not generally used in the authorities dealing with malicious prosecution, impartiality is plainly an underlying premise in the proper exercise of prosecutorial discretion. The role of choice, or discretion, in the performance of police functions and the exercise of police powers on a day-to-day basis has been the subject of considerable commentary: see S Bronitt and P Stenning, 'Understanding Discretion in Modern Policing' (2011) 35 Crim LJ 319 and the sources to which they refer. Like other ***public*** powers and functions (and especially so where they affect liberty or involve coercion) they must be exercised reasonably, rationally and fairly: Minister for Immigration and Citizenship v Li [2013] HCA 18; 249 CLR 332 at [14], [23] (French CJ), [48], [64] (Hayne, Kiefel and Bell JJ), [88]-[89], [92] (Gageler J). The Supreme Court of Canada put in this way in Beaudry v The Queen [2007] 1 SCR 190 at [35]-[39]:There is ***no*** question that police officers have a duty to enforce the law and investigate crimes. The principle that the police have a duty to enforce the criminal law is well established at common law: R. v. Metropolitan Police Commissioner, [1968] 1 All E.R. 763 (C.A.), per Lord Denning, M.R., at p. 769; Hill v. Chief Constable of West Yorkshire,[1987] UKHL 12; [1988] 2 All E.R. 238 (H.L.), per Lord Keith of Kinkel; P. Ceyssens, Legal Aspects of Policing (looseleaf ed.), vol. 1, at pp. 222 et seq.

Moreover, this principle is codified in s. 48 of the Police Act, R.S.Q., c. P13.1: The mission of police forces and of each police force member is to maintain peace, order and ***public*** security, to prevent and repress crime and,

according to their respective jurisdiction as set out in sections 50 and 69, offences under the law and municipal bylaws, and to apprehend offenders.In pursuing their mission, police forces and police force members shall ensure the safety of persons and property, safeguard rights and freedoms, respect and remain attentive to the needs of victims, and cooperate with the community in a manner consistent with cultural pluralism. Police forces shall target an adequate representation, among their members, of the communities they serve.Nevertheless, it should not be concluded automatically, or without distinction, that this duty is applicable in every situation. Applying the letter of the law to the practical, reallife situations faced by police officers in performing their everyday duties requires that certain adjustments be made. Although these adjustments may sometimes appear to deviate from the letter of the law, they are crucial and are part of the very essence of the proper administration of the criminal justice system, or to use the words of s. 139(2), are perfectly consistent with the "course of justice". The ability — indeed the duty — to use one's judgment to adapt the process of law enforcement to individual circumstances and to the reallife demands of justice is in fact the basis of police discretion. What La Forest J. said in R. v. Beare, [1988] 2 S.C.R. 387, at p. 410, is directly on point here:Discretion is an essential feature of the criminal justice system. A system that attempted to eliminate discretion would be unworkably complex and rigid.Thus, a police officer who has reasonable grounds to believe that an offence has been committed, or that a more thorough investigation might produce evidence that could form the basis of a criminal charge, may exercise his or her discretion to decide not to engage the judicial process. But this discretion is not absolute. Far from having carte blanche, police officers must justify their decisions rationally.

The required justification is essentially twofold. First, the exercise of the discretion must be justified subjectively, that is, the discretion must have been exercised honestly and transparently, and on the basis of valid and reasonable grounds (reasons of Chamberland J.A., at para. 41). Thus, a decision based on favouritism, or on cultural, social or racial stereotypes, cannot constitute a proper exercise of police discretion. However, the officer's sincere belief that he properly exercised his discretion is not sufficient to justify his decision.

Hence, the exercise of police discretion must also be justified on the basis of objective factors. I agree with Doyon J.A. that in determining whether a decision resulting from an exercise of police discretion is proper, it is important to consider the material circumstances in which the discretion was exercised. ... It was not in dispute between the parties that QPS members, like other police officers around Australia, had special responsibilities and obligations in relation to the death of any person in police custody. There was ***no*** dispute that the principal source of those responsibilities and duties for QPS officers was the OPM at ss 1.17 and 16.24. Clause 7.2 of the Queensland Coroner's Guidelines confirmed the particular sensitivities of such circumstances:Deaths in custody warrant particular attention because of the responsibility of the state to ***protect*** and care for people it incarcerates, the vulnerability of people deprived of the ability to care for themselves, the need to ensure the natural suspicion of the deceased's family is allayed and ***public*** confidence in state institutions is maintained. The respondents also accepted that there was a suite of special considerations about the treatment of Aboriginal people in custody, arising out of the recommendations of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC), which I address at [129] below, and out of the reaction of state and federal governments to those recommendations. Where the parties differed was on the significance (if any) of these matters to the allegations made by the applicants. The applicants submitted that those police officers present on Palm Island after Mulrunji's death and with responsibility for the investigation, and for dealing with Mulrunji's family and the wider Palm Island community, should have known more than they appeared to have known about recommendations in the RCIADIC report. The applicants also submitted that QPS officers should have the acted consistently with those recommendations in the way they discharged their duties during the events in November 2004. However, once again, the content of such responsibilities or obligations arising from the RCIADIC report was not addressed by the applicants. The police officers who gave evidence disclosed little interest in the RCIADIC recommendations and little awareness of how the matters discussed by the Royal Commission should affect their day-to-day policing where any Aboriginal person dies in custody or where there is a risk of that occurring, especially in communities consisting overwhelmingly of Aboriginal people. This attitude is one of the circumstantial matters contributing to the view I have formed that the conduct of QPS officers in the investigation into Mulrunji's death involved distinctions that were based on race.

Parties' arguments on s 9 of the RDA There are some differences between the parties on the construction and operation of s 9, although the larger area of dispute relates to the application of s 9 to the facts. I have set out my findings on the construction and operation of s 9 at [508] to [562] below. As I have noted above, while s 9(1) can be broken down into a series of elements or components, it is important not to lose sight of the whole, and to read the provision accordingly: see Collector of Customs v Agfa-Gevaert Limited [1996] HCA 36; 186 CLR 389 at 399-400 (Brennan CJ, Dawson, Toohey, Gaudron and McHugh JJ), endorsing comments made by Oliver LJ in Exxon Corporation v Exxon Insurance Ltd [1982] Ch 119 at 144; and see Baird at [37], [61] (Allsop J). The respondents accept, in general, that the applicants have alleged a series of "acts" (including omissions – see RDA s 3(3)) for the purpose of s 9 which, whether taken individually, or in groups, or cumulatively, can be assessed in terms of whether they contravene s 9. There is broad agreement about the construction of the terms in the phrase "distinction, exclusion, restriction or preference" in s 9 and the proposition that whether these matters exist must be determined objectively:Obieta v New South Wales Department of Education and Training [2007] FCA 86 at [209] (Cowdroy J). The parties are also agreed on the correct approach to the causal element of "based on" in that section. An act will be based on race if it is done by reference to the race of a person and does not require the stronger causal relationships that it be done "because of" or "by reason of" race: Macedonian Teachers' Association of Victoria Inc v Human Rights and Equal Opportunity Commission [1998] FCA 1650; 91 FCR 8 at 29-30 (Weinberg J). The parties are agreed that the same approach applies to omissions. There is broad agreement between the parties about the differences of the words "purpose" and "effect" in s 9, and the proposition that the phrase "on an equal footing" in s 9 suggests a comparison with how others enjoy the identified rights: Australian Medical Council v Wilson [1996] FCA 1618; 68 FCR 46 at 63 (Heerey J), and see the additional comments of Black CJ at 48 and Sackville J at 81. There is some contest between the parties about the nature and content of the human rights on which the applicants rely, and which they contend have been nullified or impaired by the respondents' conduct. The applicants refined, over the course of the proceeding, the human rights on which they rely. At the time of final submissions, they relied on seven human rights, namely:(a) to equality before the law and equal ***protection*** of the law (Art 26 of the International Covenant on Civil and Political Rights (ICCPR), and contended to be also a right in customary international law);

(b) to equal treatment before organs administering justice (ICERD Art 5(a));

(c) to access ***public*** services (ICERD Art 5(f));

(d) to enjoyment of property without unlawful interference (contended to be a customary or general international law right);

(e) not to be subjected to unlawful interference with privacy, family or home (ICCPR Art 17);

(f) to liberty and security of person (ICERD Art 5(b) and ICCPR Art 9); and

(g) not to be subjected to inhuman or degrading treatment (ICCPR Art 7). As I understand their submissions, the respondents submit that Arts 5(a) and 5(f) of the ICERD are not engaged on the facts. As to Art 5(b) of the ICERD and Arts 7, 9 and 17 of the ICCPR (which apply to the subgroup members only) the respondents submit those rights, properly construed, have not been impaired. The respondents also submit, referring to Maloney at [317] and [336] (Gageler J), that the applicants cannot invoke Art 26 of the ICCPR (the equality before the law right, including in any form it exists in customary international law). They submit that, since s 9 is a means by which the objective expressed in Art 26 is achieved, to construe Art 26 as part of the content of s 9 involves "unproductive circularity". Finally, they submit that the applicants should not be permitted to rely on any general right to enjoy property as it is outside the applicants' pleaded case and, in any case, reliance on such a right is unnecessary because the applicants' complaints with respect to interference with their homes is covered by Art 17 of the ICCPR.

The applicants' s 9 contentions applied to the facts I have outlined the three sets of issues on the pleadings, only two of which were pressed, at [7]-[12] above. On the first set of issues (the events following Mulrunji's death, between 19 and 24 November 2004), the applicants identify four categories of conduct which they contend constitute unlawful racial discrimination. Those four categories are: the compromise of the impartiality of the

investigation into Mulrunji's death; the failure to provide support to Aboriginal witnesses; the manner in which QPS officers completed a "Form 1", containing information for the coroner, and the conduct of the autopsy; and the failure to meet the cultural needs and expectations of the Palm Island community. On the second set of issues (the events immediately following the burning down of the police station, between 22 and, broadly, 28 November 2004), the applicants identify six categories of conduct which they contend constitute unlawful racial discrimination. Those six categories are: the departure of SS Hurley from Palm Island; failure by QPS officers to communicate with the local community and defuse tensions; the making and subsequent revocation of an emergency declaration under the PSP Act; the deployment of SERT officers; the arrests of those suspected of involvement in the burning down of the police station and the unrest on the island; the entries onto the properties and into the houses of those suspects; and a sixth category of a collection of other more specific instances of conduct the applicants allege to have been racially discriminatory in contravention of s 9 of the RDA. In their summary of final submissions, the applicants re-organised these issues into four, broadly chronological, categories: the investigation into Mulrunji's death; the 'intervening week' claim; the emergency declaration claim; and the SERT claim. All these matters fell within their pleadings. In that part of my reasons below where I make findings on the contested allegations (the Resolution section, beginning at [717] below), I deal with the fact finding under each of the four categories identified by the applicants in final submissions, read with the pleadings.

Whether certain claims by the applicants are within their pleaded case In final submissions, the respondents identified two areas where they contended the applicants' submissions strayed outside the pleaded case. The first was the applicants' submission that the conduct of QPS officers could be examined cumulatively, or as a whole, in relation to each of the four categories I have set out at [5] above. The respondents submitted there was ***no*** pleading that alleged a contravention of s 9 by the conduct in each of the four categories when viewed as a whole or cumulatively. In my opinion it is clear that the applicants put their claim on alternative bases. It is correct that they pleaded that individual activities constituted contraventions of s 9. Many of those claims must fail, for reasons I give elsewhere, because when the conduct of QPS officers is dissected in that way, then as dissected ***no*** contravention of s 9 is made out. However, the applicants also relied on the conduct of QPS officers in a more cumulative way. That is apparent from the descriptions of the "QPS Failures" in [244] and the "Further Failures" in [309] of the third further amended statement of claim, in which various allegations are grouped under each of those headings. The summary of final submissions by the applicants does not, in my opinion, constitute a new case based around four categories of contraventions of s 9 presented in a new, cumulative way that is not reflected in their pleaded case. The grouping found in final submissions is apparent from the descriptions of "QPS Failures" and "Further Failures" in the third further amended statement of claim. What the applicants then did in their summary of final submissions was to attempt to identify – by reference to the chronology of events, the pleadings and the submissions – how it was said that the impugned actions and decisions of QPS officers contravened s 9 of the RDA. This is what I had asked them to do in their summary and by undertaking that task the applicants have not changed or altered their fundamental case. In their summary document, the applicants put their case directly in the terms of s 9 of the RDA, which is what I had asked them to do. I do not accept the respondents' submissions that the applicants have changed their case. The second area was the nature of the challenge to the conduct of the SERT officers on 27 and 28 November 2004. The respondents submitted there was, first, ***no*** s 9 challenge to the decision to deploy SERT officers to Palm Island and, second, ***no*** s 9 challenge to the decision to use SERT officers to effect the arrests of the 11 individuals over 27, 28 and 29 November 2004. The applicants' senior counsel in final submissions expressly disclaimed an argument based on any decision to deploy SERT to Palm Island, as distinct from what happened once SERT was deployed to Palm Island. However, she maintained, as did the applicants' summary of final submissions, that the pleadings did disclose claims about the use of SERT to effect the arrests, entries and searches of the houses of the applicants and the members of the subgroup. As will be apparent from the part of my reasons dealing with these issues, I accept that claim was fairly raised on the pleadings. Adapting the language of Art 5(f) of the ICERD, senior counsel for the applicants submitted that the applicants have "focussed more on the way the services were delivered on the island once they were there". She confirmed this included a claim that SERT should not have been engaged to perform the arrests and should not have been instructed to go into the houses and apprehend individuals. I have some sympathy for the respondents' submissions. I too found it difficult to keep comparing the way the case about SERT was put in submissions, and indeed the way the cross-examination was conducted, with the pleaded case. However, in my opinion the answer to this difficulty lies in a somewhat cumbersome and unwieldy pleading, rather than any change of case by the applicants. I turn to explain

why. The pleadings are structured in the following way. A series of "acts" for the purposes of s 9 are pleaded, divided into three categories as I have said, one of which (the systemic failures) was abandoned. That left the series of acts called the "QPS Failures" and the "Further Failures". In the latter series, one finds a sequence of pleaded paragraphs dealing with the formulation of an "action plan" about the use of SERT (from [279] onwards). This included allegations (at [281]) about the nature and presentation of SERT. The applicants then make a series of allegations about what SERT did on Palm Island (at [287]). The allegations of conduct which the applicants later characterise as unreasonable and disproportionate is set out at [288] and [290]. Relevantly, then at [300]-[306] there are allegations about the unlawfulness of the arrests, and the entries and searches of houses. This conduct (the unlawful arrests and the unlawful entries) is then later alleged to be "acts" for the purpose of s 9 (at [309]). Part of the difficulty arises because of the pleadings' focus on the description of "unlawful" arrests and "unlawful" entries. As I note elsewhere, this is an unhelpful focus. But there is still ***no*** doubt that the conduct being impugned is what the SERT teams were used to do, in effecting the arrests and conducting the entries and searches, even if the shorthand phrase "the unlawful arrests" and the "the unlawful entries and searches" is unhelpful. It is then alleged (at [312]), amongst other allegations, that the respondents "did not perform their duties in the best interests of the community of Queensland, without fear or favour, and according to the same standard as those QPS services were supplied to other residents of Queensland who did not reside in a predominantly Aboriginal community, whether or not that community was geographically located in a remote location" and "acted so as to create the appearance of an excessive and unwarranted response to the events on Palm Island of 26 November 2004, and thereby brought the QPS into disrepute". These pleadings are not without difficulty, but in my opinion when considered with the submissions made on behalf of the applicants from well before the trial, it is clear that a cornerstone of the applicants' case is that the employment of SERT officers (with all that goes with a SERT operation, as pleaded) to effect the arrests, and to enter and search houses for suspects, was unreasonable and disproportionate and was only undertaken because Palm Island was an Aboriginal community. Neither the pleadings nor the written submissions focus on the decision to deploy SERT. Indeed, there were significant gaps in the evidence about which QPS officer or officers made that decision. I do not consider that the respondents have suffered any unfairness because of the way the case was conducted by the applicants and drawn together in final submissions. It was clear from the outset that the manner and conduct of the arrests, entries and searches was a major feature of the applicants' case. Indeed it was the reason for the creation of the subgroup. The definition of the subgroup in the further amended originating application is:The Applicants also represent a sub-group of group members, being persons who either: were apprehended or arrested by, or in the presence of SERT or PSRT officers in connection with the events on Palm Island on 26 November 2004;b. were present at the arrests referred to in the preceding sub-paragraph; otherwise witnessed or were present during the Raids (as defined in the 3FASC); and/or had their homes entered into, or their property otherwise interfered with, by officers of the QPS during the Raids without their consent. The evidence in chief and cross-examination also revealed a focus on the manner of the arrests, entries and searches. The respondents clearly understood this since they called three SERT officers as witnesses, and addressed in their evidence through DI Webber the connection between the deployment of SERT and the emergency declaration. I consider the respondents were on notice about how the use of SERT would be challenged as a contravention of s 9. It was always couched as a disproportionate and unreasonable use of force. The applicants' opening submissions, filed and served before trial, stated (at [20]-[24]):Part J also describes the police response to the "Riot", whereby an emergency situation was declared, and the island was physically cut off from the rest of Australia and placed under a regime of quasi-martial law, including "riot squad" (PSRT) and "counter-terrorism" (SERT) police officers marching through the streets in full uniform, and going house to house arresting people in front of their children—a spectacle that would be quite unimaginable in, for example, a residential suburb of Brisbane. Yet this was all done without the Palm Island community or even the local council being advised that an emergency situation had been declared, what that entailed, and for how long it was expected to remain in place.

As Part K of the 3FASC alleges, the emergency situation allowed the police to bypass all of the usual checks and balances on police behaviour. For example, when entering a person's home to arrest them as part of a carefully planned and executed police operation, such as the operation on Palm Island on 27 November 2004, the ordinary protocol would be for the police to first obtain a warrant to enter the property and a warrant for the person's arrest. As Deane J further stated in Donaldson, 126: "It is plainly of critical importance to the existence and ***protection*** of personal liberty under the law that the circumstances in which a police officer may, without judicial warrant, arrest or

detain an individual should be strictly confined, plainly stated and readily ascertainable." On Palm Island on 27 November 2004, however, the police used the pretence of the "emergency situation" to excuse themselves from obtaining warrants. This meant that there was ***no*** evidence compiled and presented to a judge to ensure the validity of the entry and arrest, and the entire exercise thereby becomes less transparent and more questionable, regardless of some of the arrests resulting in convictions (and others not).

Other actions of the QPS during and immediately after the emergency situation also contributed to the appearance of quasi-martial law, such as the commandeering of the Catholic school's bus, and the fact that all transport to and from the island was cut off unless it had the blessing of the police.

The Respondents have pleaded that the visible police presence was created in order to "reassure residents that the police were present on the island" and "to ***protect*** the community from unlawful disruption of peace and good order" (Defence:[206(h)], see also [225(c)]). The suggestion of residents of Palm Island being at once intimidated and "***protected***" by the authorities invokes the island's sorry history. Also familiar is the Respondents' attempts to demonise the Palm Island community, including a focus on the local residents' supposed possession of "sticks and spears" or "bladed weapons" and other implements and the use of the SERT team to raid the Sub-Group's houses, in circumstances where SERT officers are trained to presume that people present a threat until proven otherwise.

The Applicants define the above acts and omissions as cumulatively forming the "Further Failures". As in the claim concerning the QPS Failures, the Applicants' claim is not necessarily contingent on the conduct of the police being shown to have been unlawful in an administrative law sense, but rather that, because of the nature of the community on Palm Island, the ordinary rules were simply not followed and the community was not policed as it otherwise would have been. On this basis, the Applicants allege a breach of RDA s 9(1).
(Italics in original.) Finally, one of the common questions in relation to the whole group has always been:whether members of the Queensland Police Service responded unreasonably and/or unlawfully to the riots on Palm Island in November 2004; This can only be understood as a reference to the manner in which SERT was used to effect the arrests and conduct the entries and searches. Accordingly, I do not accept the respondents' second submission regarding the way in which they contend the applicants have changed their case.

Proof Two features of this proceeding were, first, the patchiness of the evidence relied upon by both the applicants and the respondents and, second, the patchiness of references in submissions to the evidence which was relied upon. There has been a great deal of material accumulated about the events of November 2004 and it is variously located in court records (including criminal prosecutions and appeals, and High Court proceedings), coronial records (and appeals from coronial inquiries), internal police inquiries and inquiries of the Queensland Crime and Misconduct Commission (CMC). Some of the witnesses before me were in the unenviable position of having given evidence about these events on several prior occasions. It often appeared that the legal representatives, and indeed the witnesses, knew a great deal more about the context and extent of aspects of the evidence than the Court was privy to. The forensic choices made by the parties and their legal representatives about the nature and extent of the evidence adduced in this proceeding does have consequences for various issues to be determined. Where appropriate, I set out those consequences in the section of these reasons where I deal with the issues affected. For example, findings I have made about individual officers can only be based on the evidence before the Court. If there were other, or more detailed, explanations for their conduct and attitudes, evidence of those explanations was not adduced. Further, the patchiness with which the parties respectively referred to the evidence which was tendered also means the court was left either without much guidance about the specific use to which certain evidence should be put or, as to some of the evidence, without guidance about the content of the evidence. The video evidence is a good example in the latter category. ***No*** comprehensive attempt was made to provide the court with information enabling it to identify all persons speaking in each video, to take but one issue. Mr Wotton was asked in evidence in chief to identify some people in some videos, but it was far from comprehensive. ***No*** agreed facts were tendered on these matters. Many people who played central roles in the events which are the subject of the applicants' allegations were not called to give evidence. With one notable exception (Ms Erykah Kyle), ***no*** explanation was given for these omissions. Again, those forensic choices may have

consequences for the parties in the Court's fact finding. Both parties accepted the relevance of the terms of s 140 of the Evidence Act which provides:Civil proceedings: standard of proof

(1) In a civil proceeding, the court must find the case of a party proved if it is satisfied that the case has been proved on the balance of probabilities.

(2) Without limiting the matters that the court may take into account in deciding whether it is so satisfied, it is to take into account:(a) the nature of the cause of action or defence;

(b) the nature of the subject-matter of the proceeding; and

(c) the gravity of the matters alleged. The Full Court in Ashby v Slipper [2014] FCAFC 15; 219 FCR 322 at [71] noted that s 140(2) reflects the common law as stated in Briginshaw v Briginshaw [1938] HCA 34; 60 CLR 336. The parties both accepted, however, that neither the matters in s 140(2) nor the common law approach in Briginshaw create any third standard of proof between the civil and the criminal, and the standard remains proof on the balance of probabilities: see Neat Holdings Pty Ltd v Karajan Holdings Pty Ltd [1992] HCA 66; 110 ALR 449 at 449-50 (Mason CJ, Brennan, Deane and Gaudron JJ); Qantas Airways Ltd v Gama [2008] FCAFC 69; 167 FCR 537 at[110] (French and Jacobson JJ) (Qantas Airways v Gama). I accept that the applicants' allegations against the respondents can be described as "serious". To allege that individuals performing ***public*** functions and exercising ***public*** powers did so on the basis of race is to make an allegation that reflects poorly upon those individuals. To allege that police officers, who have sworn to uphold the law, have contravened the law, is a matter of significance. I accept that these features of the applicants' case require the Court to be mindful of the three factors set out in s 140(2) of the Evidence Act. That said, the "seriousness" of the circumstances in this case is not one-sided. A young man died in police custody, having entered that custody apparently active and well just under an hour earlier. A community lost that young man, and a family lost a loved one. A significant number of people lost their liberty in the aftermath of protests over his death when those protests erupted out of control. Some people lost their liberty for a long period of time and were separated from their communities and their loved ones. Some of the families involved were torn apart by these events. Young children, men and women, including a pregnant woman, were terrified by armed masked men charging into their houses. A community was placed under police control in a way which resembled a war zone, with SERT and specialised riot officers, as well as other police officers and dogs, overwhelming the island with helicopters buzzing overhead. All these matters are also serious. The respondents contended that the applicants "must establish a reasonable and definite inference that the acts complained of were based on race". The respondents' adjectives correctly recognise what is implicit in the drawing of inferences by a court. An inference drawn to make a finding of fact must be one that is reasonably available on the evidence and capable of being expressed with clarity: Jones v Dunkel[1959] HCA 8; 101 CLR 298 at 305 (Dixon CJ), 306 (Kitto J); Fuller-Lyons v New South Wales [2015] HCA 31; 89 ALJR 824 at [46] (French CJ, Bell, Gageler, Keane and Nettle JJ); Communications, Electrical, Electronic, Energy, Information, Postal, Plumbing & Allied Services Union of Australia v Australian Competition and Consumer Commission [2007] FCAFC 132; 162 FCR 466 at [70]- [71] (Weinberg, Bennett and Rares JJ). An inference will not be reasonably available if it rests upon "mere conjecture": R v Baden-Clay [2016] HCA 35;90 ALJR 1013 at [47] (the Court), quoting Peacock v The King [1911] HCA 66; 13 CLR 619 at 661. Most findings of unlawful discrimination, including those arising from a provision such as s 9 with its formula "based on race", will be based on inferences drawn from the evidence. Seldom is it the case that there is either an admission of the racial basis for conduct, or direct evidence of that basis. Some of the examples that could be given – a racially-based sign outside a cinema – are easy, but not especially realistic examples of direct evidence. In most cases dealing with a course of human conduct, the picture will be more complex, and the drawing of inferences will be required. All the more so when there are, as here, multiple actors. Where I have drawn inferences in reaching my conclusions in this proceeding, I am satisfied they are reasonably available on the evidence and I have sought to express clearly the inference I have drawn. It is appropriate here to say something about the parties' respective reliance on findings made by other bodies, and individuals, about the events of November 2004 on Palm Island. I have set out those other reports and inquiries at [397] below. During the course of the trial when the use of these other findings arose, senior counsel for each of the parties accepted the findings or conclusions in the respective reports could not be adopted by the Court as findings in this proceeding.

Nevertheless, in final submissions the course disclaimed during the trial was precisely what the applicants and the respondents urged upon the Court. Broadly speaking, the respondents urged the Court to accept (and adopt, implicitly or expressly) the correctness of the findings and approach of DC Rynders in the 'Report in Response to the "CMC Review of the Queensland Police Service's Palm Island Review"'. Conversely, the applicants urged the Court to do the same with the findings of Deputy Chief Magistrate Hine and the CMC report. Obviously each side sought to impress the Court with prior conclusions which favoured that side's general thesis in this proceeding. As I made clear throughout the trial, that is not an approach which is appropriate to adopt. It may be that the fact of the conclusions of each, or some, of those previous reports has some probative significance for the issues to be determined in this proceeding. If that is the case, the fact of the conclusions reached may be taken into account. At best, they have tangential relevance in this respect. Otherwise, each of those individuals or bodies reached their own conclusions consistently with the statutory task conferred upon them, and on the basis of the evidence before them. The evidence before this Court was forensically selected by the parties, to advance their respective contentions in relation to contraventions of the RDA. Although many of the witnesses before me had given evidence, or provided information, to some of these other inquiries, I take into account only their evidence given in this proceeding, including any prior statements tendered, and including where they were examined or cross-examined on evidence given elsewhere. Otherwise I have not taken into account reports of their evidence given elsewhere, and unless I say so expressly I neither adopt nor reject the findings and conclusions of those other inquiries. This proceeding occurs as an exercise of judicial power under a different statute and in a different context. Reliance on evidence given in other contexts by witnesses called in this proceeding raises a particularly difficult issue. Despite the Court having asked on several occasions for submissions on this issue, neither party made any meaningful submissions. I give one example to illustrate the dilemma. There is an allegation by the applicants that the investigating officers did not interview PLO Bengaroo in a sufficiently thorough way, and also that they treated him, and what he had to say, less seriously because he was an Aboriginal person. This is an allegation directed especially at DI Webber. DI Webber had given substantial evidence on this issue to the Palm Island Review conducted by Acting Superintendent Mike McKay and Inspector Robert Gee. In that review there was an almost identical allegation made, arising in that context out of criticisms of the investigators in comments by Acting State Coroner Clements. DI Webber gave substantial evidence on this topic: see the 'Palm Island Review' at 355-64. During this proceeding, he was examined extremely briefly on the matter (and gave some inconsistent answers), then was cross-examined on the events themselves briefly, with most of the cross-examination involving putting to him what was found by the Palm Island Review and by Acting State Coroner Clements. It was difficult to see the relevance of that line of cross-examination, for the purposes of this proceeding. The absence, by forensic choice of both parties, of direct explanation from DI Webber for his treatment of PLO Bengaroo leaves the Court to rely on other evidence in this proceeding to resolve this allegation.

The role of SS Hurley and my findings about his conduct SS Hurley was eventually charged with manslaughter over Mulrunji's death and was acquitted. His acquittal by a jury of his peers must be respected. SS Hurley's conduct in relation to Mulrunji was put in issue many times during the trial of this proceeding and therefore there are many places in these reasons where his conduct is examined. Indeed, some of the applicants' central allegations relate to the failure to treat SS Hurley as a suspect in Mulrunji's death. To hear and determine those allegations is not to go behind the acquittal. Rather, it is to assess the conduct of QPS officers in the conduct of the investigation, without the undue benefit of hindsight. That is to be done, for example, by examining what information was available to those officers at the time, its objective qualities, and how those officers did or did not use that information. To find, as I ultimately do, that SS Hurley should have been treated as a suspect if this was an investigation being conducted impartially and independently, and without unlawful race discrimination, is not to suggest he should have been charged with Mulrunji's murder, or with his manslaughter, or with any other criminal offence at any earlier point in time. It is certainly not to suggest SS Hurley committed any offence in relation to Mulrunji's death. Rather, it is to assess, as best as can be done, the conduct of the investigating officers as circumstances stood in mid-November 2004. Further, to recognise that SS Hurley's acquittal on the charge of manslaughter over Mulrunji's death must be respected is not to immunise SS Hurley from appropriate criticism in relation to his conduct on Palm Island during these events. He was the officer in charge of Palm Island Police Station. Of all the people who should have realised it was inappropriate in the extreme for him to remain on the island for any period of time after Mulrunji's death, let alone on active duty, it was SS Hurley. Of all the people who should have realised it was inappropriate in the extreme to fraternise with other officers who had been sent to the island to investigate Mulrunji's death, it was SS Hurley. I am comfortably satisfied SS Hurley would not have behaved as he did, ignoring the

obvious community frustration and sense of injustice that existed, if these events had occurred in a small town in rural Queensland with a predominantly non-Aboriginal population. He too had a sense of impunity because he was working in a remote Aboriginal community. His acquittal of the charge of manslaughter does not, in my opinion, stand in the way of this Court making such findings on the evidence before it for the purposes of reaching conclusions about contraventions of s 9 of the RDA.

Matters not contested

The second amended agreed statement of facts The parties prepared, over the course of the trial, a number of versions of a substantial set of agreed facts. As the document developed, it became more than a document which recorded the parties' agreement as to facts. It encompassed agreement as to provisions of state legislation, the terms of the OPM, the history and findings of the RCIADIC, and the contents of some other key documents upon which the applicants sought to rely. The parties very helpfully produced an agreed list of all the persons involved in the events covered by this proceeding, and their role. A list of the houses entered and searched, with details of the person or persons to whom each house belonged and who was or was not arrested at each house, was also agreed and was most helpful. The parties each reserved their right to submit that some of the facts, legislative or regulatory provisions, or findings of various bodies, were not relevant to the issues arising in the proceeding. However, it was of great assistance to the Court that the parties could agree the provenance and effect of a large number of applicable provisions and policies. I raised with the parties during the course of the evidence whether all of the matters in the agreed statement of facts could properly be admitted pursuant to s 191 of the Evidence Act. The parties agreed that some parts were better treated either as admissions or joint submissions on questions of law. Accordingly, paragraphs of the statement as specified by senior counsel for the respondents on the last day of evidence in the proceeding were not admitted pursuant to s 191 but treated in that way. A final, second amended agreed statement of facts reflecting those changes was filed by the parties prior to final submissions.

Vicarious liability: s 18A of the RDA In their defence to the applicants' third further amended statement of claim, the respondents admit that all relevant conduct of QPS members as alleged in the applicants' pleading occurred in the course of the employment of those QPS members, and that those acts were performed by QPS members as employees or agents of the State of Queensland. They also admit that the State of Queensland is liable pursuant to s 18A of the RDA for the actions of QPS members should it be found that those actions constituted unlawful discrimination.

The report of the Royal Commission into Aboriginal Deaths in Custody At various points in their pleadings the applicants rely on the RCIADIC report. Generally they do so to plead that QPS officers who interacted with Aboriginal communities could have been expected to have knowledge of the issues raised in the report, and that officers who could be expected to have such knowledge (such as those under scrutiny in this proceeding) should have applied it in the discharge of their duties. In contrast, the respondents submitted there was, when one reduced the submissions beyond the general, little work for the RCIADIC report to do in the context of this Court's fact finding about alleged contraventions of s 9 of the RDA. In my opinion, the respondents are broadly correct. However, the RCIADIC report is an important part of the background and context to this case. People on Palm Island spoke about it frequently during the community meetings, as did witnesses before this Court. It, and deaths of Aboriginal people in custody, is part of their lived history, a point poignantly made by Ms Erykah Kyle during the ***public*** meetings in November 2004 and by Ms Andrea Sailor during her evidence in this proceeding. The RCIADIC was established by the Australian government in October 1987 in response to ***public*** concern that deaths in custody of Aboriginal people were too common and were often poorly and evasively explained. ***Public*** agitation for the Royal Commission was led by members of the Aboriginal community. The Royal Commission comprised five independent Commissioners. Its terms of reference required it to examine all deaths in custody in each state and territory between 1 January 1980 and 31 May 1989, together with the subsequent actions that had been taken in response to each death, including the conduct of coronial, police and other inquiries. The Royal Commission was also authorised to take into account the social, cultural and legal factors which may have had a bearing on the deaths. The Royal Commission investigated the deaths of 99 Aboriginal and Torres Strait Islander people who fell within its terms of reference. In its report, the Commission summarised its methodology for investigating the deaths (at [1.2.1]):All contemporary documents were subpoenaed and studied. Relevant people were interviewed wherever possible and in the great majority of instances this, was possible. In many cases post-mortem reports were reconsidered by eminent pathologists. Not only the cause of death, but all aspects of custodial care and the orders binding on custodians were critically examined. Hearings were held in ***public***; families of the deceased were

represented by legal counsel. All documents were made available to counsel. Reports on the ninety-nine deaths have been delivered to government. At the time of writing almost all have been tabled in parliament and thus made ***public***. The Royal Commission's report was tabled in April 1991. It comprised five volumes of findings and recommendations. Individual reports were also published for each state and territory, including Queensland. The Commission found that, while Aboriginal people in custody did not die at a greater rate than non-Aboriginal people in custody, the rate at which Aboriginal people came into custody was overwhelmingly higher than the rate of the general community. In relation to the causes of the 99 deaths investigated, the Commission found that none of the deaths were unlawful or deliberate killings of Aboriginal prisoners by police. Nonetheless, the Commission found many systemic defects in relation to the standard of care provided to the deceased persons by custodial authorities, and many failures to exercise proper care. In some of the cases under investigation, the defects and failures were causally related to the deaths, in some cases they were not, and in others it was open to debate. The Commission made 339 recommendations in total. The recommendations focused on improving the standard of care provided to people in custody by custodial authorities, improving police and coronial investigations into deaths in custody, ensuring that both arrest and imprisonment are used as a last resort, promoting self-determination, improving relations between Indigenous people and the police, providing adequate legal and social services for Indigenous youth, reducing alcohol and substance abuse, and promoting reconciliation. Every state and territory, as well as the Commonwealth, had responsibility for implementing the recommendations of the report and reporting on their progress. I was not referred by the parties to any progress reports by the Queensland government about its implementation of the Royal Commission's recommendations. Nevertheless, I have had regard to the 1996/97 progress report of the Queensland government, pursuant to s 144(1)(b) of the Evidence Act; see also Thomas v Mowbray [2007] HCA 33; 233 CLR 307 at [619] (Heydon J). I have done this because the report explains how some implementation occurred through instructions in the OPM, on which the applicants relied. I do not understand the subject matter of the Queensland government's progress report, or its relationship to the OPM, to be controversial in this proceeding, nor to touch on any disputed facts. It is part of the background necessary to understand how the provisions of the OPM came to be what they are. In the progress report, the Queensland government stated it had implemented 163 of the 339 recommendations and partly implemented a further 30. Implementations discussed in the 1996/97 progress report which are relevant to the work of the QPS include:(1) the introduction in the OPM of a chapter devoted to custody (chapter 16), which contains orders, policies and procedures concerning conditions in custody and the procedures to follow where there is a death in custody. This addresses a large number of the recommendations of the RCIADIC report;

(2) the insertion into chapter 8 of the OPM of provisions which implement recommendation 29 of the RCIADIC report, concerning the powers of the coroner in charge of an investigation of a death in custody over the officer in charge of the investigation;

(3) the introduction into chapters 2, 8 and 16 of the OPM of provisions which give effect to recommendations 32, 35 and 36 of the RCIADIC report, regarding the conduct of police investigations into deaths in custody;

(4) the insertion into chapter 3 of the OPM of provisions which gave effect to recommendation 86 of the RCIADIC report. That recommendation has some particular relevance to the circumstances of Mulrunji's arrest. The recommendation was that the use of offensive language in circumstances of interventions initiated by police should not generally be grounds for arrest or charge and that police services should examine and monitor the use of offensive language charges; and

(5) the introduction into chapters 5 and 16 of the OPM of policies and procedures which give effect to recommendation 62 of the report in supporting diversion of children from the criminal justice system. A number of other reforms were foreshadowed in the report, relating to the upgrading of watchhouses, better cross-cultural training, and more Police Liaison Officers. Prior to the Queensland government's implementation report, but after the RCIADIC report, the QPS produced a review of its policing in remote Aboriginal and Torres Strait Islander communities. The review, produced in 1994, was said to be a direct response to the recommendations 88 and 232 of the RCIADIC report. A copy of this review is in evidence. Inspector Gregory Strohfeld, who in November 2004 was the officer to whom SS Hurley was directly responsible, was a member of the Steering Committee for the review. The review commenced with an express acknowledgment of the reasons for the ongoing mistrust of the

police by many Aboriginal and Torres Strait Islander people. It stated (at [2.1]-[2.3]):Policing strategies employed in Aboriginal and Torres Strait Islander communities in Queensland have been directly and indirectly determined by changing State Government policies for Aborigines and Torres Strait Islanders. These policies have been embodied in what is perceived by some as largely oppressive legislation which infringed upon fundamental civil and political rights. The police, as enforcers of the law of the day, have been required to undertake a highly visual role in the execution of this legislation throughout Queensland's history.

The nature of this role has been expressed in many forms, most of which were not conducive to the development of trust and respect for the Police Service among Aboriginal and Torres Strait Islander people. Over the last hundred years, the indigenous people of Queensland have been subjected to a spectrum of ideological stances ranging from dispersal, protectionism, assimilation and integration to self management and self determination. Pursuant to legislation or expressed or implied Government sanction, members of the Police Service have been required to:

(i) Effect the policy of "dispersal" of local Aborigines from their traditional homelands in the interests of economic development and, in particular, to cater for the interests of European colonial pastoralists and facilitate the establishment of trade routes – a policy which often involved the mass slaughter of clan and tribal groups by police;

(ii) Forcibly "re-locate" Aboriginal and Torres Strait Islander people to reserve areas – which often involved the separation of family members and the aggregation of traditional enemies in close confines;

(iii) Locate and punish Aborigines and Islanders who had "escaped" from reserve areas;

(iv) Forcibly remove half caste Aboriginal children from their parents;

(v) Forcibly remove Aborigines from their homes to cater for mining interests; and

(vi) Use British law enforcement procedures and methods to enforce contemporary State laws which were incompatible with Aboriginal and Torres Strait Islander culture and did not take into account traditional indigenous laws and rules of conduct.

Although State Police are not actively involved in these activities today, there are still a significant number of Aboriginal and Torres Strait Islander people who have been directly affected or had relatives or recent ancestors affected by these activities. Subsequently, it is not surprising that a significant number of Aboriginal and Torres Strait Islander people today remain fearful and mistrusting of police. Furthermore, it is not difficult to see how these Government policies of the past have directly or indirectly contributed to any of the problems besetting Aboriginal and Torres Strait Islander communities today. At [5.141], the review noted that watchhouse facilities on Palm Island did not comply with national standards for custodial facilities. The applicants attached large excerpts from the RCIADIC report's findings and recommendations to the third further amended statement of claim. Their pleadings placed particular emphasis on the following recommendations of the RCIADIC:Recommendation 19:

That immediate notification of death of an Aboriginal person be given to the family of the deceased and, if others were nominated by the deceased as persons to be contacted in the event of emergency, to such persons so nominated. Notification should be the responsibility of the custodial institution in which the death occurred; notification, wherever possible, should be made in person, preferably by an Aboriginal person known to those being so notified. At all times notification should be given in a sensitive manner respecting the culture and interests of the persons being notified and the entitlement of such persons to full and frank reporting of such circumstances of the death as are known.

Recommendation 20:

That the appropriate Aboriginal Legal Service be notified immediately of any Aboriginal death in custody.

...

Recommendation 33:

That all officers involved in the investigation of a death in police custody be selected from an Internal Affairs Unit or from a police command area other than that in which the death occurred and in every respect should be as independent as possible from police officers concerned with matters under investigation. Police officers who were on duty during the time of last detention of a person who died in custody should take ***no*** part in the investigation into that death save as witnesses or, where necessary, for the purpose of preserving the scene of death.

Recommendation 35(a): Investigations should be approached on the basis that the death may be a homicide. Suicide should never be presumed; .....

Recommendation 60:

That Police Services take all possible steps to eliminate: Violent or rough treatment or verbal abuse of Aboriginal persons including women and young people, by police officers; and The use of racist or offensive language, or the use of racist or derogatory comments in log books and other documents, by police officers.When such conduct is found to have occurred, it should be treated as a serious breach of discipline.

Recommendation 61:

That all Police Services review their use of para-military forces such as the New South Wales SWOS and TRG units to ensure that there is ***no*** avoidable use of such units in circumstances affecting Aboriginal communities.

...

Recommendation 87(a):

That: All Police Services should adopt and apply the principle of arrest being the sanction of last resort in dealing with offenders; ... The applicants also referred to recommendations 210, 214, 215, 225 and 228, all of which relate to an increased emphasis on culturally appropriate and sensitive policing practices in Aboriginal communities, developed in consultation with members of the Aboriginal community. Despite these references in the third further amended statement of claim, the applicants' final submissions make comparatively few substantive submissions by reference to the RCIADIC and its recommendations. The principal submission seems to be that QPS officers could, and should, have been aware in November 2004 that Palm Island community members knew of the RCIADIC and its recommendations and this was a feature of their relationship with police. It seems also to be the applicants' submission that the way the investigation into Mulrunji's death was conducted paid insufficient regard to the RCIADIC's recommendations and observations. For example, the applicants' written submissions relied on the following observations at [1.2.4] and [3.1.2] of the RCIADIC report:Deaths in custody are particularly distressing for families and friends, and engender suspicion and doubt in their minds and also in the minds of members of the ***public***. The deceased person has been in the custody and care of the State, not accessible in the general sense, his or her life controlled and ordered by functionaries of the State, out of sight and of normal contact. Deaths in such circumstances breeds anguish and suspicion equally. Time may heal some of the anguish, but the suspicion can be allayed only by the most open and thorough going laying of the facts on the table.

...

As has been said earlier, there was a widely held suspicion amongst Aboriginal people, and others, that at the very least a number of the deaths were caused by foul play in the sense of the deliberate infliction of harm by custodians. This has turned out not to be the case. But it needs to be understood that this perception was not at all unreasonable for at least three quite separate reasons: firstly, custody by its nature being away from the ***public*** gaze and out of the range of family and friends, the circumstances are such as to easily lead to suspicion and doubt; secondly, the deep distrust grounded in history that Aboriginal people have for police and prison systems; and thirdly, the post-death investigations and the treatment of families were in not a few cases such as to raise suspicion rather than allay it. I have found that the QPS officers who gave evidence in this proceeding had little knowledge of, or insight into, the history of Palm Island, nor did they have more than superficial knowledge of the RCIADIC's recommendations. The QPS officers who gave evidence disclosed ***no*** awareness of the matters I have set out from the 1994 QPS review. Had there been such awareness, the obvious manifestation of it would have been more meaningful interaction and consultation with the Palm Island community in the days and weeks after Mulrunji's death, through active participation at ***public*** meetings and greater flows of information between police, the Council and the general community. Needless to say, any real awareness of the context made so plain in the Queensland government's 1994 review would have led to quite different behaviour from QPS officers during the early days of the investigation into Mulrunji's death. The lack of impartiality (in appearance and in fact) that I have found existed could not have occurred if QPS officers had any real understanding of those issues and applied that understanding to the way they behaved. These matters are relatively clear on the evidence before the Court. Beyond providing a contextual basis for findings of this kind, I do not need to give any closer consideration to the RCIADIC report or its recommendations.

SUMMARY OF STATE LEGISLATION, REGULATIONS, INSTRUMENTS, POLICIES AND PROCEDURES APPLICABLE TO THE QUEENSLAND POLICE SERVICE

The role of state legislation, instruments and policies in the applicants' case Almost all of the applicants' case involves allegations of non-compliance by QPS officers with Queensland law. In some circumstances, it is alleged that police conduct was unlawful by failure to comply with the general law, or statute law (or both); in other circumstances, it is alleged that police conduct failed to comply with a policy or procedure which may or may not render the police conduct unlawful. The effect of non-compliance with a policy or procedure was said to depend on the status of the policy or procedure within the internal hierarchy established in the Operational Procedures Manual. Nevertheless, the fact of non-compliance (even if it did not render the conduct unlawful) was said by the applicants to be significant for the purpose of establishing a contravention of s 9 of the RDA. A state law cannot authorise conduct which contravenes s 9 of the RDA. Insofar as the state law had such an effect, it would be invalid by reason of the operation of s 109 of the Constitution: see Gerhardy v Brown[1985] HCA 11; 159 CLR 70 at 92-93 (Mason J), 121 (Brennan J). In the present case, ***no*** argument of this kind was made by the applicants about any of the state laws they identified as imposing duties on QPS officers. Conversely, in Sharma v Legal Aid Queensland [2001] FCA 1699; 112 IR 124 at [27] Kiefel J observed that neither lawfulness, nor unlawfulness, would of themselves foreclose or establish a contravention of s 9:A substantial part of the applicant's case was taken up with questions as to whether the panel had followed policy guidelines regarding appointments and whether what they said was required in the position could be found in the description given of it. If the applicant had fulfilled the criteria specified and guidelines had not been followed, questions might arise as to the approach being taken by the panel. It is necessary to bear in mind however that this is not a case involving the application of principles of employment contract law, or procedural fairness. Breaches of this kind do not themselves answer the question whether race operated as a factor in the appointment process. By the same token compliance will not foreclose the possibility that considerations of race were influential in some way. The inquiry is as to what was truly in the minds of the panel members. I turn then to consider the explanations they have put forward. Subject to what I say at [150] below, as Kiefel J suggested, questions of the lawfulness or unlawfulness of conduct according to domestic law do not engage with the question posed by s 9. However, the applicants sought to use the alleged unlawfulness of various conduct by QPS officers to contend that the conduct involved a "distinction" for the purposes of s 9. That is, the "distinction" is said to be non-compliance with the law, or non-compliance with obligations imposed under the law. That conduct involving such non-compliance is then alleged to be based on the race of the applicants, including the group members. Sometimes this is put as being based on the Palm Island community as an Aboriginal community, that is: a community defined by its race. In relation to some of the acts relied upon, the lawfulness (or, on the applicants' case, the unlawfulness) of QPS conduct is said to form part of the necessary content of the

human right relied on. Thus, for example, the right in Art 9 of the ICCPR to be free from arbitrary or unlawful arrest is said by the applicants to be impaired where, in their submission, Mr Wotton was subjected to an arrest which was unlawful under Queensland law. In these kinds of examples, the "act" for the purposes of s 9 is the arrest; it is said to involve a "distinction based on race" because the arrest was made unlawfully by reference to the race of Mr Wotton; and that arrest is said to have impaired his human right under Art 9 to be free from arbitrary or unlawful arrest. It can be seen that, in examples of this kind from the applicants' pleaded case, the unlawfulness of the arrest is said to be capable of fulfilling two functions within the terms of s 9 in that it constitutes both the "distinction" and the "impairment" of a right. Nevertheless, the applicants are correct to identify lawfulness (and unlawfulness) as central to the nullification or impairment of some of the human rights upon which they rely. In relation to the arrests, entries and searches by SERT officers, lawfulness does have a role to play in determining a contravention of s 9. It is necessary, then, to give an outline of the Queensland law applicable to the conduct of the QPS officers during the series of events impugned by the applicants. With a few exceptions (such as the arrest of Mr Wotton) there was ***no*** dispute between the parties about the applicable law.

The Police Service Administration Act 1990 (Qld) (PSA Act) Section 2.3 of the PSA Act, as it was in November 2004, set out the functions of the QPS. I have set out extracts already, but it should be reproduced in its entirety:Functions of service

The functions of the police service are—

(a) the preservation of peace and good order—(i) in all areas of the State; and

(ii) in all areas outside the State where the laws of the State may lawfully be applied, when occasion demands;(b) the ***protection*** of all communities in the State and all members thereof—(i) from unlawful disruption of peace and good order that results, or is likely to result, from—(A) actions of criminal offenders;

(B) actions or omissions of other persons;(ii) from commission of offences against the law generally;(c) the prevention of crime;

(d) the detection of offenders and bringing of offenders to justice;

(e) the upholding of the law generally;

(f) the administration, in a responsible, fair and efficient manner and subject to due process of law and directions of the commissioner, of—(i) the provisions of the Criminal Code;

(ii) the provisions of all other Acts or laws for the time being committed to the responsibility of the service;

(iii) the powers, duties and discretions prescribed for officers by any Act;(g) the provision of the services, and the rendering of help reasonably sought, in an emergency or otherwise, as are—(i) required of officers under any Act or law or the reasonable expectations of the community; or

(ii) reasonably sought of officers by members of the community.

The Operational Procedures Manual (OPM) Pursuant to subss 4.8(1) and (2) of the PSA Act, the Commissioner of Police is responsible for the efficient and proper administration, management and functioning of the QPS in accordance with law. In discharging these prescribed responsibilities under the PSA Act, the Commissioner is authorised to give, and cause to be issued, such written and oral directions to QPS employees that the Commissioner considers necessary or convenient for the efficient and proper functioning of the QPS: see s 4.9(1). The principal source of the Commissioner's directions is the QPS Operational Procedures Manual (OPM). The objective of the OPM is said to be to provide guidance and instructions in all aspects of operational policing. In November 2004, "Issue 24 – July 2004" of the OPM was in force. Issue 24 of the OPM set out three levels of

directions by the Commissioner to QPS members: orders, policies and procedures. These terms were defined at p 6 of the document as follows:ORDER

[A]n order requires compliance with the course of action specified. Orders are not to be departed from.

...

POLICY

A policy outlines the Service attitude regarding a specific subject and must be complied with under ordinary circumstances. Policy may only be departed from if there are good and sufficient reason(s) for doing so. Members may be required to justify their decision to depart from policy.

...

PROCEDURE

A procedure outlines generally how an objective is achieved or a task performed, consistent with policies and orders. A procedure may outline actions which are generally undertaken by persons or organisations external to the Service. While the parties agree that orders must be complied with, they differed on the force and effect of policies and procedures, although in my opinion the difference was really one of emphasis rather than any legal or practical effect. The applicants emphasised (and pleaded) that, in November 2004, the QPS "ordinarily complied" with the policies and procedures of the OPM, and any departure would occur only in extraordinary circumstances. In contrast, the respondents emphasised the non-binding nature of these two kinds of directions, and that each left room for departure in appropriate circumstances. Although, as I set out at [725]-[739] below, I consider the aspect of the applicants' approach to s 9 whereby they argue that individual contraventions of the OPM can constitute distinctions for the purposes of s 9 to be misconceived, that does not render the terms of the OPM irrelevant. I accept the orders, policies and procedures provide a framework within which QPS officers are expected to operate. Therefore, the subject matter dealt with in the OPM, and the standard of compliance required, assists in putting the impugned conduct of QPS officers into an appropriate context. Working sequentially through the OPM, the following provisions should be noted. The parties agreed that s 1.17 of the OPM is relevant to these proceedings. That section was headed "Fatalities or serious injuries resulting from incidents involving members (Police related incidents)" and provided directions in the form of orders and policies to follow when a "police related incident" occurs. The parties agreed Mulrunji's death in custody fell within the definition of a "police related incident" in this provision. Section 1.17 contained generally applicable directions, directions applicable to multiple members of the QPS, and directions for individual members holding specific positions. Section 1.17 contained an order that investigations of police related incidents be conducted "expeditiously and impartially" with the "psychological welfare of individuals considered." It also relevantly provided the following policies applicable to first response officers, regional duty officers and regional crime coordinators under the heading "Integrity of investigation":First response officers, regional duty officers and regional crime coordinators should ensure that the integrity of the independent versions of members directly involved and members who are witnesses to a police related incident is preserved as far as practicable.

In this regard, members directly involved in the incident or who are witnesses to the incident should be interviewed separately and as soon as practicable following the incident. It is highly desirable that interviews occur prior to any critical incident stress debriefing, including any defusing. Members directly involved in the incident or who are witnesses to the incident should not discuss the incident amongst themselves prior to being interviewed. Section 1.17 assigned specific responsibilities to first response officers, in the form of orders. When a police related incident occurred, the first response officer was to:(i) assume command and control at the incident scene;

(ii) make an immediate assessment of the situation and inquire as to the circumstances surrounding the incident;

(iii) immediately notify the shift supervisor and the relevant regional duty officer in the region where the incident has occurred, and the appropriate police communications centre;

(iv) contain and preserve the scene;

(v) take possession of or safeguard exhibits;

(vi) detain offenders;

(vii) wherever practicable, ensure that members involved in the incident do not leave the scene; and

(viii) wherever practicable, ensure that members who are involved in the incident, or who are witnesses to the incident, do not undertake, or continue to perform duties associated with the investigative process, or other duties at the scene. Section 1.17 imposed orders on the regional duty officer who was notified or who became aware of such an incident. Relevantly, the regional duty officer was directed to:(i) attend the scene, make an immediate assessment of the situation and make brief inquiries with persons at the scene, including members directly involved in the incident or who may be witnesses to the incident, as to the circumstances surrounding the incident;

(ii) assume command and control of the situation pending the arrival or involvement of the regional crime coordinator;

...

(iv) cause the following officers or units to be immediately notified:...

(h) the Deputy Commissioner, Deputy Chief Executive (Operations); ...(v) wherever practicable, ensure that members who are involved in the incident, or who are witnesses to the incident, do not undertake, or continue to perform duties associated with the investigative process, or other duties at the scene; and

(vi) wherever practicable ensure that members involved in the incident or who are witnesses to the incident are available for interview by the regional crime coordinator, officers from the Crime and Misconduct Commission or the Internal Investigation Branch, Ethical Standards Command, as the circumstances require. The regional crime coordinator was assigned specific responsibilities under s 1.17. There was an order that:All police related incidents are to be investigated by or under the direction of the regional crime coordinator unless otherwise directed by the Internal Investigation Branch, Ethical Standards Command or the Crime and Misconduct Commission. A policy in s 1.17 concerning the role of the regional crime coordinator provided:When investigating police related incidents, a regional crime coordinator should contact the investigation or appoint an independent senior investigator with sufficient criminal investigation background to carry out investigations. Considerations by regional crime coordinators in making any such appointments should include the gravity of the incident, the rank of the officers or the level of seniority of the members who are directly involved in the incident (as opposed to witnesses), and the establishment at which those officers or members directly involved in the incident are stationed.

In cases involving custody police related incidents, a regional crime coordinator should appoint an investigator from a police establishment other than from where the incident occurred, or where the officers or members directly involved in the incident are stationed.

Where the Crime and Misconduct Commission or Internal Investigation Branch, Ethical Standards Command, overviews an investigation of a police related incident, the regional crime coordinator retains responsibility for that investigation. Further, under the heading “Regional crime coordinator”, there were orders that relevantly provided that the regional crime coordinator was to:(i) be directly responsible for the investigation of a police related incident, unless otherwise directed by the Deputy Commissioner, Deputy Chief Executive (Operations), or unless

responsibility for the investigation is assumed by the Internal Investigation Branch, Ethical Standards Command or the Crime and Misconduct Commission;

...

(iv) ensure that the members directly involved in the incident or who are witnesses to the incident are interviewed as soon as practicable and it is highly desirable that interviews occur prior to any critical incident stress debriefing, including any defusing; and

(v) in cases of deaths in custody as defined in s. 16.24.1 ... ensure that where necessary the provisions of ss. 16.24 to 16.24.5 ... are complied with. Section 2.5 of the OPM was headed “Investigation” and s 2.5.1 relevantly set out the following matters in relation to investigations:POLICY

The investigation of offences and the management of incidents requiring police action are dependent on timely, accurate information being passed to investigating officers. Officers collecting such information should investigate the facts and circumstances as completely as possible in order to obtain relevant, usable information. Investigating officers who consider the assignment of an operation name to an investigation is appropriate should contact the District Intelligence Officer for that purpose.

To ensure investigations are conducted in a professional manner, members should cooperate to allow the effective use of resources and to achieve desirable outcomes which reflect the needs and expectations of the community.

In all investigations, officers should strictly adhere to first response procedures. The incident scene should be preserved and contained until the arrival of any specialists. Even so, primary investigation techniques should be followed in order to ensure that potential witnesses are identified and that complete information is obtained.

...

PROCEDURE

...

It is critical that primary investigations be carried out as completely as possible. Wherever possible, primary investigations should be undertaken by the first response officer.

Activities undertaken during primary investigations may include:

(i) identification of witnesses;

(ii) identification of potential witnesses;

(iii) interview of available witnesses;

(iv) taking of statements from witnesses (suitable for court production);

(v) collection and appropriate marking, recording and handling of physical evidence;

(vi) listing observations made at the scene;

(vii) noting geographic factors;

(viii) noting demographic factors if appropriate;

(ix) noting vehicles at the scene;

(x) complete descriptions of offenders or suspects;

(xi) complete descriptions of offender's or suspect's vehicles;

(xii) complete description of the scene;

(xiii) identifying and notifying appropriate support groups;

(xiv) notifying appropriate specialist groups;

(xv) notifying the commissioned duty officer;

(xvi) arranging for necessary inquiries to be conducted by other members; and

(xvii) recording of all activities undertaken and their outcomes.

Information obtained during the primary investigation will assist in the decision regarding the priority to be given to the investigation. Primary investigators should make recommendations in criminal offence reports for the information of supervisors. Section 2.5.3 provided:Investigation and the community

POLICY

Police investigations often include contact with members of the ***public*** who have been adversely effected by criminal activity or other major personal trauma. The attitude of officers carrying out investigations is critical to how the Service is perceived by the community. Officers should therefore demonstrate professional behaviour at all times. Officers should refer to s. 2.12: 'Victims of crime' of this chapter. The OPM contained provisions relevant to the deployment and operations of the SERT. Section 2.26, headed "Special Emergency Response Team (SERT)", provided:2.26.1 Role of Special Emergency Response Team (SERT)

The Special Emergency Response Team (SERT) is a specialist support unit, established to provide the Service with the ability to respond to terrorist incidents state-wide.

The primary role of the SERT is to:

(i) respond to terrorist incidents within the arrangements agreed to under the State Antiterrorist Plan;

(ii) provid [sic] specialist police capability to resolve high risk situations and incidents which are potentially violent and exceed normal police capabilities;

(iii) provide assistance to all police with low risk tasks which require specialist equipment, skills or tactics; and

(iv) provide a rescue function in incidents which require specialised recovery techniques.

The primary unit of SERT is based in Brisbane and is under the direct control of the Inspector, SERT. SERT officers are also located at Cairns under the management of the Chief Superintendent, Operations Coordinator, Far Northern Region.

Activation and deployment of SERT, including SERT officers at Cairns, and operational control and coordination is retained by the Superintendent, Specialist Services Branch.

Whenever SERT Officers at Cairns are activated and or deployed, the Chief Superintendent, Operations Coordinator, Far Northern Region is to be advised by the Superintendent, Specialist Services Branch.

2.26.2 Authorisation of call out of the Special Emergency Response Team (SERT)

ORDER

The authority of the Deputy Commissioner, Deputy Chief Executive (Operations), is required for the deployment of the Special Emergency Response Team (SERT) in all high risk situations.

In the absence of the Deputy Commissioner, Deputy Chief Executive (Operations), the authority for deployment of the SERT may be given by the Assistant Commissioner, Operations Support Command.

In the event that an immediate response is required by the SERT to a high risk situation, the Superintendent, Specialist Services Branch, can:

(i) activate the SERT to a suitable staging area in preparation for deployment to a high risk situation;

(ii) authorise the assistance of a SERT response to rescue functions; and

(iii) activate the SERT to perform low risk tasks.

2.26.3 Call out procedure

Officers should note that response time depends on the availability of Service aircraft and/or commercial flights. If road travel is used, normal travelling times will apply.

PROCEDURE

An officer who considers that the services of SERT may be required for non-urgent operations should advise the Regional Duty Officer or other Commissioned Officer.

Upon receipt of such advice, the relevant commissioned officer should assess the situation. If they decide the assistance of SERT is required, they should ensure, in the order listed, that:

(i) a Special Emergency Response Team Request for Assistance form (QP377) is completed;

(ii) their Chief Superintendent, Operations Co-ordinator is advised of the intended request;

(iii) the Superintendent, Specialist Services Branch (SSB), is advised of the request by phone (the Superintendent, SSB, can be contacted by phone 24 hours a day. The contact number for this officer is available from the Duty Officer, Police Communications Centre, Brisbane);

(iv) the QP377 is faxed to the Superintendent, SSB; and

(v) the original of the QP377 is forwarded to the Superintendent, SSB, via the QPS internal mail system. Section 2.13.1 of the OPM contained the following policy about taking statements:Statements form a written version of the oral testimony of a witness and therefore should be as comprehensive as possible.

... Statements should be obtained at the earliest practicable opportunity ... In appropriate situations statements should be obtained and should be accepted from suspects/offenders. In relation to contemporaneous notes, s 2.13.8 of the OPM provided:Members who may be required to give evidence of conversations, events or occurrences should compile relevant notes at a time during the conversation, event or occurrence, or as soon as practicable thereafter while details are still fresh in their mind. The applicants relied on the provisions of the OPM dealing with interviewees and witnesses with special needs. Section 6.3.2 imposed the following order:When an officer wishes to interview a person, the officer is to first establish whether a special need exists ... the officer is to evaluate the ability of the person to be interviewed to look after or manage their own interests and is to establish whether the person meets the following conditions. The person is to be:

(i) capable of understanding the questions posed;

(ii) capable of effectively communicating answers;

(iii) capable of understanding what is happening to him/her;

(iv) fully aware of the reasons why the questions are being asked;

(v) fully aware of the consequences which may result from questioning; and

(vi) in the opinion of the investigating officer, capable of understanding his or her rights at law.

In making an evaluation, the officer is to take into account the following factors:

(i) the seriousness of the condition giving rise to the special need ...;

(ii) the reason for which the person is being questioned, whether as a witness or in relation to their complicity in an offence. Where the information to be obtained may later be used in a court, it will be necessary to show that any special need was overcome;

(iii) the complexity of the information sought from the person; and

(iv) the age, standard of education, knowledge of the English language, cultural background and work history of the person.

When questioning anyone with a special need officers must comply with ss. 249 and 250 of the Police Powers and Responsibilities Act. In s 6.3.6, a policy was set out to the effect that persons of Aboriginal and Torres Strait Islander descent are to be considered people with special needs because of certain cultural and sociological conditions. The OPM also provided instructions on specialised areas of policing relevant to this proceeding. For example, s 6.4 of the OPM concerned cross-cultural issues relevant to policing in culturally diverse communities. Relevantly, it provided the following policy:To achieve the goals of the Service, strategies emphasising joint community and police activities have been adopted.

Officers should always consider cultural needs which exist within the community. Section 6.4.7 provided a specific policy for officers in charge of stations:Officers in charge of stations or establishments should, in managing the provision of services, take into account the specific cultural and ethnic demographic characteristics of their area of responsibility and the needs thereby created. The terms “cultural needs” and “cultural and ethnic demographic characteristics” are not defined, and what is meant by these phrases is opaque. The applicants’ pleadings and submissions repeatedly press a contention that the QPS failed to appreciate or recognise the “cultural needs” of the Palm Island community, but they give ***no*** real content to the phrase. The respondents are correct to criticise this aspect of the applicants’ case. Section 6.4.8 of the OPM was headed “Cross Cultural Liaison Officers”, and

provided:Cross cultural liaison officers are available in all regions. The role of a cross cultural liaison officer is to establish and maintain effective liaison between police, Aboriginal, Torres Strait Islander and ethnic communities to identify the needs of communities and enable appropriate policies and strategies to be developed to ensure the delivery of an equitable service within the district or region.

The principal responsibilities of cross cultural liaison officers include:

(i) managing and coordinating cultural support activities in line with Service policy;

(ii) developing and maintaining effective communication with Aboriginal/Torres Strait Islander and ethnic community representatives, colleagues and representatives of government departments and external agencies;

(iii) developing and presenting community based policing programs in line with service policy; and

(iv) providing operational support particularly in the investigation of crime in ethnic, Aboriginal and Torres Strait Islander communities. Section 8.4 of the OPM dealt with reportable deaths, including deaths in custody. By s 8.4.1, QPS officers were ordered to assist the coroner involved in investigating a death in custody:Officers are to assist coroners in the performance of a function, or exercise of a power, under the Coroners Act and are to comply with every reasonable and lawful request, or direction of a coroner. The duty to assist the coroner also had a legislative basis: see s 447A of the Police Powers and Responsibilities Act 2000 (Qld) (PPR Act). It was agreed between the parties that s 8.4.3 of the OPM, headed “Responsibilities of investigating officers” applied to the QPS investigation team investigating Mulrunji’s death and to Inspector Williams of the Ethical Standards Command. It relevantly provided:PROCEDURE

Where initial enquiries indicate that a death is one that falls within the ambit of Part 3of the Coroners Act, the Service is obliged to investigate and report on the cause of the death. The actions required to do so will vary from case to case, dependent on the circumstances of the death. In all cases however, certain actions must be taken and certain reports must be completed. The following points provide a list of those reports and actions, and the sections that follow discuss those requirements in greater detail.

POLICY

In the case of any death which falls within the circumstances outlined in Part 3 of the Coroners Act the investigating officer is responsible for:

...

(v) completing a ‘Police Report of a Death to a Coroner’ (Form 1) then:(a) forwarding or delivering the original and a copy of the Form 1 to the coroner and obtaining from that person an order for autopsy;

(b) delivering the order for autopsy and another copy of the Form 1 to the Government Pathologist who is to perform the autopsy;

...

(d) forwarding an electronic copy of the Form 1 to their respective Officer in Charge so that it is checked and forwarded via Email to the State Coroner’s Police Support Unit ...

(e) submitting a signed copy of the Form 1 to the respective Officer in Charge to be forwarded to the local Coroner;(vi) completing, where applicable, a Supplementary Form 1 (QP528). The Supplementary Form 1 is used to provide additional information to a coroner or State Coroner.

(vii) attending and witnessing the autopsy, where applicable, or arranging for the attendance of another officer in line with local arrangements;

...

(ix) where an inquest is to be held, ensuring that the following forms have been completed as fully as possible and copies are available for submission to the coroner in compliance with s. 8.4.20 ‘Statutory forms’ of this chapter:(a) Form 1; .....

ORDER

...

In cases where additional or relevant information comes to hand that may assist a government pathologist in determining a cause of death at a time prior to an autopsy being conducted, investigating officers are to contact the pathologist as a matter of urgency and provide that information on a Supplementary Form 1. The Supplementary Form 1 should also be completed and submitted in the same way as a Form 1. A copy of the Supplementary Form 1 should also be forwarded to the relevant pathologist. There was ***no*** dispute that s 8.4.8 – headed “Completion of Form 1” – applied to the completion of the Form 1 in relation to Mulrunji’s death. It provided procedures that:The purpose of the Form 1 is to assist the Coroner in deciding whether an autopsy should be ordered, and to assist the pathologist performing the autopsy to establish the cause of death. Therefore the investigating officer should complete the relevant parts of the form as soon as possible.

...

Where an officer has additional information that could not be included on the Form 1 at the time of submission, they should provide this information on a Supplementary Form 1 (QP528). Section 16.24.1 of the OPM, which was headed “Investigation of death in custody”, relevantly provided:A death in custody should be treated as a significant event, and the provisions of s. 1.4.6: ‘Regional Duty Officer’ and s. 1.4.7: ‘Shift Supervisor’ of this Manual apply. The first response or investigating officer as the case may be should notify the:

(i) shift supervisor;

(ii) regional duty officer;

...

(iv) Officer in Charge, Cultural Advisory Unit, Office of the Commissioner.

Where the Officer in Charge, Cultural Advisory Unit, Office of the Commissioner, is to be notified, such notification should include the information outlined in parts (i) to (xiii) of s.16.24.3: ‘Additional responsibilities of officers investigating deaths in custody’ of this chapter where available.

All deaths which occur while a person is ‘in custody’ or while any person is in the company of police, should be fully investigated in accordance with s. 1.17: ‘Fatalities or serious injuries resulting from incidents involving members (Police related incidents)’ of this Manual.

Where responsibility for the investigation of a death in custody reverts to a commissioned officer pursuant to s. 1.17: ‘Fatalities or serious injuries resulting from incidents involving members (Police related incidents)’ of this Manual, the investigation should be carried out in line with the provisions of s. 2.4: ‘Crime scene’, s. 2.5:

'Investigation' and Chapter 8: 'Coronial Matters' of this Manual. Section 16.24.3 of the OPM relevantly set out "additional responsibilities" in relation to the investigation of a death in custody:PROCEDURE

Where responsibility for the investigation of a death in custody or in police company reverts to a commissioned officer pursuant to s.1.17 ... that commissioned officer should, as part of the investigation:

...

(ii) not presume suicide or natural death regardless of whether it may appear likely;

(iii) obtain statements from all witnesses, including police officers, as soon as practicable after the incident and prior to any debriefing session where practicable;

(iv) include investigations into the general care, treatment and supervision of the deceased immediately before the death in line with Service policy, orders and procedures;

(v) inquire fully into the circumstances of the arrest or apprehension including any relevant activities of the deceased beforehand;

(vi) immediately arrange for the next of kin or person previously nominated by the deceased to be notified. Cultural interests of the person being notified should be respected by using the cross cultural liaison officer, if practicable. Where the deceased is an Aborigine or Torres Strait Islander and there is a delay or inability to notify the next of kin, efforts to notify the next of kin should be recorded;

(vii) in circumstances where the deceased is an Aborigine or Torres Strait Islander, notification should preferably be assisted by an Aboriginal or Torres Strait Islander person known to those being notified;

(viii) if the deceased is an Aborigine or Torres Strait Islander, advise the Aboriginal and Torres Strait Islander Legal Service or other Aboriginal and Torres Strait Island community organisation with responsibility for the area, as soon as possible, whether or not the relatives have been located;

...

See also Chapter 8: 'Coronial Matters' and Appendix 16.4: 'Suggested format for reports on death in custody or in police company' of this Manual.

The QPS Code of Conduct Another relevant source of instructions for QPS officers is the QPS Code of Conduct. The Code is another source of directions from the Commissioner under s 4.9 of the PSA Act. Section 15 of the ***Public*** Sector Ethics Act 1994 (Qld) provides that "[t]he chief executive officer of a ***public*** sector entity must ensure that a code of conduct is prepared for the entity." The stated purpose of the Code is to provide all members of the QPS with a set of guiding principles and standards to assist them in determining acceptable standards of conduct. The Code makes clear that QPS officers are required to observe the Code as "a condition of appointment" and that a breach of the code without a valid reason will be dealt with in accordance with the applicable human resources complaint management procedures. In November 2004, the version of the Code dated 29 August 2003 was in force. Section 9.3 of the Code – headed "Obligation: Integrity" – provided that:In recognition that ***public*** office involves a ***public*** trust, a ***public*** official should seek to maintain and enhance ***public*** confidence in the integrity of ***public*** administration and advance the common good of the community the official serves. Having regard to that obligation, a ***public*** official: should not improperly use his or her official powers or position, or allow them to be improperly used;

should ensure that any conflict that may arise between the official's personal interests and official duties is resolved in favour of the ***public*** interest; and

should disclose fraud, corruption, misconduct and maladministration of which the official becomes aware ... Section 10.6 of the Code – headed "Conflict of Interests" – is also relevant to the applicants' allegations. It provided:Members of the service are expected to perform their duties in such a manner that ***public*** confidence and trust in the integrity, objectivity and impartiality of the Queensland Police Service and its members is preserved.

... Further, members are to ensure as far as practicable there is ***no*** conflict between their personal interests and the impartial fulfilment of their official duties and responsibilities.

Members are to avoid both actual or apparent conflicts of interests in all matters relating to their employment with the Service ... Where a conflict of interest does arise between the private interests of a member and the official duties or responsibilities of that member, the member is to disclose details of the conflict to their supervising Executive Officer. All conflicts of interests relating to a member's employment with the Service will be resolved in favour of the Service and the ***public*** interest.
Emergency declaration powers A significant aspect of the applicants' challenges in this proceeding relates to the making of an emergency declaration under the PSP Act on 26 November 2004 after the protests and fires. That Act deals with two broad categories of events: "emergency situation[s]" and "chemical, biological and radiological emergencies". Each category has its own suite of powers and procedures, although the Act has a much larger number of provisions dealing with the second category. The evidence established, and it was not contested, that DI Webber made the emergency declaration. He relied on s 5 of the PSP Act. For the purposes of s 5(1), DI Webber was the "incident coordinator". Section 5 of the PSP Act provided:Declaration of emergency situation

(1) Subject to section 6, if at any time a commissioned officer (the "incident coordinator") is satisfied on reasonable grounds that an emergency situation has arisen or is likely to arise the commissioned officer may declare that an emergency situation exists in respect of an area specified by the commissioned officer.

(2) The incident coordinator, as soon as practicable after he or she declares that an emergency situation exists, shall issue a certificate to this effect signed by the incident coordinator which certificate shall set out the nature of the emergency situation, the time and date it was declared to exist and the area in respect of which it exists.

(3) The declaration that an emergency situation exists shall continue until revoked by the incident coordinator.

(4) However, if an emergency situation is later declared to be a CBR emergency, the declaration of the emergency situation has ***no*** effect for the period of the CBR emergency.Note—

CBR emergencies may be declared under section 12.(5) The incident coordinator shall as soon as practicable thereafter, note the time and date of the revocation on the certificate issued pursuant to subsection (2).

(6) The certificate issued in respect of an emergency situation shall be forwarded to the office of the Commissioner of the Police Service within 14 days of the revocation of the declaration of the emergency situation and shall be held in that office for a period of at least 6 years.
(Footnotes omitted.) The Dictionary to the PSP Act defined "emergency situation" as:(a) any explosion or fire; or

(b) any oil or chemical spill; or

(c) any escape of gas, radioactive material or flammable or combustible

liquids; or

(d) any accident involving an aircraft, or a train, vessel or vehicle; or

(e) any incident involving a bomb or other explosive device or a firearm or other weapon; or

(f) any other accident;

that causes or may cause a danger of death, injury or distress to any person, a loss of or damage to any property or pollution of the environment, includes a situation arising from any report in respect of any of the matters referred to in paragraphs (a) to (f) which if proved to be correct would cause or may cause a danger of death, injury or distress to any person, a loss of or damage to any property or pollution of the environment. Section 6 of the PSP Act deals with the potential overlap with the exercise of emergency powers under another state Act, namely the Disaster Management Act 2003 (Qld):Disaster Management Act 2003

(1) A declaration pursuant to section 5 shall not be made in respect of an emergency situation which is being dealt with under a disaster situation under the Disaster Management Act 2003.

(2) A declaration pursuant to section 5 which is in force when a disaster situation is declared under the Disaster Management Act 2003, shall be revoked by the incident coordinator when the emergency situation can be effectively dealt with under that Act. Section 13 of the Disaster Management Act defined “disaster” for the purposes of that Act:(1) A disaster is a serious disruption in a community, caused by the impact of an event, that requires a significant coordinated response by the State and other entities to help the community recover from the disruption.

(2) In this section—serious disruption means—

(a) loss of human life, or illness or injury to humans; or

(b) widespread or severe property loss or damage; or

(c) widespread or severe damage to the environment. I note both s 6 of the PSP Act and s 13 of the Disaster Management Act for the purpose of giving some context to the kinds of circumstances with which an emergency declaration under s 5 of the PSP Act is intended to deal. Section 8 of the PSP Act authorises the exercise of certain coercive powers and is a critical provision in relation to some of the impugned QPS conduct:8 Powers of incident coordinator

(1) Where during the period of and in the area specified in respect of an emergency situation the incident coordinator is satisfied on reasonable grounds that it is necessary to effectively deal with that emergency situation he or she (and any other police officer acting on his or her instructions) may—(a) direct the owner or the person for the time being in charge or in control of any resource to surrender it and place it under the incident coordinator’s or police officer’s control (“resource surrender direction”);

(b) take control of any resource, whether it is in the charge or control of any person or not;

(c) in respect of any resource under the incident coordinator’s or police officer’s control, direct any person who is capable of operating that resource to operate it as directed by him or her (“resource operator direction”);

(d) direct the evacuation and exclusion of any person or persons from any premises and for this purpose may remove or cause to be removed (using such force as is necessary for that purpose) any person who does not comply with a direction to evacuate or any person who enters, attempts to enter or is found in or on any premises in respect of which a direction for the exclusion of persons has been given;

(e) close or cause to be closed to traffic and pedestrians, any road, street, motorway, private road, private way, service lane, footway, right of way, access way or other way or close any place to which members of the ***public*** have access whether on payment of a fee or otherwise;

(f) enter or cause to be entered (using such force as is necessary for that purpose) any premises;

(g) search or cause to be searched (using such force as is necessary for that purpose) any premises and anything found therein or thereon;

(h) remove or cause to be removed from any premises (using such force as is necessary for that purpose) any animal or anything;

(i) direct any person to assist him or her in the manner specified by him or her ("help direction").(2) The incident coordinator or police officer must not give a resource operator direction or a help direction to a person if giving the direction would expose the person to imminent danger.

(3) A person given a resource surrender direction, a resource operator direction or a help direction must comply with the direction, unless the person has a reasonable excuse.

Maximum penalty for subsection (3)—40 penalty units or 1 year's imprisonment. Section 46 of the PSP Act provides for the granting of compensation to persons who claim "to have suffered financial loss because of the use, damage or destruction of the property." The evidence reveals that several people whose houses were entered and searched did complain to DS Robinson in particular about damage to their houses as a result of the entry and search. There is ***no*** evidence that DS Robinson or any other QPS officer, including DI Webber, directed those people to the terms of s 46 of the PSP Act, or offered to assist them in making any compensation claims. Section 47 concerns ***protection*** from liability for conduct done in the exercise of powers under the Act. The State placed ***no*** reliance on this provision and it was not referred to by either party. I do not consider it further.
Law governing arrests In 2004, the law governing arrests was found in the PPR Act. Section 198 of that Act set out the circumstances in which arrests could be made without first obtaining a warrant. Relevantly, it provided:(1) It is lawful for a police officer, without warrant, to arrest an adult the police officer reasonably suspects has committed or is committing an offence if it is reasonably necessary for 1 or more of the following reasons –(a) to prevent the continuation or repetition of an offence or the commission of another offence;

(b) to make inquiries to establish the person's identity;

(c) to ensure the person's appearance before a court;

(d) to obtain or preserve evidence relating to the offence;

(e) to prevent the harassment of, or interference with, a person who may be required to give evidence relating to the offence;

(f) to prevent the fabrication of evidence;

(g) to preserve the safety or welfare of any person, including the person arrested;

(h) to prevent a person fleeing from a police officer or the location of an offence;

(i) because the offence is an offence against section 444 or 445;

(j) because the offence is an offence against the Domestic and Family Violence ***Protection*** Act 1989, section 80;

(k) because of the nature and seriousness of the offence;

(l) because the offence is—(i) an offence against the Corrective Services Act 2000, section 103(3); or

(ii) an offence to which the Corrective Services Act 2000, section 104 applies.(2) Also, it is lawful for a police officer, without warrant, to arrest a person the police officer reasonably suspects has committed or is committing an indictable offence, for questioning the person about the offence, or investigating the offence, under chapter 7.
Relevant offence provisions On 26 November 2004, reprint 4N of the Criminal Code Act 1899 (Qld) was in force and contained the Queensland Criminal Code at Sch 1. The Criminal Code contained a number of offences in relation to riots, with which various persons were charged after the events of 26 November 2004 on Palm Island. Chapter 9 of the Criminal Code was headed "Unlawful Assemblies – Breaches of the Peace". Section 61(1) defined an "unlawful assembly" as follows:When 3 or more persons, with intent to carry out some common purpose, assemble in such a manner, or, being assembled, conduct themselves in such a manner, as to cause persons in the neighbourhood to fear on reasonable grounds that the persons so assembled will tumultuously disturb the peace, or will by such assembly needlessly and without any reasonable occasion provoke other persons tumultuously to disturb the peace, they are an "unlawful assembly". Section 61(2) provided that it was not necessary for persons to have a "common purpose" to be engaged in an unlawful assembly. Section 61(4) provided:When an unlawful assembly has begun to act in so tumultuous a manner as to disturb the peace, the assembly is called a "riot", and the persons assembled are said to be"riotously assembled". "Disturb the peace" was not defined. Section 62 prohibited unlawful assembly:Punishment of unlawful assembly

(1) Any person who takes part in an unlawful assembly is guilty of a misdemeanour, and is liable to imprisonment for 1 year.

(2) The offender may be, and it is hereby declared that the offender always was liable to be, arrested without warrant. Section 63 prohibited taking part in a riot:Punishment of riot

(1) Any person who takes part in a riot is guilty of a misdemeanour, and is liable to imprisonment for 3 years.

(2) The offender may be, and it is hereby declared that the offender always was liable to be, arrested without warrant. Section 64 created an offence of "Rioters remaining after proclamation ordering them to disperse". It is therefore clear that the word "rioter" was used in the Criminal Code to refer to a person engaged in the act of rioting. Section 65 provided:Rioters demolishing buildings etc.

Any persons who, being riotously assembled together, unlawfully pull down or destroy, or begin to pull down or destroy—

(a) any building whatever; or

(b) any machinery whatever, whether fixed or moveable; or

(c) any structure used in farming land, or in carrying on any trade or manufacture, or in conducting the business of a mine; or

(d) any bridge, wagon-way, or trunk, for conveying materials from a mine;

are guilty of a crime, and each of them is liable to imprisonment for life. In these reasons, I refer to the offence created by s 65 as "rioting with destruction". Section 66 provided:Rioters injuring building, machinery etc.

Any persons who, being riotously assembled together, unlawfully damage any of the things in section 65 mentioned, are guilty of a crime, and each of them is liable to imprisonment for 7 years. In these reasons, I refer to the offence created by s 66 as "rioting with damage". Sections 261 to 265 provided for circumstances in which it was lawful for a person to suppress a riot, but those provisions are not material for present purposes. Sections 201 and 202 respectively created offences of officers neglecting to suppress a riot and any person neglecting to aid in suppressing a riot, but they also are not material. Section 398 of the Criminal Code prohibited stealing and contained a number of sub-points for punishment in special cases, sub-point 13 of which relevantly prohibited stealing by looting in civil unrest:Stealing by looting

If—

(a) the offence is committed during a natural disaster, civil unrest or an industrial dispute; or

(b) the thing stolen is left unattended by the death or incapacity of the person in possession of the property;

the offender is liable to imprisonment for 10 years. Section 419 prohibited burglary, including entering a dwelling with intent to commit an indictable offence and entering a dwelling and committing an indictable offence:Burglary

(1) Any person who enters or is in the dwelling of another with intent to commit an indictable offence in the dwelling commits a crime.Maximum penalty—14 years imprisonment.(2) If the offender enters the dwelling by means of any break, he or she is liable to imprisonment for life.

(3) If—(a) the offence is committed in the night; or

(b) the offender—(i) uses or threatens to use actual violence; or

(ii) is or pretends to be armed with a dangerous or offensive weapon, instrument or noxious substance; or

(iii) is in company with 1 or more persons; or

(iv) damages, or threatens or attempts to damage, any property;the offender is liable to imprisonment for life.(4) Any person who enters or is in the dwelling of another and commits an indictable offence in the dwelling commits a crime.Maximum penalty—imprisonment for life. Section 461 prohibited arson:Arson

Any person who wilfully and unlawfully sets fire to any of the things following, that is to say—

(a) any building or structure whatever, whether completed or not;

(b) any vessel, whether completed or not;

(c) any stack of cultivated vegetable produce, or of mineral or vegetable fuel;

(d) a mine, or the workings, fittings, or appliances of a mine;

(e) any aircraft or motor vehicle;

is guilty of a crime, and is liable to imprisonment for life. Section 469 prohibited wilful damage of property:Wilful damage

Any person who wilfully and unlawfully destroys or damages any property is guilty of an offence which, unless otherwise stated, is a misdemeanour, and the person is liable, if ***no*** other punishment is provided, to imprisonment

for 5 years. All of these offence provisions are relevant to the arrests and charges laid against individuals which followed the protests and fires on 26 November 2004 on Palm Island.

A DEATH IN CUSTODY In this part of my reasons I set out the sequence of events concerning how Mulrunji came to be in police custody on 19 November 2004, what happened to him once he was in custody on 19 November 2004, and the series of events that then unfolded on Palm Island through to approximately 28 November 2004, which is the point at which the applicants' allegations of racial discrimination cease in a chronological sense. Aspects of this sequence have been the subject of findings in other proceedings, and it is ***no*** part of the Court's task here to revisit those findings, nor, through the guise of allegations under s 9 of the RDA, to call into question findings made by other persons and bodies, for other purposes. If it is necessary to go over, and make findings about, factual matters which have been the subject of previous findings, that task is undertaken as part of this Court's exercise of jurisdiction to determine whether the applicants have made out their allegations of contraventions of s 9 of the RDA. This part of my reasons is based on the parties' second amended agreed statement of facts, filed by the parties towards the end of the trial, and on what I understand to be either uncontentious, or unchallenged, evidence. There was a considerable body of evidence about which the respondents in particular made ***no*** final submissions, other than generalised submissions that evidence was irrelevant or not probative. Contested factual issues relevant to the applicants' s 9 claims are dealt with in the Resolution section of these reasons. On the morning of 19 November 2004, Mulrunji was walking down Dee Street on Palm Island. Dee Street was one of the places the Court visited on the view of Palm Island undertaken during the trial. It is an ordinary suburban street, with houses on both sides. It is a short walk from the mall area and the police station. There were people out and about, including Ms Gladys Nugent, who would later give an account of what she saw. The evidence of Ms Nugent, and the preliminary autopsy report that would be completed four days later, suggest Mulrunji was affected by alcohol that morning. SS Hurley and PLO Bengaroo were in a police van, which had a locked cabin area in the back of it. They were in Dee Street at the request of Ms Nugent. She claimed to have been assaulted earlier that morning by her partner, Mr Roy Bramwell, and she had asked the police to escort her to the Bramwell house in Dee Street so she could collect her diabetes medication. In an interview with investigating officers later that day, SS Hurley stated that when they arrived at the house Mr Patrick Bramwell, Roy Bramwell's nephew, was intoxicated and called out abuse to SS Hurley. SS Hurley arrested him for ***public*** nuisance and placed him in the back of the police van. Mulrunji was present as SS Hurley was arresting Patrick Bramwell. He called out to SS Hurley and PLO Bengaroo. I return to the evidence about what Mulrunji said in more detail later in these reasons. SS Hurley arrested Mulrunji and placed him in the locked area of the police van with Patrick Bramwell. The basis for the arrest was later said to be that Mulrunji had committed ***public*** nuisance by what he said to SS Hurley and PLO Bengaroo. SS Hurley drove the police van to the Palm Island Police Station on Main Street. He parked the van in the back of the police station, where there was a partially covered parking area, which was open to the lane behind the police station. This lane is called Police Lane. Ms Penny Sibley was standing in the lane and saw Mulrunji and Patrick Bramwell being taken out of the back of the police van, as she described to the investigating officers two days later. SS Hurley removed Mulrunji from the police van and a struggle ensued. At the time SS Hurley removed Mulrunji from the police van, Roy Bramwell was inside the police station. Constable Kristopher Steadman was standing at the front passenger's side of the police van in a position where he was able to see, and did see, some of the events that occurred after SS Hurley removed Mulrunji from the police van to the time when they entered through the door of the Police Station. Sergeant Michael Leafe and PLO Bengaroo were also present in the vicinity of the police van. There was a door into the police station from the garage where the police van was located. There was a step up into the police station from this area. On the way into the police station, Mulrunji and SS Hurley fell through the rear door of the police station as they were entering it. There are various accounts of how this fall occurred and what it involved, including accounts by SS Hurley and by Mr Bramwell. Whatever occurred, Mulrunji ended up on the floor of the police station, in a corridor leading to the cells, with his head facing towards the cells and his feet facing towards the door he and SS Hurley had entered through. The parties agree he was limp and unresponsive by this stage. While in that state, Mulrunji was dragged by Sergeant Leafe and SS Hurley into a watchhouse cell. It was agreed that this occurred at approximately 10.26 am, being the time recorded in the police running sheet. Patrick Bramwell was placed in the watchhouse cell with Mulrunji. The video footage of the two men while they were in the cell was in evidence before me. It was agreed that it was during this cell video footage that Mulrunji died. The time of his death was agreed to be approximately 11 am on 19 November 2004. I set out at [286] below what can be seen during the cell video until Sergeant Leafe,

Constable Steadman and then SS Hurley all enter the cell upon Sergeant Leafe discovering that Mulrunji was not breathing. The time shown on the video footage was not accurate due to a power outage, but nevertheless it establishes that the period between the point at which the video starts (which was shortly after Mulrunji and Patrick Bramwell were placed in the cell) and the point at which Mulrunji is found not to be breathing is 44 minutes. Therefore, just under an hour elapsed between when Mulrunji was placed in the cell and when he was discovered not to be breathing. An autopsy was carried out on the following Tuesday, 23 November 2004 and found the cause of Mulrunji's death was intra-abdominal haemorrhage due to a ruptured liver and portal vein. Mulrunji had also sustained four broken ribs. It is clear he did not enter custody less than an hour earlier with those injuries. At approximately 11.19 am on 19 November 2004, SS Hurley telephoned the Queensland Ambulance Service and asked them to attend an emergency at the watchhouse. SS Hurley then made several calls notifying various people of Mulrunji's death. At approximately 11.23 am he telephoned Senior Sergeant Frank Jenkins at the Townsville District Police Communications Centre and advised that Mulrunji might be deceased. At approximately 11.30 am, he again called SS Jenkins and advised him that there had been a death in custody. At around the same time (the sequence of these calls is not clear) SS Hurley telephoned District Inspector Gregory Strohfeldt and advised him of the death in custody. Inspector Strohfeldt was also told about Mulrunji's death by SS Jenkins shortly thereafter. Approximately 15 minutes later (at approximately 11.45 am) SS Hurley telephoned Detective Sergeant Darren Robinson, who was stationed on Palm Island but temporarily in Townsville, and told him about Mulrunji's death. SS Hurley was at this time DS Robinson's superior officer. DS Robinson was the second most senior officer on Palm Island at the time, and had been stationed on the island for two years. SS Hurley had also been stationed on the island for approximately two years and, as the Officer in Charge on Palm Island, he was also in charge of the watchhouse and the cells at this time.

GENERAL NARRATIVE OF EVENTS AFTER MULRUNJI'S DEATH As in the preceding section, I have based my findings in this part of these reasons largely on the second amended agreed statement of facts, together with uncontentious or unchallenged aspects of the oral and documentary evidence where required.

Summary of officers involved in the events of 19 to 28 November 2004 It is necessary, first, to give a brief summary of the police officers mentioned in the evidence. The summary provides the rank and role of each officer as at November 2004, but quite a few of the officers have been promoted since that time. In the findings that follow, I use the rank of each officer as at November 2004 when addressing actions undertaken at that time, but when addressing the evidence given in this proceeding by certain of those officers I use their ranks at the time the evidence was taken (for the most part, in March 2016). Those officers who were called as witnesses are the subject of findings at [463] to [507] below. In relation to DS Robinson, who has left the police force, I have referred to him by the rank he held at the time of the events. In November 2004, SS Hurley was the most senior QPS officer stationed on Palm Island. As such, he was the Officer in Charge of Palm Island Police Station, including its watchhouse and cells. DS Robinson was the Officer in Charge of the Criminal Investigation Branch (CIB) on Palm Island and he was the second most senior officer stationed on the island after SS Hurley. Sergeant Leafe was stationed on Palm Island under SS Hurley's command, as were Constable Steadman, Constable Benjamin Tonges, Constable Gene Poole and Constable Timothy Hooker, although Constables Poole and Hooker were not on Palm Island at the time of Mulrunji's death on 19 November 2004. PLO Bengaroo was also stationed on Palm Island. Inspector Strohfeldt was the QPS officer to whom SS Hurley was directly responsible. He was stationed in Townsville and had held the position of District Inspector there since 29 March 2004. During his time as District Inspector, he had not been to Palm Island. However, as I note at [138] above, Inspector Strohfeldt was a member of the Steering Committee for the QPS review of policing in Aboriginal communities that highlighted the matters I have set out in that paragraph. DI Webber was the regional crime coordinator for the Northern Region, which included Palm Island. In the course of the investigation into the death of Mulrunji between 19 and 24 November 2004, DI Webber was the commissioned officer responsible for the investigation for the purposes of s 1.17 of the OPM. DSS Kitching was the Officer in Charge of the Townsville CIB. He travelled to Palm Island with DI Webber and DS Robinson on the day of Mulrunji's death, 19 November 2004. From then until 24 November 2004 he was the primary investigator into the death, under the supervision of DI Webber. DS Robinson also assisted with the investigation. Inspector Williams was a member of the Ethical Standards Command of the QPS and, after arriving on Palm Island on 20 November 2004, he too participated in the investigation of Mulrunji's death. In the evidence, and in the other reports dealing with these events, Inspector Williams is sometimes identified as holding the rank of Detective Inspector. The weight of the evidence suggests, however, that it is correct to refer to him with the rank of

Inspector, and that is the rank I propose to use. Senior Sergeant Roger Whyte was the Officer in Charge of Deeragun Police Division, Townsville. On 22 November 2004, he became Officer in Charge of the Palm Island Police Station, replacing SS Hurley. However, SS Whyte performed that role under the command of Inspector Brian Richardson, who on 22 November 2004 was instructed by Acting Assistant Commissioner Roy Wall to take charge of overall policing on Palm Island. Inspector Richardson's role was to have overarching command and to liaise with the QPS hierarchy. Inspector Glenn Kachel was the Professional Practices Manager for the QPS Northern Region and took over operational control of policing on Palm Island from Inspector Richardson after arriving on the island on the afternoon of 26 November 2004. Detective Sergeant Gary Campbell was stationed at the Townsville CIB and also travelled to Palm Island on 26 November 2004 to investigate possible offences committed during and after the protests and fires. Senior Sergeant David Dini was Officer in Charge of the Townsville Cross-Cultural Liaison Unit and also travelled to Palm Island on 26 November 2004. Senior Sergeant Donald McKay was the Officer in Charge of the SERT unit for the QPS Far Northern Region. The SERT unit was based in Cairns and was made up of two teams. Acting Sergeant Rodney Kruger was acting leader of one of those teams. Constable Wade Folpp was a member of A/S Kruger's team. Mr Folpp's rank is not revealed in the evidence, but I have applied the rank of "Constable" when referring to him based on the applicants' submissions. The respondents' submissions do not mention Constable Folpp, but I have assumed that if this rank were incorrect the respondents would have identified the mistake. Inspector Steven Underwood was from what was described in the evidence as the "specialist services branch" of the QPS. He arrived on Palm Island at approximately 7.30 pm on 26 November 2004 with the ***Public*** Safety Response Team (PSRT), of which he was the commanding officer. The function of PSRT was to ***protect public*** safety in instances of confrontation or violence. Inspector Underwood was also the most senior QPS officer to go on the operation that took place on 27 and 28 November 2004 and during the entries and searches he had command of both SERT and PSRT, although it would appear from the evidence that SS McKay had what I might describe as "practical command" over the SERT officers. It is fair to say there was very little evidence adduced by the respondents about the interrelationship between the roles of the numerous QPS officers.

Initial response to Mulrunji's death by officers on the mainland At some time between approximately 11.40 am and 12 noon on 19 November 2004, Inspector Strohfeldt notified DI Webber of Mulrunji's death. At this stage, DI Webber was in Townsville, as was Inspector Strohfeldt. Also between approximately 11.40 am and 12 noon on 19 November 2004, DI Webber appointed DSS Kitching as the primary investigator in the investigation into Mulrunji's death and, therefore, the "investigating officer" under the OPM. Sometime shortly thereafter, DI Webber also appointed DS Robinson to assist with the investigation. As I have noted above, DS Robinson was in Townsville on this day. At 11.50 am, SS Jenkins advised Senior Sergeant Lilian Bensted, the Officer in Charge of the QPS Cultural Advisory Unit (CAU), of Mulrunji's death. SS Bensted advised SS Jenkins about the relevant sections of the OPM that would need to be complied with during the investigation. She also advised that it was necessary to contact the Aboriginal and Torres Strait Islander Legal Service (ATSILS) in relation to the death. At approximately 12.10 pm the Ethical Standards Command was notified of the death in custody. Shortly after that time, DI Webber notified Detective Inspector Gil Aspinall, the Officer in Charge of the Coronial Support Unit in Brisbane, of Mulrunji's death. The State Coroner was then immediately notified of the death. There is some evidence that, at approximately 1 pm, Mulrunji's partner, Tracey Twaddle, went to the Palm Island Police Station and inquired about Mulrunji. Ms Twaddle had been Mulrunji's partner for approximately 10 years. The evidence is not especially clear whether she went to the police station once or twice on that day. There was some cross-examination to the effect that Ms Twaddle went to the police station at 1 pm, and DI Webber agreed that he learned at some stage (whether on 19 November 2004 or otherwise was unclear) that "she had been told effectively to go home". However, the CMC stated in its report (at p 124) that Ms Twaddle went to the police station at 11.30 am as well:Some time after 11.30 am on 19 November 2004, Mulrunji's partner, Tracey Twaddle, and her niece approached the police station, where an ambulance was in attendance. Her niece asked at the police station who the ambulance was for and was told it was for Chris Hurley. Tracey Twaddle returned to the police station sometime after 1 pm to ask when Mulrunji would be released. Hurley told her to come back at three o'clock and did not advise her of Mulrunji's death. At the end of his interview with investigating officers given later that afternoon, SS Hurley said that Mulrunji's "family came up when he was in the cell and ah, you know I had to tell them to see us later on", but he did not state what time that occurred, nor who he meant by Mulrunji's "family", nor whether they came to the station more than once. The only other relevant evidence in this proceeding comes from Mrs Agnes Wotton. She said:Well, my daughter, she was very good friends with Cameron's de facto, and she came and told me that, you know, "We lost Cameron." And his de facto – her – yes, his de facto wanted to know what happened to him at that time, so I don't know whether

she got an answer around about 3 o'clock that day – that afternoon but she didn't get it in the morning. She went down to the police station: "What happened to Cameron?" On the evidence before me (having regard to the approach I take to the CMC report: see [118] above) I am not able to make any findings about whether Ms Twaddle went once or twice to the police station before she and Mulrunji's family were formally notified of his death later in the afternoon by DI Webber. However, based on the concession by DI Webber in cross-examination, the statement by SS Hurley in his record of interview, and Mrs Wotton's evidence, I am prepared to find that Ms Twaddle went to the police station at least once, and was turned away by SS Hurley himself, without being told her partner had died.

Arrival of investigating officers on Palm Island At approximately 2.20 pm, DI Webber, DSS Kitching and DS Robinson travelled to Palm Island by charter aircraft, accompanied by police technical support staff (Senior Sergeant Arthy, Constable Tibbey, Sergeant Bartulovich, two Constables and a Human Services Officer). The arrival of these officers on Palm Island meant SS Hurley was ***no*** longer the most senior police officer on the island. As regional crime coordinator, DI Webber was the officer in charge of DSS Kitching, although as I have noted DSS Kitching was the primary investigating officer in the investigation into Mulrunji's death. Palm Island airport is several kilometres from the area of the town where the mall, the Council offices, the police station and the police barracks were located in November 2004. Near the airport is one of the three main settlements on the island, which is known as Butler Bay. SS Hurley and Sergeant Leafe met the arriving officers at the airport, bringing two vehicles to transport them and their support staff to the police station. Although neither Constable Steadman nor Constable Tonges were on duty at the time the officers arrived, the respondents did not dispute the contention that they could have been asked to transport the officers from the airport to the police station, but were not asked or directed to do so. Instead, SS Hurley drove the officers back to the station. At that time, the investigating officers were not aware of any allegation that SS Hurley had assaulted Mulrunji. Allegations to that effect were subsequently made by Roy Bramwell and Penny Sibley, as I describe below. However, SS Hurley, DI Webber and DSS Kitching knew the types of matters required to be investigated following a death in custody, including the matters set out in s 16.24.3 of the OPM, which I have extracted at [182] above. The settled part of Palm Island covers relatively confined areas on the island. It is a small community, with few roads. Anyone travelling in a vehicle around Palm Island is highly visible. It would also have been obvious to those officers that some members of the community were likely to see SS Hurley driving DI Webber and DSS Kitching from the airport to the police station. SS Hurley, having spent two years on the island by November 2004, would certainly have known himself how visible he would be driving the investigation team. Neither DI Webber nor SS Hurley's commanding officer Inspector Strohfeldt instructed SS Hurley not to discuss the circumstances surrounding the death in custody with other QPS officers. What was said between SS Hurley and the investigating officers during this drive was the subject of some oral evidence by Inspector Kitching, to the effect that they engaged in minor conversation about what was going to transpire, but ***no*** conversation about Mulrunji's death. DI Webber gave evidence that there was some discussion of the possibility of "unrest or ill [will]" in the community. In the absence of more fulsome evidence about what occurred during that drive, I am not prepared to find that the extent of the conversation between the men in that vehicle was limited to what Inspector Kitching and DI Webber now recall. However, I am also not able on the evidence to make any positive findings about what was discussed. The fact that SS Hurley went to the airport and drove the officers back to the police station is one of the events relied on by the applicants as demonstrating the lack of impartiality (both in fact and in appearance) in the investigation into Mulrunji's death.

Notification of next of kin Shortly after DI Webber arrived on the island, he arranged to go to notify Mulrunji's next of kin that Mulrunji had died. The timing of this notification is impugned by the applicants as a contravention of s 9, and I return to it below. DI Webber took Mr Owen Marpoondin, who was at that time working for ATSILS, and Sergeant Leafe from the police station. Sergeant Leafe drove the police vehicle. They went first (at approximately 3.40 pm) to see Ms Twaddle to inform her of the death; then they went (at approximately 4 pm) to Mulrunji's mother's house to inform Mulrunji's mother.

Interviews and re-enactments with witnesses That same day, and while the next of kin were being notified, between approximately 4.04 pm and 4.36 pm DSS Kitching and DS Robinson interviewed SS Hurley. During the interview, SS Hurley gave an account of what had happened which included an allegation that Mulrunji had struck him in the face as SS Hurley was taking him out of the police van, and that SS Hurley had then grabbed hold of Mulrunji and a "struggle" had ensued, resulting in the two men falling through the door to the police station. SS Hurley told the investigators that he and Sergeant Leafe had then dragged Mulrunji into the cell and that he had noticed "a small amount of blood" coming from an injury above Mulrunji's right eye. SS Hurley gave this description

of the struggle and fall ("H" standing for SS Hurley and "K" standing for DSS Kitching):H ... Now from there what happened was I opened the rear door of the police vehicle to get the two people in custody out. As I did this, Cameron DOOMADGEE struck me with a closed fist – that was on the back side of his fist – he came across my face. I then took hold of him by grabbing him on the shirt – up close to where they ahh the V of the shirt – a struggle ensued. What I was trying to do at the time was get a hold of – get a hold of one of his arms – but it was a confined area between the – police vehicle and the side wall of that police station – from there we ahh – the struggle moved into the station where we were on the ground – because the step up

K So you tripped over a step is that right

H Over the step as we came in – there's a step there

K How did you manage to fall on the ground

H I fell to the left of him and he was to the right of me

K What caused you to fall

H Just coming into the station I was trying to grab him and he was trying to get away

K Oh OK

H From there – ahh – Sergeant LEAFE had closed the back door of the ahh – wagon

K Where was umm – Patrick BRAMWELL at that stage

H I'm not sure – I'm not sure whether Sergeant LEAFE had brought him into the station or whether he was still outside

K OK

H Anyway umm – Sergeant LEAFE then seeing the struggle went and opened up the watchhouse – the door to the watchhouse so he didn't have to struggle (U/I) and then when there were two of us there – we took him by both arms and we took him into the watchhouse – he'd stopped um, he'd stopped fighting us. Put him into the watchhouse – there was two mattresses there – he didn't lie on any of the mattresses – he lay on the floor.

...

K And when you said you got him out of the police vehicle – who assisted you [to] get him out of the police vehicle

H Nobody

K OK so you got him out by yourself

H Yeah

K OK and you said you had a struggle between the police vehicle and the wall of the police station

H Yes

K Ok umm – who assisted you to get him from the police vehicle to the police station

H Nobody – I was the only one that was umm – wrestling with him

K And you said as a result of the struggle you fell into the police station because of a step is that right

H Yeah – I can only presume we fell over the step because when we were at the station I can remember that we were on the ground

K OK – and who was assisting you then

H Nobody – I stood up (ui) Michael LEAFE came and ahh – assisted me to drag him into the cell

...

K When you fell to the ground inside the station there did you receive any injuries yourself

H ***No*** – ***no*** but I had noticed his – you know that, I've been over that – just a tiny scratch on my arm there on the left hand arm there – probably from the ahh – the little wrestle that we had – that's the only thing I can see

K And you didn't land on top of him

H ***No*** I landed beside him on the ahh – on the ahh – what do you call it – the ahh lino

K Did he ever complain of any medical injuries or

H ***No***

K That he was aware of any injuries

H I wasn't, I wasn't, I wasn't able to ask him the questions because of his aggression and because of the fact we took him straight to the cell ... SS Hurley said nothing about falling on top of Mulrunji, instead stating that he "landed beside him". Nor did SS Hurley say anything about any heavy contact between himself and Mulrunji during the fall, nor anything about hitting Mulrunji himself. After interviewing SS Hurley, over the next two and a half hours or so (between approximately 4.50 pm and 7.10 pm) DSS Kitching and DS Robinson interviewed a number of other people, in the following order: PLO Bengaroo; Gladys Nugent; and Patrick Bramwell. Later that night (between approximately 7.50 pm and 8.12 pm) they interviewed Sergeant Leafe. He told them that, as SS Hurley was removing Mulrunji from the police vehicle, he had heard SS Hurley cry out that Mulrunji had hit him; that he had then seen SS Hurley "scuffling" with Mulrunji; and that a few seconds later, Mulrunji had been lying limp on the ground of the police station and had felt like a "dead weight" as Sergeant Leafe and SS Hurley dragged him into the cell. A little later that evening (between approximately 8.22 pm and 8.35 pm) DSS Kitching and DS Robinson conducted a recorded interview with Edna Coolburra, who was a resident of Dee Street and saw Mulrunji being arrested by SS Hurley. After the interviews had been completed for the evening, DI Webber, DSS Kitching and DS Robinson ate a meal with SS Hurley at SS Hurley's residence. The meal was prepared by DS Robinson. The men consumed a modest amount of beer. Sergeant Leafe and his wife (who was also a police officer) were present for part of this time. This event is another of the examples relied on by the applicants as demonstrating that the investigation lacked impartiality, both in fact and in appearance. The next morning (20 November 2004), interviews began again. At approximately 8.15 am, DSS Kitching and DS Robinson conducted an interview with Roy Bramwell, an Aboriginal man who lived on Palm Island. DSS Kitching and DS Robinson had driven to Roy Bramwell's house at approximately 8 am that morning to bring him to the station for an interview, having received

information the previous day that he had been inside the police station when SS Hurley brought Mulrunji into the station. During his interview, Mr Bramwell alleged that he saw SS Hurley assault Mulrunji, including while Mulrunji was lying on the floor after SS Hurley knocked him down. Mr Bramwell is recorded (at p 7 of his record of interview) as saying:They dragged him in ... Chris started punchin' him just in the hall there, Chris started punchin' him, you want more Mr Doomadgee, (ui). You want more Mr Doomadgee hey that's enough for ya, just kept on going like that, Chris (ui) sat down and (ui) I seen Mr Doomadgee legs sticking up. Shortly after the interview, DS Robinson prepared a typed statement for Mr Bramwell, which he subsequently signed. DS Robinson had been typing up statements for the other witness interviews as well, although there is ***no*** evidence before the Court that he prepared witness statements recording what SS Hurley and PLO Bengaroo said in their interviews. Transcripts of the interviews with SS Hurley and PLO Bengaroo were in evidence, however. A little later in the morning (between 9.16 am and 9.25 am) DSS Kitching also interviewed Gerald Kidner, who stated that he had seen SS Hurley arrest Mulrunji in Dee Street the previous morning. Inspector Williams arrived on Palm Island by plane about mid-morning on Saturday, 20 November 2004. The parties agreed a fact that it was Inspector Williams' role to "overview" the investigation, as required by s 1.17 of the OPM and cl 7.2 of the Coroner's Guidelines, although DI Webber retained responsibility for the investigation as regional crime coordinator, and DSS Kitching remained the principal investigator. It is correct that the OPM and the Coroner's Guidelines use the verb "overview" but there was ***no*** real evidence or explanation before the Court about what this meant in practice. As I set out elsewhere in these reasons, it was the case that Inspector Williams took an active part in the interviews and re-enactments, and certainly did more than simply supervise or have other officers report to him. DI Webber gave Inspector Williams a briefing, together with DSS Kitching and DS Robinson. Inspector Williams reviewed the interviews and witness statements which were then in existence. At approximately 10.52 am on 20 November 2004, Inspector Williams and DI Webber conducted a video re-enactment with Roy Bramwell of the events surrounding Mulrunji's death, during which Mr Bramwell repeated his allegation that SS Hurley assaulted Mulrunji. This video re-enactment was in evidence before me, and was the best evidence before the Court of what the inside of the police station looked like at the time. The same officers, together with DSS Kitching and Constable Tibbey, then visited the site of Mulrunji's arrest in Dee Street. SS Hurley drove the officers to and from Dee Street. Whilst at Dee Street, SS Hurley gave an account of what had occurred when he arrested Mulrunji. What occurred during this event was said by the applicants to contravene s 9 of the RDA in several ways, and I return to this in the Resolution section of these reasons. The officers did not take PLO Bengaroo with them, and so did not ask him to re-enact anything that happened during the arrest at Dee Street. After the visit to Dee Street, Inspector Williams and DI Webber conducted video re-enactments with SS Hurley, PLO Bengaroo and Sergeant Leafe, between approximately 11.53 am and 1.12 pm. These re-enactments were in evidence before me. It will be recalled that PLO Bengaroo had been with SS Hurley when Mulrunji was arrested in Dee Street and had travelled with SS Hurley in the police van to the police station. He had been present when SS Hurley took Mulrunji out of the van and brought him into the police station. In his re-enactment, PLO Bengaroo described seeing SS Hurley and Mulrunji go "both together" through the doorway of the police station. He was asked what was happening as they both went through the doorway and replied that they were "both still struggling". When asked what happened then, PLO Bengaroo repeated that the men were struggling and then said they went down the hallway. Inspector Williams then asked whether anything had happened "here" (indicating an area just inside the doorway where SS Hurley had said the men fell). I infer that, given PLO Bengaroo had said nothing about any fall, Inspector Williams asked this because of what SS Hurley had said. PLO Bengaroo did not answer Inspector Williams directly. He shifted around, looking downwards and, I find, appearing uncomfortable. He looked at the other officers and then said "can't recall, ***no***". Inspector Williams then tried again, asking if the men "walked down the hallway". PLO Bengaroo repeated that they were struggling. After a little more hesitation, PLO Bengaroo then said Mulrunji "flopped against the floor" and that SS Hurley "fell down on him". He then said that "Chris was trying to pick him up". DI Webber reassured PLO Bengaroo that he should take his time. Inspector Williams asked if he was saying Cameron fell down. DI Webber then asked "or did they both fall down". PLO Bengaroo replied that they both fell down. PLO Bengaroo then described, with some prompting from the officers, how SS Hurley tried to pick up Mulrunji "from behind". PLO Bengaroo then confirmed that he did not go inside. He concluded this part of the re-enactment by saying he saw SS Hurley and Sergeant Leafe dragging Mulrunji down the hallway. PLO Bengaroo was asked by Inspector Williams whether, after the fall, he was watching as SS Hurley and Sergeant Leafe dragged Mulrunji down the hallway in the police station leading to the cells. PLO Bengaroo replied, "***No*** I wasn't". Inspector Williams asked "What were you doing? What, how come you were standing there?". PLO Bengaroo replied "I can't remember. I just stood there because I was thinking, um, if I see

something I might get into trouble myself or something ... the family might harass me or something you know." Inspector Williams responded, "Oh, OK". After that exchange, DI Webber and Inspector Williams asked PLO Bengaroo about whether he saw SS Hurley do anything while Mulrunji was on the ground and whether he saw SS Hurley punch Mulrunji. PLO Bengaroo replied that SS Hurley "scruffed" Mulrunji. As he said this PLO Bengaroo raised his left arm, with his elbow at right angles, apparently indicating how he recalled SS Hurley "scruffed" Mulrunji. PLO Bengaroo was then asked whether he saw SS Hurley punch Mulrunji and he replied "I didn't, nah". The applicants' case included allegations that the failure by DI Webber and Inspector Williams to follow through with PLO Bengaroo about what he had said (and not said) during this re-enactment was a key failure of the investigation. The implication the applicants sought to draw was that PLO Bengaroo had seen things he did not wish to volunteer or talk about and this would have been obvious to any objective investigator. They allege that this failure occurred because PLO Bengaroo was an Aboriginal man and therefore what he said was not taken seriously, or that the investigators were not keen to focus on matters which might impugn SS Hurley. At approximately 1.10 pm on Saturday, 20 November 2004, DSS Kitching and Inspector Williams undertook a re-enactment with SS Hurley. This was the second time SS Hurley gave an account of what occurred. During the re-enactment SS Hurley described what occurred in the following terms ("MW" standing for Inspector Williams, "WW" standing for DI Webber, and "CH" standing for SS Hurley):MW ... Chris what we'd like you to do please is ah we're gonna video tape the re- enactment of how you um dealt with the deceased once we came back here to the the ah station. What I'd like you to do is um basically in slow motion we'll just go through each and every point as we run along and if you can just explain as we go along um his demeanour your actions what was happening and who you saw around you ah at the time is that Okay

CH Yep, that's fine

MW Beautiful

CH Um, initially, we arrived that door, that door was shut. I got here and Sergeant LEAFE was standing here as was the male person that male person was Roy BRAMWELL um there was also a lady there who is Penny SIBLEY I now know that. I didn't know SIBLEY at the time. Lloyd told me that's who it is. Um before opening the cage Sgt LEAFE told me that that was Roy BRAMWELL and I, I, was ah conducting initial investigation into ah three bodily harms from in the morning that Roy BRAMWELL was the suspect and ah LEAFE asked me what I want done with him and ah I said put him in the on the yellow chair. The yellow chair is normally the chair we use for suspects basically. Um, I can't remember whether he went in then or what happened. I turned and I opened up this um cage the second person that was ah arrested was um Patrick NUGENT and NUGENT was more at the back there ah Cameron DOOMADGEE was at the, at the front. So he came out first when I opened the when I opened the door I opened it to here or somewhere around there and I told them to come out and what happened then DOOMADGEE stepped out or started to step out and I got assaulted. I was like that ready to get in there and the punch wasn't like that (sound of punch) it was like that (sound of punch) it was like type of backwards

WW Backhand

CH It was a type of backhand closed fist punch

MW Okay

CH Um, that ah that struck me like that anyway I

MW So it struck your right jaw

CH It struck my right jaw chin area

MW Yep

CH I didn't hit me up here he hit me down there anyway um I have then grabbed hold of him by the shirt and there's been a tussle go on between us and that tussle continued to inside the building

MW Now can you just, just slow down buddy and just explain to me how the tussle what, what sort of tussle did that involve, getting him down to the ground

CH Well when ...

WW Mate, if I play the part ...

WW Yep

CH When, when he was coming out um I don't know how far out he was I can't recall that but straight away the tussle went on and I went straight for his shirt, to pull him towards me to stop that happening basically. The weight of him coming towards me, I was on the back and then I tried to heave him towards this way and we're in between us here. And basically because of the state of his intoxication he was also like lower than, just go a bit lower boss, he was a lot lower than that and we were, we were tussling to try and get him there

WW Did he have hold of you

CH and he had a hold of me and I don't know particularly where, but I had a hold of his shirt and I kept onto his shirt like that the whole way in. I remember bouncing off the wall a couple of times. I remember I bounced into the amplimesh a couple of times from the tussling that was going on.

MW Yep

CH And ah the tussling was you know whilst I can't remember exactly, the tussling was something similar to come on, come come like this. Now what had happened was Lloyd BENGAROO the Police Liaison Officer, had opened this door for me Um he had pinned it back like that. Now when I was tussling with um DOOMADGEE he was low I've stepped like this and he's gone like that like that and we're both gone like like that.

[I interpolate here that the video of the re-enactment shows SS Hurley demonstrating that he and Mulrunji fell through the door together with SS Hurley falling to the left and Mulrunji falling to the right. In the demonstration, SS Hurley and DI Webber (who was playing the part of Mulrunji in the re-enactment) are in contact during and immediately after the fall but they fall side by side rather than SS Hurley on top of DI Webber.]And that was the thing, his head was there and I recall that I was making sure it didn't hit there or there but his legs were more out, if I can remember ***no*** his legs were more out the door at that time. He was kind of like that and then I've, then I've stood up and I can't remember whether he was on his stomach when he fell or on his back. But I can remember to try to get him up, I had his shirt and I was going like that. Now he ended up that he wasWW You trying to lift him

CH He was down like that he was down and his feet were he was more in and I don't know how he got from that point to that point but I had tried to lift him when when he went near there I tried to lift him a couple of, sorry I tried to left him a couple of occasions.

MW Just take your time mate

CH I tried to lift him a couple of occasions. Like this I'm going get up Mr Doomadgee get up

[I interpolate here that in the video of the re-enactment SS Hurley grabs DI Webber by the shirt and tugs at it several times to indicate an attempt to lift him up from the ground.]I said don't start it again you know. Anyway he was down there and ah, he refused to get up. Now I can't I can't remember, I just asked Michael before .. um when

did he come through. That's ... I can't even remember Michael LEAFE coming through but Michael has come through here, past us, opened that wooden door and then opened the door of the watchhouse and come back and we both grabbed a by this stage um DOOMADGEE was like that on his back I've stepped over him like that, LEAFE was on the other hand and by his wrists and like that we have dragged him then from there and we have dragged this door was open and the watchhouse door was open. We have dragged him from there into the cell, into the cell and he just layed there thenWW When you say dragged, what with your arms under each armpit or

CH ***No***, dragged like he was laying on the ground and he just he was dragged backwards

WW With his legs dragging

CH With his legs dragging

MW When you had Mr DOOMADGEE on the ground you said you were trying to pick him up, what, what happened as you were trying to pick him up did you pick him by the shirt.

CH I picked him up like to a certain but his shirt kept ripping I picked him a couple of times.

MW Can, can we just do that again. Can you just show us the movement you made as you tried to pick him up by the shirt without ripping your shirt.

CH Yeah well at the time I had him like this I was trying to pick him up like that.

MW Yes

CH Well you can hear that it just kept on ripping.

MW What happens to your hand when it ripped.

CH When it ripped it it went like that.

MW Yep

CH And just ripped. I had force on it but then it went like that because it ripped basically and then well you know well I just didn't want to keep ripping his shirt off obviously. Um, a very short time later, Mick was back to help me and we dragged him into the cell

MW When you try to lift people is the what's your standard way of lifting someone off the ground that's more or less a dead drunken weight as Mr, Mr DOOMADGEE was at this time.

CH If, if he had the clothing on that the Inspectors got on now I would have just gripped him by the belt and pulled him up and one by the shirt. But ah he didn't he had the um type of um board shorts or whatever things on so I was trying to grab him up by the things and get him onto the feet and then to walk him into the cell.

MW We might just go through and show us how you put into the cell please.

CH We won't um actually put him in the cell because we haven't cleaned it out

MW ***No*** that's fine

WW Cell door open or shut

CH That was open

WW It was open

CH Yeah the cell door was open like that like how the cells are open there, cell was open and basically from here I had I had the left arm and Michael had the right, Sergeant LEAFE had the right and we just dragged him into here and put him straight into the cell and um

WW Backwards

CH Backwards like that and put him straight in the cell and we put him on the left hand side of the cell where um he is on the video

WW Alright I notice here a couple of steps right did was at any stage did anyone fall on the ground, or anything here

CH ***No*** ***No*** the only thing that um would have been uncomfortable for him was that his feet were dragging it would have gone like that but there was nothing else

WW Head

CH ***No***

WW Never struck the ground

CH ***No*** the head never struck the ground ***no***

MW Actually we won't talk in there because it seems to vibrate around a bit. Um could you just come back out here. Um, did Mr DOOMADGEE's head strike the ground anywhere in this area.

CH His head was on the ground it didn't strike either of here but um later on that's when we found him deceased I noticed he had a, had a spot of blood there, um so there's obviously is a possibility that we've come in, his head has hit the ground or

MW You more or less said you tripped as you come through the door

CH Because of the fact that um, well most likely because of the fact two of us trying to get through the door and ah, I ended up on my knees beside him and he was here

MW Okay you described Mr DOOMADGEE as being down low can you just indicate height wise here for us how, how low he was before he actually came down onto the ground.

CH Um, well probably about the height of if you have a look at that, from that type of distance because yeah, he was, and he was low because of his state of intoxication and because of the fact that um well probably, probably just the fact that he was resisting and just didn't want to come in.

MW Okay, but when you were on the ground who could you see around at that point.

CH Ah nobody to tell you the truth, Oh I didn't only from hindsight and from speaking to the people found out that Lloyd was the one that opened the door and um, um, BRAMWELL was over there. But I was aware I told Michael to bring BRAMWELL in, but I couldn't see BRAMWELL. I didn't know whether he was there there or not. But ah, I knew Michael was there and I knew Mrs SIBLEY, Penny SIBLEY was out there and Lloyd was around this area somewhere. Like everybody was around. Um but I didn't like try and mentally picture it I did see them you know. I was more concerned about what you know having the tussle with DOOMADGEE.

WW In physical stature how would you describe the deceased more like myself or more like Inspector WILLIAMS

CH More like the Inspector here um he had a bit of strength about him

WW Well putting on a struggle

CH Well the thing that surprised me is I when he hit me out the back of the um van, I said "he hit me, he punched me". Because that's not normal here, you know and ah it shocked me basically. Um, so yeah that's when I grabbed him and I knew there'd be a tussle on to get him inside if he is going to hit the copper

MW Did he make any complaint to you at all as he was going through about anything.

CH He was objecting about being in custody. Like I can't recall what he was saying but I remember him objecting about you know getting locked up

MW Anything else Inspector

WW Not that I can.

MW Just cover one more small thing when he was lying on the ground, what position, what side, back, front how was he lying on the ground just here

CH Initially I remember when we both came in, I was down, he was he had his right side that way. And then ah, that was when we first came in. And then when we ended up dragging him into the cell he was on his back.

MW So basically laying on his right side when he was here

CH On his right side initially when he came in I can remember

MW Yeah and then onto his back

CH And then onto his back yeah.

MW Okay. Was he still ah, conscious

CH Yes

MW At this time. Was he still moving at this time, as you were dragging him, was he still what was he doing as you were dragging him in was he still talking ah or wasn't he talking.

CH ***No*** he wasn't particularly talking

MW Was, was he moving

CH Yes, yes

WW Did he was he trying to get say when he was moving, what what were his actions.

CH Oh he was moving his legs and whatever but he wasn't ah, I think he was resound [sic; "resigned"] to the fact that he was going in there and

WW Was he trying to stand was he trying to move forward

CH ***No***, he didn't stand he, he refused to stand when I tried to get him up on a number of occasions. So listen I just said to Mick lets drag him in The applicants made allegations about how SS Hurley changed the account he gave in this second interview from the one given on the Friday. The applicants attributed the changes to SS Hurley being permitted to remain in the police station and (they alleged) overhear what others were saying, as well as SS Hurley being permitted to talk to other officers. The final interview conducted by DSS Kitching during this period was an interview with Ms Florence "Penny" Sibley conducted in Ingham (which is on the mainland, approximately 45 km west of Palm Island) between 7.50 am and 8.05 am on 21 November 2004. Ms Sibley is an Aboriginal woman. On her account of what she saw outside the police station on 19 November 2004, after Mulrunji had been taken out of the police van, he punched SS Hurley and Ms Sibley then saw SS Hurley hit Mulrunji. By this stage all relevant officers had been interviewed except Constable Steadman. Constable Steadman had been sent to Palm Island only a couple of days before Mulrunji's death. Nevertheless, he was present at many critical events, including checking on Mulrunji in the cell. In the watchhouse cell video which is in evidence, Constable Steadman is the person in plain clothes, as he was off duty at this time. He was not interviewed by the investigating officers before the CMC took over the investigation on 24 November 2004. Instead, he was interviewed by CMC investigators on 8 December 2004. The applicants make allegations concerning the failure to interview Constable Steadman in a timely fashion, and I deal with these below. Whether one speaks of a fall (on SS Hurley's account), a "scruffing" (on PLO Bengaroo's account) a "hit" (on Ms Sibley's account) or repeated punches (on Mr Bramwell's account), on any view the investigating officers knew it was SS Hurley who was the person with Mulrunji in the events leading up to him being dragged, limp, into the cell and dying there. Despite this, SS Hurley was not suspended from duty on 19 or 20 November 2004. He was on duty for the remainder of 19 November and was also on duty on 20 November. He was not asked to stay at home. Nor was he asked to leave the island. On Sunday, 21 November 2004, SS Hurley had a rostered day off. There is ***no*** evidence about what he did during this day. He resumed duty on the morning of Monday, 22 November 2004. On the Saturday (20 November 2004), the original investigation team left the island: namely, DI Webber, DSS Kitching and Inspector Williams. DI Webber's explanation was that they had completed all necessary interviews, apart from that of Penny Sibley, and that there were ***no*** other lines of inquiry to follow on the island at that point in time.

Police conduct in relation to the first autopsy Sometime in the afternoon of Friday, 19 November 2004, Mulrunji's body had been taken from the police station to the Palm Island hospital, which is located a short distance away, ***no*** more than a few hundred metres. From there, his body was taken off Palm Island for the purpose of an autopsy being conducted in Cairns. The autopsy occurred on Tuesday, 23 November 2004. A second autopsy was conducted on 30 November 2004, and thereafter Mulrunji's body was returned to Palm Island. He was buried on Palm Island on 11 December 2004. The police logs suggest the State Coroner may have delayed releasing Mulrunji's body back to his family pending "advice" in relation to the second autopsy. What this "advice" might have been is not revealed on the evidence. In order for an autopsy to be conducted, the police officers on Palm Island had to first complete what is known as a "Form 1" certificate for the pathologist who was to conduct the autopsy. In November 2004, this form was required pursuant to s 7(3) of the Coroners Act 2003 (Qld) and constituted formal notification to a coroner of a "reportable death", which included deaths in custody. The Form 1 was also required under s 8.4.8 of the OPM. The version of the form that is relevant to this case was entitled "Police Notification of Death to Coroner" and was published in the Queensland Gazette on 21 November 2003 pursuant to theCoroners Act. The applicants' case included allegations that critical information from two Aboriginal witnesses (Mr Bramwell and Ms Sibley) was left out of the Form 1 by DSS Kitching. They also alleged that unsubstantiated information,

adverse to Mulrunji, was given to the coroner. I deal with these matters below. DSS Kitching prepared a Form 1 on the night of Friday, 19 November 2004 at approximately 8.58 pm, and forwarded it to DI Webber that night. DI Webber examined the Form 1 on the same evening and did not make any amendments to it, nor did he instruct DSS Kitching to forward the Form 1 to any person. The Form 1 was not sent to the State Coroner, the Government Pathologist, the State Coroner's Police Support Unit or the local coroner on 19 November 2004. Indeed, it was not sent until Monday, 22 November 2004. On the morning of 22 November 2004, the Form 1 was emailed to the State Coroner at 7.43 am and then also sent by facsimile to the State Coroner at 10.40 am. The Form 1 remained as it had been filled out by DSS Kitching on the evening of 19 November 2004, despite further information coming to light during the interviews over the weekend. Under the heading "Summary of Incident" on the Form 1, DSS Kitching wrote:The deceased was arrested by Senior Sergeant HURLEY of Palm Island Police at approximately 10.15am on the morning of the 19th November 2004 in Dee Street Palm Island for an offence of Breaching of the peace. At that time the decease [sic] was aggressive and was restrained and placed in the rear of a caged police vehicle. The deceased was then transported to the Palm Island Police Station where he again became aggressive when police attmepted [sic] to remove him from the rear of the police vehicle. At that time the deceased is alleged to have assaulted Senior Sergeant HURLEY. The deceased was then physically restrained and placed in Cell 2 of the Palm Island Police Watchhouse and charged at 10.26am. At that time the deceased laid on the floor of the cell and went to sleep immediately. A physical inspection was conducted of the deceased at 10.55am and he was asleep and breathing at that time. A further physical inspection of the deceased was conducted at 11.23 am. At that time police could not see the deceased breathing and could find ***no*** pulse. Queensland Ambulance Service was contacted immediately and attended the Palm Island Watchhouse and resusicitation [sic] was not possible. Any person familiar with the information available at the time the Form 1 was sent on Monday, 22 November 2004 would be able to see this account is inaccurate and incomplete in several key respects. Both DI Webber and DSS Kitching had watched the cell video on 19 November 2004 before interviewing SS Hurley, although the entire video up to the point that Mulrunji is discovered not to be breathing goes for 44 minutes and it is unclear on the evidence whether either or both of them watched all of it at this stage, or subsequently. It is also not clear whether they watched it together or separately. There are some discrepancies in specified times as between the cell video and the Form 1, but these appear explicable at least in part by the technical issues with the time stamp on the video. It appears the check of Mulrunji occurred closer to 10.45 am than 10.55 am; and that Mulrunji was found not to be breathing by Sergeant Leafe at just after 11.15 am, rather than 11.23 am. Nothing turns on these discrepancies. The key timing fact for the purposes of the investigation was that there is only just under an hour between when Mulrunji was dragged into the cell by SS Hurley and Sergeant Leafe, and when he was found by Sergeant Leafe not to be breathing. More critically, and contrary to the impression created by the Form 1, the cell video shows clearly that Mulrunji was not asleep during the period before he was found dead. What the cell video shows is Mulrunji rolling slowly from side to side, and moving his limbs from time to time, while lying down. He calls out from the start of the tape at 10:18:52 (by the time stamp on the video). There is a brief check at 10:30:35 by SS Hurley, it would appear in response to a loud call from Mulrunji at 10:30:00. SS Hurley is only there for a few seconds and does not bend down. Mulrunji is still while SS Hurley is in the room, but then continues to move after SS Hurley leaves. What is said in the Form 1 is however more consistent with what SS Hurley said in his record of interview. In that interview, he stated that when he checked the prisoners "both were asleep and both were snoring". Having now watched the cell video many times, I am unable to see how any objective investigator could have accepted SS Hurley's description if the investigator watched (and listened to) the cell video. The cell video then shows Sergeant Leafe checking Mulrunji and Patrick Bramwell at 11:02:53. Sergeant Leafe checks Mulrunji for some time and pats him, apparently trying to wake him up, before leaving at 11:04 and returning briefly a few seconds later. SS Hurley then enters the cell and crouches over Mulrunji for several seconds, apparently checking for signs of life. He leaves, but returns and repeats that process at 11:05:50, staying for more than a minute. At 11:09, Sergeant Leafe and Constable Steadman enter the cell again, followed by SS Hurley. By this time it is clear Mulrunji is dead. The Form 1 is also inaccurate and incomplete in other key respects. It says nothing about PLO Bengaroo's statement that SS Hurley fell on Mulrunji when the two men entered the police station. It says nothing about Mulrunji being dragged limp and a "dead weight" (according to Sergeant Leafe) into the watchhouse cell, after having been vigorously struggling from the point at which he was taken out of the police van and brought inside until the point at which he ended up on the floor of the police station. It says nothing about Mr Roy Bramwell's allegations, nor those of Ms Sibley. It suggests Mulrunji laid himself down on the floor of the cell, which is patently wrong. As I have said above, it suggests Mulrunji "went to sleep" in the cell, when it is clear from the cell video that he was rolling and moving

around, making audible noises. Under the heading “Pr233;cis of Statements” DSS Kitching wrote in the Form 1:Senior Sergeant Christopher James HURLEY has been interviewed by Detective Senior Sergeant KITCHING of the Townsville CIB. HURLEY stated that he arrested the deceased in Dee Street, Palm Island. At that time the deceased was aggressive and abusive towards police and was physically placed in the rear of a caged police vehicle. HURLEY states that upon arrival at the police station he opened the door on the cage of the police vehicle and at that time the deceased became aggressive and punched HURLEY in the side of the face. HURLEY then physically restrained the deceased and struggled with him to the rear door of the police station where they both fell to the ground. Another police officer Sergeant Michael LEAFE then assisted Senior Sergeant HURLEY place [sic] the deceased into the watchhouse cell by dragging him with both arms. He was charged at 10.26am. HURLEY then conducted a physical inspection of the deceased at 10.55am and he was asleep and breathing. A further inspection was conducted by Sergeant LEAFE at 11.23am and the deceased was not breathing and had ***no*** pulse. HURLEY states that QAS attended the watchhouse and resusicitation [sic] was not possible. Dr IBE of the Palm Island Hospital later attended the watchhouse and pronounced life extinct. HURLEY noticed a small abrasion to the right eye of the deceasedafter [sic] he was found to be deceased. This injury was brought to the attention of HURLEY by the QAS. This was the only injury identified on the deceased. It can be seen that this summary is more consistent with the account given by SS Hurley to DSS Kitching. It does mention the fall. Somewhat extraordinarily, it records Mulrunji being “charged” after he was dragged into the cell, in a condition the parties agreed could be described as “limp and unresponsive”. However, again, there is ***no*** reference to the statements of Mr Roy Bramwell and Ms Sibley. There is also ***no*** reference at all in the original Form 1 to how Mulrunji appeared in the cell video, which I have described at [286] above. Thus, for the purposes of the chronology, the steps necessary for the autopsy to be undertaken and a report given by the coroner did not occur until Monday, 22 November 2004. Further, although there were provisions in the OPM requiring a Supplementary Form 1 to be filled in and sent to the coroner where new or different information arose after the completion of the original Form 1, ***no*** such form was prepared or submitted by the investigating officers.

Police conduct and interactions with the Palm Island community between 22 and 25 November 2004

Events of Monday, 22 November 2004 SS Hurley returned to duty on the morning of 22 November 2004. By this stage Inspector Williams, DI Webber and DSS Kitching had left the island (having left on the Saturday), apparently content for SS Hurley to remain on the island, in charge and on duty. At some point shortly after mid-morning, a community meeting was held in the mall area not far from the police station. During this meeting, local people were calling for SS Hurley to be held accountable for what had happened and asking why he had not been arrested. Subsequently, there was an exchange of words between SS Hurley and Lex Wotton in Police Lane, at the rear of the police station near where Mulrunji had been brought in the police van. SS Hurley was driving a police van with DS Robinson next to him. PLO Bengaroo, and another uniformed officer were in the back. A Palm Island resident, Tony Palmer, was in the locked part of the van. Mr Palmer yelled “Get me out of here. Otherwise I’m going to be the next one”, and the considerable crowd of people around the police station, estimated by Mr Wotton to be between 150 to 200 people, began to get stirred up. They began to call out abuse to the officers. I return to these events in more detail in the Resolution section. It appears that after this exchange, a decision was taken by the QPS that SS Hurley should leave the island. It is unsatisfactory that the respondents, who had knowledge of these matters, chose to lead ***no*** clear evidence about this significant event. SS Whyte could not recall anything much of what occurred on that day (he had just arrived on Palm Island), and ***no*** other QPS officer who was present was called as a witness. I deal at [389] with the failure of the respondents to call a number of significant witnesses. SS Hurley left Palm Island on the afternoon of Monday, 22 November 2004. There is ***no*** direct evidence in this proceeding whether he was ordered to leave, or left voluntarily. In my opinion, the evidence favours a finding that he was directed to leave: see [1035] below. On that same day, SS Whyte arrived on the island with Inspector Richardson and SS Whyte replaced SS Hurley as the Officer in Charge of the police station. By Monday, 22 November 2004, tensions were still high in the Palm Island community. There was ***no*** news available about how Mulrunji had died, as the autopsy had not yet been conducted. At this time, the Palm Island Council included the Mayor, Ms Erykah Kyle, the Deputy Mayor, Mr Zacchias Sam, the CEO, Mr Barry Moyle, and Ms Denise Geia, an employee of the Council who later in the week became acting CEO. The Council were involved in trying to gather and convey information to the community about the autopsy process and the investigation. They were also attempting to provide representation of the community to the police and to other government agencies, as well as attempting to quell tensions within the community. It is clear from the contemporaneous video footage that different views where

held within the community about how well the Council performed these roles. On any view however, Mayor Kyle was a constant and highly visible presence in the contemporaneous video footage. There was a debate between the parties about how much interaction there was between the QPS and the Palm Island Council members, how much consultation occurred, and how much assistance the QPS sought from the Council. I deal with these matters in the Resolution section. Although the QPS had members identified as "Cross Cultural Liaison Officers" (CCLOs), it does not appear that such an officer was sent to Palm Island until SS Dini arrived on 26 November 2004. CCLOs have specific roles, including to improve relations and provide effective liaison between members of the QPS and Aboriginal and Torres Strait Islander community groups; to identify the needs of those communities; to enable appropriate policies and strategies to be developed; and to ensure that the police deliver an equitable service within the region. This is a different role from the role performed by the QPS Cultural Advisory Unit which was based in Brisbane and reported to and advised the Police Commissioner. That unit had a broader policy role. CCLOs were avowedly intended to be used in everyday policing situations, and to provide assistance in that context. SS Dini was a CCLO based in Townsville, who was familiar with Palm Island. He was on holidays at the time of the death of Mulrunji and did not return to work until 26 November 2004. There was ***no*** acting CCLO while he was away. On the morning of his return to work, he was sent to Palm Island. I return to the role he played in the Resolution section. At 2.30 pm on 22 November 2004, a second ***public*** meeting occurred in the mall area next to the Palm Island Council Chambers. Estimates in the evidence of how many people were at that meeting varied, but I accept Mr Wotton's evidence that it was in the region of 150 people. DS Robinson, Inspector Richardson and SS Whyte also attended the meeting. During the meeting, some community members expressed their dissatisfaction to Inspector Richardson, SS Whyte and DS Robinson about Mulrunji's death. It seems that little, if any, information about progress in the investigation was passed to the community at the meeting, nor was any information passed on about the progress of the autopsy. From the footage it appears community members believed SS Hurley was still the Officer in Charge of Palm Island Police Station, and still on the island. Perhaps for that reason, the evidence shows that Inspector Richardson addressed the meeting and told the community SS Hurley was ***no*** longer the officer in charge of policing on Palm Island and that he and SS Whyte were now the officers in charge. Mr Wotton made demands at this meeting that SS Hurley should be arrested and in custody. I return to what was said in the meeting in more detail in the Resolution section of these reasons. There were incidents demonstrating that tensions remained, at least in relation to some Palm Island residents. For example, the police running log records that, during the Monday night and the following night, rocks were thrown at police vehicles and at the police station, causing damage to the vehicles that included a broken windscreen and a dented door. It appears that sometime after the community meeting on the Monday afternoon, police reinforcements were flown to the island, increasing the police numbers on the island from seven officers on 19 November 2004 to 20 officers on 22 November 2004. That is, more than one police officer for every 100 residents, if one includes the elderly and children.

Events of Tuesday, 23 November 2004 The next day (23 November 2004) there was another meeting in the mall, at approximately 10.30 am. SS Whyte did not attend this meeting, but sent a Senior Sergeant Bennett to observe it. Approximately 150 Palm Island community members were present at the meeting. From the video footage it appears many were deliberately there for the meeting, but many were also there because they were at the island shop, or passing through and stopped to listen. The evidence shows that Mr Wotton spoke at this meeting, as did Mr Roy Bramwell. Mr Wotton's evidence (which I accept) was that he and Mr Bulsey picked up Mr Bramwell and took him to the meeting. They explained to Mr Bramwell that the meeting was an opportunity to inform the community about what Mr Bramwell said he saw, because there were rumours in the community. Mr Wotton said this was "an opportunity for Roy to say things". Mr Bramwell did speak to the assembled crowd, as did Mayor Kyle. When he spoke to the meeting, Mr Bramwell gave an account of what he had seen in the police station on Friday, 19 November 2004. It was a relatively matter of fact account that reflected what he had told the police on 20 November 2004, including that SS Hurley struck Mulrunji several times while Mulrunji was on the ground while saying words to the effect of "Do you want more, Mr Doomadgee? Have you had enough?". Towards the end of the meeting, Mr Wotton spoke about his understanding of what was in the report of the RIADIC. In the video footage, there is a visible level of agitation, concern and anxiety apparent in many of the community members, including those who spoke, but there is ***no*** sign of violence or unrest beyond this. At approximately 2.30 pm on 23 November 2004, DS Robinson received a report from a person described in the evidence as a "confidential informant" that certain persons were going to fire bomb the police station and barracks. DS Robinson subsequently spoke with a couple of residents of the island, Dwayne Blanket and Frank Conway, about these threats. The police log records

that they told DS Robinson they had ***no*** intention to fire bomb the police station or the barracks. However, there was clearly some heightened concern amongst QPS officers and, approximately an hour after the information was reported to DS Robinson, A/AC Wall directed that police officers on Palm Island take their weapons to their sleeping quarters with them. How many officers complied with this direction was, again, not the subject of any evidence. Later that afternoon, police officers arranged for units of the rural fire brigade to be on standby to attend the police station compound if required. SS Whyte drew up a fire evacuation plan for the police station. Also on 23 November 2004, and apparently before the meeting at 10.30 am, Inspector Richardson gave what I consider to be an ill-judged and somewhat inflammatory media interview which was dismissive of the concerns of Palm Island residents, despite those concerns being in my opinion both understandable and justified. In his comments, Inspector Richardson engaged in the kind of stereotyping of Palm Islanders, and Aboriginal communities, which I find was a consistent feature of the attitudes of QPS officers during these events on Palm Island. The video of the media interview was in evidence before me. The relevant part of what Inspector Richardson said was as follows:On Friday, the investigation team, as I said, have arrived here and conducted the investigation through to Saturday, and I understand the island was very quiet, the people were, there wasn't any real concerns at that time. All of a sudden, yesterday, there was concerns raised in relation to his death. A lot of questions are being asked. From what I can make of it a lot of the questions they're asking are based on rumours. They're not factual. It's what people are saying. We had a meeting with them yesterday – a ***public*** meeting yesterday and I explained to the people that they need to sit back and wait and let us put the investigation together, to tie it together, wait for the post-mortem to take place and then let's see what happens from there. Then they can ask their questions once they get all the facts.

...

These community problems frequently arise when there's been a death in custody. The Aboriginal communities, the people in there tend to, they are emotional about the deaths of course – especially when there's police involved – and quite often they become very personal against the officers. There's attacks made and allegations made. The majority of it is unfounded but it's developed through rumours which are spreading throughout the community.

...

The investigations at this stage have shown ***no*** improper police practice. We'll just have to wait and see now what happens with the post-mortem, which is being conducted in Cairns today.

...

Yes, we did [bring reinforcements to the island] yesterday as a result of, I think there was about 200 to 300 people outside the Police Station here demanding a meeting and asking questions with the officer in charge at the time, it had become very uncomfortable here on the island and, when you take into consideration the history of the island, we have to take all measures to ensure everyone is safe. What Inspector Richardson meant by "when you take into consideration the history of the island" was not explained in the evidence. On any view, it characterised all Palm Islanders, as a group, in a negative way. There were, on the evidence, ***no*** measures taken to ensure Palm Islanders were safe. At 1 pm on Tuesday, 23 November 2004, an autopsy of Mulrunji's body was conducted by pathologist Dr Guy Lampe in Cairns. DSS Kitching attended the autopsy. At some point during the conduct of the autopsy DSS Kitching told Dr Lampe that Mulrunji may have been sniffing petrol or drinking bleach prior to his arrest by SS Hurley. In oral evidence, Inspector Kitching claimed he received this information from DS Robinson. He was not able adequately to explain why he passed on this information, which he characterised as "unconfirmed stories", to the coroner but did not pass on the allegations made by Ms Sibley and Mr Bramwell.

Events of Wednesday, 24 November 2004 During the autopsy on 23 November 2004, Dr Lampe told DSS Kitching that the cause of death was intra-abdominal hemorrhage due to ruptured liver and portal vein. In his "Preliminary

Autopsy Report" dated 24 November 2004, Dr Lampe found that Mulrunji's death was "as a result of haemorrhage into his abdominal cavity", which occurred "secondary to a rupture of the liver (which virtually cleaved the liver in two), as well as from a hole in the portal vein". Dr Lampe further found that the degree of liver rupture and injury to soft tissues was "indicative of a moderate to severe compressive force applied to the upper abdomen" and that "there is nothing to suggest that this man has drunk any bleach or other caustic substance". During the autopsy, Dr Lampe had made it clear to DSS Kitching that Mulrunji's death was not from natural causes and that, in addition to the intra-abdominal haemorrhage due to ruptured liver and portal vein, Mulrunji had four broken ribs. Although this was not an agreed fact, DI Webber accepted in cross-examination that on Wednesday, 24 November 2004, Dr Lampe informed him that the State Coroner, Michael Barnes, had requested the word "fall" be removed from Mulrunji's autopsy certificate so that it did not appear that the pathologist was assisting the police in a "cover-up". Notwithstanding this comment, and despite the completion of the autopsy on 23 November 2004 with DSS Kitching in attendance, it seems that on 24 November 2004, neither Inspector Richardson nor SS Whyte were informed about the injuries Mulrunji had sustained prior to his death whilst in police custody, nor were they informed of the cause of death, including the fact that Mulrunji's liver had been ruptured. Nor were they told of the fact that Mulrunji had sustained four broken ribs whilst in QPS custody. In his evidence DI Webber said that DSS Kitching had telephoned him on the afternoon of Tuesday, 23 November 2004 and outlined the findings of the autopsy. He also stated that he informed the Assistant Commissioner immediately afterwards, whom he understood then made a number of telephone calls to other officers. DI Webber agreed that, during the telephone call with DSS Kitching, it became clear that Mulrunji had not died from natural causes. He agreed that DSS Kitching had informed him that Mulrunji had died as a result of haemorrhaging in his abdominal cavity that was secondary to a rupture of the liver. He also agreed that DSS Kitching told him about the four broken ribs. By this time, DI Webber had not been on Palm Island for several days, having considered the investigation on the island complete by Saturday, 20 November 2004. There continued to be unrest on the island. Although the QPS had the autopsy results by the afternoon of 23 November 2004, ***no***-one had communicated those results to Mulrunji's family, nor to the Palm Island community. The police log records that, on the evening of 24 November 2004, rocks and bricks were thrown at the police station and the adjacent police barracks. The log records that the windows of the barracks were smashed by a "large gathering" of persons outside and that "991 [a police car] moved to intercept [but was] forced back by [the] mob". However, the log also records that there was "Nil damage to vehicles or injuries to officers at this time". The State Coroner's office gave the preliminary autopsy report dated 24 November 2004 to the CMC, which had, on that date, assumed responsibility for the investigation. It is unclear, on the evidence before this Court, how the report was transmitted, to whom, and when. That the CMC had taken over the investigation into Mulrunji's death appears to have occurred as a result of a request from the QPS. However, what that request was, who made it, and how the decision was made for the CMC to take over the investigation were also not the subject of evidence before me. Inspector Ken Bemi from the CMC formally took over responsibility for the conduct of the investigation, assisted by Inspector Williams from the Ethical Standards Command. It will be recalled that Inspector Williams had been on Palm Island over the weekend, conducting interviews with the QPS, in his capacity as the officer representing the Internal Investigation Branch, Ethical Standards Command for the purposes of s 1.17 of the OPM.

Events of Thursday, 25 November 2004 On Thursday, 25 November 2004, in the early evening near 6 pm, SS Whyte spoke to Ms Denise Geia, who was by then the acting CEO of the Palm Island Council. Ms Geia told SS Whyte that Mayor Kyle was inside the Palm Island Council Chambers with members of Mulrunji's family, speaking with the family about the autopsy report. It would seem that by this time, the Mayor and the family had some information about the autopsy report, but what they had and how they received it is not revealed by the evidence. The only evidence I have been able to find is what was said by Mayor Kyle at the ***public*** meeting the following day (Friday, 26 November 2004), where she spoke of a phone call to the State Coroner regarding what information could be released to the community. After speaking with Ms Geia, SS Whyte reported to Inspector Richardson the information Ms Geia had provided to him. It appears from the evidence that SS Whyte understood that there was "argument about whether the full or partial results of the autopsy (were to be) released in the ***public*** meeting on the Friday". It does not appear that either Inspector Richardson or SS Whyte took any steps to inform themselves about what the autopsy report said. Shortly after this, A/AC Wall called Inspector Richardson and told him that the results of the autopsy upon Mulrunji had either been delivered to the family of Mulrunji or were about to be delivered to the family. This led Inspector Richardson to warn the QPS members on the island to "be on your toes and be on the

look out, you know things could turn a bit hostile". Notwithstanding these events, the evidence does not suggest anything untoward occurred on the evening of 25 November 2004.

The protests and fires on 26 November 2004 The next morning, on 26 November 2004, another community meeting was held in the mall area. At approximately 12.30 pm Mayor Kyle spoke to the people there, who numbered approximately 150 to 200. There is video footage in evidence of Mayor Kyle speaking to the assembled community members. Mayor Kyle said that the report revealed that there had been "an accident somewhere around the cell" and that Mulrunji had sustained injuries from a "fall". She also told the crowd that the doctor explained that there was a compressive force on Mulrunji's body where four ribs were broken and that caused a rupture to his liver, which caused heavy internal bleeding. However, what she said omitted several important elements of the preliminary autopsy report, including that the pathologist also said SS Hurley's added weight might provide "a satisfactory explanation" for the injuries Mulrunji sustained if SS Hurley had fallen on top of him, and that while there was ***no*** evidence to suggest the use of direct force it also could not be excluded. Mayor Kyle's comments may also have conveyed the impression that the conclusions in the report were final and that ***no*** further inquiries would be made by either the State Coroner or the QPS. I return below to why Mayor Kyle's comments may not have conveyed a correct impression of the autopsy results to those listening. The video footage shows the distress Mayor Kyle felt at what she was conveying and the distress in those listening can also be heard. People made comments about SS Hurley's responsibility for Mulrunji's death. There is ***no*** evidence that any police officer or other official representative attended or addressed the crowd during the meeting. Inspector Whyte's evidence was that he thought even his attendance "may have incited problems because if they wanted us at the meeting they would have invited us to the meeting". After Mayor Kyle finished speaking, a series of other individuals spoke, including David Bulsey and Mr Wotton. They, and others in the crowd, expressed disbelief that Mulrunji could have died from a fall and anger at the police for failing to arrest SS Hurley. I describe what was said more fully at [774] below. Not long after the meeting, just outside the police station, SS Whyte encountered Mr Wotton, who was with some other local people. They had a heated and somewhat aggressive conversation, the details of which were contested and about which I make findings below. At approximately 1 pm, the crowd's unrest increased and a number of people moved from the mall area to the police station, including Mr Wotton. Rocks were thrown at the police station; the courthouse, the police station and the police residence of SS Hurley were set on fire; a police vehicle was set on fire; and some members of the community yelled threats and obscenities. The police left the police station and went to the police barracks across Police Lane. As locals saw the police moving, a crowd of locals followed the police to the barracks, a distance of approximately 50 metres, and still close to the mall. The distances between these places, it must be recalled, are quite small. As the crowd arrived at the barracks, SS Whyte, who was outside the barracks (but behind the fenced area fronting onto Mango Avenue) called out to speak to Mr Wotton. Mr Wotton told him the community had heard the results of the autopsy report and wanted the police to leave the island within an hour and that he would escort the police so that they were not harmed. There is a dispute on the evidence of the two men about who said what, and about the outcome of the conversation. I deal with this below. What was not contested by Inspector Whyte was that, at some time after their conversation, Mr Wotton told the crowd to stop throwing rocks, and the crowd dispersed soon after. After the crowd dispersed, the police then moved, as a group, from the barracks to the hospital. The evidence suggests this was done in the belief there would be greater safety for the officers at the hospital. Some video footage of the officers moving along Mango Avenue is in evidence. There are few if any local people visible, and not much noise can be heard. However, at this stage, the police station and SS Hurley's home were still burning. The evidence suggests the fire brigade arrived at approximately 1.34 pm, approximately 43 minutes before the police left the barracks for the hospital at 2.21 pm. The fire brigade officers do not appear to have had any difficulty moving through the groups of local people to put out the fires. Once at the hospital, the police lined up outside the front of the hospital, facing the sea. There is video footage of this event in evidence. There was a line of approximately 20 police officers, mostly in uniform. One officer had a large police dog, which was barking at the crowd. Several officers had firearms in their holsters. The crowd of locals gathered in front of the hospital may have numbered 100. They were seated or standing in small groups at various points in front of the hospital. There were a number of older people, women and children present. A few people were calling out. ***No*** local people appear to be carrying anything, despite DI Webber's evidence that he saw locals carrying sticks and spears. Inspector Whyte's evidence was that he did not see anyone carrying sticks or spears. Again, the evidence is somewhat sparse regarding how this situation was resolved, but it appears that after some discussions which seemed to have involved, at least, Mayor Kyle, Mr Wotton and several officers, the local people

simply dispersed and went about their business at some point after 3 pm. It thus appears the 'standoff' outside the hospital may have lasted an hour or so. On the evidence, the whole sequence of events – from the announcement by Mayor Kyle of the autopsy results, to the confrontation at the police compound, to the fires, to the arrival of the fire brigade (who then had the fire promptly under control), to the police lining up outside the hospital – took place over the course of approximately three hours. The police station and SS Hurley's house were destroyed in the fire.

The emergency declaration and the arrival of police reinforcements, including SERT and PSRT Exactly how and when the QPS on the mainland were informed about the events on the island was not the subject of much evidence. However, it is clear from a combination of the police logs and DI Webber's evidence that A/AC Wall advised DI Webber of the fires and the general situation on the island more or less as those events occurred. At that point, A/AC Wall and DI Webber were both at the Mundingburra Police Station in Townsville. DI Webber then made a number of telephone calls to arrange for officers to go to Townsville Airport in order to fly to Palm Island. Having done so, DI Webber went to the airport himself in order to fly to the island with the other officers. While he was at the airport, and at approximately 1.45 pm, DI Webber made a declaration of an emergency situation under s 5(1) of the PSP Act ('the emergency declaration'). The effects of such a declaration were, in summary, to enable the use by police (and special police operations teams such as SERT) of a variety of coercive powers, and powers of entry, search and seizure, which otherwise would not be available to them without warrant. Those powers were purportedly exercised throughout Friday evening, Saturday and Sunday morning. It was common ground that ***no*** 'Certificate relating to the Declaration of an Emergency Situation' under s 5(2) of the PSP Act was issued or caused to be issued on 26 November 2004. Rather, the evidence is that the Emergency Declaration Certificate was not completed by DI Webber until two days' later, at around 8.50 am on Sunday, 28 November 2004. DI Webber revoked the emergency declaration at 8.10 am on Sunday, 28 November 2004. Thus, the Emergency Declaration Certificate was completed more or less contemporaneously with the revocation by DI Webber of the emergency declaration. A certificate concerning the revocation (and noting the time of revocation as 8.10 am) was faxed to the QPS in Townsville at approximately 9.15 am on 28 November 2004. ***No*** attempt was made by QPS officers to inform the local community on Palm Island about the making of the emergency declaration on 26 November 2004. Nor is there any evidence the community was informed when it was revoked. Whether because of the emergency declaration, or because of the events that occurred on the afternoon of 26 November 2004 (including the burning down of the police station and SS Hurley's house), or both, a large contingent of police officers was despatched from Townsville to Palm Island. This included, during the afternoon and evening of 26 November 2004: 11 QPS officers and one police dog at approximately 2.15 pm via Police Airwing; four QPS officers at approximately 3 pm via an unknown aircraft; one QPS officer at approximately 3.20 pm via Queensland Emergency Services helicopter; 13 QPS officers and one police dog at approximately 3.37 pm via an unknown aircraft; six QPS officers at approximately 4 pm via an unknown aircraft; 10 QPS officers at approximately 4.40 pm via Police Airwing; one QPS officer between 5.30 pm and 6 pm via Queensland Emergency Services helicopter; and approximately seven QPS officers at unknown times via unknown aircraft. The next day (Saturday, 27 November 2004) another seven officers arrived during the morning by Police Airwing. It was an agreed fact that over the course of the period covered by the emergency declaration there were between approximately 59 and 82 QPS officers (non-SERT or PSRT) on Palm Island. The situation on Friday, 26 November 2004, and the emergency declaration, also resulted in a decision to send specialist police officers to Palm Island. These officers were drawn from two specialist teams within the QPS: SERT and PSRT. The role of SERT, as set out in s 2.26 of the OPM, was to operate as a specialist support unit, established to provide the QPS with the ability to respond to terrorist incidents across Queensland, whose primary functions were: to respond to terrorist incidents within the arrangements agreed to under the State Antiterrorist Plan; to provide specialist police capability to resolve high risk situations and incidents that were potentially violent and exceeded normal capabilities of the QPS; to provide assistance to all officers of the QPS with low risk tasks which required specialist equipment, skills or tactics; and to provide a rescue function in incidents which required specialised recovery techniques. The role of PSRT, as set out in 2.24 of the OPM, was to provide a unit of specially trained, centralised QPS officers who were equipped to respond in the interest of ***public*** safety to instances of confrontation, violence and other specialist duties which exceeded normal police capabilities. It is not entirely clear from the evidence when the SERT and PSRT officers arrived on Palm Island, nor who decided they should be sent and why. There was an unsatisfactory gap in the evidence on these issues. Inspector McKay's evidence was that SERT could be deployed "verbally in an urgent-response capability". He described his understanding of how that verbal communication occurs through the QPS chain of command but his evidence was not specific to the

deployment of SERT and PSRT to Palm Island. When asked whether he had any role in organising the attendance on Palm Island of SERT or PSRT officers, DI Webber answered:Well, when I declared the emergency situation to exist, I suppose that initiated an activation plan for them - for them to actually attend to assist other officers. At the actual determination of what involvement – I suppose – they have, it has to be – I suppose – agreed to by one of the deputy commissioners. DI Webber confirmed that he had signed a written request for SERT assistance, but that he had done so after he returned from Palm Island on the afternoon of Monday, 29 November 2004, not on 26 November 2004 when it appears the decision to deploy SERT was made. The written request was in evidence and is titled "Special Emergency Response Team Request for Assistance Form (Section 2.26 of the Operational Procedures Manual)". Despite DI Webber's evidence that it was not filled out until 29 November 2004, the form is dated 26 November 2004 and states that DI Webber was the officer making the request. In it, DI Webber outlined the situation on Palm Island as follows:1. Outline Situation or Incident:

At approximately 12 midday on Friday the 26th of November 2004 a large crowd of approximately 200 people gathered in the Mall area on Palm Island to discuss the findings of the post mortem report into the death of in custody [sic] of Cameron DOOMADGEE. After the results were publicised a male person using a ***public*** address system addressed the crowd, and in an emotionally charged speech accused the Police of 'cold blooded murder." This male person went on and said, "They're inciting a riot them cops. They're inciting. The want it to happen ....Why should he get away with fucking murder and walk around free. If you don't stand up, it'll happen again, maybe to one of your children. It's cold blooded murder and this man is still free." The crowd responded with applause and clapping after this person had finished.

At the conclusion of this address, the large crowd moved to the Palm Island Police Station. Emotions remained strained at the Police Station with people calling to kill police and burn the station. The crowd then reputed ["erupted"] into a violent frenzy that saw the Police Station being pelted with rocks, bricks and other objects, police being threatened and damaged [sic] caused.

As the situation escalated, Police Officers were in grave fear of their safety and were present in the police station when it was being doused with petrol and set alight. Police officers have then fled and came under further rock throwing attacks prior to barricading themselves in the Police barracks. They were again targeted [by] a large crowd who continued to throw rocks and other objects at them as the crowd attempted to gain access into the barrack compound. Another Police residence was then set alight and was totally destroyed by fire. The remaining police residences were then looted by the crowd and property was destroyed and stolen.

Police later sought refuge in the local hospital until re-enforcements from Townsville arrived. The crowd then followed police to the hospital and again confronted them and demanded officers leave the Island. Upon the arrival of re-enforcements the crowd dispersed and left the area.

An Emergency Situation was declared at 1345hrs on 26/11/04 for the entire Palm Island.

Urgent assistance from S.E.R.T. members is required to provide ***protection*** for policing operations on the island. Assistance is likely to be required for some time until normal policing operations can be restored.

Persons on the island are capable of using lethal force including rocks, molotov cocktails and have access to other weapons including knives, machetes, spears and possibly stolen police firearms. A number of armed offenders will need to be apprehended as part of the investigations into the civil disorder. These offenders will pose a serious threat to police officers and good order on the island.

2. Who or what is the subject of the request?

2.1 Offender/Suspect(s) details:

The subject of the request is to assist conventionally equipped police officers to maintain a policing presence on Palm Island and the secure the safety of all Palm Island residents. Assistance is also sought to search for and apprehend persons who took part in the riot and arson of Police property. These persons may be armed with weapons and pose a serious threat to the life and safety of police members.

The identity of individual offenders will be provided on an ongoing basis for operational planning.

2.2 Other possible occupants and their relevant criminal histories? (including women and children.):

Actions by SERT and other members will be assessed on an individual basis subject to individual collection plans.

2.3 Particulars of Vehicles used:

N/A

2.4 Particulars of weapons the offender may be in possession of or have access to:

It is suspected a QPS Mini-14 rifle may have been looted from the Police Barracks prior to it being burnt down. Offenders have shown a propensity to use rocks, molotov cocktails and iron bars as weapons. Offenders have ready access to other weapons including knives, machetes, and spears.

3. SERT is requested to:

X Provide a specialist police capability to resolve a high risk situation which is potentially violent and exceed normal police capabilities; (i.e. defeat fortification, detain armed high risk offenders).

...

MISSION

4. SERT is requested to:

SERT to travel to Palm Island and undertake the following tasks:

a) To provide security to police members on Palm Island and regain control of ***public*** order on the Island.

b) To assist investigators to locate and detain wanted persons and associates by tactical methods.

c) To assist in provision of ongoing policing of Palm Island and to provide security and ***protection*** of QPS employees and property on Palm Island.

5. Legislative Authority

Is there a warrant in existence: Yes - ***No*** X Pending -

Warrant type: P.S.P.A. Declaration

...

7. Intelligence

The intelligence for this application is accurate as at 1400 on 26/11/2004.

How has the intelligence been verified?

Intelligence will be collected and provided as it becomes available.

... In addition to the date of 26 November 2004 given on the front page, the form is signed by DI Webber with a time and date of 2 pm on 26 November 2004 written next to his signature. Beneath DI Webber's signature is a signed statement from Superintendent Casey of the Specialist Services Branch, Operations Support Command recommending to Chief Superintendent Henderson of Operations Support Command that the request be granted. Beneath that recommendation is a second signed statement from CS Henderson to Deputy Commissioner Conder, which again recommends that the request be granted and states:Members of the BNE + FNR SERT to support PSRT in a crowd management role. To have less lethal capabilities i.e. taser, OC spray + bean bag rounds. Propensity for violence exhibited - police rifle missing. Beneath CS Henderson's recommendation is an authorisation for the deployment of SERT signed by DC Conder. The recommendation from Superintendent Casey to CS Henderson, the recommendation from CS Henderson to DC Conder, and DC Conder's authorisation for the deployment of SERT are each dated 14 December 2004. In cross-examination, DI Webber accepted that an "uninitiated reader" would mistakenly think, based on the dates on the form, that he had requested the deployment of SERT in writing on 26 November 2004 when this was not the case. He also gave evidence that he typed the document himself. He could not recall exactly when he signed it, but when shown a memorandum dated 9 December 2004 that he wrote recommending that the form be forwarded to the Assistant Commissioner, Operations Support Command, he agreed that he must have signed it at some point between 29 November and 9 December 2004. When asked why he had completed the form quite some time after the events referred to in it, and why he had backdated the form to 26 November 2004, DI Webber's evidence was that the form was "for record purposes. It was for filing purposes. It wasn't an action document". He also agreed that by the time he completed the form he knew that ***no*** armed offenders had been arrested on Palm Island, despite the statement on the form that "A number of armed offenders will need to be apprehended". There are a number of inaccuracies in what DI Webber wrote on this form, some serious. There is ***no*** evidence before the Court of many of the assertions he makes in it, including ***no*** evidence from him about those matters. The document contains matters that DI Webber clearly did not know on Friday afternoon when a decision was made to deploy SERT to the island. There is little if any evidence to support the proposition that the document completed by DI Webber reflects the process by which the request to deploy SERT was made and the decision to deploy SERT was taken. Indeed it is unclear whether there even was a "request" or whether one or more QPS officers simply decided SERT would be deployed. The evidence of the SERT operatives who were witnesses in the proceeding does not shed any further light on the question, although they did make clear that they were mobilised to travel to Palm Island on the afternoon or early evening of Friday, 26 November 2004. Again, this is an area of evidence about which the respondents appear to have consciously decided to remain silent. The fact that the deployment of SERT is not specifically pleaded as a contravention of s 9 of the RDA is ***no*** explanation: SERT's actions while on Palm Island were the subject of detailed pleading and I infer that the absence of evidence from the respondents about how SERT came to be on the island is the result of a forensic choice. By the time SERT commenced its operation early on the morning of Saturday, 27 November 2004, there were 14 SERT officers and seven PSRT officers on Palm Island, and another four from each team arrived during the day, making a total of 18 SERT officers and 11 PSRT officers who were sent to Palm Island over the 24-hour period. Other police actions were also quickly implemented. A police headquarters was

established at the local high school, Bwgcolman Community School. Classrooms were used for various planning and interview purposes, and QPS officers also slept in them. Communications to and from Palm Island came through this headquarters by telephone and fax, although at least initially there was ***no*** police computer system in operation there. The local school bus from St Michael's Catholic Primary School was commandeered for police use. This was the subject of specific allegations by the applicants, to which I return in the Resolution section. On the Friday (26 November 2004), despite the emergency declaration, the QPS arranged for a ferry to be available from Palm Island to Townsville. Some teachers and service providers on the island left Palm Island on this ferry. There was an issue in this proceeding about who was able to leave the island, and whether only non-Aboriginal people were able to leave, or were informed there was a way they could get off the island if they were fearful for their safety. The QPS also arranged for the evacuation of some patients (including some Indigenous patients) from the Palm Island hospital to Townsville by Queensland Emergency Services helicopter. The evacuation of some patients can be seen on the video footage in evidence. Between 1.45 pm on 26 November 2004 and 1.30 pm on 27 November 2004, all commercial flights to and from Palm Island were suspended. During that period, all persons on Palm Island were unable to leave the island on commercial flights. In that respect, the arrangements by the QPS for the special ferry departure assumed particular significance. It does not appear to have been considered whether there would be Palm Islanders in Townsville who might, on hearing of the situation, have wanted to return to their families on Palm Island. In any event, ***no*** arrangements were made for them to do so and, as I have noted, in fact the opposite occurred and the island was shut down. Mr Campbell gave evidence that, on the evening of 26 November 2004, he and DS Robinson "started formulating, like, a master list of persons of interest or suspects" in relation to the protests and fires. This led, it appears, on the evening of Friday, 26 November 2004, to the formulation of an "action plan" about how those suspected of involvement in the protests and fires would be identified and apprehended. DI Webber was one of the officers responsible for formulating this plan, together with Inspector Underwood and Inspector Kachel. The plan was as follows. It does not appear to have been committed to writing other than on a whiteboard at the school, where (as I have noted above) the QPS operations were based. Photos of the suspects, their addresses and their names, were put up on the boards. DS Robinson was to identify the addresses "of interest" and provide them to the SERT and PSRT officers; SERT and PSRT officers were to go to each address of interest with DS Robinson; DS Robinson was to enter each residence and identify persons of interest; and DS Robinson and the SERT and PSRT officers would apprehend the person or persons of interest with the minimum force necessary, secure the person or persons, and then take them from the residence. The action plan noted that, if doors were locked and secured, SERT would use force to gain entry. Other occupants within the dwellings were not to be disturbed, if possible. The team would then move on to the next address. I note that the evidence of the 'plan' left it unclear as to who would be the arresting officer. The identity of the arresting officer is a matter I deal with in the Resolution section below. DSS David Miles, a QPS officer stationed in Townsville, was responsible for compiling a list of persons to be arrested. A/AC Wall, also in Townsville, approved the list. How closely A/AC Wall was involved in formulating the whole action plan is unclear, and it is unclear whether he "approved" the whole plan.

The arrests, searches and entries on 27 and 28 November 2004 The arrests, searches and entries began at 5 am on the morning of 27 November 2004. The evidence showed that SERT teams would usually operate earlier in the morning than 5 am – often more like 3 am – in order to optimise the chances of suspects being asleep. The evidence was that, because it was clear some or all of the houses would be occupied by other people, including women and children, it was decided that these entries and searches would start somewhat later in the morning. In any event, at least some of those whose houses were to be entered and searched were expecting to be arrested. That was certainly the case with Mr Wotton. He had told his partner and family the night before that he expected to be arrested on the Saturday, and that the police would come for him. There is ***no*** evidence he realised a SERT team would be sent to apprehend him, nor that he anticipated being apprehended in the way he was. The arrests, entries and searches were conducted between approximately 5 am and 8.10 am on 27 November 2004; between approximately 12 pm and 12.15 pm on 27 November 2004; between approximately 6.15 pm and 6.35 pm on 27 November 2004; and periodically during the morning of 28 November 2004. The following properties were entered and searched:(1) The Wotton house, in the Farm area of Palm Island, at around 5 am on 27 November 2004. Mr Wotton was apprehended there. A/S Kruger tasered Mr Wotton in the course of the arrest.

(2) The Clay house, also in the Farm area, at 5.10 am. The police were looking for Shane Robertson but he was not apprehended there.

(3) The Norman house, also in the Farm area, at 5.15 am. The police were looking for a juvenile offender (whose identity is ***protected***). The juvenile offender was not apprehended but another target, Garrison Sibley, was apprehended.

(4) The Parker house, also in the Farm area, at 5.25 am. The police were looking for Russell Wayne Parker (Russell Parker Senior) and he was apprehended there.

(5) The Bulsey house, at 5.45 am. The police were looking for David Bulsey and he was apprehended there. Mr Bulsey was not fully clothed when he was apprehended.

(6) The Poynter house, in the Top End area, at 6 am. The police were looking for Lincoln Poynter and Jason Poynter, but neither was apprehended there. The evidence does not reveal when Lincoln Poynter was arrested, but he was subsequently charged with and pleaded guilty to rioting.

(7) Berna Poynter's house, also in the Top End area, at 6.02 am. The police were looking for Jason Poynter, but he was not apprehended there.

(8) The Walsh house, in the Butler Bay area, at 6.05 am. The police were looking for Jason Poynter, but he was not apprehended there.

(9) The Clumpoint house, also in the Butler Bay area, at 6.15 am. The police were looking for John Clumpoint and he was apprehended there.

(10) The Obah unit, also in the Butler Bay area, at 6.25 am. The police were looking for Jason Poynter, but he was not apprehended there. Mr Poynter was proving somewhat elusive.

(11) The Barry House, in the Top End area, at 6.35 am. The police were looking for Jason Poynter, but he was not apprehended there. The police apprehended Solomon Nona on an outstanding warrant that was unrelated to the events of 26 November 2004. Mr Nona was not on the QPS list of targets.

(12) Alberta Poynter's house, also in the Top End area, at 6.40 am. The police were looking for Jason Poynter. Jason Poynter was not apprehended but another target, Lance Poynter, was apprehended there.

(13) The Sibley house, in the Bottom End area, at 8 am. The police were looking for Shane Robertson and he was apprehended there.

(14) The Nugent house, in Dee Street, at 12 pm. The police were looking for a Ruger Mini-14 rifle that was believed to be missing from the police barracks. The rifle was not found at the house, and in fact it was still locked in a cupboard in the police barracks, where it was found on or about 8 December 2004.

(15) Agnes Wotton's house at 6.15 pm. The police were looking for Richard Poynter and he was apprehended there. Mr Poynter was in the shower at the time he was apprehended.

(16) The Blackman/Oui house, in the Butler Bay area, at 6.30 pm. The police were looking for William Blackman Senior but he was not apprehended there. Mr Blackman saw the police coming and ran from his house in an

attempt to lead them away from his family. He escaped, but he subsequently turned himself in later that night at the school, where he was arrested.

(17) The Biara house, in the Cooktown area, at 5.20 am on 28 November 2004 and again at 4.45 am on 29 November 2004 (although there was very little evidence about the latter). The police were looking for Russell Edward Elias Parker (Russell Parker Junior) but he was not apprehended during either search.

(18) The Pearson house, at 5.36 am on 28 November 2004. The police were looking for Russell Parker Junior but he was not apprehended there. The final operation was conducted at Wallaby Point at 6.20 am on 29 November 2004. The police were looking for Russell Parker Junior and Robert Nugent and both were apprehended there. The applicants make a series of allegations about the conduct of the entries and searches, and I make findings on those allegations in the Resolution section. Several matters should be noted here. First, none of the arrests (with the exception of the arrest of Mr Nona) were made with a warrant. Nor were warrants obtained for the entries and searches of the houses. Second, the evidence is that the two primary suspects after the protests and fires were Lex Wotton and Erykah Kyle. Ms Kyle's name was later removed from the list of wanted persons and she was not arrested or charged at all in the course of the police operation. There is ***no*** explanation in the evidence for why that occurred, or what grounded the original suspicion of her as a prime suspect. Third, one of the targets was a 13-year-old boy. SS McKay's evidence was that in his career of some 24 years he could not recall ever being sent as a SERT team member to apprehend a 13-year-old. I return to this below. Fourth, women, children, and men who were not suspects were present in many of the homes that were entered and searched. Evidence was given by nine of them. There is ***no*** doubt those who gave evidence were terrorised and permanently scarred by what happened to them. I accept that similar effects are likely to have been suffered by some who did not give evidence. The disproportionate nature of the police response, and the manner in which the entries and searches were inevitably conducted once it had been decided that SERT would be used to conduct them, has had long lasting consequences for many members of the Palm Island community. Fifth, there is some disputed evidence about other conduct engaged in by SERT and, or alternatively, PSRT while on the island, such as marching in groups down residential streets. These matters are contested and I deal with them below. Finally, the manner in which the SERT and PSRT officers were armed and dressed should be noted. It was a key feature of the evidence of group members who were terrified by the entries and searches. Each SERT officer was wearing a dark blue police uniform with a ballistic vest and a load-bearing over-vest. Each officer wore a ballistic helmet and a fire retardant balaclava (which covered his face), as well as goggles. The SERT officers were equipped with gas masks and sound and flash distraction devices. As their primary weapon they were armed with assault rifles with light sources and they had as secondary weapons a pistol also with a light source. Officers also carried oleoresin capsicum (OC) spray, a baton and handcuffs. Some SERT officers were further equipped with tasers (the model of which has since been superseded) and what was described as 'method of entry equipment' for breaking down doors and the like if necessary, together with a 'less lethal' shotgun and extended range impact munitions. Inspector McKay gave the following evidence about extended range impact munitions and the use of a "less lethal" shotgun:An extended range impact weapon gives you that ability from an extended range. For example, if someone is armed with an edged weapon like a knife, they're – initially – the initial teaching was that it was – you had to be 21 feet away from the person. Then it was 10 metres, and now the – the teaching is there's ***no*** safe distance being away from someone armed with an edged weapon. So obviously, inappropriate for you to move close enough to be able to strike someone with a baton if someone is armed with an edged weapon, but with an extent – but if you had that ability to strike them in the same way as you would with a baton from an extended range using extended range impact weapons, then that's where the benefit of that capability comes in. So, currently within the service we have that ability in a 12 gauge capacity which is a shotgun round. Now, the munitions come in a variety of manners. Some of them are a canvas sack that is filled with lead shot that fires from the weapon, strikes the person and causes pain and incapacitation, hopefully, and getting them to stop what they're doing. The PSRT officers each had a dark blue police uniform, with a '***public*** order vest' with (non-ballistic) arm and leg ***protection***, a '***public*** order helmet' with visor and flash hood, and cut resistant gloves. The PSRT officers were equipped with riot shields and pistols, as well as OC spray, baton and handcuffs. One of the key differences between PSRT and SERT was that the former did not wear balaclavas. After the arrests were complete (except for those at Wallaby Point), at 8.10 am on Sunday, 28 November 2004 DI Webber revoked the emergency declaration in relation to Palm Island. The

length of time during which the Palm Island community was subject to the emergency declaration is also a matter challenged by the applicants as unlawful race discrimination. The revocation meant that ordinary travel between the island and the mainland could resume, and it also led to the departure of most of the additional police officers then on Palm Island. Inspector Dini's evidence was: that there was still a "command post" on 29 November 2004 and that on that day the "command group" was "doing rosters, organising resources, getting, you know, supplies to the island, flying police over, taking police out" and that the police were "[m]aintaining a presence at four or five other sites around the island". He also said that he himself left the island on 30 November 2004 for a debrief and returned to the island on 1 December 2004, staying for approximately a week. On any view, there appeared to be greatly reduced concerns on behalf of the QPS about the need for extra policing in the Palm Island community, or about police safety. The evidence does not disclose when those non-Aboriginal people (for example, teaching staff from the schools) who left the island on the specially arranged ferry returned to the island. The evidence shows St Michael's did not get its school bus back for approximately a week: why it took that long is not explained in the evidence.

Subsequent events, including court proceedings and inquiries The applicants' RDA case substantially ends at this point in the chronology, and accordingly, there was very little evidence about the aftermath on Palm Island after the SERT and PSRT teams left. Some of the applicants' witnesses gave evidence about the charges against various individuals and their outcomes. Ultimately, those matters were agreed between the parties and I set them out below. There was, however, evidence about the aftermath of these events insofar as official investigations and inquiries were concerned, of which there were several. On 27 September 2006, Acting State Coroner Christine Clements delivered her report in her inquest into the death of Mulrunji. Acting State Coroner Clements was appointed to continue the inquest after the first coroner – State Coroner Barnes – recused himself. In her report, Acting State Coroner Clements concluded that the actions of SS Hurley caused Mulrunji's fatal injuries. However, the whole of Acting State Coroner Clements' finding as to how Mulrunji died was set aside on 16 June 2009 by the Queensland Court of Appeal on the basis that her finding was not reasonably open on the evidence: Hurley v Clements [2009] QCA 167;[2010] 1 Qd R 215 at [48] (the Court). The Court ordered that the inquest be re-opened by another coroner: at [57]. On 19 December 2006, in response to comments made by Acting State Coroner Clements in her finding (and before the finding was set aside), the Commissioner of Police formed an Investigation Review Team (IRT) to examine in detail any criticisms of the QPS and its members arising from the inquest and the Acting State Coroner's finding. The Commissioner also requested the CMC to review the internal investigation. In November 2008, the IRT delivered the three-volume report of its internal investigation, entitled 'Palm Island Review', to the CMC. On 5 February 2007, SS Hurley was charged with manslaughter and common assault. By this time, the charges against some of the persons arrested for offences relating to the protests and fires on 26 November 2004 had been discontinued or finalised, while the charges against others were still ongoing. In June 2007, SS Hurley was acquitted by a jury of the charges against him. On 29 May 2006 (that is, before any inquest findings had been delivered and before SS Hurley was charged), Chief Superintendent Wall (who had been Acting Assistant Commissioner in November 2004) recommended that a number of officers involved in the events on Palm Island should receive awards ranging from a Commissioner's Certificate or higher award to an Assistant Commissioner's Certificate or Letter of Appreciation. Those recommended for awards included: all 19 of the officers who were in the police station when the protests and fires began, with Inspector Richardson, SS Whyte and DS Robinson identified as deserving particular praise; five officers who were involved in the subsequent identification of suspects, including DI Webber; eight officers who were in the Major Incident Room in Townsville, including DSS Kitching; and several officers involved in the "overall strategic management" of the events, including CS Wall himself. In cross-examination, each of DI Webber, Inspector Kitching and Inspector Whyte confirmed that he received a framed award as a result of those recommendations, with Inspector Kitching and Inspector Whyte stating that their awards were conferred at a formal ceremony. Mr Campbell's evidence was that he did not receive an award despite being recommended for one. On 3 November 2008, DS Robinson was awarded the Queensland Police Service Valour Award, for his conduct in responding to the events of 26 November 2004. This award is the highest commendation the QPS can bestow on an officer, for acts of bravery in hazardous circumstances. QPS officers who had been involved in the events on the island, including some of those called as witnesses, also subsequently received promotions. The applicants rely on those facts as part of their damages case and I address them in the damages section of these reasons. In total, 27 people were charged with offences in connection with the events of 26 November 2004. Of those, 16 people were convicted of at least one offence and the remaining 11 were either acquitted or had their charges withdrawn. The agreed facts concerning the charges laid against

individuals who were eventually convicted of at least one offence were as follows:(1) Cedric Barry was charged with: (i) entering a dwelling and committing an indictable offence; (ii) stealing by looting in civil unrest; and (iii) entering a dwelling with intent. The first charge was withdrawn and Mr Barry pleaded guilty to the latter two charges. On 9 December 2004, he was sentenced to 15 months' imprisonment on the second charge and 6 months' imprisonment on the third charge.

(2) George Coolwell was charged with: (i) entering a dwelling and committing an indictable offence; (ii) stealing by looting in civil unrest; and (iii) entering a dwelling with intent. The first charge was withdrawn and Mr Coolwell pleaded guilty to the latter two charges. On 1 December 2004, he was sentenced to 2 months' imprisonment on the second charge and 6 months' imprisonment on the third charge, suspended for 2 years after 4 months.

(3) Terrence Kidner was charged with three counts of rioting with damage and two counts of arson of a structure or building. A nolle prosequi was entered for two of the rioting with damage counts and both of the arson counts. Mr Kidner pleaded guilty to the third rioting with damage count and on 8 May 2007 he was sentenced to 4 years' imprisonment suspended for 4 years after 16 months (with 166 days of pre-sentence custody).

(4) Alissa Norman was charged with rioting with damage. She pleaded guilty and on 28 July 2006 she was sentenced to 12 months on an intensive correction order, but on appeal this was increased on 8 December 2006 to 18 months' imprisonment with a parole release date of 8 April 2007.

(5) A juvenile whose identity is ***protected*** under the Youth Justice Act 1992 (Qld) was charged with three counts of rioting with damage. A nolle prosequi was entered for two of the counts and the juvenile pleaded guilty to the third count. On 28 July 2006, the juvenile was sentenced to 150 hours of community service.

(6) Robert Nugent was charged with: (i) rioting with damage; (ii) arson of a structure or building; and (iii) stealing by looting in civil unrest. A nolle prosequi was entered for each of the first two charges and Mr Nugent pleaded guilty to the third charge. On 1 March 2007, he was sentenced to 6 months' imprisonment with 125 days of pre-sentence custody and a parole release date of 1 March 2007.

(7) Russell Parker Junior was charged with: (i) two counts of arson of a structure or building; (ii) one count of rioting with damage; and (iii) one count of stealing by looting in civil unrest. A nolle prosequi was entered for each of the arson charges and for the rioting with damage charge. Mr Parker pleaded guilty to the looting charge and on 28 July 2006 he was sentenced to 6 months' imprisonment (with 9 days of pre-sentence custody).

(8) Russell Parker Senior was charged with two counts of rioting with damage. A nolle prosequi was entered for the first count and he pleaded guilty to the second count. On 28 July 2006, he was sentenced to 18 months' imprisonment suspended for 3 years after 6 months (with 9 days of pre-sentence custody), but on appeal this was increased on 8 December 2006 to 2 years' imprisonment with a parole release date of 8 April 2007.

(9) Jason Poynter was charged with two counts of rioting. A nolle prosequi was entered for one count and he pleaded guilty to the other count. On 28 July 2006, he was sentenced to 12 months on an intensive correction order (with 8 days of pre-sentence custody), but on appeal this was increased on 8 December 2006 to 15 months' imprisonment with a parole release date of 8 May 2007.

(10) Lincoln Poynter was charged with two counts of rioting. A nolle prosequi was entered for one count and he pleaded guilty to the other count. On 24 August 2006, he was sentenced to 4 months' imprisonment suspended for 1 year after 10 days (having already served 10 days of pre-sentence custody).

(11) David Shepherd was charged with rioting with damage. He pleaded guilty and on 1 March 2007 he was sentenced to 18 months' imprisonment with a parole release dated of 1 July 2007 (with 6 days of pre-sentence custody).

(12) Garrison Sibley was charged with: (i) rioting with damage; (ii) arson of an aircraft or motor vehicle; and (iii) stealing by looting in civil unrest. A nolle prosequi was entered for each of the first two charges and Mr Sibley pleaded guilty to the third charge. On 28 July 2006, he was sentenced to 6 months' imprisonment (with 88 days of pre-sentence custody).

(13) Anthony Thompson was charged with wilful damage and pleaded guilty. On 21 June 2006 he was sentenced to 80 hours of community service.

(14) Joseph Watson was charged with: (i) entering a dwelling and committing an indictable offence; (ii) stealing by looting in civil unrest; and (iii) entering a dwelling with intent. The first charge was withdrawn and Mr Watson pleaded guilty to the latter two charges. On 1 December 2004, he was sentenced to 2 months' imprisonment on the looting charge and 6 months' imprisonment suspended for 2 years after 4 months on the enter dwelling with intent charge.

(15) Thomas Wilson was charged with wilful damage and pleaded guilty. On 21 June 2006, he was sentenced to 80 hours of community service.

(16) It was agreed that Lex Wotton was charged with: (i) one count of wilful damage; (i) four counts of rioting with damage; (ii) three counts of arson of a structure or building; (iii) two counts of rioting; and (iv) one count of arson of an aircraft or motor vehicle. It was agreed that the prosecution offered ***no*** evidence on the wilful damage count and a nolle prosequi was entered for each of the other counts except for one count of rioting with damage, to which Mr Wotton pleaded not guilty. After a trial, Mr Wotton was found guilty by a jury. On 7 November 2008, he was sentenced to 6 years' imprisonment with 110 days of pre-sentence custody and a parole eligibility date of 18 July 2010. The provisions of the Criminal Code relevant to the charges laid are set out at [195] above. When a comparison is undertaken between these provisions and the agreed facts, some difficulties emerge. The words "injuring" and "damage" appear in s 66, while s 65 deals with rioting that "demolishes" or "destroys" the things to which it refers. It is the latter provision which carries life imprisonment. The agreed facts use the words "injuring" and "damaging" when referring to various charges. They do not use "demolish" or "destroy". The charge with which Mr Wotton was convicted is described in the agreed facts as "Rioters Injuring Building or Machinery etc", which can only be a reference to rioting with damage. However, having regard to both the sentencing remarks for Mr Wotton (which were in evidence) and the High Court's decision in Wotton v Queensland [2012] HCA 2; 246 CLR 1 at [4], it seems clear that Mr Wotton was charged with and convicted of rioting with destruction under s 65 of the Criminal Code, not the lesser offence of rioting with damage under s 66. Further, it is clear from Bulsey v State of Queensland (unreported, Sup Ct, Qld, North J, 20 February 2015) at [48] (Bulsey trial judgment) that David Bulsey was also charged with rioting with destruction contrary to s 65, although the agreed facts do not reflect this. Notwithstanding these discrepancies, I have inferred that, where the agreed facts use the word "damaging" or "injuring" they refer to the lesser offence of rioting with damage under s 66. I have therefore taken it that it was this offence with which persons were charged in connection with the protests and fires, except for the charge with which Mr Wotton was convicted and which was laid against Mr Bulsey, about which there is other and, I find, better evidence. The charges that were laid against individuals who were ultimately not convicted of any offence were as follows:(1) William Blackman was charged with three counts of rioting with damage. A nolle prosequi was entered for two of the counts and on 5 March 2007 he was found not guilty of the third count.

(2) Dwayne Blanket was charged with three counts of rioting with damage. A nolle prosequi was entered for two of the counts and on 5 March 2007 he was found not guilty of the third count.

(3) John Clumpoint was charged with three counts of rioting with damage. A nolle prosequi was entered for two of the counts and he pleaded not guilty to the third count. On 5 March 2007, he was found not guilty of the third count.

(4) A juvenile offender whose identity is ***protected*** under the Youth Justice Act was charged with rioting with damage and with arson of a structure or building. On 28 July 2006, a nolle prosequi was entered for each charge.

(5) Lester Parkinson was charged with rioting with damage and with arson of a structure or building. On 28 July 2006, a nolle prosequi was entered for each charge.

(6) Lance Poynter was charged with three counts of rioting with damage. A nolle prosequi was entered for two of the counts and he pleaded not guilty to the third count. On 5 March 2007, he was found not guilty of the third count.

(7) Richard Poynter was charged with rioting with damage. On 28 July 2006, a nolle prosequi was entered for the charge.

(8) Shane Robertson was charged with rioting with damage and two counts of arson of a structure or building. On 28 July 2006, a nolle prosequi was entered for each charge.

(9) Fleur Wotton was charged with rioting with damage and with arson of a structure or building. On 28 July 2006, a nolle prosequi was entered for each charge.

(10) Agnes Wotton was charged with rioting with damage and with arson of a structure or building. On 28 July 2006, a nolle prosequi was entered for the charge.

(11) As set out by North J in the Bulsey trial judgment at [48], David Bulsey was initially charged with unlawful assembly contrary to s 62 of the Criminal Code, but that charge was withdrawn and he was charged instead with rioting with destruction under s 65 of the Criminal Code, which carried a maximum sentence of life imprisonment. The prosecution subsequently conceded in committal proceedings that it did not have a case against Mr Bulsey and he was discharged: see Bulsey trial judgment at [16]. Mr Wotton brought a constitutional challenge to the bail conditions imposed on him, which required him not to attend ***public*** meetings on Palm Island without the prior approval of a corrective services officer, not to speak to or have any interaction whatsoever with the media, and not to receive any direct or indirect payment or benefit from the media: see Wotton v Queensland [2012] HCA 2; 246 CLR 1. That challenge was unsuccessful, although the Parole Board removed the condition about speaking with the media during the currency of Mr Wotton's action in the High Court. ***No*** member of the QPS, other than SS Hurley, was charged with a criminal offence in relation to Mulrunji's injuries or death, the subsequent investigation, the entries and searches of the houses or the property damage arising from them. On 14 May 2010, some three years after SS Hurley's acquittal, the Coroner (Deputy Chief Magistrate Hine) found that Mulrunji died of fatal injuries which resulted from some force to his abdomen. Deputy Chief Magistrate Hine found that these injuries occurred either accidentally as Mulrunji and SS Hurley fell into the police station, or by deliberate action of SS Hurley in the few seconds after they landed. He concluded that it was not possible to ascertain whether the force was deliberately inflicted or accidentally applied. In reaching those conclusions, Deputy Chief Magistrate Hine made the following findings. First, that Mulrunji was not suffering from any injury when the police van arrived at the station (at [95] of the findings). Second, that Mulrunji was seriously intoxicated at that time, with a blood alcohol level of 292mg/100mL (0.292), and therefore his co-ordination would have been significantly affected such that he would have been less able to ***protect*** himself in a fall (at [104]). Third, that the medical evidence established that Mulrunji's internal injuries were likely to have been caused by a single blow involving "the application of a very considerable force" to the torso while the torso was "otherwise immobilised" against an object or surface such as the floor, rather than being caused by several blows (at [110]). Fourth, that on the medical evidence alone (before taking other evidence into account) it could not be excluded that the single blow might have been accidentally

inflicted: (at [110], [132]). Fifth, that Mulrunji struck SS Hurley while SS Hurley was attempting to remove him from the police van (at [124]) and that SS Hurley responded by striking Mulrunji (at [179]). Sixth, that SS Hurley fell onto Mulrunji as they came through the door of the police station (at [354]). Seventh, that Mulrunji's internal injuries could have been caused by the application of direct crushing pressure by SS Hurley's elbow, shoulder or hip during the fall and were not necessarily caused by SS Hurley's knee (at [358]-[359]). Eighth, that there was ***no*** medical evidence to suggest that the internal injuries were caused by punching, kicking or stomping (at [360]). Ninth, that it could not positively be concluded that SS Hurley deliberately applied the force that caused the internal injuries (at [363]). Tenth, that it also could not positively be concluded that the force that caused the internal injuries was applied accidentally (at [367]). Eleventh, that after the fall SS Hurley punched Mulrunji three times to the face before dragging him limp into the cells (at [365]). Deputy Chief Magistrate Hine summarised his finding about how Mulrunji died as follows:The deceased died of fatal injuries which resulted from some force to the abdomen of the deceased either accidentally as the deceased and Christopher Hurley fell into the Palm Island watchhouse or by deliberate actions of Hurley in the few seconds after they landed, but it is not possible to ascertain whether the force was deliberately inflicted or accidentally suffered. The four fractured ribs, liver laceration and portal vein rupture occurred as a result of this single injury. In June 2010, shortly after the Deputy Chief Magistrate handed down his finding, the CMC handed down a report entitled 'CMC Review of the Queensland Police Service's Palm Island Review'. It was critical of the QPS. It found the evidence was insufficient to support consideration of any criminal prosecution proceedings, but it recommended disciplinary proceedings against a number of individual officers: DI Webber; DSS Kitching; DS Robinson; and Inspector Williams. None of these officers were disciplined. On 19 August 2010, the Supreme Court of Queensland declared that the Commissioner of Police was disqualified from giving any personal consideration to commencing disciplinary proceedings but was not prevented from delegating the consideration of the commencement of disciplinary proceedings to a prescribed officer as defined in s 7.4 of the PSA Act: see Kitching v Queensland Commissioner of Police[2010] QSC 303. As the title of this proceeding suggests, it was commenced by Inspector Kitching. DS Robinson was the second applicant. The Commissioner delegated to Deputy Commissioner Rynders as a prescribed officer the task of considering the recommendations in the CMC Report and determining any disciplinary issues. The CMC, by letter dated 10 September 2010 to the Commissioner, advised that the matter was considered appropriate for consideration at the Deputy Commissioner level. On 7 January 2011, DC Rynders handed down a 405-page report entitled 'Report in Response to the "CMC Review of the Queensland Police Service's Palm Island Review"'. In her report, DC Rynders decided that the key officers involved should not face disciplinary proceedings, but should be given what was called "managerial guidance" in relation to some (but not all) of their conduct on Palm Island during the period 19 to 28 November 2004. That finding applied to Inspector Williams, DI Webber and DSS Kitching. It appears DC Rynders concluded that not even managerial guidance should be given to any other officers, including, somewhat remarkably it might be thought, SS Hurley. This might be explained on the basis that the scope of DC Rynders' report was determined by the CMC review, which focused on certain officers and limited its examination of SS Hurley's conduct pending legal proceedings which included the third inquest, as the IRT had done before it in the Palm Island Review. Nevertheless, given SS Hurley's acquittal some four years earlier, I remain of the view that the failure of DC Rynders' report to deal with SS Hurley's conduct is something of a glaring omission. Copies of the documents directed towards these three officers were in evidence, although not copies which had any "responses" from those officers filled in at points in the document where a response was suggested. Aside from reciting the sequence of events leading up to the giving of managerial guidance, the actual managerial guidance appears to be contained in several paragraphs in each document. I shall take the document directed at DI Webber as an example (at paragraphs 9 to 15 of the document):By statute, the Commissioner has the prescribed responsibility to ensure the Service is managed efficiently and effectively in accordance with law and there are expectations by the broader community that police officers undertake their official duties with due diligence having regard to legislation, hence the promulgation of Service policy and procedures.

You have an obligation to the Service and wider Queensland community to perform your official duties ethically and professionally at all times. There is ***no*** room for complacency. Service policy and procedures exist to enhance ***public*** confidence in our day-to-day official duties. Police officers must perform their duties with a high degree transparency and be accountable for their actions. In your case, and despite this incident having occurred some

time ago, still leaves some questions concerning the integrity of the initial investigation on Palm Island in November 2004 at the expense of the reputation of the Service, its broader membership and community confidence.

You hold the rank of Inspector and obviously have a supervisory role within your work environment. I have ***no*** doubt that you have learnt from your failings and the perceptions it has created; I sincerely hope that you will take positive steps in the future to avoid any similar adverse perceptions. As a supervisor, your reputation is at stake, you have the responsibility to ensure your subordinates conduct their official duties appropriately and comply with Service directions and guidelines. Should there be a further or similar occurrence of the kind particularised in the Direction Notice, you render yourself liable to disciplinary action.

Do you fully understand the significance of your failings and the likely consequences that may follow?

RESPONSE

Before I conclude, is there anything you wish to say?

RESPONSE

You have been given managerial guidance and I will notify the Commissioner and the Assistant Commissioner, Ethical Standards Command accordingly. I consider the matters against you arising from the Review of the Queensland Police Service's Palm Island Review now finalised. The CMC could have, but did not, appeal against or seek review of the findings of DC Rynders in her report. The evidence revealed, and many of the parties' witnesses accepted, that there have been some positive changes on Palm Island since the events of November 2004, due to increased focus on education, social and cultural needs, and building a stronger community. Nevertheless, as Professor Altman's evidence demonstrated, it remains one of the most disadvantaged communities in Queensland. It seems an obvious but necessary observation that the amount of ***public*** legal, financial and human resources which have been spent on the investigations and inquiries I have recounted – if applied instead to Palm Island itself – could have fundamentally and permanently transformed the lives of the entire Palm Island community. In 2007, David Bulsey and his partner, Yvette Lenoy, commenced a proceeding in the Supreme Court of Queensland claiming damages (including aggravated and exemplary damages) for the tort of trespass to the person (assault and false imprisonment, and in Mr Bulsey's case also battery) in connection with Mr Bulsey's arrest and detention on 27 November 2004. Their claims were dismissed at first instance (see Bulsey trial judgment), but succeeded on appeal: see Bulsey v State of Queensland [2015] QCA 187 (Bulsey). The evidence at trial was that it was DSS Miles in the Major Incident Room in Townsville who had ultimately decided which persons should be arrested: Bulsey trial judgment at [46]. The evidence in this proceeding was less clear about precisely who made those decisions and I return to those matters below. In his leading judgment on the appeal in Bulsey, Fraser JA held (at [19]-[22]) that Mr Bulsey's arrest was unlawful because the officers who apprehended Mr Bulsey did not reasonably suspect that he had committed an offence. His Honour held it was irrelevant whether DSS Miles in Townsville held such a suspicion. Mr Bulsey was awarded $165,000 in damages, including aggravated damages, comprising $60,000 for assault, battery and false imprisonment, $100,000 for false imprisonment after the wrongful arrest, and general damages of $5,000 for personal injury. Ms Lenoy was awarded damages of $70,000 for assault and false imprisonment. Interest was payable on both awards. I return to the Court of Appeal decision in more detail at [1305] below, as it is directly relevant to the applicants' claims in this proceeding. While the inquiries and investigations into the events of November 2004 continued over these seven or so years (if one excludes the Bulsey appeal – otherwise, the period is 11 years), other litigation was brought about the treatment of Aboriginal people on Palm Island. In May 2008, Ms Joan Maloney, another Palm Island resident, was found in possession of a bottle of bourbon and a bottle of rum in a car in a ***public*** place on Palm Island. She was charged and convicted in the Queensland Magistrates Court of an offence under s 168B of the Liquor Act 1992 (Qld). At the time of the offence, just as at the time of the events in November 2004, there were restrictions on possession of alcohol in ***public*** places on Palm Island (and in other Aboriginal communities in Queensland) imposed by the Liquor Act and

its associated regulations. Ms Maloney sought to have her conviction set aside on the basis that the relevant legislative and regulatory provisions were invalid under s 109 of the Commonwealth Constitution by reason of inconsistency with s 10of the RDA. The High Court in Maloney [2013] HCA 28; 252 CLR 168 found that the legislative and regulatory provisions were a "special measure" within the meaning of that term in s 8(1) of the RDA, but a majority of the Court (French CJ, Hayne, Crennan, Bell and Gageler JJ, Kiefel J contra) found that if they had not been a special measure they would have been inconsistent with s 10 of the RDA for the reason that they had discriminatory effects on Ms Maloney's right to own property (that is, in substance, to possess liquor she had purchased). Maloney is an important decision in the consideration of some of the legal principles that are applicable to the applicants' claims in this proceeding.

EVIDENCE ON CONTESTED ISSUES

Key participants in the events of November 2004 who were not called to give evidence Some of the key people who feature in the narrative I have set out above were not called as witnesses in this proceeding. They include SS Hurley, DS Robinson, Inspector Williams, Inspector Richardson, Inspector Underwood, Inspector Kachel, Constable Steadman, Sergeant Leafe, PLO Bengaroo, the other SERT team members, Erykah Kyle, and David Bulsey. There were also people such as Constable Craig Robertson, who took video of the protests and fires that occurred on 26 November 2004, who were absent. I found it somewhat remarkable that neither DSS Miles nor A/AC Wall were called as witnesses. DSS Miles was the QPS officer who was responsible for identifying the suspects to be arrested. A/AC Wall had an overall command role and made such decisions as the one on Monday, 22 November 2004 to remove SS Hurley from the island. He was also the author of the 2006 memorandum in which a long list of QPS officers were recommended of a range of bravery, valour and service awards. This conduct, and the memorandum, were significant aspects of the applicants' case and yet the author and apparent decision-maker was not called. There was ***no*** evidence adduced to explain his absence. The applicants submit that in drawing inferences about whether the conduct was based on race, the Court can and should consider what they describe as the respondents' "election" not to call evidence that could potentially be relied upon to resist the drawing of adverse inferences about the racial basis for QPS conduct. The applicants rely on the following passage from the judgment of Menzies J in Jones v Dunkel[1959] HCA 8; 101 CLR 298 at 312:where an inference is open from facts proved by direct evidence and the question is whether it should be drawn, the circumstance that the defendant disputing it might have proved the contrary had he chosen to give evidence is properly to be taken into account as a circumstance in favour of drawing the inference. The respondents submit this rule does not operate to require a party to give cumulative evidence. Referring to JD Heydon, Cross on Evidence (9th Australian ed, LexisNexis Butterworths, 2013) at p 40, they submit that they were not required to explain or contradict any of the matters on which the applicants invite the Court to draw inferences, so the rule has ***no*** operation. Referring again to Cross on Evidence at p 38, the respondents submit the rule cannot be used to fill gaps in the evidence or to convert conjecture and suspicion into inference. I accept the respondents' submissions in general. The applicants bear the onus of proof in this proceeding. How that burden was to be discharged was a matter for the applicants, and the respondents were not obliged to assist the applicants by providing witnesses whose evidence might fill any gaps in the applicants' case. The "true complexion on the facts relied on as the ground for" an inference (see Jones v Dunkel at 308 (Kitto J)) may, or may not, have been revealed by the calling of one or more of the many QPS officers not called. In a case with as broad a factual base as this, where witnesses' evidence ranged over so many events, a broad-based submission invoking Jones v Dunkel cannot succeed. The Court takes the evidence before it and makes findings on the balance of probabilities accordingly. There may have been evidence before other courts, persons and entities examining these events which was not before this Court. There may have been evidence before this Court that was not before those other courts, persons and entities. The state of the evidence is the result of the parties' forensic choices. The correct approach is set out in Australian Securities and Investments Commission v Hellicar [2012] HCA 17;247 CLR 345 at [165] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ):Disputed questions of fact must be decided by a court according to the evidence that the parties adduce, not according to some speculation about what other evidence might possibly have been led. The respondents' forensic choices about which individuals they chose to call as witnesses have had some consequences for my fact finding, but not as a result of the application of Jones v Dunkel. Rather, they have meant there is, in relation to some aspects of my fact finding, ***no*** countervailing evidence to be considered other than that upon which the applicants rely. The contemporaneous video evidence is one example: although the respondents tendered one piece of video footage, they led almost ***no*** evidence seeking to give any context to what could be seen in the video

evidence, to contradict it, or to qualify it. That is true even of the video taken by Constable Robertson. A similar observation can be made about the applicants' forensic choices: on some matters there is insufficient evidence for the Court to be satisfied the applicants have discharged their burden of proof. For example, they alleged that QPS officers behaved in a 'militaristic' manner in the course of their activities on Palm Island following the protests and fires. While a substantial amount of evidence was led about the arrests, entries and searches that occurred in the course of the SERT operations, it was insufficient to prove on the balance of probabilities that the general behaviour of the police on Palm Island could be described as 'militaristic' (see [1267] below). Ms Andrea Sailor gave a short explanation regarding why her mother, Erykah Kyle, did not give evidence in this proceeding. I need not set out that explanation: the respondents accepted that Ms Kyle was unable to give evidence. The Court has the benefit of contemporaneous video evidence of her speaking on many occasions, including an interview with her. Ms Kyle had a pivotal leadership role in the Palm Island community during these events. While it was also clear, from some of what can be heard in the contemporaneous video evidence, that some members of the Palm Island community were dissatisfied with the leadership she provided, for my own part I was impressed by how she worked to hold her community together at such a difficult time. The circumstances were especially difficult because Ms Kyle had lost a son in a death in custody situation. The video evidence also makes clear that Ms Kyle sought to engage with QPS officers on the island, albeit relatively unsuccessfully.

The documentary evidence A wide range of documents, photographs, videos and audio recordings were in evidence, tendered principally by the applicants but also by the respondents. The documentary evidence includes:(a) video footage of Mulrunji in the watchhouse cell of the Palm Island Police Station on 19 November 2004, and the response of QPS officers when he was found dead;

(b) transcripts, video recordings and witness statements from the interviews and re-enactments conducted by the QPS investigating officers on Palm Island on 19 and 20 November 2004 (and in Ingham on 21 November 2004);

(c) documents relating to the coronial functions following Mulrunji's death, including the Form 1 and preliminary autopsy report, as well as the final autopsy report dated 21 January 2005 and the findings of the coronial inquests which followed in 2006 and 2010;

(d) videos depicting various ***public*** meetings held on Palm Island during the week of 22 November 2004;

(e) videos depicting the protests and fires that occurred on Palm Island on 26 November 2004;

(f) videos depicting media interviews with QPS officers from the week of 22 November 2004;

(g) QPS media releases and news reports about the events on Palm Island in November 2004;

(h) QPS executive and ministerial briefing notes about the situation on Palm Island in November 2004;

(i) QPS logs and running sheets recording events on Palm Island between 19 November 2004 and 13 December 2004, including what was referred to in the running sheets as "Operation CHARLIE CLOVER – 'State of Emergency Palm Island'";

(j) photographs depicting the planning and aftermath of the arrests, entries and searches, and depicting SERT and PSRT officers during the period of the entries and searches;

(k) the OPM and related documents, such as the applicable versions of the Queensland Police Service Code of Conduct and the National Guidelines for the Police Use of Lethal Force and Deployment of Police in High Risk Situations;

(l) documents relating to "Managerial Guidance" given to various QPS officers involved in the events on Palm Island;

(m) reports of various bodies about the events on Palm Island, including the QPS's November 2008 'Palm Island Review' and the CMC's June 2010 'CMC Review of the Queensland Police Service's Palm Island Review';

(n) various reports on policing in Aboriginal and Torres Strait Islander communities generally, including the report of the Royal Commission into Aboriginal Deaths in Custody (RCIADIC) and the regional report of that Royal Commission regarding Queensland;

(o) witness statements of QPS officers involved in the events of November 2004, some taken at the time of the events and some taken afterwards;

(p) sentencing remarks of the District Court of Queensland in relation to those persons who were charged with offences arising from the protests and fires that took place on Palm Island on 26 November 2004; and

(q) audio of interviews conducted by DS Robinson on 28 and 29 November 2004 with persons affected by the arrests, entries and searches. The video footage of witness interviews which were taken at the time (that is, on or around 19 November 2004) were taken largely by Constable Tibbey, who accompanied DI Webber to Palm Island on the afternoon of 19 November 2004. The witness statement made by Constable Tibbey for the purposes of the criminal trial of SS Hurley was in evidence in this proceeding. Constable Tibbey refers also to photographs he took, but they were not in evidence in this proceeding. ***No*** objection was taken to that statement and I am satisfied it provides the necessary proof of the authenticity and contemporaneity of the video footage and photographs taken by Constable Tibbey.

The witnesses called by the parties in this proceeding My assessment of the witnesses in this proceeding is critical for some issues that must be determined and less critical for others. Much of the sequence of events that forms the basis of the applicants' claims is not disputed, so that individual differences in accounts of those events are not, in my opinion, critical to the findings to be made. That is especially so when Palm Island community members and police officers were clearly approaching the sequence of events from such different perspectives, differently informed, with different priorities and concerns, and with different sets of assumptions. Generally, although their different perspectives informed their evidence, I did not see the differences as affecting the views I formed about the factual findings necessary for the purposes of s 9(1). The issues where the witness evidence really matters were the following. First, my impression of the police officers did inform my findings about whether the pleaded conduct was based on race. That is not so much because individual officers exhibited behaviour, opinions or language which could be described as racist (although a few did). Rather it was because their oral evidence provided a clear picture of the perspective they brought to the discharge of their policing role and responsibilities on Palm Island during the claim period. Second, the evidence of the witnesses from the Palm Island community had two particular impacts on my findings. The first is that their evidence, including how they presented as witnesses, assisted me to understand what it was like to be living on Palm Island during these events, and what the Palm Island community was like. It bore little resemblance to the perceptions exhibited by members of the QPS about the Palm Island community. The second is that the evidence of those witnesses who were still children during the entries and searches was profoundly affecting. I describe my impressions in more detail as I deal with each witness. The terror instilled in those witnesses who were children at the time of these events was palpable and continuing during their evidence in this proceeding. I deal with the witnesses in the order in which they were called. Where I describe relationships between individuals, I use familial descriptors without distinguishing between biological and non-biological relationships. It seems to me this is consistent with how the Aboriginal witnesses described their relationships and, for the purposes of this proceeding, whether a relationship was biological or not was of ***no*** consequence. What matters was the existence of family, and extended family, relationships and living arrangements. Although the respondents did test the accounts given by the applicants' witnesses about the arrests, entries and searches, in my opinion the vast bulk of the eyewitness evidence should be treated as reliable.

These individuals experienced something that was out of their normal range of experiences, and which terrified them. They have lived with those experiences ever since and in my opinion their recollections have remained good because of the heightened states induced by what they saw and experienced. I did not detect any particular exaggerations or reconstructions. In contrast, the respondents either called ***no*** eyewitnesses, or they called officers who were physically distant from many of the events although present in the vicinity. An example is Inspector McKay, who was present during the arrests, entries and searches but did not go up to or into the houses. Of the SERT officers called (Superintendent Kruger and Sergeant Folpp), these men were giving evidence about events that occurred a long time ago, in circumstances where each of them had attended many other SERT callouts both before and after those events. In terms of detail, I am not satisfied their recollections would be as reliable as the applicants' eyewitnesses. It did not strike me that either of these witnesses had found their task on Palm Island anything much out of the ordinary, and they did not appear to have any special recollections of it. They were able accurately to describe what they were trained to do in such situations, how they were trained to think, and therefore gave evidence about how they were likely to have behaved. That kind of evidence, as given by them, can be accepted. However where there is a direct conflict with the applicants' eyewitnesses who were, so to speak, on the receiving end of the SERT conduct, I prefer the evidence of the applicants' witnesses because in my opinion the uniqueness of those experiences for them means they are more likely to recall the events rather than reconstruct them. As I have said, it is my firm impression that what they experienced has stayed with them and has had lasting adverse effects on them. There were, I regret to say, many leading questions asked of the applicants' witnesses. The irony of that occurring in a trial where the applicants led expert evidence about the susceptibility of Aboriginal people to gratuitous concurrence should not be overlooked. Where I considered a witness's evidence was affected by the leading nature of a question or questions, I have not given any weight to that evidence. The result is that the evidence of some witnesses, such as Mr Clumpoint, is not of high probative value. Nevertheless, there were large and important parts of much of the witness evidence for the applicants that were not affected by this problem.

The applicants' witnesses

Tuesday, 22 September 2015

Ms Andrea Sailor Ms Sailor has lived on Palm Island all of her life. She is the daughter of Ms Erykah Kyle, the former mayor of Palm Island, who features in much of the witness evidence and the video evidence from November 2004. At the time of giving her evidence, Ms Sailor was employed as a field officer for the Department of Corrective Services on Palm Island. Between 2002 and 2005, Ms Sailor was employed as a field officer with ATSILS on Palm Island. Her role at ATSILS included attending court, attending the watchhouse when a person was taken into custody, and sitting in on police interviews with clients in custody. Ms Sailor was a careful and measured witness. She was clear in what she could recall and what she could not. Of the matters she did recall, I am satisfied her evidence is reliable and accurate, in particular her evidence about what she observed from her home in Butler Bay on 27 November 2004, when the SERT teams arrived in that area looking for the suspects they had been instructed to apprehend.

Mr Owen Marpoondin Mr Marpoondin has lived on Palm Island since he was four years old. He was a board member of ATSILS on Palm Island from 2002-2006. As part of his duties as a board member of ATSILS, he transported people to court in the ATSILS car and assisted the legal and field officers to provide other services to the community. During this time, he worked with Ms Sailor. Mr Marpoondin had known Mulrunji since they were children, as they both grew up on Palm Island. His evidence related to his attendance at the police station with Ms Sailor after they found out about Mulrunji's death and his attendance at the houses of Mulrunji's partner, Ms Tracy Twaddle, and mother, Ms Doris Doomadgee, with DI Webber and other police officers for the purpose of informing the family of Mulrunji's death. I found Mr Marpoondin gave fairly straightforward answers to the questions he was asked. Although his answers were often brief, I am satisfied his evidence was reliable.

Mr Albert Wotton Mr Albert Wotton is the son of Mr Lex Wotton and Ms Cecilia Wotton. He has lived on Palm Island all of his life. At the time of giving his evidence, he was a trainee health worker at the Joyce Palmer Medical Centre on Palm Island. His evidence primarily related to the entry and search of his home by police on 27 November 2004. He was 12 years old at the time of the entry and search. Mr Albert Wotton was a quietly spoken witness, but I found his evidence sincere and carefully given. I accept that he remains afraid of the police, and this came through very much in his oral evidence. Although his evidence about the precise sequence of events when the SERT officers came to the Wotton house was challenged in cross-examination, on the whole I found his

evidence reliable. If there were some small inaccuracies in his recollection of the sequence of events, this did not affect the reliability of his key evidence.

Ms Krysten Harvey Ms Harvey is the niece of Mr Lex Wotton and the granddaughter of Mrs Agnes Wotton. She has also lived on Palm Island all of her life. Until around September 2014, when she gave birth to her son, Ms Harvey was employed as a teacher's aide at St Michael's Primary School on Palm Island. At the time of the events in issue in this proceeding, Ms Harvey was sixteen years old. She was at Mrs Agnes Wotton's house on the day of the arrests, entries and searches and her evidence relates predominantly to her experiences during the entry and search of Mrs Agnes Wotton's house. I found Ms Harvey to be a most straightforward witness, with a good recollection of the events she recounted. Reliving those events prompted some distress in her, which was obviously genuine. Where her evidence differs from the evidence or submissions put by the respondents about what happened inside Mrs Agnes Wotton's house, I prefer her evidence. I am satisfied what happened in Agnes Wotton's house was a singular and terrifying experience for Ms Harvey, and she has neither forgotten what occurred, nor mistakenly reconstructed aspects of it.

Wednesday, 23 September 2015

Mrs Agnes Wotton Mrs Agnes Wotton is the second applicant in this matter and the mother of the first applicant, Lex Wotton. Mrs Wotton is a resident of Palm Island and has lived there since approximately 1957, when she was forcibly relocated to the island at the age of around 13 years. She lived in one of the dormitories in the 'Mission' area of the island between the age of 13 until her marriage at the age of 17 years. I set out the evidence about the dormitories at [33] to [39] above. Mrs Wotton became a Palm Island Councillor in the 1970s and was a member of the Aboriginal and Torres Strait Islander Commission in the early 1980s. She became a land rights activist in the mid-1980s and an advocate for the implementation of the recommendations of the Royal Commission into Aboriginal Deaths in Custody after the Commission handed down its final report in 1991. It is clear she has been a prominent member of the Palm Island community for many years. Her evidence related to her personal experiences growing up on Palm Island, what she observed and heard at community meetings after Mulrunji's death, and the events surrounding the arrest of Mr Lex Wotton. Although she is now in her seventies and not in the best of health, I accept Mrs Wotton is a senior and respected member of the Palm Island community. Her personal story of how she came to Palm Island is a sadly typical example of the removal of young Aboriginal children from their families and communities in the mid-20th century. Her evidence was carefully given, and I accept her as an honest witness, although there were parts of her evidence when her memory failed her. She gave sincere evidence about the impact of being prevented from attending Mulrunji's funeral. She was prevented from attending the funeral because she was required to stay in Townsville for six to eight weeks after she was charged with rioting with damage in connection with the events on Palm Island. The charges against her were later dropped.

Ms Schanara Bulsey Ms Bulsey is the daughter of Mr Lex Wotton and Ms Cecilia Wotton. She has lived on Palm Island most of her life. Ms Bulsey recently spent eight years living in Townsville, before returning to Palm Island. Ms Bulsey's grandfather is Mr David Bulsey. When she gave her evidence in September 2015, Ms Bulsey had been employed as an administrative officer at the Joyce Palmer Hospital on Palm Island for five months. Ms Bulsey was at the home of Mr Lex Wotton and Ms Cecilia Wotton on the night of the police entry and search of their house, when her father was arrested. I am satisfied Ms Bulsey gave honest evidence about what she could recollect. In parts, she was able to provide considerable detail, which I accept was from genuine recollection. In other parts, her recollection was less clear. Given the events she described were traumatic for her, it is unsurprising her recollection of detail is varied. Her distress, more than a decade later, was obvious and still raw. In cross-examination she made appropriate concessions, but in general I accept her evidence, including where it differs from, or conflicts with, the evidence given on behalf of the respondents.

Mr William Neville Blackman (Mr Blackman Senior) Mr Blackman Senior has lived on Palm Island since he was 16 or 17 years of age. At the time of giving his evidence, Mr Blackman Senior was working in a diversion program funded by the Palm Island Community Company. Mr Blackman Senior stated that he was a close friend of Mulrunji. He gave evidence that he became friends with Mulrunji when they were both children and they grew up together. Mr Blackman Senior's grandfather arrived on Palm Island in 1918. His grandmother was brought to Palm Island as a child, where she resided in the girls' dormitory on Palm Island. Mr Blackman Senior was arrested and charged with rioting with damage in connection with the events of 26 November 2004. As part of his bail conditions, he was prohibited from staying on Palm Island in the time leading up to the hearing of his charges. Consequently, he stayed in Townsville for a period of around six months and like Mrs Wotton was unable to attend Mulrunji's funeral.

Two of the charges against him were subsequently dropped and he was found not guilty of a third. Having described himself as a "close mate" of Mulrunji, a decade later his anger and frustration about Mulrunji's death was still evident. His evidence about the sequence of events when police came to his house and his subsequent surrender to police was given in a straightforward manner. The impact of not attending Mulrunji's funeral was clear in his evidence. In cross-examination, he made appropriate concessions about factual issues. Despite being challenged in cross-examination, he was firm in his evidence that his mother came with him when he gave himself up to police. I found his evidence reliable.

Ms Mersane Oui Ms Oui is the de facto partner of Mr Blackman Senior. This was also the case in November 2004. She gave evidence about the evening the SERT teams came to their home. Ms Oui appeared to me to have a good recollection of the entry and search of her house by police. Although she was not as emotional during her evidence as some of the witnesses (albeit that she was visibly upset), it was apparent the incident was frightening and distressing for her. Like the other witnesses called by the applicants, my impression is that the entry and search was a singular event in her life that has had lasting consequences.

Mr William Lloyd Blackman (Mr Blackman Junior) Mr Blackman Junior is the son of Mr Blackman Senior. Mr Blackman Junior was born on Palm Island and has spent all of his life on Palm Island. He gave evidence about the police entries and searches and their effect on him. He was about 12 years old at the time. I found Mr Blackman Junior to be quite a reticent witness, who gave what I consider to be reasonably reliable evidence about the SERT entry and search of his family home and its effect on him. Given his age at the time, his evidence was unsurprisingly limited to a few critical aspects of that event as it directly related to him. On occasions, he showed something of a steady resolve under questioning, especially in cross-examination. For example, when pressed about the use of alcohol, he responded "everybody drinks, not just on Palm Island". I accept his evidence.

Thursday, 24 September 2015

Mr John Clumpoint Mr Clumpoint has lived on Palm Island since he was 10 years old. He is a carpenter by trade and has four children. In his evidence, Mr Clumpoint said that he was related to Mulrunji and knew him very well. He referred to Mulrunji as his "little brother". Mr Clumpoint was told about Mulrunji's death by Mulrunji's partner, Tracey Twaddle. He gave evidence about, among other things, how Mulrunji's death affected him and the events on the day of the entry and search. He was one of the suspects arrested on 27 November 2004, and spent time in custody as a result although two of the charges against him were dropped and he was acquitted of a third. Mr Clumpoint presented as something of a broken man. The causes of this could be many and varied. There were some real difficulties in the way his evidence was adduced, because leading questions were regularly employed. In a general sense, it may be accepted that the way he was treated in his sudden arrest and his inability to return to live and work on Palm Island had a material effect on the breakdown of his family relationships. Under cross-examination he became stronger in his answers and he adhered quite adamantly to his account of events when challenged. Ultimately, I am satisfied he attempted to give honest evidence, but he was somewhat confused about what happened on the day of the entry and search.

Mr Chevez Morton Mr Morton has lived on Palm Island all of his life. He has previously been employed as a painter with the local Council although he was not employed at the time of giving evidence. Mrs Agnes Wotton is Mr Morton's great aunt. He was at Mrs Agnes Wotton's house, playing hide and seek, at the time of the SERT entry and search. He was nine years old at the time. When he came to give evidence, Mr Morton was tense and appeared extremely nervous. He took deep breaths from time to time and tended to stare straight ahead of him, rather than look at anybody in the room. He appeared frightened – his hands were visibly shaking. A considerable part of his obvious fear related to the events he was being asked to recall and relate. I found his evidence vivid and compelling, and I accept he was relating genuine recollections of what happened to him. His evidence about his ongoing fear of police was poignant. He withstood challenges to his version of events under cross-examination.

Ms Collette Wotton Ms Collette Wotton is the daughter of Mrs Agnes Wotton and the sister of Mr Lex Wotton. She has lived on Palm Island her whole life. She has three other siblings: Gerald, Lance and Anthony. She has four children of her own and five grandchildren. Ms Wotton had previously worked at St Michael's Primary School for 20 years in administration, as a parent liaison and as a community Indigenous support worker. That is where she was employed in November 2004. She gave evidence about the community meetings after Mulrunji's death, her conversation with her niece Ms Krysten Harvey after Ms Harvey's experiences with the SERT entry and search at Mrs Agnes Wotton's house, and the entry and search of her own house. Ms Wotton presented as a very sincere

person dedicated to her family but also to the Palm Island community. Her roots in this community are clearly deep: for example, her evidence about hearing of Mulrunji's death while on an overnight stay in Townsville and that she could not wait to get back home to her family. It was plain she still feels considerable resentment towards the police and the way they conducted themselves in the days after Mulrunji's death. She was able to give her own narrative of the events of 19 to 24 November 2004, but her evidence had an air of generality about it which led me to place less weight on her narrative than on some of the other witnesses. It appeared to me that some of that narrative may not have been actual recollections of what she saw and what she heard, but could well have been based on what she has subsequently learned. She became somewhat combative under cross-examination, but I find that is explicable by the degree of anger she still has towards the QPS. Nevertheless, her evidence conveyed a strong sense of injustice about how the QPS dealt with the investigation into Mulrunji's death, their failure to work closely with the community in the days and weeks following that event, and what she saw as heavy-handed policing.

Mr Zacchias Sam Mr Sam is a pensioner and has lived on Palm Island all of his life. In 2004, he was the CEO and then Deputy Mayor of the Council. He said he saw Mulrunji grow up as he used to visit Mulrunji's parents' house regularly. He gave evidence about the community and Council meetings he attended after Mulrunji's death. He exhibited a genuine focus on community welfare, but Mr Sam's recollection of specific events was not strong and I am unable to place much weight on his evidence.

Ms Cecilia Wotton Ms Cecilia Wotton is married to Mr Lex Wotton and gave her evidence over 24, 25 and 28 September 2015. She and Mr Wotton have been in a relationship for 20 years. At the time of giving her evidence, she was working as a cleaner at the Joyce Palmer Health Service on Palm Island. Her family has a significant history on Palm Island: her grandfather was a Palm Islander and her uncle was involved in the 1957 strike. Ms Wotton had a close relationship with Mulrunji's elder sister, Claudelle, who lived with Ms Wotton and her family for a period of time. While Claudelle was living with Ms Wotton, Mulrunji would often visit Ms Wotton's family house and spend time with Ms Wotton's family. In November 2004, Lex Wotton and Ms Wotton had a number of children living with them, including their own. Ms Wotton gave evidence about, among other things, the police entries and searches after the protests and fires, and the effects that Mr Wotton's arrest and imprisonment had on her and her family. Ms Wotton was a fragile witness. Recalling the events of the entries and searches was distressing for her. My impression was she was reluctant to say out loud too much of what she remembered. Her evidence about the effects and aftermath of Mr Wotton's arrest was circumscribed, although in part this was due to the manner of examination in chief, which was again peppered with leading questions. Her answers in cross-examination disclosed a firmness about her recollection which I found reliable. She was honest in answering questions in cross-examination about her struggles in day-to-day life, while accepting in what I found to be a stoic way that she could get through the day. She is obviously a self-reliant kind of person. Her quiet nature and her tendency for stoicism led, in my opinion, to something of an under-emphasis in her descriptions of how traumatic the events of November 2004 and their aftermath had been for her and her family.

Monday, 28 September 2015

Mr Anthony Koch Mr Koch is a retired journalist. His experience ranged from working in the Queensland Justice Department in Brisbane for 10 years as a shorthand court reporter, to working for the Courier Mail for 22 years first as a political reporter and later an associate editor. He was also a chief reporter with The Australian newspaper for 10 years, where he focused on Indigenous affairs. Mr Koch has been awarded a Walkley award for journalism five times, along with numerous other local and international awards. While he was with The Australian, he described working hard to obtain the trust of the Palm Island community, so that he was able to report on various stories from the island. On 26 November 2004, Mr Koch received a telephone call from a Palm Island community member, who told him about the fires and the protests. He travelled to Palm Island the next day. His evidence related to his experiences and observations reporting on Palm Island and talking to community members in the days after his arrival. I found Mr Koch to be a down to earth kind of man, with a wide range of life experience. He is clearly an experienced and distinguished journalist. As chief reporter for The Australian, I accept he had a leading role in reporting on Indigenous affairs. He had been to Palm Island at least 12 times prior to November 2004 and his particular interests in, and familiarity with, Palm Island gave him a perspective of, and level of experience about, the island which was well beyond any other non-Aboriginal witness in this proceeding. He exhibited a clear independent streak, evident in his account of how he chose to go to Palm Island during the unrest. This was his evidence:Yes. Yes. I decided to – I spoke to ..... and I got on a plane and came to Townsville that night. I had – I was then contacted by Murandoo Yanner, who's a very outspoken Aboriginal activist, if you like, from Burketown. But he had

very strong connections with Palm Island. He –and people were in touch with him, and he said that I should meet up in the morning with a local man called Brad Foster – I didn't know Brad – and that he would, you know, introduce me to people and look after me on the island, and – and so I did. I met Foster the next morning, and we or I hired a helicopter and – and we went over to the island, because I had been told then – by that time, I had been told that any planes that were leaving on the island with journalists on that police were meeting them and then shepherding them into the school there, where they were – well, the term used was "embedded", but where they were to stay, but they were under the eye of the police. I mean, they weren't held there against their will or anything, but they didn't have free access to the island.

And what was your view about that?---Well, that wouldn't have suited me, so the arrangement was that we fly to the island and – and hopefully get – and stay in the Foster home, out – just up from the general store there.

So in the central part of - - -?---Yes, so I would have free access, yes, to island to speak to people. Yes.

And is that what happened?---Yes. That's what happened.

And you stayed in the Foster home, it sounds like - - -?---I did for the whole period. I think I was there for eight or 10 days. Yes. I consider Mr Koch was conscientiously recalling what he could from 27 November 2004 onwards and was attempting to be accurate, although in cross-examination some assumptions and glosses on his evidence were exposed. There were some aspects of his evidence that disclosed a sense of the legacy of Palm Island's history on the community in November 2004. Two examples will suffice. First, Mr Koch gave evidence that at about 2 am on 28 November 2004, while he was driving around the island and talking to people, he was approached by Mrs Renata Pryor (whose name was also sometimes spelled "Prior" in the materials in evidence), the mother of William Blackman Senior. Mrs Pryor recognised Mr Koch because five years earlier he had interviewed Mrs Pryor's father, Peter Prior. Peter Prior was the man who had shot Superintendent Robert Curry in 1930 in the incident I describe at [36] above and was about 90 years old at the time of the interview with Mr Koch. During the interview, Mr Prior had told Mr Koch that, immediately after the murder charge against him in relation to Mr Curry's death was dropped and Mr Prior was released from prison, the police arrested and imprisoned him again, without charge, on the pretext that it was for his own ***protection*** because Superintendent Curry's brother wanted to kill him. Against the background of that experience, Mrs Pryor was extremely worried for her son, Mr Blackman, who at that time was hiding from the police. Mr Koch and Mrs Pryor drove around and eventually found Mr Blackman. At Mrs Pryor's request, Mr Koch photographed Mr Blackman's body in an attempt to record that he did not have any bruises or bullet holes in him because Mrs Pryor and Mr Blackman were afraid that he would be injured by the police. Second, Mr Koch gave evidence indicating that, as in other Aboriginal communities, the Palm Island Council was very influential on Palm Island and could have assisted the QPS with apprehending people in a less confrontational manner. His evidence was that Mr Robert Blackley, who had previously been Mayor of Palm Island, had told him that if the police wanted to arrest people all they had to do was go to the Council and ask that those people make themselves available and the Council could make that happen. Mr Koch's evidence was that he found Mr Blackley's opinion to be reasonable based on his own observations about the power and influence of elected councils in Aboriginal communities. By reason of the perspective he brought, I found Mr Koch's evidence to be more balanced than that of many of the respondents' witnesses, which I found defensive and without appreciation of the history and nature of the Palm Island community. Therefore, I gave considerable weight to his evidence about what he saw in the time after 26 November 2004.

Dr Rosalind Kidd Dr Kidd gave evidence via video link. She is an academic historian who graduated with a Doctor of Philosophy from Griffith University, Brisbane in 1995. She specialises in Indigenous affairs and, throughout her career, has submitted reports to numerous inquiries and committees relating to Indigenous affairs. Dr Kidd was retained by the applicants to provide a historical report on Palm Island including an overview of how the settlement on Palm Island came to be established, the strike of 1957 and historical policing on Palm Island. Her report was an annexure to her affidavit sworn on 16 June 2015. Dr Kidd began her oral evidence as a careful witness making appropriate concessions and qualifications. But as her cross-examination tended to show, her method was not as rigorous as it should have been. For example, at [3.2.26] of Dr Kidd's report, she states that: "reports during 1970

showed only 165 houses for 1300 people on the island, resulting in gross overcrowding and unhealthy home conditions caused by the impossibility of keeping the houses clean." In the footnote to this statement, Dr Kidd cites a document at pages 118-119 of the extracts to her report headed "Training officer's comments on L/O's reports" and dated November 1969 to March 1970. However, that particular source document does not support a statement that the conditions of homes on Palm Island were "unhealthy". The only negative statements about the conditions of homes on Palm Island in that document are that there was an overcrowding problem (and the population statistics and the number of homes Dr Kidd uses are stated) and that "[i]n several homes, the wives have done their best to keep their homes clean, but due to the lack of room, it has been impossible for them to keep their homes as we expect them to." This statement at [3.2.29] of Dr Kidd's report was also challenged during cross-examination:Yet another gastroenteritis epidemic struck, killing one child and hospitalising a further 55. Ten of the most critically ill children were sent to Townsville Hospital where the medical superintendent said chronic severe malnutrition on the Island left many children looking like 'starved Biafrans'. The source Dr Kidd cites to support this statement, a newspaper article titled "Gastro Victims 'Like Biafrans'" – which appears to be from the Townsville Daily Bulletin on 21 September 1973 – actually states:Many of the Palm Island children who were admitted to hospital with gastro-enteritis were like "newspaper photographs we have seen of starving Biafran children," the Medical Superintendent of the Townsville General Hospital, Dr. D. Bowler, said yesterday.

"The extreme undernourishment of many of the children made them especially susceptible to the many bugs on the island which could have caused the epidemic," he said. I agree with senior counsel for the respondents that Dr Kidd did not accurately summarise the medical superintendent's statement, in that his statement was about the appearance of children admitted to hospital with gastroenteritis rather than children on the island generally. I consider that at various points in her report, Dr Kidd was given to imposing some glosses and exaggeration on the historical record. That is not to diminish the underlying subject matter of her report, which disclosed terrible conditions on Palm Island and the attitude of state and federal authorities in forcibly removing individuals, families, and parts of families to Palm Island and then virtually imprisoning them there. However, none of the broad opinions she expressed were subject to any challenge under cross-examination. The historical material attached and referred to in her report, which was not challenged, provides insight into the historical conditions on Palm Island and the attitude of the authorities to Aboriginal people living there. I have relied on this material at [23] to [59] above, and on some of Dr Kidd's opinions, where I found them to be well-founded in the historical material to which she referred.

Ms Jacinta Barry Ms Barry came forward during the hearings on Palm Island. Leave was granted to the applicants to add her as a witness and she was called on 28 and 29 September 2015. Ms Barry has lived on Palm Island all of her life. She is mother to seven children and Mulrunji was her first cousin. It was Ms Barry's evidence that she knew Mulrunji very well and that she spent considerable time with him when she was younger. Ms Barry's house was entered and searched by SERT officers on 27 November 2004 and her evidence related mostly to that incident. Ms Barry's position as, in substance, a "volunteer" witness who put herself forward is of some significance. Her evidence of the entry and search of her house by SERT officers was vivid and believable. She spoke about the impact of the entry and search, in terms of her fear of the police. I accept her fear is genuine, although I consider Mrs Barry may have exaggerated it a little in her evidence. There is ***no*** doubt she is focused on the entries and searches as the source of her anxiety and difficulties in life. The evidence was insufficient to reach any conclusion on that issue, nor is any such conclusion necessary because these reasons do not address relief in relation to members of the subgroup.

Tuesday, 29 September 2015

Emeritus Professor Jon Altman Professor Altman, who is an economist and anthropologist, gave evidence via video link from the Court's Sydney Registry. He is an Emeritus Professor and Visiting Fellow at the Australian National University's Regulatory Institution Network, a Fellow of the Academy of the Social Sciences in Australia and an adjunct Professorial Fellow at the Research Institute for the Environment and Livelihoods at Charles Darwin University in Darwin. The respondents did not challenge his qualifications or his experience in working with Indigenous people, and in working on a variety of Indigenous policy issues with federal and state governments, Aboriginal and Torre Strait Islander organisations and communities, and non-government organisations. Professor Altman was engaged by the applicant's solicitors to provide information on the extent of the socio-economic

deprivation on Palm Island. Professor Altman produced a report with his colleague Dr Nicholas Biddle, which was annexed to his affidavit dated 3 September 2015. There was also ***no*** challenge by the respondents to Dr Biddle's expertise. Professor Altman was a measured and impressive witness. His explanations for the use of the 2006 census data in relation to the circumstances on Palm Island in 2004 were persuasive, even though the data post-dates those circumstances, and I had ***no*** difficulty in relying on that material. His evidence was of limited relevance to the issues I have to decide, but it was of high quality.

Mr Lex Wotton Mr Wotton is the lead applicant in this proceeding. He gave oral evidence on 29 and 30 September and 1 October 2015. He has lived his whole life on Palm Island, aside from a year at Townsville while in high school, and time he was forced to spend away from Palm Island as a result of the charges and subsequent conviction arising out of the events of 26 November 2004. His partner is Ms Cecilia Wotton and, as I have indicated, they have a number of children. He is a plumber by trade and, at the time of giving his evidence, was employed by the Palm Island Council. Mr Wotton was convicted of rioting with destruction and was sentenced to a term of six years' imprisonment with a non-parole period of two years, and allowance of 110 days for time served. After his conviction he spent 20 months in custody. In some respects, I found Mr Wotton a difficult witness to assess. He initially gave his evidence in monotone, seeming to have something of a forced calmness of attitude about him. His evidence in chief tended to be somewhat rambling and lacked focus. I do not wish to be unduly critical of him, because I accept this was a testing experience for him and it is the case that little control was exercised over his evidence in chief. At various times, his evidence tended to be irrelevant to the issues in the proceeding. An example of this was how he interrupted his own narrative of the events that took place on Palm Island on Tuesday, 23 November 2004 to commence a long discourse about the Royal Commission into Aboriginal Deaths in Custody. On occasion, he seemed determined to say what he wanted to say, irrespective of the questions asked by his counsel. In cross-examination, Mr Wotton also seemed determined at times not to answer a question unless it was completely non-controversial. He asked for clarification of questions that were straightforward, including where the answers he may have had to give were not necessarily going to reflect well on him. Thus, I find there was some evasiveness in his evidence. However, when he started describing what happened at the community meetings that took place on Monday, 22 November 2004 and thereafter, his account became more animated and appeared to be more composed of actual recollection. That said, it is my opinion he sought to downplay his role at the meetings and protests, and he certainly downplayed matters such as the kind of language used. I prefer to rely on the contemporaneous video footage for my conclusions about these events, as I also found Inspector Whyte's evidence exaggerated, one-sided, unduly emotive and unreliable. How Mr Wotton presented in the witness box was in stark contrast to the angry, confrontational man who can be seen in the video footage. My sense was he was working hard to be measured and controlled in his evidence. That does not mean I found his emotions when speaking about the arrests, entries and searches not to be genuine, but I am not confident that his evidence disclosed the whole of his personality, and therefore I am not confident about how reliable his evidence is in terms of the level of impact he contends these events had on him. The significant contrast between how he appears in the video footage and his demeanour and attitude in this proceeding must be taken into account, allowing of course for the fact that ***no*** individual is one-dimensional. That said, I did find Mr Wotton's account of how he was tasered and arrested, how he heard his children 'singing' out, and how frightened he observed them to be, to be a genuine account. I have made almost all my findings in this proceeding without needing to rely heavily on Mr Wotton's evidence. That is because, where possible, I have preferred to rely on the contemporaneous documentary and video evidence. However, I found his evidence about the sizes of the crowds on various occasions, and the general sequence of events, to be reliable. I also found his account of what occurred at his home when he was arrested to be reliable. Where his evidence must be squarely confronted is in his damages claim. It is in this aspect of the proceeding that I have been unable to give full force and effect to all he said in oral evidence. In contrast to his partner, Ms Cecilia Wotton, I simply did not find his evidence wholly persuasive. I have ***no*** doubt that his arrest and imprisonment have occasioned significant hardship for him, as well as for his family. However, I also consider that Mr Wotton is a particularly tough and resilient individual, and an individual who is capable of being highly assertive and confrontational. Therefore, I cannot wholly accept the picture of a highly controlled, softly spoken, measured individual that he presented in this proceeding. I consider there are other, tougher, dimensions to his personality which were apparent on 26 November 2004, and which reduce the likelihood that he suffered the same kind of debilitating, long term impact from the arrests, entries and searches and his arrest that Ms Cecilia Wotton suffered, to take one example.

Wednesday, 30 September 2015

Dr Diana Eades At the time of giving her evidence, Dr Eades was a consultant sociolinguist and Adjunct Professor in the School of Behavioural, Cognitive and Social Sciences at the University of New England. In 2010, Dr Eades was elected as a Fellow to the Australian Academy of the Humanities and, at the time of giving her evidence, was head of Section of Linguistics Fellows. Dr Eades was retained by the applicants to review the interviews conducted by non-Indigenous police officers with Aboriginal witnesses. Her brief included, amongst other things, providing an expert opinion on the issues of language and culture that arise when interviewing or taking evidence from Aboriginal witnesses, the circumstances in which a support person would be required to attend an interview with an Aboriginal witness, and whether there were any issues or difficulties with the way interviews with certain Aboriginal witnesses were conducted in this case. In answering the latter question, Dr Eades was asked to provide her opinion on specific excerpts from the interview transcripts, which she did. Dr Eades was an impressive witness. I found her thorough and measured in her evidence, which was also objective and well-balanced. The respondents did not challenge her expertise or experience, which were impeccable. Overall, she was a knowledgeable and helpful witness.

Mr Stephen Ralph At the time of giving his evidence, Mr Ralph was a consultant Forensic Psychologist. He has a Master of Arts (Hons) in Psychology from the University of Sydney. Mr Ralph was retained by the applicants to provide an assessment of whether Lex Wotton, Cecilia Wotton and Agnes Wotton suffered any psychological harm as a result of the conduct of the police in relation to the Palm Island riots and their aftermath. Mr Ralph's report includes details on each individual's history, any treatment or counselling received, the individual's condition and any associated disabilities, the likely cause of that condition, the prognosis (including the likely duration of the condition) and any further treatment or rehabilitation the individual might benefit from. Although he produced a single report, each of the three individuals he reported on were separately interviewed, and did not see those parts of his report relating to the others. I found Mr Ralph to be a careful witness, who moderated what he said in an appropriate way. I found his evidence insightful. The weight of his evidence, however, may be affected by inaccuracies and inconsistencies in some of the history given to him by Ms Cecilia Wotton, as well as (he frankly conceded) matters that Ms Wotton apparently chose not to tell him. The respondents' challenge in cross-examination – namely, that his focus was rather narrow – has force. Mr Ralph took ***no*** substantial medical history and obtained ***no*** medical records for any of the three individuals. He did not consider or examine events in their lives prior to Mulrunji's death in custody and he did not much examine the possible effects of events after November 2004. It does seem, for example, that Mr Ralph may have paid insufficient regard to the 18 months the Wottons spent in Townsville while Mr Wotton's criminal process was underway. Nevertheless, I consider his opinions about Ms Cecilia Wotton and Mr Wotton should be given some weight. I also consider there was force in his reasoning about the effects of an ***apology*** for each of the applicants. I return to these issues in more detail in the Relief section of these reasons.

The respondents' witnesses

Friday, 2 October 2015

Inspector David Dini At the time of giving his evidence, Inspector Dini was the Officer in Charge of the QPS Far North District Cross-Cultural Liaison Patrol Group based in Cairns. In November 2004, Inspector Dini was a Senior Sergeant employed by the QPS performing the role of Officer in Charge of the Townsville Cross-Cultural Liaison Unit. His evidence relates to his experiences on Palm Island after his arrival there on 26 November 2004. Inspector Dini began as a relatively straightforward witness. However, there were some aspects of his recollection which were puzzling – such as that he was unable to recall a group of children around where he and other officers were standing on Reservoir Ridge when he arrived on Palm Island, looking down toward the fires at the Police Station. In the video evidence, these children are visible and noisy. While I accept his focus at the time was on the fires and what was happening at the police barracks, as his evidence went on, it had something of a rehearsed quality to it and it seemed to me he was unprepared for questions about matters he had not anticipated. In common with several QPS witnesses, I found his descriptions of events tended to be self-serving, particularly in the way he described the level of risk and threat on Palm Island during this time. For example, his evidence concerning what was happening when QPS officers were lined up outside the hospital involved a description by him of "missiles" being thrown at police officers. The lengthy videos of that event that were in evidence do not show any local people throwing anything. An express question was put to Mr Wotton in cross-examination whether he saw rocks being

thrown at police officers outside the hospital, to which he gave a firm '***no***'. In contrast, Mr Wotton admitted he saw people throwing rocks outside the barracks. There was nothing visible in the video evidence that would fit the description of a "missile", and ***no*** more precise evidence was adduced by the respondents to support assertions of this kind. When he was pressed in cross-examination, some of Inspector Dini's answers tended to be less clear and he tended to answer with denials. For example, he was cross-examined about a conversation it was alleged he had with Ms Sailor, which he firmly denied. As I have set out, I found Ms Sailor a reliable witness: in my opinion, it is more likely Inspector Dini has forgotten this conversation. My impression is that he was not focused at all on the local residents; he was focused on the police operations. I gave his evidence limited weight.

Monday, 7 March 2016

Dr Jill Reddan Dr Reddan is a Consultant Psychiatrist who currently practices privately from consultancy suites in Brisbane, as well as at the Prison Mental Health Service at West Moreton Hospital and Health Service in Wacol, Queensland. Dr Reddan was retained by the solicitors for the respondents to provide a medico-legal report in relation to Ms Cecilia Wotton "on the papers" – that is, without any examination of Ms Wotton. The respondents' solicitors also requested that Dr Reddan assess Mr Ralph's Forensic Psychological Report on Ms Wotton. Dr Reddan produced a report dated 21 July 2015, which was limited to an assessment of Mr Ralph's report; she did not provide an assessment of Ms Wotton on the papers. Dr Reddan's report highlights a number of weaknesses of Mr Ralph's assessment process and report. In evidence in chief, Dr Reddan's affidavit dated 4 August 2015 was tendered, attaching her report. In cross-examination, Dr Reddan accepted that specialised skills are required to work in Aboriginal and Torres Strait Islander mental health and admitted that she has never worked in Aboriginal communities. She has only been to Palm Island once, in 1988 or 1989, and only for a couple of days. She pointed out, however, that she spends 60% of her working time in prisons and sees many Aboriginal and Torres Strait Islander clients in that capacity. I found Dr Reddan to be quite a defensive witness, and some of her opinions seemed rather too absolute. I did not find her evidence particularly helpful, and I found her criticisms of Mr Ralph to be somewhat technical. Even putting these reservations to one side, what she did was conduct a 'desktop' review of Mr Ralph's reports, having never met the Wottons herself. In assessing damages, I am not inclined to give much weight to expert medical evidence of that kind.

Detective Inspector Warren Webber DI Webber gave evidence on 7, 8 and 9 March 2016. At the time of giving his evidence, he had approximately 40 years policing experience and was working in the state intelligence unit at QPS police headquarters in Brisbane, holding the positions of Inspector and Operations Manager. At the time of Mulrunji's death in November 2004, he was the regional crime coordinator for the Northern Region, which included Palm Island. As regional crime coordinator, his duties and responsibilities included the investigation of police-related incidents and the oversight of major criminal investigations in the Northern Region. He told the Court that the position of regional crime coordinator was independent of the Criminal Investigation Branch, or CIB. After being informed of Mulrunji's death in custody on 19 November 2004, it was DI Webber's task to assemble a team of people to travel with him to Palm Island to carry out an investigation. His evidence related to the nature and process of this investigation and the people involved, up until 24 November 2004, when the CMC took over responsibility for the investigation. DI Webber presented with a matter of fact demeanour, giving quite formal and brief answers to questions. I found in his evidence he tended to emphasise the possibility of unrest in the community, rather than exhibit any understanding about the effect of Mulrunji's death on local people. I also found that, in common with other police witnesses, he sought to emphasise 'weapons' that local residents had. For example, in answer to a question from the Court, he replied that he saw some local people with spears when they were gathered in front of the line of police outside the hospital. He also gave some rather vague evidence about having seen Mr Wotton on a verandah of a house in between the hospital and the school with spears. It appears this information also made its way into an executive briefing note drafted that day, which stated that Mr Wotton had "encircled himself with supporters armed with spears, chains and other make shift weapons". Contrary to this kind of evidence, there was ***no*** cross-examination of the applicants' witnesses to confirm such views. There was, in contrast, ample evidence about how local people used spears for fishing. There is ***no*** contemporaneous video evidence showing any indication that any local people had spears. It was not put to Mr Wotton in cross-examination that he or anyone he was with at any material time before or during 26 November 2004 were carrying spears. Both Mr Wotton and Mr Marpoondin gave evidence about local men (including Mulrunji) going spear fishing, but that was the extent of the evidence. I do not accept DI Webber's evidence, or the evidence of any other police witness, about local people carrying spears at the meetings or gatherings during the week after Mulrunji's death. Whether officers such as DI

Webber mistook what they saw, I do not know. In contrast, during events such as the line-up at the hospital, the police were fully armed and had police dogs. DI Webber was quite frank in accepting the criticisms that have been made of his conduct in the investigation by other bodies such as the CMC and in coronial findings. From time to time in his evidence he accepted that some conduct was inappropriate – for example, he made this concession about his decision to have a meal and beer with SS Hurley on the night of 19 November 2004. At other times, he qualified his concession with an acknowledgement that, with the benefit of hindsight, he could have done things differently. Overall, however, of all the respondents' witnesses, he was the officer most prepared to make reasonable concessions about the clear failures in aspects of QPS conduct during the events with which this proceeding is concerned. I found DI Webber to be a more reliable witness than Inspector Whyte, in terms of his account of what happened on and after 26 November 2004. That said, his evidence was to my mind still carefully expressed so as to emphasise a level of threat supporting the views of QPS officers at the time, and (so far as I can ascertain) the consistent position of the QPS since 2004 in every inquiry or proceeding concerning the level of threat to the physical safety of QPS officers. I set out my findings about that at various points below, including at [792]-[815].

Wednesday, 9 March 2016

Inspector Joe Kitching Inspector Kitching gave his evidence on 9, 10 and 11 March 2016. At this time, he held the rank of Inspector of Operations (Northern Region) in the QPS. In November 2004, he held the rank of Detective Senior Sergeant, Officer in Charge of the Townsville CIB. He has approximately 30 years policing experience and, in November 2004, had been a detective for approximately 16 years. He was the most senior officer at the Townsville CIB at that time. Inspector Kitching was appointed by DI Webber as the primary investigator into Mulrunji's death. His evidence related to his role as primary investigator and the conduct of the investigations. He was the officer primarily responsible for recording events in the police logs. These logs were more or less contemporaneous records kept by the QPS and they assume some significance in aspects of the applicants' claims. Inspector Kitching gave quite matter of fact answers in his oral evidence. He presented as efficient, and sure of what he had and had not done. However, he also appeared quite agitated throughout his evidence and was often anxious to defend himself. That is to some extent understandable as he (like other officers such as DI Webber) has been through a series of inquiries and proceedings about these events on Palm Island, often aimed at scrutinising police conduct. He emphasised in his answers that whatever criticisms might be made of his conduct, or QPS conduct more generally, those criticisms could only be made with the benefit of hindsight. He was persistently reluctant to express any agreement with criticism of his conduct. For example the following finding of Deputy Chief Magistrate Hine (at [8] of the coronial report) was put to Inspector Kitching:The investigation of the death of Mulrunji by officers who knew Senior Sergeant Hurley and/or were from within Townsville District Command was, in my view, unsatisfactory and inappropriate. The involvement of such officers undermined the credibility of the investigation and its appearance of independence and impartiality. The conduct of investigating officers and of Senior Sergeant Hurley during the first day of the investigation exacerbated this problem, in particular the perception of collusion. Inspector Kitching's response to this was:I suggest to you that that's an accurate representation of the position, isn't it?---That's what was found, yes.

It's a fair reading of the facts?---That's what was found, yes.

No. Listen to the question: it's a fair reading of the facts, would you agree?---That's what was commented on, yes, that's correct. I understand. That's right.

It's a fair reading of the facts, isn't it?---That's correct. That's how it was reported by Coroner Hine. In this sense, I found him a more defensive witness than DI Webber – at times, disproportionately defensive. There were aspects of his conduct which, even putting to one side whether they contravened s 9 of the RDA, were plainly open to legitimate criticism. These include his failure to include a range of critical information on the Form 1 for the autopsy and his repeated failure to bring a number of allegations and circumstances about Mulrunji's death to the attention of the pathologist in any other way. However, Inspector Kitching was, unlike DI Webber, unprepared to make any concessions about how his conduct might have been less than adequate. To that extent I am not prepared to place

great reliance on his evidence where it was in conflict with, or different from, other witnesses, or different from the contemporaneous evidence.

Friday, 11 March 2016

Mr Gary Campbell At the time he gave his evidence, Mr Gary Campbell was a senior investigator with the Australian Commission for Law Enforcement Integrity. He was formerly employed by the QPS as a Detective Senior Sergeant until March 2015. In November and December 2004, he was a Detective Sergeant employed by the QPS at the Townsville CIB. Mr Campbell was not on Palm Island, and had ***no*** involvement in any events occurring there, during the period of 19 to 26 November 2004. Mr Campbell was directed to attend Palm Island after the protests and fires and was in charge, jointly with DS Robinson, of the on-island investigations into possible offences committed during the riot, under the oversight of the Townsville Major Incident Room (MIR). He gave evidence about how he came to assume this role, how he and DS Robinson conducted their investigations, how they developed the list of persons of interest to the criminal investigation into the protests and fires, their provision of this list to SERT, and the instructions he gave to investigators once the persons of interest were apprehended. Mr Campbell was a straightforward witness who spoke frankly about his role in the events on Palm Island in November 2004. He staunchly defended the use of SERT teams. His response to a suggestion in cross-examination that calling in SERT was “overkill”, and was done because it was an Aboriginal community was:I believe it was entirely appropriate on the back of the acts of extreme violence and property destruction that had occurred. He referred again to extreme violence when describing the events of 26 November 2004. Consistently with the findings I have made at [792]-[815], Mr Campbell’s descriptions of the level of violence is not borne out by the contemporaneous evidence. In his case, he was not on the island at the time of these events and so does not fall into the category of a QPS officer whom I accept may have had a subjective fear for her or his own safety, whether well-founded or not.

Monday, 14 March 2016

Inspector Donald McKay (SERT Operative 1) Inspector McKay gave evidence on 14 and 15 March 2016. At that time, he was employed as an Inspector in the QPS, stationed in the Cairns SERT. He explained in his evidence that he now has a “commission rank” in SERT, so while he is still attached to SERT, he is ***no*** longer an operational member. In November 2004, he was a Senior Sergeant in the QPS, performing the role of Officer in Charge of the Far Northern Region SERT. He has been a member of SERT since 1992. In the documentary evidence about the entries and searches, Inspector McKay is often referred to as SERT Operative 1. During the entries and searches, Inspector McKay played an oversight and coordination role, which meant that he generally remained outside the residences attended by the SERT teams. He gave evidence about the nature of SERT, how SERT operations are generally run, and the details of this particular SERT operation. In relation to the latter, he gave evidence about the information and directions that were provided to SERT in their briefing, the actions of SERT upon arrival at the residence of each person of interest, the equipment and weapons SERT officers carried, and SERT’s activities at the Wotton residence (including an account of the tasering of Mr Wotton). Inspector MacKay’s evidence was couched in terms of ‘tasks’, and he presented himself very much as a functionary in that sense – doing the job he was ordered to do, so as to achieve ‘the outcome’ those orders were directed at achieving. His evidence about the tasering of Mr Wotton was given in a clinical and positive way, despite Mr Wotton being present in court. If Inspector Mackay had any insight into the effects of his actions, and the actions of the SERT team, on the individuals they interacted with on Palm Island, it was not at all apparent in the way in which he gave his evidence. That said, I found his evidence reasonably reliable in terms of the narrative of events.

Tuesday, 15 March 2016

Inspector Roger Whyte Inspector Whyte gave his evidence on 15 and 16 March 2016. He has been employed by the QPS for approximately 32 years and, at the time of giving his evidence, was working as an Inspector in the Townsville Patrol Group. In and around November 2004, he was a Senior Sergeant in the QPS, performing the role of Officer in Charge of Deeragun Police Division, Townsville. He gave evidence that between 1987 and 1997, he worked in Aboriginal communities in the Cape York region, including communities in Weipa, Aurukun, Kowanyama, Lockhart River, Bamaga, Thursday Island and Pormpuraaw. He arrived on Palm Island on 22 November 2004 to act in SS Hurley’s position as Officer in Charge of the Palm Island Police Station until further notice. He remained in that position until 26 November 2004. Inspector Whyte gave evidence about what occurred after he arrived on Palm Island, leading up to 26 November 2004, and then what occurred during the protests and fires. He described

an encounter between himself and Mr Wotton at the police station before the protests and fires, his negotiations with Mr Wotton and his attempts to calm and talk to the crowd. He also gave evidence about the advice and instructions he gave to the QPS officers under his command during the protests and fires, and events at the QPS barracks and the hospital during the protests and fires. Inspector Whyte presented as rather a nervous witness to begin with, but became more assertive, especially on the second day of his evidence. I accept Inspector Whyte seems to have been personally affected by what happened on 26 November 2004, and that therefore giving evidence in this proceeding was not easy for him. Those difficulties may account for some of his confrontational and exaggerated evidence. However, in my opinion, they do not account for all of it. From what I observed of him in the witness box and in the contemporaneous video evidence, Inspector Whyte's personality was such that he was given to aggression and confrontation as his 'default' positions for managing conflict or tense situations. I found Inspector Whyte's evidence to be the most exaggerated and defensive of all the respondents' witnesses, and for those reasons also the most unreliable. This was the submission made by the applicants about Inspector Whyte in their closing submissions, citing his evidence in this proceeding and a police interview with him that occurred on 26 November 2004, after the protests and fires:[T]he Applicants note that SS Whyte was sent to Palm Island on 22 November 2004 to be the officer in charge of the station and Insp Richardson was sent in order to oversee the policing operations. In respect of SS Whyte, the Applicants submit that his training in culturally sensitive policing was wholly inadequate and rely on the following matters in that regard: his description in his interview of 26 November 2004 of Mr Wotton as "not blackie blackie half cast" and of David Bulsey as a "skinny fella, half caste fella";

his statements in that same interview that Aboriginal people "will turn on you when they're drinking alcohol" and will "turn on you if they've got something that, ah, really makes them go off";

his attempt in his evidence to justify the remark that Aboriginal people will "turn on you when they're drinking alcohol" on the basis that, after he was "promoted to the rank of sergeant to take charge of the Pormpuraaw Aboriginal community", of the 600 Aboriginal people in the Pormpuraaw community, there were "two people that didn't consume alcohol, to [his] knowledge";

his disrespectful remark in the 26 November 2004 interview that "this is obviously the death of Doomadgee person made them go off";

his description during his evidence to the committal hearing of Lance Poynter being an "ugly looking fellow";

the pride that he apparently took in having told Mr Wotton to "fuck off" outside the police barracks on 26 November 2004; and

his remarks on 26 November 2004 in the police barracks to the other police officers that:it may be the case that you have to discharge a few fuckin' rounds in the air to scare the shit out of these cunts. I don't know about you, but that's fuckin' it, that's just ridiculous. There's not one court in the land, not one cunt anywhere in Australia that's gonna fuckin' put up with all this.

(Footnotes omitted.) The respondents accepted that Inspector Whyte could be described as having an "us-and-them mentality", but submitted that his evidence was "coloured by his experiences during the riot" and that he was an "old-school policeman ... from a different era brought up in a different general milieu [or] approach to things". In closing submissions, senior counsel for the respondents made the following submissions in response to questions from the Court:HER HONOUR: - - - Mr Whyte, this us and them mentality. I mean, is the fear coming from the fact that they are facing a group of black people?

MR HINSON: We submit not. It's a group of people, armed with rocks, making threats who set fire to the police station. It wouldn't – that's what happened. That's what caused the fear. It's, we would submit – well, one can't

really – one can't think of a real life comparator and it's difficult to think of a hypothetical – this is an actual situation that evolved and in terms of - - -

HER HONOUR: Well, there were some riots in the middle of Melbourne not very long ago down on the street at Federation Square and Flinders Street Station where, ***no*** doubt, there were lots of police and there were lots of things, as I understand the media reports, being thrown and there were ordinary policemen down there and women dealing with that situation. I don't think it's – I'm not sure why you say it's something so far out of the ordinary experience of a police officer. They have a very dangerous job.

MR HINSON: They do. But it's – an earlier version of the statement of claim described the riot as an "unprecedented event" which was - - -

HER HONOUR: Well, it was clearly unprecedented on Palm Island, wasn't it?

MR HINSON: Well, we would submit it was unprecedented more broadly than that. Senior counsel for the respondents also submitted that the language used by SS Whyte in his 26 November 2004 interview could be explained on the basis that "this was an interview given by Mr Whyte late at night – 9 o'clock – after a long day – a long and frightening day – and there's ***no*** basis for treating what he said on that occasion in those circumstances has being his typical behaviour". In my opinion, the applicants' submissions about Inspector Whyte are soundly based, although the difficulty in Inspector Whyte's attitude went beyond a lack of training in "culturally sensitive policing". There were so many examples through his evidence, and from evidence of what he said and did while he was on Palm Island in November 2004, that I am comfortable reaching a conclusion that Inspector Whyte brought a negative attitude to his interactions with Aboriginal people, and he had a clear and regular propensity to stereotype them, and to stereotype their lifestyles, attitudes and tendencies. Insofar as the respondents' submissions sought to minimise or excuse that attitude, or to suggest that it was simply the result of the circumstances on Palm Island in November 2004, I do not accept them. When Inspector Whyte was asked in cross-examination about the kind of language he can be heard using in a video from 26 November 2004, calling local people "cunts", this was his response:at the time it was language used to enhance morale of my people. There is some truth in this answer, but not for the reason I consider Inspector Whyte intended to convey. When one watches and listens to the video in which these statements are made by Inspector Whyte, it is as if there is a battle in progress, between non-Aboriginal (and mostly, if not only, white) police officers, and those who are perceived as their enemies. This was the impression I had from a great deal of Inspector Whyte's evidence – Aboriginal people were the enemies, the 'other', the ones who could not be trusted, who needed overt and forceful policing and controlling. When he spoke about his work in Aboriginal communities, as the applicants submitted, it had a controlling flavour to it: he gave ***no*** sense of co-operation or intention to work with communities he was policing. Indeed, as the applicants submitted, the way Inspector Whyte expressed his earlier work in communities was not without significance:I was promoted to the rank of sergeant, to take charge of the Pormpuraaw Aboriginal community.

(Emphasis added.) Language can tell us much about the attitudes of individuals. In my opinion, this language reflects Inspector Whyte's attitudes to Aboriginal people. I have noted at [490] above his rather astonishing and sweeping assertion about the level of alcohol abuse in the Pormpuraaw Aboriginal community. How he came to give that evidence should be placed in its full context. Inspector Whyte was being cross-examined about the record of interview he gave shortly after the protests and fires on Palm Island. The interview was conducted by Detective Sergeant Michael Walker at the Palm Island school between 9.55 pm and 10.54 pm on 26 November 2004. It was during this interview that he made the "blackie blackie" and "half caste" comments to which I have referred above. The cross-examination concerned another statement in that interview where Inspector Whyte had said:look, I have ***no*** problems with the Aboriginal people at all – none whatsoever. You know, at the end of the day, um, they will turn on you when they're drinking alcohol and they'll turn on you if they've got something that ah really makes them go off and this is obviously the death of Doomadgee person made them go off. It was in the context of being challenged about the reasons he made these remarks, that in this proceeding Inspector Whyte said:When I was – when I was the officer in charge of Pormpuraaw police division there were 600 Aboriginal people. There were two

people that didn't consume alcohol, to my knowledge ... in that community. My wife and I and our two boys lived in that community for three years, so I have an idea about Indigenous communities. I have an idea – a very big idea – about the issues alcohol causes communities and people. With further questioning, the exaggeration inherent in this statement became obvious – Inspector Whyte had swept into his generalisation all people living in that community, including children. That is, he had been prepared, in his sworn evidence, to speak about a community, whose entire population was 600, as all drinking alcohol except for two people. He did so in an attempt to defend his earlier comments (as I set them out at [497]) which were grossly stereotypical, and pejorative, of Aboriginal people. This is ***no*** overzealous scrutiny of his evidence. In my opinion, these aspects of his evidence are revealing. Inspector Whyte was well aware of the seriousness of these proceedings, and of the circumstances in which he was giving evidence. He is also an experienced and long-serving police officer. That he was prepared to generalise – so obviously incorrectly – about an Aboriginal community as part of an attempt to justify his previous evidence about Aboriginal people and alcohol reveals the prejudices that he carries, consciously or unconsciously. As I have said, language can be informative, especially unguarded language. Inspector Whyte's language on 26 November 2004 as recorded in the video footage was unguarded. So was his language in his record of interview, where he felt, I find, comfortable and comforted in speaking to a fellow white police officer. He felt safe to use language that revealed his attitudes to Aboriginal people: "blackie blackie", "half caste" and the like. Those attitudes are derogatory as well as being racially discriminatory. It is obvious that, if asked to describe an Anglo-Australian suspect, Inspector Whyte would not say "whitey whitey". I am unable to place weight on Inspector Whyte's evidence in relation to any issues of substantial contest or controversy.

Wednesday, 16 March 2016

Superintendent Rodney Kruger (SERT Operative 3) Superintendent Kruger gave evidence on 16 and 17 March 2016. At that time, he was employed as a Superintendent in the Australian Federal Police (AFP). Prior to his employment with the AFP, he was an Acting Sergeant in the QPS SERT unit based in Cairns. He was employed by the QPS from 1994 until he joined the AFP in 2005. In November 2004, he had been a SERT officer for approximately eight years and was in the position of Acting Sergeant and acting team leader. He is referred to in the documentary evidence by the codename SERT Operative 3. He was involved in the arrest of Mr Wotton and was the SERT officer who tasered Mr Wotton. His evidence related to the training he received as a SERT officer and his experiences and actions as a SERT officer during the operation on Palm Island. He gave an account of what occurred at Mr Wotton's residence, including the tasering incident. He also gave evidence about his role in the arrests, entries and searches on a number of the other houses. Superintendent Kruger was a careful and measured witness. He had little recollection of the details of the entries and searches, which is unsurprising given his ongoing role in SERT and the passage of time since November 2004. He accepted, properly, that SERT officers would appear intimidating to lay people caught up in an entry and search. Beyond this kind of concession, his evidence reflected his professional role and experience as a SERT officer, which is understandable. This example from his cross-examination about the tasering of Mr Wotton provides an illustration:He told you, yes, he was Lex Wotton?---Yes.

And he had asked you why you wanted him to go on his knees?---I think so, yes.

And you didn't answer him, did you?---I again asked him to get on his knees and put his hands above his head.

You repeated it, in a very loud voice?---Yes.

"Get on your knees"?---Yes.

And he had asked you why. That's a fair enough question, isn't it? He has got people pointing guns at him. Fair enough question to know why you want him to go on his knees?--- ..... sorry, is that a question?

Yes. It's a fair enough question for him to ask, isn't it?---I don't know. All I know is that I directed him on three separate occasions, at least, to get on his knees and put his hands above his head. He did neither.

And he asked you a perfectly reasonable question, and you didn't answer him. That's correct, isn't it?---What would I – what would I have said?

He asked you a perfectly reasonable question, i.e. why did you want him to get on his knees, and you didn't answer him. Your answer was to taser him. That's correct, isn't it?---***No***. My answer was to ask him again to get on his knees, and put his hands above his head, and again.

To shout at him?---To ask him in a loud voice.

Yes?---A clear, loud voice.

Yes. You agree that there's ***no*** police power to direct people to lie down on private property?---I don't know.

You don't know?---***No***.

Well, you're demanding someone does something, and tasering them for not doing it?---***No***. I tasered him because I formed the assumption that he was going to attempt to flee being arrested. When giving this evidence, it was apparent to me that Superintendent Kruger did not really comprehend how it could be "reasonable" or "fair" for a suspect he had been instructed to arrest to ask any question. Superintendent Kruger plainly believed that the suspect was to comply with what the suspect was ordered to do, and would be forced to comply if he did not do so voluntarily. That was how Superintendent Kruger had been trained to approach these situations, and that is how he did approach them. There was ***no*** room for debate, or for nuance. Undefined notions of 'fairness' were simply not part of the performance of his professional task. As far as he was concerned, all control lay with him and he would do what was necessary to apprehend Mr Wotton in as short a time and in as effective a way as could be done. That was what he had been instructed to do. Contrary to the applicants' submissions, I do not consider there is a basis for criticism of Superintendent Kruger in this regard: he cannot be criticised for acting in accordance with the way he had been trained as a SERT officer. The problem, as I have set out elsewhere in these reasons, was having SERT officers undertaking these arrests at all.

Thursday, 17 March 2016

Sergeant Wade Folpp (SERT Operative 4) Sergeant Folpp was, at the time of giving evidence, a sergeant with the AFP. He has been employed by the AFP since 2005. In and around November 2004, he was an officer in the QPS Cairns SERT unit. He had been a SERT officer for approximately two and a half years at that time. His team leader in the unit was Acting Sergeant Kruger. Sergeant Folpp's evidence related to the events of the SERT operation on Palm Island, including, notably, the tasering and arrest of Mr Wotton by Sergeant Kruger and Sergeant Folpp's own interaction with Ms Krysten Harvey during the entries and searches. Sergeant Folpp was a very clear witness, who seemed well experienced in giving evidence. I found him more forthcoming than Superintendent Kruger, and he seemed more relaxed, with an open demeanour. However, like Superintendent Kruger, his evidence was structured around what he was trained to do in the circumstances of the entries and searches. His account of what he did when inside Agnes Wotton's house was given in a plausible way, and I accept that he may well have done things such as lower his weapon and remove his balaclava, as he related he did. As I set out elsewhere, even if that was the case I do not consider it materially reduced or altered the terror which was induced in Krysten Harvey.

THE RDA: RELEVANT LEGAL PRINCIPLES It is as well to begin this section of these reasons by extracting the provisions of the RDA that are of principal relevance to the discussion that follows. The extracted provisions are the same today as they were in November 2004. Sections 8, 9 and 10 of the RDA are contained in Pt II of the Act, which is headed "Prohibition of racial discrimination". The term "Convention" is defined in the Act to mean the ICERD. By s 7, approval is given to ratification by Australia of the ICERD, the text of which is set out in a Schedule to the Act. Section 9 provides, in full:Racial discrimination to be unlawful

(1) It is unlawful for a person to do any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of ***public*** life.

(1A) Where:(a) a person requires another person to comply with a term, condition or requirement which is not reasonable having regard to the circumstances of the case; and

(b) the other person does not or cannot comply with the term, condition or requirement; and

(c) the requirement to comply has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by persons of the same race, colour, descent or national or ethnic origin as the other person, of any human right or fundamental freedom in the political, economic, social, cultural or any other field of ***public*** life;the act of requiring such compliance is to be treated, for the purposes of this Part, as an act involving a distinction based on, or an act done by reason of, the other person's race, colour, descent or national or ethnic origin.

(2) A reference in this section to a human right or fundamental freedom in the political, economic, social, cultural or any other field of ***public*** life includes any right of a kind referred to in Article 5 of the Convention.

(3) This section does not apply in respect of the employment, or an application for the employment, of a person on a ship or aircraft (not being an Australian ship or aircraft) if that person was engaged, or applied, for that employment outside Australia.

(4) The succeeding provisions of this Part do not limit the generality of this section. The text of s 9(1) closely tracks the definition of "racial discrimination" in Art 1(1) of the ICERD, which provides:In this Convention, the term "racial discrimination" shall mean any distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of human rights and fundamental freedoms in the political, economic, social, cultural or any other field of ***public*** life. Article 2(1) then provides for a range of ways in which states parties to the ICERD undertake to eliminate racial discrimination:States Parties condemn racial discrimination and undertake to pursue by all appropriate means and without delay a policy of eliminating racial discrimination in all its forms and promoting understanding among all races, and, to this end:

(a) Each State Party undertakes to engage in ***no*** act or practice of racial discrimination against persons, groups of persons or institutions and to ensure that all ***public*** authorities and ***public*** institutions, national and local, shall act in conformity with this obligation;

(b) Each State Party undertakes not to sponsor, defend or support racial discrimination by any persons or organizations;

(c) Each State Party shall take effective measures to review governmental, national and local policies, and to amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists;

(d) Each State Party shall prohibit and bring to an end, by all appropriate means, including legislation as required by circumstances, racial discrimination by any persons, group or organization;

(e) Each State Party undertakes to encourage, where appropriate, integrationist multi-racial organizations and movements and other means of eliminating barriers between races, and to discourage anything which tends to strengthen racial division. Section 10 of the RDA provides:Rights to equality before the law

(1) If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin.

(2) A reference in subsection (1) to a right includes a reference to a right of a kind referred to in Article 5 of the Convention.

(3) Where a law contains a provision that:(a) authorizes property owned by an Aboriginal or a Torres Strait Islander to be managed by another person without the consent of the Aboriginal or Torres Strait Islander; or

(b) prevents or restricts an Aboriginal or a Torres Strait Islander from terminating the management by another person of property owned by the Aboriginal or Torres Strait Islander;

not being a provision that applies to persons generally without regard to their race, colour or national or ethnic origin, that provision shall be deemed to be a provision in relation to which subsection (1) applies and a reference in that subsection to a right includes a reference to a right of a person to manage property owned by the person. Section 8 relevantly provides:Exceptions

(1) This Part does not apply to, or in relation to the application of, special measures to which paragraph 4 of Article 1 of the Convention applies except measures in relation to which subsection 10(1) applies by virtue of subsection 10(3).

... Article 1(4) of the ICERD deals with “special measures” and provides:Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such ***protection*** as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved. More so than provisions in other federal anti-discrimination statutes, s 9 is textually based on human rights law. Together with ss 8 and 10, it is unique amongst federal anti-discrimination statutes in its fidelity – in text, purpose and structure – to the international instrument which it implements: the ICERD. That fidelity has, in my opinion, at least two consequences. First, its general language, apt for an agreement between nation states in the field of international law, must nevertheless be given meaning capable of clear application to the determination and enforcement of private rights between persons under domestic law. See similar observations by Gummow J in Applicant A v Minister for Immigration and Ethnic Affairs [1997] HCA 4; 190 CLR 225 at 275; Gerhardy v Brown [1985] HCA 11; 159 CLR 70 at 86 (Gibbs CJ); and Maloney v The Queen [2013] HCA 28; 252 CLR 168 at [15] (French CJ). Second, ss 8, 9 and 10 attract the well-established principle that, to the extent their text, context and purpose permits, they should be construed consistently with the ICERD: see Koowarta v Bjelke-Petersen[1982] HCA 27; 153 CLR 168 at 264-65 (Brennan J); Applicant A at 230-31 (Brennan CJ), 239-40 (Dawson J), 251-52 (McHugh J), 272 (Gummow J), 292 (Kirby J); Minister for Immigration and Multicultural and Indigenous Affairs v QAAH of 2004

[2006] HCA 53; 231 CLR 1 at [34] (Gummow ACJ, Callinan, Heydon and Crennan JJ); Plaintiff M61/2010E v Commonwealth [2010] HCA 41; 243 CLR 319 at [27] (the Court); TCL Air Conditioner (Zhongshan) Co Ltd v Judges of the Federal Court of Australia [2013] HCA 5; 251 CLR 533 at [8](French CJ and Gageler J); Maloney at [14] (French CJ), [235] (Bell J). This is a different point from the issue raised by Gleeson CJ in Coleman v Power [2004] HCA 39; 220 CLR 1 at[17]- [24], where his Honour exposed the difficulties in an argument which sought to have the 1931 Queensland legislation in issue in that proceeding interpreted consistently with the subsequent ICCPR. That issue does not arise in the present proceeding. Rather, the question is, in giving effect to the constructional assumption to which I have referred at [517] above, what kinds of materials can inform a conclusion on the meaning of the international text, and thus inform the constructional choices available in the statutory text? Two particular limitations arising fromMaloney should be mentioned. In Maloney, the application of these principles was important because submissions were made about the nature and operation of s 8 of the RDA – what constituted a 'special measure' for the purposes of s 8, and whether conduct could not be a special measure unless there had been adequate consultation with the community affected by the conduct. The submissions of the appellant and one of the interveners supporting the appellant relied on General Recommendation 32 of the Committee on the Elimination of Racial Discrimination (2009) and an opinion issued by another body established by the United Nations Human Rights Council: the Expert Mechanism on the Rights of Indigenous Peoples. Four justices (French CJ at [23]-[24]; Crennan J at [134]; Kiefel J at [175]-[176] and Bell J at [235]) did not favour reliance on materials of this kind when there was little or ***no*** support in the text of either the ICERD or, more importantly, in ss 8, 9 and 10, for the approach being advanced. The consultation argument in Maloney was characterised by the Court as seeking to import into the ICERD (and as a consequence, it was said, into s 8) requirements, limits, or other meanings that the text "will not bear": see for example French CJ at [24]. The applicants in this proceeding made ***no*** arguments of that kind, nor did the respondents submit that the applicants had done so. That is, in relation to the construction of s 9, the applicants did not advance any construction of that provision dependent on decisions or opinions of international bodies which was said to be more than the 'text of s 9 can bear'. The controversies between the parties about the construction of s 9, such as they are (and they are in reality quite nuanced), can be resolved by an orthodox approach to the construction of the provision, taking into account the constructional assumption to which I have referred at [517] above. By far the larger sphere of debate between the parties concerns the application of s 9 to the evidence. The second, but connected, limitation concerns the manner in which the decisions of international bodies (and perhaps also domestic courts in other jurisdictions) postdating the enactment of the RDA – but dealing with its interpretation – can be used to inform constructional choices about ss 8, 9 and 10. In Maloney at [61] Hayne J said:The Convention to which these provisions refer is the International Convention on the Elimination of All Forms of Racial Discrimination, which was opened for signature on 21 December 1965 and entered into force on 2 January 1969 (the Convention). The preamble to the RDA recites that the RDA "make[s] provision for giving effect to the Convention" and this Court has held that the RDA is a valid enactment of the Parliament because it implements Australia's obligations under the Convention. Of course, resort may be had to the Convention in interpreting provisions of the RDA. But, because an Act like the RDA is to be interpreted "by the application of ordinary principles of statutory interpretation", the only extrinsic materials that may bear upon that task are materials of a relevant kind that existed at the time the RDA was enacted. Material published later, such as subsequent reports of United Nations Committees, may usefully direct attention to possible arguments about how the RDA should be construed but any debate about its construction is not concluded by reference to or reliance upon material of that kind.

(Footnotes omitted.) His Honour then appears to apply this opinion by rejecting the consultation arguments at [91]. Paragraph [61] ends with a "cf." footnote reference to Gleeson CJ's remarks in Coleman v Power but, as I have noted, Gleeson CJ was dealing with a different aspect of the use of international and comparative decisions in statutory construction. It would appear that a different approach was taken by Bell J (at [236]) and Gageler J (at [324]-[328]), each Justice indicating that in construing ss 8 and 10 it was appropriate to examine the contemporary international understanding of the ICERD. I respectfully agree with the approaches of Bell and Gageler JJ in Maloney. ***No*** submission was made by the respondents relying on reasoning such as that of Hayne J. Again, it does not seem to me that the parties have raised competing constructional choices about s 9 which can only be solved by reference to international or comparative decisions which postdate the enactment of the RDA. It is true that in some of the submissions concerning the content of various human rights relied on by the applicants, resort needs to be had to international and comparative decisions. I see ***no*** difficulty in that occurring, because s 9 itself gives

relevance in Australian law to the content of those human rights. Their nature and content has not been rewritten or codified into Australian law. Rather, the international human rights themselves are incorporated by reference. That being the case, it is not only appropriate but, in my opinion, necessary to have regard to international and comparative decisions concerning the content of those rights. In Maloneyat [236] Bell J said that "in light of the RDA's object ... it is appropriate to give weight to the construction that the international community places upon the Convention", referring to the statement in Queensland v Commonwealth [1989] HCA 36; 167 CLR 232 at 240 (Mason CJ, Brennan, Deane, Toohey, Gaudron and McHugh JJ) that:The existence of an international duty depends upon the construction which the international community would attribute to the Convention and on the operation which the international community would accord to it in particular circumstances.

I respectfully agree with both observations and I consider they apply to s 9. In final submissions, there was some attention paid to the series of recent cases in Queensland, and in the High Court, concerning the application of the RDA to Aboriginal communities in relation to the scope and operation of Queensland's liquor legislation. These cases are Maloney, Morton v Queensland Police Service[2010] QCA 160; 240 FLR 269 and Aurukun Shire Council v Chief Executive Officer, Office of Liquor Gaming and Racing in the Department of Treasury [2010] QCA 37; 1 Qd R 1. These decisions are important to a proper understanding of the RDA and its application in this case, especially Maloney. That is so notwithstanding they are all cases concerning s 10 of the RDA, together with s 8, rather than s 9. Sections 8, 9 and 10 of the RDA together comprise the core of the Parliament's implementation of the ICERD: although each has its sphere of operation, when one examines the purpose and construction of any of these three sections, the other two must be considered. In Maloney at [278], Gageler J commenced his analysis of the RDA with the ICERD and two antecedents to the ICERD. The first antecedent is the Charter of the United Nations, which, in Art 1(3), contains express reference to the purpose of promoting and encouraging respect for human rights and fundamental freedoms "without distinction as to race". The second antecedent is the Universal Declaration of Human Rights (UDHR), which also emphasises the entitlement of all people to enjoy the rights and freedoms set out in the UDHR "without distinction of any kind, such as race". His Honour then noted (at [280]) that both the ICCPR and the International Covenant on Economic, Social and Cultural Rights (ICESCR) did not open for signature until after the ICERD opened for signature, although they had each existed in draft form since 1954. Gageler J's description of the United Nations General Assembly resolution which preceded the ICERD should, with respect, be noted (at [281]):The Convention was preceded in 1963 by a resolution of the General Assembly of the United Nations known as the "United Nations Declaration on the Elimination of All Forms of Racial Discrimination" (the Racial Discrimination Declaration). The Racial Discrimination Declaration affirmed both "the necessity of speedily eliminating racial discrimination throughout the world, in all its forms and manifestations, and of securing understanding of and respect for the dignity of the human person" and "the necessity of adopting national and international measures to that end" in order to secure the universal and effective recognition and observance of principles it went on to proclaim (paras 1-2). At the forefront of those principles were that "[d]iscrimination between human beings on the ground of race ... is an offence to human dignity" (Art 1) and that "[n]o State ... shall make any discrimination whatsoever in matters of human rights and fundamental freedoms in the treatment of persons ... on the ground of race ..." (Art 2(1)).

(Footnotes omitted.) In Koowarta at 260, Brennan J expressed the opinion that "I should think that the implementing of that Convention by Australia must be of the first importance to the conduct of Australia's relations with its neighbours, if not indeed to Australia's credibility as a member of the community of nations." It is critical, as Allsop J observed in Baird v Queensland [2006] FCAFC 162; 156 FCR 451 at [37], that provisions such as s 9(1) not be dissected into small pieces so that their intended holistic operation and meaning are lost. To describe s 9(1) in terms of a series of "elements", as the respondents' submissions do, is to take a step along the path to dissection. Nevertheless, s 9(1) can be seen as having a conduct-based limb and an outcome-based limb. First, there must be an act involving a distinction, exclusion, restriction or preference which is based on race, colour, descent or national or ethnic origin. This is the conduct-based limb. Second, the act (in the expanded character given to it by the first limb) must have either the purpose or the effect of nullifying or impairing a human right. This directs attention to the actual outcome of the act, if "effect" is the focus; or on what was intended, in a purposive sense, to be the outcome, if "purpose" is the focus. The first limb looks to what happened, and its connection with race. The second limb looks to the outcome or consequences (actual or intended) of what happened. The breadth of s 9(1) is clear from its source in the ICERD and its text, and is recognised in the authorities. Some textual matters may be emphasised. The provision attaches to "any" act, which emphasises its breadth, as does the reference to

"any" human right or fundamental freedom. In examining the outcome or consequences of the impugned act, the text of s 9(1) requires a qualitative assessment of the impact of conduct because it deals not only with human rights which have been nullified, but human rights which are "impaired". The provision is not confined to facilitating the exercise of human rights; it is protective of the rights themselves. Like the international instruments to which it owes its origins, s 9 is concerned with the inherent dignity and equality of all people in the Australian community. By requiring that each person has her or his rights recognised and ***protected*** "on an equal footing", s 9(1) is concerned with substantive equality. Special measures to achieve substantive equality are, as Gageler J pointed out in Maloney (at [327]), not properly seen as an exception to the non-discrimination principle enshrined in ss 9 and 10, but rather as "integral to its meaning". What is comprehended by an "act" for the purposes of s 9 should also be broadly construed. Read with s 3(3) ("refusing or failing to do an act shall be deemed to be the doing of an act and a reference to an act includes a reference to such a refusal or failure"), it extends to the kind of conduct pleaded by the applicants in the present proceeding, which often focuses on the failures of the QPS to do what the applicants contend should have been done. Section 3(4) further confirms that breadth by providing that an "act" includes "the doing of an act by a person in association with other persons". The phrase "distinction, exclusion, restriction or preference" involves the concept of differential treatment. That is the sense in which Brennan J in Koowarta characterised these four matters as proscriptions (at 265):The recognition, enjoyment and exercise of human rights and fundamental freedoms by all persons on an equal footing irrespective of race, colour, descent or national or ethnic origin is the purpose of the Convention to which Art. 1, cl. 1, in conjunction with other Articles (especially Arts. 2 and 5), gives effect. The denial or impairment of such recognition, enjoyment or exercise of human rights and fundamental freedoms is proscribed ("distinction, exclusion, restriction or preference"). Similarly, in Gerhardy at 117-19 and also at 127-28, Brennan J described the operative concept in ss 9 and 10 of the RDA as being difference in treatment, or differential treatment, based on race. In Hagan v Trustees of the Toowoomba Sports Ground Trust [2000] FCA 1615, Drummond J said of s 9 (at [38]):This section is not directed to ***protecting*** the personal sensitivities of individuals. It makes unlawful acts which are detrimental to individuals, but only where those acts involve treating the individual differently and less advantageously to other persons who do not share membership of the complainant's racial, national or ethnic group and then only where that differential treatment has the effect or purpose of impairing the recognition etc of every human being's entitlement to all the human rights and fundamental freedoms listed in Article 5 of the International Convention on the Elimination of All Forms of Racial Discrimination or basic human rights similar to those listed in Article 5.

(Emphasis added.) In Baird, Dowsett J at first instance ([2005] FCA 495; 224 ALR 541) said (at [114]):The allegation of employment by the Government is critical to the engagement of s 15 of RDA in these proceedings. However the allegation is also of importance in connection with s 9. That section applies to an act 'involving' a 'distinction, exclusion, restriction or preference' which is 'based on' race [emphasis in original]. In practice, each of the words "distinction", "exclusion", "restriction" and "preference" implies differential treatment of at least one person as compared to the treatment of at least one other [emphasis added]. In Qantas Airways v Gama [2008] FCAFC 69; 167 FCR 537, French and Jacobson JJ, with whom Branson J agreed, held that the act in that case – Mr Gama's supervisor making remarks to him in the presence of his colleagues – involved a "distinction." That was because Mr Gama, who was born in India and was of colour, was singled out for these remarks, while other colleagues around him were not. At [76], French and Jacobson JJ stated:The making of a remark is an act. It may be that the remark involves a distinction because it is made to a particular person and not to others ... Where the remark, critical of one person in a group but not others, expressly or by implication links the criticism or denigration to that person's race then that linkage establishes both the distinction and its basis upon race. That was the present case.

(Emphasis added.) Although as Allsop J noted in Baird, s 9 does not require a comparator in the way that some federal and state anti-discrimination statutes do, that is not to gainsay the need for comparison. As Gleeson CJ said in Griffiths v Minister for Lands, Planning and Environment [2008] HCA 20; 235 CLR 232 at [7]:Discrimination is judged by making comparisons. The presence of the words "on an equal footing" in both Art 1(1) of the ICERD and s 9 of the RDA also requires some comparative analysis of the circumstances, albeit one that is not constrained by the complex comparator structure found in other federal anti-discrimination statutes. The applicants forcefully disclaimed the need for a comparator, but I consider that disclaimer mistaken. Each case will vary in how the terms of s 9 are to be applied. Baird dealt with the payment of wages to Aboriginal people, and only to Aboriginal people. Nevertheless, the Court's reasoning in Baird is not devoid of comparison: comparisons are made between what

was paid and what should have been paid (see, eg, at [69] per Allsop J: “the acts of calculating and paying the grants involved a distinction by the calculation of the grants based on below-award wages, rather than award wages”). To observe, as Gleeson CJ did in Griffiths, that discrimination is about comparisons is not the same as contending that a “comparator” must be identified and defined for discrimination to be shown. The point is also made by the following extract from the reasons of Black CJ in Australian Medical Council v Wilson [1996] FCA 1618; 68 FCR 46 at 48 (cited with approval by Allsop J in Baird at [60], Spender J and Edmonds J agreeing), in which Black CJ highlights the language of “on an equal footing” appearing in s 9 of the RDA and Art 1(1) of the ICERD:the concept used in s 9(1) and in s 9(lA) of impairing the enjoyment of a right on an equal footing must be taken to be a broad one that involves looking at the footing upon which rights are enjoyed by those sections of the community at large who do not suffer from the racial discrimination and the other like types of discrimination that the Act aims to eliminate. The language used in s 9 does not point to any narrower operation, in my view, and nor does the evident policy of the Act. The respondents suggested some comparison was required and, in my view, that submission is correct. In Minister for Immigration and Multicultural Affairs v Khawar [2002] HCA 14; 210 CLR 1 at [78], McHugh and Gummow JJ described aspects of the concept of discrimination for the purposes of refugee law and drew parallels with the concept of discrimination in s 117 of the Constitution:The selective enforcement of a law of general application may result in discrimination between complainants which produces, in the legal sense, discrimination against one group of complainants. In Street v Queensland Bar Association, when dealing with the phrase “disability or discrimination” in s 117 of the Constitution, Gaudron J said:“Although in its primary sense ‘discrimination’ refers to the process of differentiating between persons or things possessing different properties, in legal usage it signifies the process by which different treatment is accorded to persons or things by reference to considerations which are irrelevant to the object to be attained. The primary sense of the word is ‘discrimination between’; the legal sense is ‘discrimination against’.”

(Footnotes omitted, emphasis in original.) This same approach – differential treatment without justification – is integral to the ICERD, and to ss 8, 9and 10. Sections 8, 9 and 10 of the RDA, and the ICERD, are at base concerned with eliminating the unjustified differential treatment of people on the basis of race. It is the assessment of the difference in treatment and its basis in race which is the gravamen of the prohibitions. In Maloney, Gageler J emphasised this in the following passage (at [335]):A difference in the extent of enjoyment of a human right is similarly a question of degree. In the context of s 10 of the RDA, it is a question of degree to be answered in light of the principles and objectives of the Convention. Construed against the background of those principles and objectives, persons of one race will enjoy a human right “to a more limited extent” than persons of another race where a difference in their relative enjoyment of a human right is of such a degree as to be inconsistent with persons of those two races being afforded equal dignity and respect. The relevant indignity or want of respect lies in the difference in the levels of enjoyment of a human right by persons of the two races rather than in the absolute level of enjoyment by persons of the disadvantaged race. The significance of a difference can be affected by contextual factors, which may include racial targeting or presumptions about the characteristics of racial groups just as they may include ignorance or lack of consideration of the characteristics of racial groups. Although Gageler J employs the language of s 10 (“to a more limited extent”) rather than the language of s 9(“nullifying or impairing the recognition ... on an equal footing”), the point is the same. The lack of dignity and respect that inheres in treating people in particular ways based on race lies in the difference between how the human rights and freedoms of those people are recognised and enjoyed and how the human rights and freedoms of people of other races are recognised and enjoyed. To answer the whole of the question posed by s 9(1), one must ask not only whether race is the reference point for the differential treatment, but also what is the nature and extent of the difference. “Race” and the related attributes in s 9 are not defined in the RDA or the ICERD. Australian courts have relied heavily on the decisions of foreign courts in determining the meaning of these terms. In Eatock v Bolt[2011] FCA 1103; 197 FCR 261, Bromberg J considered the meaning of the terms “race, ethnic origin, and colour” in determining whether Australian Aboriginal people are a race and have common ethnic origins for the purposes of the RDA. In doing so, his Honour canvassed some of the central foreign cases which examine the meaning of these terms (at [312]):In King-Ansell, the New Zealand Court of Appeal (Richmond P, Woodhouse and Richardson JJ) was asked to construe s 25(1) of the Race Relations Act 1971 (NZ). An element of an offence under that section included intent to excite hostility or ill will against a group of persons on the grounds of colour, race, or ethnic or national origin of that group. The Race Relations Act 1971 was enacted including in order to implement CERD. In that context, Richardson J considered the meaning of “race” and “ethnic origin” and stated at 542:Race is clearly used in its

popular meaning. So are the other words. The real test is whether the individuals or the group regard themselves and are regarded by others in the community as having a particular historical identity in terms of their colour or their racial, national or ethnic origin. That must be based on a belief shared by members of the group.and at 543:... a group is identifiable in terms of its ethnic origins if it is a segment of the population distinguished from others by a sufficient combination of shared customs, beliefs, traditions and characteristics derived from a common or presumed common past, even if not drawn from what in biological terms is a common racial stock. It is that combination which gives them an historically determined social identity in their own eyes and in the eyes of those outside the group. They have a distinct social identity based not simply on group cohesion and solidarity but also on their belief as to their historical antecedents.Those passages were approved by the House of Lords in Mandla at 564. His Honour then discussed the House of Lords decision in Mandla v Dowell Lee [1982] UKHL 7; [1983] 2 AC 548 where, in considering whether Sikhs were to be regarded as an "ethnic group" for the purposes of the Race Relations Act 1976 (UK), the Court stated:For a group to constitute an ethnic group in the sense of the Act of 1976, it must, in my opinion, regard itself, and be regarded by others, as a distinct community by virtue of certain characteristics. Some of these characteristics are essential; others are not essential but one or more of them will commonly be found and will help to distinguish the group from the surrounding community. The conditions which appear to me to be essential are these: (1) a long shared history, of which the group is conscious as distinguishing it from other groups, and the memory of which it keeps alive; (2) a cultural tradition of its own, including family and social customs and manners, often but not necessarily associated with religious observance. In addition to those two essential characteristics the following characteristics are, in my opinion, relevant; (3) either a common geographical origin, or descent from a small number of common ancestors; (4) a common language, not necessarily peculiar to the group; (5) a common literature peculiar to the group; (6) a common religion different from that of neighbouring groups or from the general community surrounding it; (7) being a minority or being an oppressed or a dominant group within a larger community, for example a conquered people ... His Honour concluded that Australian Aboriginal people were a race (at [314]):They are a group of people who regard themselves and are regarded by others as having the two essential distinguishing conditions referred to by Lord Fraser in Mandla — a long shared history and a culture distinctly of their own. An act done because a person or a group of people are Aboriginal people is, in the terms of s 18C(1)(b), done because of the race or ethnic origin of the person or group. I respectfully agree. In the present proceeding, the respondents did not dispute that Aboriginal people are a "race" within ss 8-10 of the RDA. Similarly, Torres Strait Islander people may also be a "race" for the purposes of s 9, although the question is not critical to the determination of this proceeding. There was ***no*** discussion of the meaning of "race" in Maloney, Morton or Aurukun. It may be significant for the purposes of this proceeding in particular to note that the listed attributes in s 9 (race, colour, descent and national or ethnic origin) are not linked – in the terms of the provision – to an individual. In other words, for s 9 to be contravened, one need not identify the race (or related attribute) of a particular person as the basis for the impugned conduct. Circumstances can be imagined where the person who does the s 9 act has ***no*** particular individual in mind, or in contemplation. A sign on the door to a gym which says 'Japanese people not welcome here' involves a distinction based on national origin, even if the person who erected the sign had ***no*** particular Japanese person in mind, or knowledge about whether a Japanese person was soon to come to the gym. To the extent in this case that the applicants' pleadings appear to assume there is a need to prove that the respondents' conduct involved a distinction or restriction based on the race of a particular individual, they assume the responsibility to prove more than s 9 requires. Unless the context otherwise suggests, I have not approached the question of contravention through the prism of the need to identify any particular individual as a member of the race (here, Aboriginal) said to be the basis for the distinctions and restrictions. As I have said above, it is well-established that the phrase "based on race" in s 9 does not imply any causal requirement but connotes that the act involving the distinction, exclusion, restriction, or preference be done, or undertaken, by reference to race: see Macedonian Teachers' Association at 29-30 (Weinberg J), approved by the Full Court on appeal ([1999] FCA [1999] FCA 1287; 1287; 91 FCR 47 at [8]). Although the principle is not in doubt, the connection between race and the conduct of the QPS in this case was sometimes either simply asserted by the applicants, or said to be obvious. More than assertion is required: the search is for the basis of the impugned conduct. On what does the conduct turn? In asking that question, the basis of the impugned conduct must not be conflated with intention or subjective purpose. It is useful to recall how Weinberg J illustrated the difference in Macedonian Teachers:To read the phrase "based on" in s 9(1) as meaning only a relationship of cause and effect would be likely to significantly diminish the scope for ***protection*** which is afforded by that subsection. It is always possible to argue that the sole reason why the impugned conduct occurred

had nothing to do with its essentially discriminatory nature, but resulted from some wholly laudatory motive. To take but one example, during the Second World War, after Pearl Harbour, President Roosevelt signed an Executive order requiring all Americans of Japanese ancestry living on the West Coast of the United States to be interned in what the President himself later described as “concentration camps”. Congress gave this order the force of statute. The motive behind this edict was to ensure that in the event of an invasion by Japan, the defence forces would not be hampered by the invaders donning civilian clothes in order to remain undetected. The validity of this statute was upheld in Korematsu v United States [1945] USSC 43; (1944) 323 US 214 by a 5-4 majority of the Supreme Court.

It is difficult to see how, or why, a law which operates in terms against a single ethnic group only, and which requires tens of thousands of their number to be interned for ***no*** reason other than their ethnic origin, should not be said to violate a provision such as s 9(1) of the Act. Merely because the motive for, and hence the “cause” of the making of, such an order is said to be military necessity, rather than a desire to discriminate, provides ***no*** justification for excluding such conduct from the ambit of such legislation. It is of course possible that the statute itself will provide for a defence of reasonable justification, as s 9(1A) does, where indirect discrimination only is in issue. Section 9 makes ***no*** provision, however, for any such defence in the context of direct discrimination under s 9(1). It is a nice question whether in an appropriate case the doctrine of necessity would operate to dispense with the obligation to comply with the terms of the statute: see F Bennion, Statutory Interpretation (3rd ed, 1997), p 882. Korematsu seems not to have been such a case.

Korematsu is generally regarded as one of the United States Supreme Court’s less distinguished contributions to jurisprudence. One can readily think of other, less extreme, examples where laudatory motives might be invoked to justify acts which are essentially discriminatory in nature. This can be done simply by adopting an analysis which focuses upon the “cause” of the impugned conduct which is then found to be something other than race. Almost of necessity questions of motive are thereby introduced, notwithstanding the admonition, repeatedly stressed, that the intent or motive with which an essentially discriminatory act is performed is irrelevant.

An example of the dangers of permitting questions of motive to intrude into proscriptions against discrimination based on race is to be found in Buchanan v Warley[1916] USSC 116; (1917) 245 US 60. There the Supreme Court overturned the Court of Appeals of Kentucky and invalidated a law forbidding negroes from buying homes in white neighbourhoods. The Court observed (at 81):“It is urged that this proposed segregation will promote the ***public*** peace by preventing race conflict. Desirable as this is, and important as is the preservation of the ***public*** peace, this aim cannot be accomplished by laws or ordinances which deny rights created or ***protected*** by the FederalConstitution.”In Banovic at 176 their Honours Deane and Gaudron JJ demonstrated that they were acutely conscious of the dangers of permitting intention or motive to intrude into the determination of whether acts, essentially discriminatory in their nature, breach anti-discrimination legislation. They cited with approval certain observations of Lord Goff in R v Birmingham City Council; Ex parte Equal Opportunities Commission [1989] AC 1155at 1193-1194. In rejecting as irrelevant intention or motive as a condition of liability his Lordship explained that if it were otherwise:it would be a good defence for an employer to show that he discriminated against women not because he intended to do so but (for example) because of customer preference, or to save money, or even to avoid controversy”. Weinberg J continued (at 40-41):It is not correct, in my view, to say that in assessing the “true basis” of the distinction brought about by the directive it is relevant to consider the second respondent’s purpose in having issued it. That simply draws the assessment back to motive. It is an approach which conflicts with the views expressed by Mason CJ and Gaudron J inWaters; by Kirby J in IW v City of Perth; by Deane, Gaudron and Dawson JJ in Banovic, and by Sackville J in Australian Medical Council v Wilson. I have quoted from Weinberg J’s judgment at length because it is pertinent in the present proceeding to bear in mind the distinctions his Honour draws. In the present case, there may have been laudable motives, appreciable difficulties or understandable dilemmas attending some of the conduct and behaviour of the QPS officers in the circumstances they faced. The existence of laudable motives, appreciable difficulties or understandable dilemmas will not prevent or preclude a contravention of s 9 where it can nevertheless be said that the impugned conduct involved a distinction, exclusion, restriction or preference that was based on race. Assuming some matters in their favour, but bearing in mind this is a class action, one aspect of s 9(1) which must be carefully addressed is how the applicants can, or cannot,

establish a connection between an act involving a distinction based on race and the impairment of a relevant human right or freedom enjoyed by the Palm Island group members. That is, it must be the impugned conduct which impairs the human right or freedom: see, eg, Qantas Airways v Gama at [77]. In relation to many of the allegations, especially some of the more singular or detailed ones, it is difficult to see the requisite connection between the impugned act and the impairment of a human right or freedom enjoyed by the Palm Island group members. The respondents have made this point in their written submissions, and it has considerable force in relation to certain of the applicants' allegations. These matters also raise the question whether, in the formulation of the first limb of s 9(1), it is the act that must be based on race, or the distinction, restriction, exclusion or preference. In considering the answer, the use of the word "involving" in s 9(1) is important. The Macquarie Dictionary (6th ed, 2013) relevantly gives these meanings for the verb "involve": to include as a necessary circumstance, condition, or consequence; imply; entail. to affect, as something within the scope of operation. to include, contain, or comprehend within itself or its scope. to bring into an intricate or complicated form or condition. to cause to be inextricably associated or concerned, as in something embarrassing or unfavourable. to implicate, as in guilt or crime, or in any matter or affair. Meanings of this kind were noted by Habersberger J in Rimanic v Business Licensing Authority [2001] VSC 400, where the question was whether a threat to kill was "an offence involving violence" and therefore a "serious offence" within the meaning of s 3(1) of the Motor Car Traders Act 1986 (Vic). In that case, his Honour concluded that because one of the dictionary meanings of "involving" was "implying", it could be said that a threat to kill "involved" violence. Of course, Habersberger J made that constructional choice about the meaning of the verb "involve" in a different statutory context, but one further observation by his Honour is of some significance. His Honour said (at [48]):It is important to note that the definition of "serious offence" in s.3(1) of the MCTA is, relevantly, "an offence involving violence". That is, it is something less than an offence of violence (Pollard) or an offence one of the essential ingredients of which is violence (McCrossen). The observation is that the use of the preposition "of" gives the phrase "offence of violence" a narrower meaning, requiring that violence be an essential ingredient, or form part of the offence. Textually, there could be ***no*** such substitution in the language in s 9(1) but this observation is helpful in illustrating that the function of the word "involving" in the composite phrase contained in the first limb of s 9(1) is connecting rather than definitional. Whichever of the dictionary meanings is used, and bearing in mind the authorities to which I have referred, when used in the phrase "act involving a distinction" the use of the word "involving" requires the examination of more than just the impugned act, or conduct. The use of the word "involving" requires there to be an examination of what is bound up with or included in the impugned conduct, what are the consequences of the conduct, what is associated with the conduct. All these substitute expressions indicate, in my opinion, the appropriate construction of the composite phrase "act involving a distinction, exclusion, restriction or preference". That this is the function of the verb in s 9(1) is also illustrated by the following extract from the Full Court in Qantas Airways v Gama (at [76]):The making of a remark is an act. It may be that the remark involves a distinction because it is made to a particular person and not to others. The remark may convey ***no*** express or implicit reference to the person's race, colour, descent or national or ethnic origin. Nevertheless, a linkage may be drawn between the distinction effected by the remark and the person's race or other relevant characteristic by reason of the circumstances in which the remark was made or the fact that it was part of a pattern of remarks directed to that person and not to others of a different race or relevant characteristic. Where the remark, critical of one person in a group but not others, expressly or by implication links the criticism or denigration to that person's race then that linkage establishes both the distinction and its basis upon race.

(Emphasis added.) A "remark" can be distinguished from a threat of violence, which explicitly refers to violence and therefore "involves" it in the sense (as Habersberger J found) of implying it. As this passage from Qantas Airways v Gama illustrates, if a remark were the "act" for the purposes of s 9(1), what the remark must involve, for the purposes of s 9(1), is a distinction. In assessing whether it does involve a distinction, the objective circumstances in which the remark was made become highly relevant. The Court makes an objective assessment of what, objectively (including the surrounding circumstances and consequences), was "involved" in the act in order to ascertain whether the act has the character or quality required by s 9(1). To summarise, the impugned act must be one which involves a distinction, exclusion, restriction or preference. Read purposively and as a composite phrase, the "act involving a distinction" is the differential treatment. The gravamen of this part of s 9 – to express it in alternative language – is that it is the differential treatment which must be based on race. This construction gives better effect to the purposes of the RDA – and s 9 in particular – and to the ICERD, those purposes being to eliminate the treatment of people, without justification, in different ways by reference to an irrelevancy: namely their race, colour, descent or national or ethnic origin. That said, this is but one example where undue parsing of s 9 is

counterproductive. The phrase “act involving a distinction” cannot be neatly, or appropriately, separated. Nor can it be replaced with a descriptor such as “discrimination”. In Baird at [70]-[71], Allsop J set out the correct approach:In [134] of his reasons, the primary judge said that the grants were based on race in the sense that they were made to assist indigenous people. The appellants submitted that such a finding is sufficient to satisfy s 9. I disagree. One does not look at the act divorced from the relevant distinction etc in assessing the relationship with race. It is the part of the act that is the distinction etc or the act involving the distinction that must be based on race.

It is the act involving the distinction (not “any discrimination”, being the phrase used by the primary judge) that must be based on race, that is, be done by reference to race.

(Emphasis added.) The issue is of significance in this case because of the somewhat complex analysis required to address the applicants’ identification of the impugned “acts” of QPS officers and the range of alleged distinctions, exclusions, restrictions, or preferences upon which the applicants rely. I return to these matters at [1141] below.

SUMMARY OF THE HUMAN RIGHTS AND FUNDAMENTAL FREEDOMS RELIED ON BY THE APPLICANTS FOR THE PURPOSES OF S 9 In Gerhardy at 125-26, Brennan J described the nature and importance, for the operation of the RDA, of the phrase “human rights and fundamental freedoms”:The recognition and observance of human rights and fundamental freedoms by a State involves a restraint on the untrammelled exercise of its sovereign powers in order to ensure that the dignity of human beings within each State is respected and that equality among human beings prevails. Clearly enough, human rights and fundamental freedoms are not to be understood as the rights and freedoms which a person has under a particular legal system; they are rights and freedoms which every legal system ought to recognize and observe. They are inalienable rights and freedoms that a human being possesses simply in virtue of his humanity, independently of any society to which he belongs, independently of the legal regime which governs it, and independently of any right or freedom that he might acquire by entering into a special relationship with another. The term connotes the rights and freedoms which must be recognized and observed, and which a person must be able to enjoy and exercise, if he is to live as he was born – “free and equal in dignity and rights”, as the Universal Declaration of Human Rights proclaims. The State and other persons are bound morally, though not legally, to recognize and observe those rights and freedoms. What is their content? The Universal Declaration of Human Rights contains a general statement of human rights, and particular examples (some relating, perhaps, to private fields of life) are set out in Art. 5 of the Convention. But an attempt to define human rights and fundamental freedoms exhaustively is bound to fail, for the respective religious, cultural and political systems of the world would attribute differing contents to the notions of freedom and dignity and would perceive at least some differences in the rights and freedoms that are conducive to their attainment: see Donnelly, “Human Rights and Human Dignity”, American Political Science Review (1982), vol.76, p. 303. As I have set out at [89] above, the applicants contend that the conduct of QPS officers nullified or impaired the recognition, enjoyment or exercise by the Palm Island group members of the following rights or freedoms:(a) to equality before the law and equal ***protection*** of the law (ICCPR Art 26);

(b) to equal treatment before organs administering justice (ICERD Art 5(a));

(c) to access ***public*** services (ICERD Art 5(f));

(d) to enjoyment of property without unlawful interference (said to be a customary or general international law right);

(e) not to be subjected to unlawful interference with privacy, family or home (ICCPR Art 17);

(f) to liberty and security of person (ICERD Art 5(b) and ICCPR Art 9); and

(g) not to be subjected to inhuman or degrading treatment (ICCPR Art 7). In relation to the right to equality before the law, the applicants also rely on that right as they contend it exists under customary international law, including

what they contend is a “subsidiary right to equal ***protection*** by law enforcement agencies”. As the respondents point out, some of the rights and freedoms on which the applicants rely can only be applicable in relation to the subgroup members, because they relate to impugned conduct which affected only those subgroup members. The rights and freedoms in this category are those set out at (d)-(g) above. In relation to the rights and freedoms in Art 5(a) and (f) of the ICERD, the respondents do not contest, in substance, the existence or content of those rights, but submit they are not engaged on the facts of this case. The respondents do contest the proposition that Art 26 of the ICCPR confers an autonomous human right, and that it has independent content. Before descending into a discussion of the rights listed above, it is as well to set out the entirety of Art 5 of the ICERD:In compliance with the fundamental obligations laid down in article 2 of this Convention, States Parties undertake to prohibit and to eliminate racial discrimination in all its forms and to guarantee the right of everyone, without distinction as to race, colour, or national or ethnic origin, to equality before the law, notably in the enjoyment of the following rights:

(a) The right to equal treatment before the tribunals and all other organs administering justice;

(b) The right to security of person and ***protection*** by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution;

(c) Political rights, in particular the right to participate in elections – to vote and to stand for election – on the basis of universal and equal suffrage, to take part in the Government as well as in the conduct of ***public*** affairs at any level and to have equal access to ***public*** service;

(d) Other civil rights, in particular:(i) The right to freedom of movement and residence within the border of the State;

(ii) The right to leave any country, including one’s own, and to return to one’s country;

(iii) The right to nationality;

(iv) The right to marriage and choice of spouse;

(v) The right to own property alone as well as in association with others;

(vi) The right to inherit;

(vii) The right to freedom of thought, conscience and religion;

(viii) The right to freedom of opinion and expression;

(ix) The right to freedom of peaceful assembly and association;(e) Economic, social and cultural rights, in particular:(i) The rights to work, to free choice of employment, to just and favourable conditions of work, to ***protection*** against unemployment, to equal pay for equal work, to just and favourable remuneration;

(ii) The right to form and join trade unions;

(iii) The right to housing;

(iv) The right to ***public*** health, medical care, social security and social services;

(v) The right to education and training;

(vi) The right to equal participation in cultural activities;(f) The right of access to any place or service intended for use by the general ***public***, such as transport, hotels, restaurants, cafes, theatres and parks.

Article 5(a) of the ICERD: the right to equal treatment before tribunals and all other organs administering justice The debate between the parties is whether the QPS can be said to be an "organ administering justice". A somewhat tentatively expressed view to this effect was made by Chesterman JA (Holmes JA agreeing) in Morton. Morton, like Maloney and Aurukun, was a case invoking s 10 of the RDA in relation to liquor restrictions imposed in Aboriginal communities in Queensland, although each case was argued differently. Chesterman JA and Holmes JA held that s 10 did not apply to s 168B(1) of the Liquor Act 1992 (Qld), which, read with other provisions of that Act and the Liquor Regulation 2002 (Qld), prohibited a person in a ***public*** place on Palm Island from possessing more than a prescribed quantity of a type of liquor. Having noted at [79] that the Court was "not referred to any case which has considered the ambit of the Art 5(a) right, and [his Honour's] own researches ha[d] been fruitless", Chesterman JA said, relevantly, at [80]:The subject matter of that right would seem to be the equal application of municipal laws to all persons regardless of race etc. It suggests, to my mind at least, a requirement of non-discriminatory conduct by tribunals and courts, and such like institutions, which make decisions affecting the persons with whom they deal. It probably extends to the executive enforcement of laws, for example by police officers. Constable Tabuai, who made the complaint, and the magistrate who convicted the applicant, may each have been an organ or tribunal administering justice, but their conduct is not complained of. Anyway s 10 does not apply to them. It applies to laws which have the described effect. Parliament, when it passed the Liquor Act, was not a tribunal or organ administering justice.

(Emphasis added.) The applicant in Morton had been charged with and convicted of one count of possessing – in a restricted area – more than the prescribed quantity of liquor for that area, contrary to the prohibition contained in s 168B(1). I assume Chesterman JA referred to Constable Tabuai in the above passage because his Honour saw the charging of an individual, and thus the beginning of a process which could end in a court (clearly, an organ administering justice) as sufficiently connected with the criminal justice process to fall within Art 5(a). However his Honour went on to find (at [81]) that Art 5(a) did not assist because it did not confer upon the applicant a right "to control Parliament with respect to the laws it passes, or a right to be unaffected by any law made by Parliament which, by its terms, applies to her". Insofar as the RDA could affect laws passed by a state parliament this was, Chesterman JA held, achieved by the operation of s 10 of the RDA. Thus, when [80] and [81] of Morton are read together, it can be seen that Chesterman JA acknowledged the kind of argument now put on behalf of the applicants but, because Morton concerned s 10 and Art 5(a) was employed differently before the Court of Appeal, did not further consider or determine the issue. McMurdo P, although in dissent on the application of s 10 in Morton, did not expressly say the scope of Art 5(a) included police officers responsible for the charging of the applicant. Her Honour did, however, appear to conclude (at [21]) that Art 5(a) was engaged on the facts, in the following way:When parliament enacts laws, the practical effect of which is to create an offence which disproportionately affects Aboriginal Australians, Aboriginal Australians are precluded from enjoying the right to equality before the law in the equal treatment before tribunals or other organs administering justice to the same extent as non-Aboriginal Australians. In my opinion, Art 5(a) means that such laws enacted by a State or Territory cannot escape the consequences of s 10. Whatever support might be gained from Morton for the applicants' argument is minimal. Whether Art 5(a) extends to the role of police officers in a prosecution process need not be determined in this proceeding. The applicants do not contend that the prosecution processes which followed the events with which this proceeding is concerned involved any contraventions of s 9. The applicants do not rely on any other authority to support their contention that the police officers involved in the four broad categories of conduct they impugn (the investigation into Mulrunji's death, the intervening week conduct, the emergency declaration, and the arrests, entries and searches) were, in any or all of those categories of conduct, acting as organs administering justice. Article 5(a) was one of the rights relied on in Maloney. ***No*** member of the Court was persuaded the Article had any application. French CJ (at [36]) did not consider the right had any application because the appellant was not complaining about how the Liquor Act (and the Liquor Regulation) required a court

to treat her. Hayne J (at [73]) expressed doubts which might be seen as aligning with the view of French CJ. Kiefel J considered the Article was concerned with what her Honour described as "procedural equality" (at [151]). Bell J took a similar approach, stating that Art 5(a) was akin to Art 14 of the ICCPR and was to be understood as a right to equality of access to courts and other adjudicative bodies: at [215]. Gageler J also drew a parallel between Art 5(a) and Art 14 of the ICCPR (at [287]), and found that Art 5(a) was "more narrowly focussed" than Art 26 of the ICCPR and Art 7 of the UDHR. It was, his Honour found (at [336]), focussed on "the administration and enforcement of laws by courts and tribunals rather than on the content of laws more generally". In my opinion, there is ***no*** room for the application of Art 5(a) to the impugned conduct of QPS officers in this proceeding. Even taking a simply textual approach to Art 5(a) and allowing, in the applicants' favour, that a police service could be described as an "organ" in the sense it is a body of persons formed by the executive to perform ***public*** functions and exercise ***public*** power, it is not properly characterised as an organ administering justice. The concept of "administering justice" is, in the commentaries on Art 5(a) and its broad equivalent in the ICCPR (Art 14), viewed as a function performed by courts and tribunals: see M Nowak, U.N. Covenant on Civil and Political Rights: CCPR Commentary (2nd ed, NP Engel, 2005) at pp 307-09; N Lerner, The U.N. Convention on the Elimination of all Forms of Discrimination (Sijthoff & Noordhoff, 1980) at p 56. For the same reasons, the applicants' submissions about the application of Art 5(a) to what they contend to have been denials of natural justice by the QPS cannot succeed. There was a faint attempt, in written submissions, to rely further on Art 5(a) by the submission that the Queensland Coroner was an "organ administering justice" within the terms of Art 5(a). The consequence of this, it was submitted, is that the failure of QPS officers to conduct an impartial inquiry impacted substantially on the ability of the Coroner to make findings as required under the Coroners Act and the Coroner's Guidelines. Some reliance was placed by the applicants on "remarks" made by both Deputy Chief Magistrate Hine and Acting State Coroner Clements about QPS officers in their respective reports. I have found elsewhere in these reasons that the conduct of DSS Kitching in relation to the preparation of the Form 1 for the Coroner, and in relation to the nature of the information provided (and not provided) to the Coroner, contravened s 9 of the RDA. The right I have found impaired is the Art 5(f) "services" right, which I discuss below. The corresponding duty and responsibility which inhere in that services right attached to DSS Kitching in his role as an investigator. In contrast, Art 5(a) is directed towards the treatment of people by tribunals and other organs administering justice. It may also extend to the conduct of other actors in the proceedings or processes of such tribunals, as the obiter comments in Morton suggest. I need not decide that question. None of the conduct of QPS officers impugned in this proceeding occurred during any of the coronial inquests. Certainly, there is ***no*** suggestion that Palm Island group members were treated differently during the inquests, by QPS officers or anyone else. The corresponding duties or responsibilities for Art 5(a) attached to the Coroners, and to those participating in the inquests. None of the conduct impugned in this proceeding is conduct of that nature.

Article 5(f) of the ICERD: the right to access ***public*** services Specific provision is made in s 13 of the RDA for discrimination based on race in the provision of goods and services. The applicants do not rely on s 13, and instead rely on Art 5(f) as part of the general non-discrimination prohibition in s 9. As the applicants submit, the terms of s 9(4) of the RDA contemplate such an approach. The respondents, correctly, do not submit that Art 5(f) is unavailable (by reason of s 13) as part of an alleged contravention of s 9. In their written closing submissions, the applicants relied on just one case (Commissioner of Police, NSW Police Service v Estate Edward John Russell [2001] NSWSC 745) to make good their submissions that the nature of the right in Art 5(f) includes a right inhering in the general ***public*** to have police services provided. They also referred to R v Palu [2002] NSWCCA 381; 134 A Crim R 174 in their reply. They make little or ***no*** specific submissions about the content of the right. Relying, it would seem, on their general allegations about non-compliance by the QPS with their obligations under the PSA Act and the OPM, I understand their submission to be that if the "QPS Failures", or some of them, are made out then the applicants' rights under Art 5(f) have been nullified or impaired. It is, I might say, unsatisfactory in a case of this size and importance, with the significant opportunities the applicants have been given to make submissions and the lengthy submissions they have in fact made, for such a central aspect of their case to be so thinly presented. The respondents also identified two decisions of relevance to the nature and content of the Art 5(f) right. One was Farah v Commissioner of Police of the Metropolis [1996] EWCA Civ 684; [1998] QB 65, and the other Commissioner of Police (NSW) v Mohamed [2009] NSWCA 432; 262 ALR 519. I return to those decisions below. The respondents do not submit the nature and content of this right precludes the applicants relying on it in the present proceedings. They do submit, however, that some of the circumstances in respect of which it is relied upon

are not circumstances which concern policing services provided to the general ***public***, and therefore to the Palm Island group members. An example they give is the alleged failure to notify Mulrunji's next of kin. Farah was a decision of the UK Court of Appeal concerning the Race Relations Act 1976 (UK). Ms Farah was a Somali woman who, with her 10-year-old cousin, had been attacked by some white youths and their dog, and had called the police '999' number for assistance. When the police arrived, instead of assisting her, they arrested her and charged her with affray, common assault and causing unnecessary suffering to the dog, then released her. When she appeared to answer the charges, ***no*** evidence was offered and she was acquitted. In her claim against police, an issue arose whether the duties of police officers in responding to her call for assistance fell within s 20(1) of the Race Relations Act, which provided:It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the ***public*** or a section of the ***public*** to discriminate against a person who seeks to obtain or use those goods, facilities or services –

(a) by refusing or deliberately omitting to provide him with any of them; or

(b) by refusing or deliberately omitting to provide him with goods, facilities or services of the like quality, in the like manner and on the like terms as are normal in the first-mentioned person's case in relation to other members of the ***public*** or (where the person so seeking belongs to a section of the ***public***) to other members of that section. Noting (at 78) that it was open to Parliament to remove or impinge upon whatever common law immunity police officers might enjoy concerning the discharge of their ***public*** duties, Hutchison LJ accepted that the terms of s 20(1) were wide enough to capture at least some of the duties performed by police officers. One of the duties his Lordship expressly saw as included was the duty of officers to ***protect*** members of the ***public*** (at 78). His Lordship added at 79:Taking the view I do on construction, I do not consider that there is any basis for entertaining Mr. Seabrook's policy arguments. I would observe, however, that (as the judgment of Templeman L.J. recognised) there are in any event powerful arguments on each side of the ***public*** policy issue and I do not find the spectre of claims of racial discrimination against the police, with the inconvenience and expense that that may involve, to be more disturbing than the prospect that a member of the ***public*** who, seeking assistance in dire need, has been the subject of racial discrimination, should be without remedy. Otton LJ (at 83) expressed a similar view:Like Templeman L.J. in Savjani v. Inland Revenue Commissioners [1981] Q.B. 458 I should be slow to find that the effect of something which is humiliatingly discriminatory in racial matters falls outside the ambit of the Act. I accept that the police officers perform duties in order to prevent and detect crime and to bring offenders to justice. They are also vested with powers to enable them to perform those duties. While performing duties and exercising powers they also provide services in providing ***protection*** to the victims of crimes of violence. The context in Farah (and also in Savjani, to which it refers) was obviously different from the present proceeding. In those cases, the impugned conduct related to the way officers behaved vis-a-vis a particular individual. Some of the allegations here might be seen to fit into that category but, if they do, then (putting the subgroup claims to one side) without more they cannot be sustained, because the relevant rights impaired or nullified are not those of the Palm Island group members but rather of the individual concerned. For example, PLO Bengaroo does not, as an individual, complain of his treatment at the hands of QPS officers. His treatment is, however, one of the categories of impugned conduct about which the applicants complain. Demonstrating how their human rights were impaired or nullified by the treatment of PLO Bengaroo (assuming in the applicants' favour the remainder of s 9 is made out) is a matter which presents some difficulties for the applicants' case, unless it is seen as part of a pattern of conduct by QPS officers in relation to Aboriginal people. I deal with these issues in detail below when considering each category of impugned conduct. The second case is Mohamed. In that case, the New South Wales Court of Appeal considered questions of law arising from a decision of the New South Wales Administrative Decisions Tribunal (ADT). The respondent alleged that, upon complaining to police that she and her family had been abused and assaulted by members of a neighbouring family, two officers attended the respondent's family home, but were rude and failed to take their complaint seriously. It was alleged that the basis for the officers' reactions and behaviour was the race of the respondent and her family. The Commissioner had sought to have questions of law referred to the Court of Appeal. It is fair to say that in its reasons the Court of Appeal was critical of the Commissioner's litigious and confrontational approach to the respondent's complaint in the ADT, including the referral of matters for decision by the Court of Appeal without a substratum of facts having been established. Those reservations expressed by the Court of Appeal should be borne in mind when considering its reasons. At [21], in noting the difficulties with one of the

Commissioner's questions of law as formulated, Basten JA (with whom Spigelman CJ agreed) reformulated the question, which is the one of relevance in the present proceeding. His Honour's reformulation was:Can the detection and prevention of crime, as defined by s 6(3) of the Police Act 1990(NSW) constitute a "service" within the meaning of s 19 of the Anti-Discrimination Act? Basten JA noted (at [23]) the limits on the scope and structure of the New South Wales anti-discrimination legislation, by reference to the observations of the High Court in IW v City of Perth [1997] HCA 30; 191 CLR 1at 14-15 per Brennan CJ and McHugh J. His Honour described the scope in the following way:Generally speaking, the areas in which the prohibitions operate seek to exclude entirely private activities, not having a broader ***public*** element to them. His Honour examined (from [31] onwards) the "mission" and "functions" of the New South Wales Police Force as they were set out in s 6 of the Police Act 1990 (NSW). In s 6(3), there was a definition of a statutory phrase "police services". That subsection provided:In this section:

police services includes:

(a) services by way of prevention and detection of crime, and

(b) the ***protection*** of persons from injury or death, and property from damage, whether arising from criminal acts or in any other way, and

(c) the provision of essential services in emergencies, and

(d) any other service prescribed by the regulations. The Commissioner's argument (of some assistance in itself to the applicants in the present proceeding) was that the "services" provided by the New South Wales Police were not services provided to individuals, but rather to the general ***public***. At [36], in a passage with which I respectfully agree, Basten JA found that the duties performed by police officers fell within the concept of services as that term was employed in the New South Wales anti-discrimination legislation:There is nothing surprising about the proposition that the police owe individual members of the community a duty to exercise their powers and carry out their functions on a non-discriminatory basis. Such a duty is recognised in international law, which may uphold a claim for refugee status on the part of a person denied ***protection*** from violence on the basis of a ***protected*** characteristic, in his or her country of nationality: see Minister for Immigration and Multicultural Affairs v Khawar (2002) 210 CLR 1; 187 ALR 574; 67 ALD 577; [2002] HCA 14. Indeed, the fact that an authority is required to provide a ***public*** service implies that the service is to be provided without discrimination across all sectors of the community. To withdraw such a service from a particular group on the basis of a characteristic ***protected*** under human rights law is not to default on any obligation to the ***public*** at large, but in relation to members of that group. There is ***no*** reason why members who suffer individually as a result of such conduct should not have a basis for complaint under appropriate legislation, including the Anti-Discrimination Act. Dealing with the Commissioner's submissions that there was some inconsistency, or incongruity, in exposing police officers to the prohibitions in anti-discrimination legislation while at the same time not imposing a common law duty of care on officers in relation to all those functions, Basten JA said (at [48]):However one characterises the cause of action under the Anti-Discrimination Act, it does not involve the creation of a general law duty of care, of the kind discussed in Hill, Tame and Sullivan. Nor does it give rise to the kind of policy questions which affect the scope of such a duty. Rather, its scope is to be identified as a matter of statutory interpretation. If the Parliament seeks to subject the Police Force to statutory prohibitions, with civil remedies for breach, the courts must apply the statute, which is not in any sense contingent upon the existence of a general law duty of care, nor on matters of legal principle which underlie the existence or absence of such a duty. Accordingly, submissions based on these authorities should be rejected. Again, I respectfully agree with the opinions expressed by Basten JA in this passage. Although later in his judgment (at [87], but cf [90]), Handley AJA was careful to allow for a different characterisation about functions such as the discretion to prosecute, his Honour reached similar conclusions about police activities involving initial investigations and prevention of unlawful conduct, stating at [78]-[79]:If the maintenance of order by Police at a sporting or entertainment event is a service to the organisers it is not apparent why the maintenance of order in a neighbourhood is not a service to those affected by the disorder.

Nor is it apparent why the prevention and detection of crime, and the ***protection*** of the respondents from injury and the ***protection*** of their property from damage which are services within s 6(3) of the 1990 Act are not services to them within s 19 of the 1977 Act. Both judgments in Mohamed approved and applied the Court of Appeal's decision in Farah. The High Court's decision of IW v City of Perth also referred to Farah with approval: see [1997] HCA 30; 191 CLR 1 at 14 (Brennan CJ and McHugh J), 23 (Dawson and Gaudron JJ), 29 (Toohey J), 44 (Gummow J), 74 (Kirby J). There is also the decision of Russell. I propose to refer to the first instance judgment of Sully J because, although the matter did go on appeal to the New South Wales Court of Appeal, the service issue was not considered by the Court of Appeal. Mr and Mrs Russell, and their son Mr Edward Russell, who was deceased by the time of the case before the ADT, were Aboriginal. Mr and Mrs Russell continued the prosecution of their son's proceeding in the ADT after his death. Mr Edward Russell had alleged that, in December 1993, he was arrested by a large group of police officers (approximately 10) and during the arrest was treated in a way (including by the language used by the arresting officers) that was racially discriminatory and vilified him on the ground of his Aboriginal race. Mr Russell also alleged that, during his police interview, he complained about being assaulted and vilified during his arrest and the interviewing officer did not refer his complaint to the appropriate, or any, investigating authorities. He alleged this failure was based on his race. One of the questions of law referred to the Court by the ADT in Russell was whether the conduct of an individual police officer in the course of the pursuit and arrest of Mr Russell amounted to the provision of a "service" within the meaning of s 19 of the Anti-Discrimination Act 1997 (NSW), recalling that in the New South Wales legislation the relevant services had to be provided by a "***public*** authority". Sully J held that the New South Wales Police Service was a ***public*** authority for the purposes of the Anti-Discrimination Act, chiefly by reference to the mission and functions of the Police Service as set out in s 6 of the Police Service Act 1990 (NSW), but also by reference to the "Statement of Values" set out in s 7 of that Act. The Police Service Act was renamed the Police Act 1990 (NSW) in 2002, which is why the references to the Act inMohammed are different. Subsections 6(3)(a) and 6(3)(b) of the New South Wales Police Service Act were in the same form as they were when considered by the Court in Mohamed. I have extracted them above at [593]. Sully J held at [44] that a correct assessment of the police officers' conduct in relation to Mr Edward Russell was:[1] The police officers who took part in the pursuit of Mr. Russell were providing to the community at large services of the kind described in section 6(3)(a) and (b) of the Police Service Act.

[2] The police who took part in the arrest of the late Mr. Russell were also thereby providing to the community at large services of those two kinds.

[3] As soon as the late Mr. Russell had been formally arrested, and had passed thereupon into police custody, the arresting police, and any police officer who had any part at all in the way in which Mr. Russell was subsequently handled; or who witnessed the way in which Mr. Russell was handled; became thereupon charged with a ***public*** duty to provide to the late Mr. Russell police services by way of the ***protection*** of his person from injury or death, and the ***protection*** of his property from damage, "whether arising from criminal acts or in any other way".

[4] All of the police officers mentioned in [3] above wholly failed, on the facts as found by the Equal Opportunity Division, to provide the services which they were bound to provide to Mr. Russell pursuant to section 6(3)(b).

[5] To say that what the individual police officers did, or suffered to be done, to the late Mr. Russell amounted to the provision by them to him of police services, but on a basis discriminatory in the sense contemplated by section 19(b), seems to me to be a wholly artificial perception, given the facts found by the Equal Opportunity Division. The police officers involved did not, in my opinion, provide imperfectly to the late Mr. Russell the services which they were duty bound to provide to him. They did not provide those services at all.

(Original emphasis.) It can be seen that the kinds of services which Sully J found to have been provided were twofold. First, services to the ***public*** or community at large, which were connected with the detection of crime and the apprehension of persons suspected of breaking the law. Second, services provided to the individual who was

the subject of police action, which were connected with ensuring his safety and wellbeing, and the ***protection*** of his property while in police custody. I emphasise this aspect of Sully J's findings because it supports the contentions advanced by the applicants that police officers may provide services of different kinds, to different groups, and also to individuals. To accept those contentions is not to accept that in every circumstance where police powers or functions are exercised or performed in relation to an individual, a "service" is being provided to that individual: see, eg, the findings of Yates J in Robinson v Commissioner of Police, NSW Police Force [2012] FCA 770; 292 ALR 702at [168]- [169] and [178], which were not challenged on appeal (see Robinson v Commissioner of Police, New South Wales Police Force [2013] FCAFC 64 at [145]). In the present proceeding, of course, the difficulty with any contention that QPS officers were providing services to particular individuals is that this is a class action and the cause of action must rely on services provided to the Palm Island group members or, at least, an identified subgroup of them. The only identified subgroup is the one comprising the people whose properties and homes were entered by SERT officers on 27 and 28 November 2004 and those present during the entries and searches. Although these authorities are of assistance in confirming that, in the context of other statutory regimes dealing with anti-discrimination, the functions performed by police officers (or at least some of them) have been held to be capable of being characterised as services for the purposes of the prohibitions in those regimes, the existence of such authorities does not automatically answer the question posed by the applicants' contentions in this proceeding. That question is (expressed in summary form) whether the conduct of QPS officers in investigating the death of Mulrunji, in policing Palm Island in the week after his death, and in their policing reaction to the events of 26 November 2004 should, separately or collectively, be characterised as the provision of services. There is then also the question of to whom those services were provided. There is a definition of "services" in s 3 of the RDA, but since it is a statutory definition it can be seen as applicable only to provisions such as s 13, where the term "services" is used. It does not assist in identifying the scope and content of the right in Art 5(f). Bell J dealt briefly with the content of Art 5(f) in Maloney, noting (at [225]) that the right it confers is not one found in other international human rights instruments. It may be that the particular history of nations that had notorious segregation practices and denials of access to places and services for persons of particular races informed the express identification of a right such as this: see T Meron, "The Meaning and Reach of the International Convention on the Elimination of All Forms of Racial Discrimination" (1985) 79 AJIL 283-84; see also Maloney at [287] (Gageler J). In Maloney, the service identified for the purposes of the Art 5(f) right was access to the supply of alcohol at licensed premises. Bell J concluded (at [227]) that, by reason of the liquor restrictions, Aboriginal persons on Palm Island enjoyed the right in Art 5(f) to a more limited extent than persons of other races elsewhere in Queensland. Her Honour's conclusions are, of course, expressed in the context of s 10 of the RDA rather than s 9, but they are nevertheless important to repeat (at [225] and [227]):Article 5(f) recognises a right of access not only to any place intended for use by the general ***public*** but also to any service intended for ***public*** use. The right of access to places and services recognised by the Convention is not found in other international human rights instruments. The right of all persons of access without distinction based on race to places and services intended for use by the ***public*** is an important aspect of the ability to live in full dignity and enjoy the ***public*** benefits of the society.

...

By reason of the liquor restrictions, Aboriginal persons on Palm Island enjoy the rights under Art 5(d)(v) and (f) to a more limited extent than persons of another race present elsewhere in Queensland. It follows that s 10(1) is engaged subject to consideration of whether the liquor restrictions qualify as special measures under s 8(1). If they do not, they will be invalidated because they impose a discriminatory burden.

(Footnotes omitted.) Where, as in Queensland, statute codifies the role and functions of the police service in a particular jurisdiction, the Court's task of describing the role and function of the police can largely be taken from such a statutory source. That is what the Court in Russell did, in relation to New South Wales. For the purposes of this proceeding, the version of s 2.3 of the PSA Act in force in November 2004 set out the functions of the QPS:The functions of the police service are—

(a) the preservation of peace and good order—(i) in all areas of the State; and

(ii) in all areas outside the State where the laws of the State may lawfully be applied, when occasion demands;(b) the ***protection*** of all communities in the State and all members thereof—(i) from unlawful disruption of peace and good order that results, or is likely to result, from—(A) actions of criminal offenders;

(B) actions or omissions of other persons;(ii) from commission of offences against the law generally;(c) the prevention of crime;

(d) the detection of offenders and bringing of offenders to justice;

(e) the upholding of the law generally;

(f) the administration, in a responsible, fair and efficient manner and subject to due process of law and directions of the commissioner, of—(i) the provisions of the Criminal Code;

(ii) the provisions of all other Acts or laws for the time being committed to the responsibility of the service;

(iii) the powers, duties and discretions prescribed for officers by any Act;(g) the provision of the services, and the rendering of help reasonably sought, in an emergency or otherwise, as are—(i) required of officers under any Act or law or the reasonable expectations of the community; or

(ii) reasonably sought of officers by members of the community. Numerous features of this provision fit comfortably within the concept of a service "intended for use by the general ***public***" as set out in Art 5(f). The word "intended" should also be understood to mean objectively intended: cf Colyer v State of Victoria [1998] 3 VR 759 at 769-74; Richardson v ACT Health and Community Care Service [2000] FCA 654; 100 FCR 1 at [26]. I consider these authorities are distinguishable on the basis of the text and purpose of the particular exemption in issue. In Colyer, the exemption was s 82 of the Equal Opportunity Act 1995 (Vic), which provided:(1) Nothing in Part 3 applies to anything done in relation to the provision to people with a particular attribute of special services, benefits or facilities that are designed—(a) to meet the special needs of those people; or

(b) to prevent or reduce a disadvantage suffered by those people in relation to their education, accommodation, training or welfare.(2) Without limiting the generality of subsection (l) —(a) a person may grant a woman any right, privilege or benefit in relation to pregnancy or childbirth;

(b) a person may provide, or restrict the offering of, holiday tours to people of a particular age or age group. In Richardson, the exemption was contained in s 27(b) of the Discrimination Act 1991 (ACT), which at the relevant time provided:Nothing in Part III renders it unlawful to do an act a purpose of which is —

...

(b) to afford members of a relevant class of persons access to facilities, services or opportunities to meet their special needs. Exemptions of this kind direct attention, at least as one consideration, to the purpose or object of the service-provider. There does not appear to be any international or comparative judicial decisions on the meaning of "intended" in the context of Art 5(f). In comparable domestic human rights instruments, rights of access to services are expressed without reference to intention. For example, s 44(1) of the Human Rights Act 1993 (NZ) provides:It shall be unlawful for any person who supplies goods, facilities, or services to the ***public*** or to any section of the ***public***—

(a) to refuse or fail on demand to provide any other person with those goods, facilities, or services; or

(b) to treat any other person less favourably in connection with the provision of those goods, facilities, or services than would otherwise be the case,—

by reason of any of the prohibited grounds of discrimination. Section 5 of the Canadian Human Rights Act 1977 is expressed as follows:It is a discriminatory practice in the provision of goods, services, facilities or accommodation customarily available to the general ***public***

(a) to deny, or to deny access to, any such good, service, facility or accommodation to any individual, or

(b) to differentiate adversely in relation to any individual,

on a prohibited ground of discrimination. Section 29(1) of the Equality Act 2010 (UK) provides:A person (a "service-provider") concerned with the provision of a service to the ***public*** or a section of the ***public*** (for payment or not) must not discriminate against a person requiring the service by not providing the person with the service. Without needing to refer to any particular domestic laws, in Khawar at [85], McHugh and Gummow JJ described ***protection*** by the State of Pakistan as a:fundamental right otherwise enjoyed by Pakistani nationals, namely access to law enforcement authorities to secure a measure of ***protection*** against violence to the person. While the issue is not free from doubt, in my opinion the preferable approach, particularly with functions which have been codified, as the functions of police officers have in Queensland, is to discern the meaning of "intention" consistently with the approach taken to Parliament's intention in the context of statutory interpretation. That approach is set out by the High Court in Lacey v Attorney-General for the State of Queensland [2011] HCA 10; 242 CLR 573 at [43]-[44] (French CJ, Gummow, Hayne, Crennan, Kiefel and Bell JJ):The objective of statutory construction was defined in Project Blue Sky Inc v Australian Broadcasting Authority as giving to the words of a statutory provision the meaning which the legislature is taken to have intended them to have. An example of a canon of construction directed to that objective and given in Project Blue Sky is "the presumption that, in the absence of unmistakable and unambiguous language, the legislature has not intended to interfere with basic rights, freedoms or immunities". That is frequently called the principle of legality. The legislative intention there referred to is not an objective collective mental state. Such a state is a fiction which serves ***no*** useful purpose. Ascertainment of legislative intention is asserted as a statement of compliance with the rules of construction, common law and statutory, which have been applied to reach the preferred results and which are known to parliamentary drafters and the courts. As this Court said recently in Zheng v Cai:"It has been said that to attribute an intention to the legislature is to apply something of a fiction. However, what is involved here is not the attribution of a collective mental state to legislators. That would be a misleading use of metaphor. Rather, judicial findings as to legislative intention are an expression of the constitutional relationship between the arms of government with respect to the making, interpretation and application of laws. As explained in NAAV v Minister for Immigration and Multicultural and Indigenous Affairs, the preferred construction by the court of the statute in question is reached by the application of rules of interpretation accepted by all arms of government in the system of representative democracy."The application of the rules will properly involve the identification of a statutory purpose, which may appear from an express statement in the relevant statute, by inference from its terms and by appropriate reference to extrinsic materials. The purpose of a statute is not something which exists outside the statute. It resides in its text and structure, albeit it may be identified by reference to common law and statutory rules of construction.

(Footnotes omitted.) On that approach, it is to the PSA Act that one must look to determine whether the functions to be performed by QPS officers are properly characterised as "services" intended for use by the general ***public***. To say that a service is "intended for use" by the general ***public*** is another way of identifying the activity as one to which the general ***public*** is intended to have "access"; the right in Art 5(f) being initially described as a right of access. That these activities are described in s 2.3 as "functions" lends support to their characterisation as activities to which the ***public*** is intended to have "access". In some cases that "access" may be active – see for example s 2.3(g)(ii) which expressly contemplates that members of the ***public*** will seek out assistance from police

officers. On other occasions, the "access" will be consequential on the performance of the function, rather than as a result of any interaction between identified members of the ***public*** and identified police officers – see, for example s 2.3(a)(i): the preservation of good order within the state. It is still intended, in my opinion, that members of the police force perform this function as a service to the community – that is, as something of benefit and helpful to them, or of advantage to their welfare: see IW v City of Perth at 11 (Brennan CJ and McHugh J), 41 (Gummow J). The preservation of peace and good order is a service to which it is intended that all members of (relevantly here) the Queensland community have access. To focus on statutory intention when determining whether the exercise of a ***public*** power or function is a "service" is not to deny that the particular circumstances of its exercise may be relevant to whether it can be characterised in that way. It may be that a power or function is expressed in sufficiently broad terms that some instances of its exercise will meet the description of a "service" while other instances will not. For example, a power to do all things necessary to ensure the proper functioning of a city's water mains might entail some functions that could properly be described as services intended for use by the general ***public*** (such as fixing burst pipes to restore water flow to homes) and others that could not (such as entering contracts to purchase new pipes). In those cases, "intention" is still to be determined objectively by reference to the intention of the legislature, but the intention of the legislature may be described as being that some exercises of the power will be a service while others will not. Whether a particular exercise of a power of that nature is a service must be determined by reference to the facts of the case. While the functions in s 2.3 are broad, in my opinion they are sufficiently specific that conclusions can be reached regarding whether they are intended to be services. For example, s 2.3(d) – the detection of offenders and the bringing of them to justice – was a function, and a service, of critical importance on Palm Island following the death of Mulrunji. His death in custody required investigation and required, as s 2.3(d) expressly provides, that any person who was an "offender" in relation to that death be brought to justice. The function in s 2.3(e) of upholding the law generally was also important. Part of upholding the law in the investigation into Mulrunji's death was to ensure the investigation was impartial and independent both in fact and appearance. Determining who was responsible for the destruction of ***public*** property on Palm Island on 26 November 2004 was also important in upholding the law, as well as (returning to s 2.3(d)) in detecting offenders. In investigating who was responsible for the destruction of that property, or for inciting the destruction of that property, the QPS was providing a service intended to be used by all members of the Queensland community. All members of the Queensland community had an interest in those responsible for the destruction of ***public*** property on the island, and inciting its destruction, being brought to justice. Section 2.3(b) – the ***protection*** of all communities in the State and all members thereof – is ***no*** doubt a function the respondents would emphasise in the role of the QPS on Palm Island in the aftermath of Mulrunji's death and then after the burning of ***public*** buildings (including SS Hurley's house, which was part of the police compound) on Friday, 26 November 2004. As I note later, on the evidence before me, I find that the perception of QPS officers about who was in need of ***protection*** on Palm Island was, in part, based on race. The applicants did not rely heavily on the protective functions of the QPS and that is understandable. Their contention, which again I accept in part, is that the level of threat assessed to be present on Palm Island was exaggerated and overemphasised, in order to justify a heavy-handed and disproportionate response to ***public*** protests against police, including protests by way of setting fire to ***public*** buildings. There was ***no*** sense in the evidence that I heard from Palm Island residents, nor in the contemporaneous evidence tendered at trial (either through witness statements or videos) that Palm Islanders felt under threat from anyone but the police. Some of the attributes which the applicants submit should attend the conduct of police officers are apparent in the terms of s 2.3(f) – in particular, responsibility and fairness. Attributes of this kind describe, or fill out, the nature of the service which is provided to the general ***public***. The QPS must administer (for example) the powers and duties set out in the OPM responsibly and with fairness. It is a service with those attributes which is intended to be provided to the general ***public***. What should be made of the use in Art 5(f) of the term "access" in the phrase "right of access"? Should this be construed as limiting the content of the right in Art 5(f)? In my opinion, it would be inconsistent with the approach set out in many authorities to the interpretation of the terms of international human rights instruments to take a narrow view of the meaning of access. The word "right" in Art 5(f) does not involve a private legal right, separately enforceable under domestic law. In provisions such as Art 5(f), the word "right" is rather used as a descriptor of the universally recognised entitlements that inhere in all people, so as to achieve the equality and dignity contemplated by the UDHR and the international human rights instruments which have followed it: see, for example, Gerhardy at 101-102 (Mason J). The text and context of Art 5(f) must also be borne in mind. The right with which the provision deals is not just a right to access services: it is a right of "access to any place or service" intended for use by the general ***public***. It is not directed at services available only to a selection of people:

its purpose is to ensure equality for people of all races so that – as members of the community (the "general ***public***") – they can be treated with substantive equality. On one view, access to a place connotes actively seeking to enter and remain in a particular location – be it a cinema, a ***public*** square, a sporting ground, a hotel or a university. If Art 5(f) were given content dependent on activities by persons affected, the mere placing of a sign at the front of a cinema which said '***no*** Indians' may not contravene Art 5(f) unless and until an Indian person sought entry. That would not give effect to the purposes of the ICERD, because racially discriminatory conduct would already have occurred by the placement of the sign, and by the purpose and effect of the placement of the sign. The imperative to treat all persons equally in their entitlement to go to the cinema would already have been defeated. Indian people may be discouraged simply by the presence of the sign. Whether that occurs or not, the mere placement of the sign is incompatible with the values of equality and dignity Art 5(f) is designed to ***protect***. This example illustrates why the better view is that the word "access" in Art 5(f) includes entitlements to access, not only the activity of seeking access to a place, or to a service. This approach is also consistent with the whole of the introductory phrase in Art 5(f) – "the right of access." That said, there are some relevant limits to the content of the Art 5(f) right. The use of the verb "access" connotes, as I have said, an entitlement of all individuals to benefit from (or be assisted by) ***public*** facilities and functions in substantively the same way and to substantively the same extent and effect, without distinction as to race: that is, without race being the basis on which differential treatment turns. However, there is in the choice of the word "access" a connotation that individuals will use facilities, or be the beneficiaries of the performance of functions or activities. In some sense, the individuals to whom Art 5(f) gives rights of access to places and services must be in the contemplation of those who make facilities and places available, or perform the services. Individuals may not need to be the direct recipients on identifiable occasions of access to a place, or access to a service, but the place or activity must still be one which is available for access, or capable of being accessed. That may mean that some of the functions in a provision such as s 2.3 of the PSA Act do not fall within the concept of "the right of access to any ... service" for the purposes of Art 5(f). In my opinion, functions such as the one in s 2.3(c) (the prevention of crime) may be such a function. Insofar as it is not subsumed within the other functions set out in s 2.3, crime prevention is not a "service" which it is intended the general ***public*** should use, for the purposes of Art 5(f). To be clear, a situation such as a complaint made to police about the commission of an offence would in my opinion be covered by s 2.3(d), and what the police did, or should have done, in response to a complaint would constitute a service which it is intended the general ***public*** use. However, "prevention of crime" could include a wide range of activities, such as strategic decision-making, coordination between police and other law enforcement agencies, and advocacy by police to government concerning changes in the law. These kinds of activities, in my opinion, are not activities which Art 5(f) is apt to ***protect***. By conferring this function on the QPS, the Queensland Parliament did not intend that the general ***public*** "use" this kind of activity. Nor could it be said objectively that the prevention of crime, itself, is a service which the ***public*** is intended to use: cf subss 2.3(d), (f) and (g). Describing functions such as those set out in s 2.3 as inherently ***public*** functions is consistent with the common law's characterisation of the role of the police. For example, in Glasbrook Bros Ltd v Glamorgan County Council [1924] UKHL 3; [1925] AC 270 at 277, Viscount Cave LC said:there is an absolute and unconditional obligation binding the police authorities to take all steps which appear to them to be necessary for keeping the peace, for preventing crime, or for ***protecting*** property from criminal injury; and the ***public***, who pay for this ***protection*** through the rates and taxes, cannot lawfully be called upon to make a further payment for that which is their right. It is also consistent with the constitutional framework at state and federal level in Australia, which can be said to contemplate that there will be mechanisms by which the rule of law will be upheld and enforced for the benefit of the whole community, in a way which itself is consistent with core values of independence, impartiality and reasonableness: see, generally, Australian Communist Party v Commonwealth [1951] HCA 5;83 CLR 1 at 193 (Dixon J); Lange v Australian Broadcasting Corporation [1997] HCA 25; 189 CLR 520 at 564 (the Court); Plaintiff S157/2002 v Commonwealth [2003] HCA 2; 211 CLR 476 at [103]- [104] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ); APLA Limited v Legal Services Commissioner (NSW) [2005] HCA 44; 224 CLR 322 at [30] (Gleeson CJ and Heydon J); Thomas v Mowbray [2007] HCA 33; 233 CLR 307 at [61](Gummow and Crennan JJ); South Australia v Totani [2010] HCA 39; 242 CLR 1 at [61]- [62] (French CJ); Ebner v Official Trustee in Bankruptcy [2000] HCA 63; 205 CLR 337 at [103] (Gaudron J); Li [2013] HCA 18; 249 CLR 332 at [23] (French CJ), [64] (Hayne, Kiefel, and Bell JJ), [88]-[89] (Gageler J). Accordingly, I have concluded that most of the QPS functions on which the applicants rely are properly characterised as a service intended for use by the general ***public*** within Art 5(f).

Article 26 of the ICCPR: equality before the law There was considerable debate between the parties about the nature and content of this right. The applicants contend Art 26 establishes an "autonomous" human right, which in its content has three aspects: equality before the law and the entitlement without discrimination to equal ***protection*** of the law; the entitlement to a guarantee of equal and effective ***protection*** against discrimination on any ground; and entitlement to a guarantee of non-discrimination through prohibitions in the law. The respondents contend Art 26 is not a freestanding right, and has ***no*** content independent of, or separate to, other Articles in the ICCPR. They submit Art 26 expresses an "objective" to which the ICERD and the RDA are addressed. The respondents do appear to accept that Art 26 imposes an obligation on states parties in relation to their domestic legislation and the operation of that domestic legislation. This issue assumes some significance because some of the conduct of QPS officers that I have identified as contravening the first limb of s 9(1) will not result in a contravention of s 9 itself unless there is some independent content to the Art 26 right. That is because I have not accepted the applicants' submissions that the other human rights they relied on were nullified or impaired by that conduct: see [1481]-[1485] below. Both parties rely on various obiter statements in Maloney and Aurukun to support their respective arguments. I now turn to those decisions. In Maloney, two justices expressly found that the Art 26 right could not itself be a "right" for the purposes of s 10 of the RDA, nor for the purposes of s 8 where the impugned law for the purposes of s 10 is said to be a special measure (as it was in Maloney). To understand their Honours' reasoning, it is worth recalling the terms of s 10(1) of the RDA, which provides:If, by reason of, or of a provision of, a law of the Commonwealth or of a State or Territory, persons of a particular race, colour or national or ethnic origin do not enjoy a right that is enjoyed by persons of another race, colour or national or ethnic origin, or enjoy a right to a more limited extent than persons of another race, colour or national or ethnic origin, then, notwithstanding anything in that law, persons of the first-mentioned race, colour or national or ethnic origin shall, by force of this section, enjoy that right to the same extent as persons of that other race, colour or national or ethnic origin. At [159]-[162], Kiefel J explained why, in her Honour's opinion, it would render s 10 (and s 8, where relevant to the operation of s 10) of the RDA "unnecessary" if Art 26 was given substantive content. The context of her Honour's observations must be noted. At [159], her Honour observed that the freedom under consideration was the freedom to possess alcohol for consumption. This was not, in her Honour's opinion, a fundamental freedom of the kind to which the ICERD was addressed, but the freedom to possess and consume alcohol was nevertheless a freedom enjoyed by "many other persons in Queensland and in Australia ... to a greater extent than that enjoyed by Aboriginal persons on Palm Island". In that context, her Honour acknowledged reliance by the appellant, and by the Australian Human Rights Commission in its intervening submissions, on rights such as Art 26 (and also Art 5(a) of the ICERD), as the basis for the contention that the "right" for the purposes of s 10 was the right to be ***protected*** from the practical (discriminatory) effect of domestic laws. It was in this context that her Honour expressed the view (at [160]) that this was not the kind of right upon which s 10 could operate, and that these Articles (that is, Art 26 of the ICCPR and Art 5(a) of the ICERD) were to be seen as "broader objectives" to which the ICERD and the RDA are addressed. For this reason, her Honour concluded (at [161]) that s 10 "cannot operate in the manner intended with respect to a broad right not to be discriminated against". Gageler J expressed a similar opinion, but by reference to what his Honour saw as the circularity in an argument relying on Art 26 of the ICCPR. At [336], his Honour accepted that human rights within the scope of s 10, not being limited to those in Art 5 of the ICERD, "encompass the full gamut of the civil, political, economic and social rights recognised in the Universal Declaration and in the ICESCR and ICCPR". Gageler J then continued:However, the analysis required to determine whether or not the first component of the condition for the application of s 10 is satisfied is not readily assisted by focusing on the free-standing right to equality before the law or equal ***protection*** of the law expressed in Art 7 of the Universal Declaration and Art 26 of the ICCPR. That is because it is in the nature of such a right that a question about its enjoyment requires the undertaking of an analysis that mirrors the very analysis that s 10 requires to be undertaken with respect to the human rights to which it refers. To inquire for the purposes of s 10 into whether there is by reason of a law unequal enjoyment of a human right to equality before the law or equal ***protection*** of the law is to become mired in unproductive circularity. The right referred to in Art 5(a) of the Convention (to equal treatment before the tribunals and all other organs administering justice) is not properly equated to a right to equal ***protection*** of the law in Art 7 of the Universal Declaration and Art 26 of the ICCPR. Like Art 14 of the ICCPR, Art 5(a) of the Convention is more narrowly focused: on the administration and enforcement of laws by courts and tribunals rather than on the content of laws more generally.

(Emphasis added.) French CJ did not consider the issue, focussing on the Art 5 rights relied on by the appellant: at [35]. Hayne J declined to determine the issue: at [72]. Crennan J generally agreed with the reasons of Hayne J, and wrote separately only on the special measures issue, so her Honour did not address the debate about the content of Art 26 and its role (or not) in s 10 of the RDA. Although Bell J accepted that Art 26 (and its equivalent in Art 7 of the UDHR) were rights "***protected*** by" the ICERD and formed part of the customary law of nations (see [219]), her Honour expressly refrained determining the content of the Art 26 right or how s 10(1) might be said to ***protect*** it (at [223]). Her Honour did however point out that the content of Art 26 is described by some commentators as controversial, and noted what was said on behalf of Australia at the time of Australia's ratification of the ICCPR. Her Honour said (at [222]):Australia's acceptance of Art 26 was "on the basis that the object of the provision is to confirm the right of each person to equal treatment in the application of the law", an understanding that Australia's representative suggested was more in keeping with the original intention of the framers of the ICCPR.

(Footnotes omitted.) Her Honour referred to the discussion of Australia's position in Meron's article on the ICERD (see [609] above) at p 292. Meron refers to what was said on behalf of Australia as an illustration of the difficulty Art 26 might pose in its application to "nongovernmental" actors. That, it seems to me, is a different issue from the one presented in Maloney, and the one presented in this proceeding. QPS officers were, it is conceded by the respondents, acting on behalf of the State. The important points emerging from Bell J's reasons for present purposes are, first, that Art 26 (like Art 7 of the UDHR) is an autonomous human right and forms part of customary international law; and second, that its content includes, at least, the right to equal treatment in the application of the law. Keane J, who did not sit on Maloney, had taken the same approach to Art 26 as that taken by Kiefel J and Gageler J in Maloney when his Honour was a member of the Queensland Court of Appeal in Aurukun. In Aurukun, his Honour said at [147] that Art 26 is:simply a paraphrase of the purpose of s 10 of the RDA. As I have said, to assert this "right" is not to identify the content of the right said to be ***protected*** by s 10 of the RDA. To rely upon the purpose and effect of s 10 of the RDA as itself the "right" ***protected*** by it is to fail altogether to address the need to identify the content of the "right" ***protected*** by s 10 of the RDA. The majority in Morton (Chesterman JA, with whom Holmes JA agreed) also took this approach. At [85], Chesterman JA made it clear that, although he accepted the correctness of the decision in Aurukun(McMurdo P and Philippides J constituting the majority on this issue), he did not accept that Aurukuncorrectly enunciated the effect of s 10. His Honour said at [86]:If the applicant's submission were right there would have been ***no*** need to distinguish between human rights and fundamental freedoms and other rights. It would have been sufficient to decide that there was discrimination on the ground of race. The subject matter of the discrimination would not have mattered, yet the cases proceeded by declaring that s 10 applied to "human rights" and then identifying the right in question to determine if it fell within that category. At [89]-[92], his Honour said of Art 26 itself:The right "without any discrimination to the equal ***protection*** of the law", is elusive in meaning and content. It is the expression of an ideal, or high moral principle, lacking any indication of how it is to be achieved, or more profoundly, what it means.

...

It is, I think, obvious that s 10 itself confers a right on persons of all races to be treated equally by the law. It does so by the particular mechanism described in the section. It is not obvious to me that the object sought by Art 26 is not achieved by the enactment of s 10.

The focus of Art 26 is on equal treatment before the law, or equal ***protection*** of the law. Section 10, it seems to me, is a provision which aims to achieve that very goal. It does not do so by saying that ***no*** law may discriminate on the ground of race with regard to any subject matter. The subjects of legislation which may be discriminatory will be few in number because of the width of the definition of human rights in the Convention, but it is the case that some subject matter will not be caught.

To make the suggested substitution in s 10 involves a degree of circularity. Section 10 confers a right to equal ***protection*** of the law. If one answers the question: "what is the right it confers?" by saying it is the right to equal

protection of the law without discrimination, one has not got a satisfactory answer, nor got to the point of saying that it is a right not to be discriminated against in any respect under any circumstances. In contrast, McMurdo P in Morton appeared to contemplate that Art 26 was one of the human rights and freedoms to which s 10 could apply: see [18] and [24]. Her Honour did not address the circularity, or logical inconsistencies, to which Kiefel J and Gageler J in Maloney referred, and to which Chesterman JA in Mortonand Keane J in Aurukun also referred. Philippides J in Aurukun (at [240]-[243]) also concluded that Art 26 was a right to which s 10 could apply. Adopting the language of the Human Rights Committee (HRC) to the effect that Art 26 involves an autonomous human right, her Honour said (at [242]) that a broad construction of s 10:leads to the conclusion that the right to equality before the law includes, as a fundamental right, a right to "equal ***protection*** of the law", which operates to nullify legislation that is racially discriminatory "in any field regulated and ***protected*** by ***public*** authorities". Similarly, McMurdo P was prepared to accept (at [34]) that "Art 26 exists as a free standing right against discriminatory laws in 'any field regulated and ***protected*** by ***public*** authorities'". There may be a narrow preponderance of judicial opinion from these authorities favouring the proposition that, in considering the application of s 10 of the RDA, the right expressed in Art 26 of the ICCPR is not a "right" upon which s 10 can operate. The judicial reasoning to which I have referred describes the purpose, and reason for existence, of s 10 as to implement Australia's obligations under Art 26, amongst other generally expressed provisions (such as Arts 2 and 3 of the ICCPR and Art 2 of the ICERD). In that sense the terms of s 10 as the Australian Parliament has chosen to enact them are the implementation in Australian domestic law of Australia's obligation (see Art 2 of the ICERD) to "amend, rescind or nullify any laws and regulations which have the effect of creating or perpetuating racial discrimination wherever it exists". Therefore, the second and third aspects of the Art 26 right upon which the applicants rely (see [635] above) are likely to be seen as implemented in Australia through s 10. I do not consider the same can be said of the first aspect (equality before the law) which encompasses the application of the law without discrimination. In this proceeding, the respondents extrapolate the observations in Maloney about the overlap between Art 26 and s 10 (especially those of Gageler J) from s 10 to s 9. The applicants submit they should not be so extrapolated. I agree with the applicants. Whether or not Art 26 has any independent operation in the context of s 10 is not a matter on which I need express a view. There is ***no*** doubt that Art 26, as it has been interpreted by the HRC, does not duplicate the guarantees given in Art 2 of the ICCPR, which is plainly about implementation of ICCPR rights into domestic law. Art 26 derives from the equal ***protection*** principle in Art 7 of the UDHR and is concerned with the obligations imposed on states in regard to their legislation and the application of that legislation: see Human Rights Committee, Views: Communication ***No*** 172/1984, 29th sess, UN Doc CCPR/C/OP/2 (1990) ('Broeks v The Netherlands'). It is the latter aspect of Art 26 (the application of domestic law) which tends to give the right it enshrines greater content than simply being a commitment by states about the kind of legislation they will enact, or retain, domestically. If one examines the decisions of the HRC about Art 26, one sees the wide-ranging operation it has been given. This operation, in addition to the express statements of the HRC, establishes that, at least so far as the HRC is concerned, Art 26 has a separate and autonomous operation which extends beyond the enactment, amendment or retention of domestic legislation so as to make it compliant with the obligations assumed by states under the ICCPR (or, for that matter, the ICERD). A few examples of that jurisprudence will suffice. Broeks v The Netherlands was one of the early HRC decisions which emphasised the independent role of Art 26. It concerned entitlements under Netherlands legislation to unemployment benefits. Mrs Broeks claimed her entitlement was different because she was a woman, and married. It should be noted that the impugned law was retrospectively amended to remove the discrimination, but the amendment did not cover all of the period of Mrs Broeks' claims. The Netherlands opposed the complaint by submitting, amongst other things, that Art 26 did not provide ***protection*** against discrimination in relation to economic, social and cultural rights – only civil and political rights. This submission nevertheless did recognise an independent operation for Art 26. The Committee's decision included the following summary of its approach to Art 26:12.3. For the purpose of determining the scope of article 26, the Committee has taken into account the 'ordinary meaning' of each element of the article in its context and in the light of its object and purpose (art. 31 of the Vienna Convention on the Law of Treaties). The Committee begins by noting that article 26 does not merely duplicate the guarantees already provided for in article 2. It derives from the principle of equal ***protection*** of the law without discrimination, as contained in article 7 of the Universal Declaration of Human Rights, which prohibits discrimination in law or in practice in any field regulated and ***protected*** by ***public*** authorities. Article 26 is thus concerned with the obligations imposed on States in regard to their legislation and the application thereof.

12.4. Although article 26 requires that legislation should prohibit discrimination, it does not of itself contain any obligation with respect to the matters that may be provided for by legislation. Thus it does not, for example, require any State to enact legislation to provide for social security. However, when such legislation is adopted in the exercise of a State's sovereign power, then such legislation must comply with article 26 of the Covenant.

12.5. The Committee observes in this connection that what is at issue is not whether or not social security should be progressively established in the Netherlands but whether the legislation providing for social security violates the prohibition against discrimination contained in article 26 of the International Covenant on Civil and Political Rights and the guarantee given therein to all persons regarding equal and effective ***protection*** against discrimination.

13. The right to equality before the law and to equal ***protection*** of the law without any discrimination does not make all differences of treatment discriminatory. A differentiation based on reasonable and objective criteria does not amount to prohibited discrimination within the meaning of article 26.

(Emphasis added.) Other HRC decisions have followed Broeks v The Netherlands, and applied this approach to the payment of a wide range of social benefits, insurance and subsidies by states parties: see the list of cases set out in S Joseph and M Castan, The International Covenant on Civil and Political Rights (3rd ed, Oxford University Press, 2013) at [23.18]. This line of cases includes a case against Australia, alleging contraventions of Art 26 in relation to the non-payment of Veterans Entitlement pensions to a same-sex couple: see Human Rights Committee, Views: Communication ***No*** 941/2000, 78th sess, UN Doc CCPR/C/78/D/941/2000 (2003) ('Young v Australia'). Other cases include a successful claim by a Jewish parent about what was said to be the preferential funding of Roman Catholic schools in Canada (Human Rights Committee, Views: Communication ***No*** 694/1996, 67th sess, UN Doc CCPR/C/67/D/694/1996 (1999) ('Waldman v Canada')). The success of this claim before the HRC had ***no*** domestic effect in Canada, the Ontario Government refusing to implement the decision because of the alleged effect on its budget (if all religious schools needed to be funded), on its secular model of education (if it needed to permit education for religious groups in ***public*** schools) or on its constitutional obligations (see s 93 of the Constitution Act 1867 (UK) and the decision of the Supreme Court of Canada in Adler v Ontario [1996] 3 SCR 609). Nevertheless, it can be seen the impugned funding decisions were the application of various statutory provisions to individuals. Article 26 has also been successfully applied to the failure of a state party to provide in a post-colonial constitution for languages other than English to become official languages: see Human Rights Committee, Views: Communication ***No*** 760/1997, 69th sess, UN Doc CCPR/C/69/D/760/1997 (2000) ('Diergaardt v Namibia') in relation to the use of the Afrikaans language. Joseph and Castan note (at [23.15] and [23.19]) there have also been strong dissents from this approach, based on the significant intrusion into the priorities of states parties in the implementation of economic, social and cultural rights. That debate is not relevant to the issues to be determined in this proceeding. Although these cases support the general position that Art 26 is a freestanding right, and its content includes the manner in which domestic law is applied to individuals, the overlap with the purpose and operation of s 10 of the RDA is apparent. The content of Art 26 which does not, in my opinion, overlap with or duplicate s 10 is the application of domestic law to an individual or individuals where there is some decisional freedom about how the law is applied. The focus of s 10 of the RDA is on the operation of domestic law itself. Where domestic law confers powers or functions, so that repositories have a choice about how to exercise those powers or perform those functions, then in my opinion there is room for the content of Art 26 to apply. In any given situation, the work that the content of the Art 26 right has to do may depend on the application of other, more particularly expressed, human rights and fundamental freedoms. Article 26 has been applied to executive or administrative action. An example is Human Rights Committee, Views: Communication ***No*** 1306/2004, 91st sess, UN Doc CCPR/C/87/D/1306/2004 (2007) ('Haraldsson and Sveinsson v Iceland'), which dealt with the way the Icelandic government allocated fishing rights through a quota system. The HRC held that Iceland had not demonstrated that the quota system implemented, which distinguished between existing fishers and new entrants to the fishery, was based on objective and reasonable grounds. There were significant dissents in this case, which essentially preferred to leave the complex policy issues involved in allocation of fishing rights to the Icelandic executive. In some cases, the political context of a decision has meant the HRC has decided not to uphold a complaint, especially where a broad executive discretion is involved. That was the case in Human Rights

Committee, Views: Communication ***No*** 1314/2004, 87th sess, UN Doc CCPR/C/87/D/1314/2004 (2006) ('O'Neill and Quinn v Ireland'), which concerned decisions made under Irish legislation about the early release of members of the Irish Republican Army (IRA) convicted of serious offences, including murder. The authors, who had been convicted of a particularly notorious IRA-organised killing of a police officer, were excluded from the scheme. The HRC found the criteria for participation in the scheme were developed in a political context concerning the ending of the long-standing conflict in Northern Ireland and the state party's assessment of those criteria should stand. One member of the majority expressed the rationale for the decision this way:Article 26 does not allow the Committee to sit as an administrative court, reviewing every government decision, in the same fashion as a national administrative tribunal. This is a point especially important in the management of our decisional capacity under the First Optional Protocol. There is at least one HRC case which is more closely applicable to the present proceeding. Human Rights Committee, Views: Communication ***No*** 1493/2006, 96th sess, UN Doc CCPR/C/96/D/1493/2006 ('Lecraft v Spain') involved a woman who complained she had been stopped by police at Valladolid railway station and asked for identity papers on the basis of her racial characteristics, because police had been instructed to carry out checks on "coloured people". The HRC found Spain was in breach of Art 26:7.2 The Committee must decide whether being subjected to an identity check by the police means that the author suffered racial discrimination. The Committee considers that identity checks carried out for ***public*** security or crime prevention purposes in general, or to control illegal immigration, serve a legitimate purpose. However, when the authorities carry out such checks, the physical or ethnic characteristics of the persons subjected thereto should not by themselves be deemed indicative of their possible illegal presence in the country. Nor should they be carried out in such a way as to target only persons with specific physical or ethnic characteristics. To act otherwise would not only negatively affect the dignity of the persons concerned, but would also contribute to the spread of xenophobic attitudes in the ***public*** at large and would run counter to an effective policy aimed at combating racial discrimination.

...

7.4 In the present case, it can be inferred from the file that the identity check in question was of a general nature. The author alleges that ***no*** one else in her immediate vicinity had their identity checked and that the police officer who stopped and questioned her referred to her physical features in order to explain why she, and ***no*** one else in the vicinity, was being asked to show her identity papers. These claims were not refuted by the administrative and judicial bodies before which the author submitted her case, or in the proceedings before the Committee. In the circumstances, the Committee can only conclude that the author was singled out for the identity check in question solely on the ground of her racial characteristics and that these characteristics were the decisive factor in her being suspected of unlawful conduct. Furthermore, the Committee recalls its jurisprudence that not every differentiation of treatment will constitute discrimination, if the criteria for such differentiation are reasonable and objective and if the aim is to achieve a purpose which is legitimate under the Covenant. In the case under consideration, the Committee is of the view that the criteria of reasonableness and objectivity were not met. Moreover, the author has been offered ***no*** satisfaction, for example, by way of ***apology*** as a remedy. The HRC concluded (at [8]):In the light of the foregoing, the Human Rights Committee, acting under article 5, paragraph 4, of the Optional Protocol to the International Covenant on Civil and Political Rights, is of the view that the facts before it disclose a violation of article 26, read in conjunction with article 2, paragraph 3, of the Covenant. Although it is fair to say that a number of HRC cases do concern the operation and effect of domestic legislation, in a way which may well be covered by s 10 of the RDA so far as Australian law is concerned, it is also apparent that Art 26 can extend to the ***protection*** of individuals from discriminatory executive or administrative action. In particular, as Lecraft v Spain demonstrates, the ***protection*** of Art 26 has been found to extend to the activities of police officers as agents of the state, in relation to their conduct against an individual. The HRC is established under Art 28 of the ICCPR, with its 18 members drawn from states parties to the ICCPR, although they do not sit as representatives of their respective governments: Art 28(3). One of its functions is to issue General Comments which explain the meaning of the ICCPR. Another of its functions is to hear and determine individual complaints brought under the First Optional Protocol to the ICCPR. Australia is a signatory to the First Optional Protocol and has been subject to HRC decisions: see, eg, Human Rights Committee, Views: Communication ***No*** 488/1992, 50th sess, UN Doc CCPR/C/50/D/488/1992 ('Toonen v Australia'). It may be accepted that domestic statutes based on or referable to the implementation of Australia's international obligations should be construed, so far as their language permits, conformably with established rules

of international law and conformably with the treaty they are said to implement (see the authorities cited at [517] above). It may also be accepted that this principle does not permit the elevation of "extraneous materials" (such as HRC decisions) over the text of an international treaty: see Maloney at [134] (Crennan J). That principle, or approach, is qualitatively different from the issue in the present proceeding about Art 26 and its content. The question of the content of Art 26 of the ICCPR is not a question about the construction of a provision in a domestic statute. It is, as Brennan J explained in Gerhardy, in the extract I have reproduced at [563] above, a question about the content to be given to inalienable rights and freedoms possessed by every human being. As Brennan J observed, different religious, cultural and political systems (and, one might add, legal systems) may attribute different content to various rights. Nevertheless, they are rights recognised under international law and, through a provision such as s 9, given effect in domestic law. In my respectful opinion, and in contrast to the construction of s 9 itself, decisions of the HRC, and decisions of other courts interpreting Art 26 or similar human rights, can and should inform a choice by an Australian court about the content of such rights. It is permissible, and appropriate, in ascertaining the content of a right set out in the ICCPR to examine the decisions of the HRC, as the body constituted by the ICCPR to interpret the treaty and to determine complaints brought under the Optional Protocol. Such decisions are not extraneous to the ICCPR; they are integral to and contemplated by it. The HRC has been established by the treaty to interpret it, and to rule (under the Optional Protocol) on individual complaints brought under it. It should be noted that the location of Art 26 in the ICCPR confirms it is intended to have an independent operation. Articles 22-25 are located before it, and Art 27 after it, each of those provisions dealing with independent human rights with independent content. The fact that many of the ICCPR Articles concern principles of non-discrimination does not itself suggest Art 26 can be given ***no*** independent content. The ICCPR Articles which, in their content, may operate on discriminatory treatment do so because, as Joseph and Castan have observed, unjustified discriminatory treatment is often at the root of human rights abuses. Such treatment may arise because of the operation of a domestic law (directly or indirectly), in which case this may be addressed in Australian federal law by s 10 of the RDA; or it may arise because of executive or administrative action, in which case s 9 of the RDA may have application. It is to be expected that the RDA would pick up, as examples of the kinds of human rights to which it applies, the specific human rights listed in the ICERD which the RDA implements. It does so in s 9(2), which provides that the rights referred to in s 9 include any right of a kind referred to in Art 5 of the ICERD. It is well-established (and incontrovertible from its language, and the language of s 9(1)) that s 9(2) is not intended to be exhaustive. There is ***no*** debate that s 9 (and s 10) can operate on rights set out in the ICCPR and the ICESCR: see, for example, Illiafi at [62] (Kenny J); Aurukun at [33] (McMurdo P), [240] (Philippides J). However, the RDA is implementing Australia's obligations under the ICERD, not under the ICCPR. Article 26 is ***no*** different from the other Articles which surround it in the ICCPR. There may often be overlap between various human rights as expressed (and the overlap between Art 5 of the ICERD and Art 26 is an example), but the existence of overlap does not deprive each of them of independent content. The second sentence in Art 26 (dealing with the obligation of states to ensure their laws provide the guarantee set out in the first sentence) is but one aspect of the right set out in the first sentence. There will be circumstances (such as the sample of HRC cases given above) where an individual's right to equality before the law without distinction as to race may be impaired or nullified not by a domestic statute, but by its application, including its discretionary application, or the exercise of discretionary authority under a statute. Further, there may be circumstances in which the common law is the basis for the treatment of a person in a way which does not give the person equality before the law. Article 26 can operate in both situations: indeed, in relation to police officers and matters such as common law powers of arrest, one finds an example. It seems to me that the exercise of discretionary statutory powers is another likely example. The law conferring the discretion may not be discriminatory either in its direct or indirect operation. But the manner in which a discretion is exercised may well be. The exercise of that discretion will be an "act" involving a distinction, exclusion, restriction or preference for the purpose of s 9 if the effect of the exercise of the discretion is to impair the ***protection*** the law should afford to that person on an equal footing with persons of other races. Take, for example, the discretionary decision whether to remove a child from her parents on the ground that her health and safety are under threat. If it could be shown that discretion was exercised by reference to race, her right to equal ***protection*** of the law may be found to have been impaired. The child may also have other human rights which have also been impaired. However that is not to deny that her Art 26 right may be one of the impaired rights. It may well be the case that where the scope and operation of a law, on its face, is concerned, the terms of s 10 will leave ***no*** work for the right in Art 26. That can be determined on a case-by-case basis. To say as much is distinct from the proposition that Art 26 has ***no*** content or is not an independent human right. It is also distinct from the proposition that s 10 is a

paraphrase of Art 26. All those statements are, with respect, too broad. In the present proceeding, the way the applicants invoke Art 26, differently to the other human rights they rely on, is not well developed. There was some mixing of submissions on Art 26 with submissions on Art 5(f) of the ICERD. In relation to the conduct relating to the investigation into Mulrunji's death until approximately 24 November 2004 (including matters such as notification of next of kin), the applicants' written submissions put the matter in the following way:a failure by the police to carry out their prescribed functions constitutes a failure to preserve peace and good order and a breach of the rights of citizens to go about their affairs in peace.

As submitted above, the right to equality before the law and equal ***protection*** under the law without discrimination is an autonomous right which prevents both the enactment of discriminatory laws and the discriminatory application of laws by ***public*** authorities. In the Applicants' submission, the QPS is one such ***public*** authority and the application of powers and functions imparted on the QPS by force of law in a manner which constitutes racial discrimination can amount to a breach of the right to equality before the law and equal ***protection*** under the law.

Further, the Applicants submit that a failure by the police to exercise their functions as prescribed by statute and as recognised under the common law could amount to a breach of the rights of citizens to equal ***protection*** under the law in the sense that it would be a violation of their rights to go about their affairs in peace and under the ***protection*** of the police. Neither written nor oral submissions developed the argument much beyond this rather global contention. In relation to the alleged failures of the QPS in the intervening week and then during the events surrounding the protests and fires on 26 November 2004, the applicants' written submissions contended:... the acts relied on which occurred between 22 to 25 November 2004 resulted in a wholesale failure of the police to meet the cultural needs and expectations of the community on Palm Island or to address the feelings of grief and anger in the community. Rather, the manner in which policing was conducted served to inflame tensions between the community and the police. The community's questions were derided as "not factual" and derogatory comments were made about the "violent" culture in the community. The police visibly increased their presence in an aggressive manner, including by beginning to carry firearms, and not in a productive manner involving engagement with members of the community. The few positive measures which were taken, including the removal of SS Hurley and the establishment of regular meetings between Insp Richardson, SS Whyte and Erykah Kyle, were not proactive, but reactive and belated.

In the Applicants' submission, this resulted in the administration of policing services, as authorised by statute and by the general law, in a manner which caused a wholesale failure to uphold the law, to maintain peace and good order, to provide services required of officers under the law or the reasonable expectations of the community, or to allow honest citizens to go about their affairs in peace. Accordingly, the recognition, enjoyment or exercise on an equal footing of the Applicants' rights to equality before the law was impaired, as were their rights to access policing services intended for the use of the general ***public***. And then, as to the events of 26 November 2004 and onwards, the applicants submit (having contended that much of the impugned conduct only occurred because Palm Island was an isolated Aboriginal community):In the Applicants' submission, this resulted in the administration of policing services, as authorised by statute and by the general law, in a manner which caused a wholesale failure to uphold the law, to maintain peace and good order, to provide services required of officers under the law or the reasonable expectations of the community, or to allow honest citizens to go about their affairs in peace. In those circumstances, the recognition, enjoyment or exercise on an equal footing of the Applicants' rights to equality before the law and to access policing services intended for the use of the general ***public*** were severely impaired. The overlap with the applicants' reliance on the Art 5(f) right is apparent from these submissions. The "equal ***protection***" aspect of Art 26 is not advanced in these submissions beyond an entitlement to have policing services rendered on an equal footing with the manner in which those services would be rendered to any other community or section of the ***public*** in Queensland, rather than (as the applicants contend) a heavy-handed, culturally insensitive and disproportionate manner. Accordingly, in my opinion, despite the views I have expressed about the content of the right in Art 26, including its capacity for independent application, the content of this right has little separate application to this proceeding. The content of Art 26 as relied upon by the applicants does not appear to extend beyond the content of

Art 5(f), and they can be dealt with together. The one exception to this is the making and continuation of the emergency declaration under s 5 of the PSP Act. That is because this conduct is not, in my opinion, comprehended by Art 5(f). I deal with this at [1482]-[1485] below.

The common law rights relied on by the applicants The applicants contend the police officers charged with investigating the death of Mulrunji had duties to act with reasonable diligence and integrity in the way they conducted the investigation. These duties were pleaded (in the third further amended statement of claim at [115]) as either arising from the legislative scheme under which the QPS operates, or at common law. For the existence of such duties at common law, the applicants relied on O'Malley v Keelty, Australian Federal Police Commissioner [2004] FCA 1688 at [6]- [8] (Emmett J) and Zalewski v Turcarolo [1995] VicRp 76; [1995] 2 VR 562 at 578-79 (Hansen J). The respondents contended, without elaboration, that such allegations about common law duties "should be ignored", on the basis that the functions and powers of the QPS have a statutory source, and also because breaches of those duties were not pleaded. The respondents did not cavil with the general nature of the obligations and requirements alleged by the applicants to apply to police officers in the manner in which they carried out their functions and powers, because ultimately both parties accepted the applicability of the regulatory scheme established by the PSA Act and the instruments and policies made under it. In relation to the events of 19 to 24 November 2004, the applicants also rely on a breach of what they describe as "their rights to go about their affairs in peace under the ***protection*** of the police services, under the common law". The respondents' submissions give the same answer to this contention, again without elaboration: namely, that the powers and functions of the QPS have a statutory source. The way the applicants rely on the common law is another aspect of their case which lacks clarity. It is unclear whether the applicants are relying on the common law as a source of rights within the terms of s 9 of the RDA, or whether it forms part of their case about what are the distinctions and restrictions for the purposes of s 9. As I have noted elsewhere, the manner in which the applicants have structured their argument about distinctions for the purposes of s 9 has been to identify what they contend the QPS officers were required to do in certain circumstances and then identify what they did not do; the non-compliance being, on the applicants' argument, the relevant "distinction" for the purposes of s 9. It is unclear whether the applicants contend that QPS officers' non-compliance with the common law (without particulars about that non-compliance) is an "act involving a distinction" within the meaning of s 9(1). Insofar as the applicants seek to rely on the common law as a source of rights to which s 9 applies, that is a novel submission. Section 9, like s 10, is about a collection of rights described as "human rights and fundamental freedoms". The term "human rights" is generally seen as referring to rights derived from international law, or (possibly) domestic law which implements international human rights obligations assumed by states parties. Whether in s 9 of the RDA the term "fundamental freedoms" comprehends freedoms that exist at common law is a novel question. In circumstances where the applicants themselves did not develop any submissions about this construction of s 9, nor any submissions about the precise nature of the common law rights or freedoms relied on (including their source in judicial authority), I do not propose to decide the question. The general way the applicants describe those rights does not seem to me to involve any different evaluation or consideration of the evidence from the way the applicants contend the powers and functions under the Queensland legislative scheme operate to control police conduct. The content of the asserted common law rights is not materially different, at least not on the generalised submissions made by the applicants. Nevertheless, I should not be taken as accepting the respondents' submissions that there are ***no*** such common law rights, and ***no*** correlating common law duties imposed on police officers. The issue was given such scant attention by both parties that it is not capable of resolution, other than to say I am satisfied the applicants have not discharged their burden of proof in relation to breaches of any common law duties or obligations by QPS officers, however those allegations are said to operate within s 9 of the RDA.

The human rights and fundamental freedoms relied on by the applicants and the subgroup members The applicants and the subgroup, consisting of those individuals whose homes were subject to entries and searches by SERT officers on 27 and 28 November 2004 and those who were present in or around the houses during the entries and searches, advance s 9 claims independent of the principal class in this proceeding, and accordingly rely on a separate set of rights and freedoms for that purpose. The applicants and the subgroup rely in significant measure on the right set out in Art 17 of the ICCPR, which is in the following terms: ***No*** one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation. Everyone has the right to the ***protection*** of the law against such interference or attacks.

They also rely on the right in Art 7 of the ICCPR:***No*** one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment. In particular, ***no*** one shall be subjected without his free consent to medical or scientific experimentation. The rights and freedoms contained in Art 17 are critical to the resolution of the applicants' allegations and I deal with them at [705] below. Generally speaking, Art 7 and commensurate rights (such as Art 3 of the European Convention on Human Rights (ECHR), or those in constitutionally entrenched Bills of Rights) apply to a certain severity of treatment and conduct which renders the right unlikely to be applicable in the context of the present proceeding. It is not necessary to do more than give a brief summary of the content of the Art 7 right. Just as under Art 1 of the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment (CAT), a contravention of Art 7 by reference to "torture" involves conduct inflicting severe physical violence: see, for example Committee Against Torture, Views: Communication ***No*** 207/2002, 33rdsess, UN Doc CAT/C/33/D/207/2002 (2004) ('Dimitrijevic v Serbia'), re Art 1 of the CAT; Human Rights Committee, Views: Communication ***No*** 1761/2008, 101st sess, UN Doc CCPR/C/101/D/1761/2008 (2011) ('Giri v Nepal'), re Art 7 of the ICCPR. Although in General Comment 20, the HRC made it clear that causing mental suffering may constitute torture, it is likely the kind of mental suffering would need to be extreme: see also Zaoui v The Attorney-General (NZ) [2004] NZCA 228; [2005] 1 NZLR 577 at 103-07. Claims relating to poor or severe prison conditions have generally not been successful on the basis of alleged contravention of Art 7 rights or their equivalents: see, for example Taunoa v Attorney-General (2004) 7 HRNZ 379 in relation to a prisoner subjected to a "special behaviour management regime" in a New Zealand prison. This decision also describes the adjective "cruel" in Art 7 and similar provisions as requiring the intentional infliction of severe suffering. In contrast, "degrading" treatment is treatment which induces humiliation and debases a person. In Wainwright v United Kingdom (2007) 44 EHRR 40, a mother and her disabled son claimed that strip searches they were subjected to upon entering a prison as visitors of an inmate constituted degrading treatment contrary to Art 3 of the ECHR. In rejecting that contention, the European Court of Human Rights described the "threshold" for degrading treatment as follows (at [41]):Ill-treatment must attain a minimum level of severity if it is to fall within the scope of Art.3 of the Convention. The assessment of this minimum level of severity is relative; it depends on all the circumstances of the case, such as the duration of the treatment, its physical and mental effects and, in some cases, the sex, age and health of the victim. In considering whether a treatment is "degrading" within the meaning of Art.3, the Court will have regard to whether its object is to humiliate and debase the person concerned and whether, as far as the consequences are concerned, it adversely affected his or her personality in a manner incompatible with Art.3. Though it may be noted that the absence of such a purpose does not conclusively rule out a finding of a violation. Furthermore, the suffering and humiliation must in any event go beyond the inevitable element of suffering or humiliation connected with a given form of legitimate treatment or punishment, as in, for example, measures depriving a person of their liberty.

(Footnotes omitted.) Other cases also serve to illustrate the point at which treatment may become degrading. It must involve more than official conduct which is excessive or disproportionate. For example, excessive use of pepper spray by police was held not to be "degrading" in Falwasser v Attorney-General [2010] NZHC 410; [2010] NZAR 445. Handcuffing a person for a court appearance may not amount to degrading treatment if there is adequate justification: Raninen v Finland [1997] ECHR 102; (1998) 26 EHRR 563. In contrast, having prisoners in a Scottish jail "slop out" human waste was held to be degrading treatment contrary to Art 3 of the ECHR: see Napier v Scottish Ministers [2004] ScotCS 100; [2005] 1 SC 229. Corporal punishment has been held to be degrading treatment when inflicted by police officers as part of a sentence: see Tyrer v United Kingdom[1978] ECHR 2; (1979-80) 2 EHRR 1. The applicants and the subgroup members further rely on two rights, one in Art 9(1) of the ICCPR and one in Art 5(b) of the ICERD, which have similar content. However, these rights are given significantly more emphasis in the claims of the applicants themselves. Article 9(1) of the ICCPR provides:Everyone has the right to liberty and security of person. ***No*** one shall be subjected to arbitrary arrest or detention. ***No*** one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law. Similarly, Art 5(b) of the ICERD ***protects***:The right to security of person and ***protection*** by the State against violence or bodily harm, whether inflicted by government officials or by any individual group or institution. There is ***no*** debate that the first limb of Art 9 requires any deprivation of liberty to adhere to the requirements of the law. In the present proceeding, if the arrests of Mr Wotton and certain members of the subgroup were unlawful, then the Art 9 rights of those individuals have been impaired or nullified. In and of itself, that will not establish a contravention of s 9 of the RDA, but it is important to note that Art 9 requires, first and foremost, adherence to other requirements of the law. However, like other ICCPR rights, Art 9 goes beyond the requirements of the law and confers a freedom from

arbitrary deprivation of liberty. Article 9 was considered by a Full Court of this Court in Minister for Immigration and Multicultural and Indigenous Affairs v Al Masri [2003] FCAFC 70; 126 FCR 54. The Court said at [143]-[146]:In construing Art 9(1) it should first be noted that the right not to be subjected to arbitrary detention is, textually, in addition to the right not to be deprived of liberty except on such grounds and in accordance with such procedure as are established by law. Professor Manfred Nowak, in his authoritative commentary on the ICCPR, The UN Covenant on Civil and Political Rights: CCPR Commentary ... notes this additional limitation and observes that it is not enough for the deprivation of liberty to be provided for by law; the law itself must not be arbitrary.

The history of the second sentence of Art 9(1) supports the conclusion pointed to by the text and supports, as well, a broad view of what constitutes arbitrary detention for the purposes of Art 9. Professor Nowak reviews the travaux pr233;paratoires ... and observes that the prohibition of arbitrariness was adopted as an alternative to an exhaustive listing of all the permissible cases of deprivation of liberty. It was based on an Australian proposal that was seen as highly controversial, and although some delegates were of the view that the word arbitrary ("arbitraries") meant nothing more than unlawful, the majority stressed that its meaning went beyond this and contained elements of injustice, unpredictability, unreasonableness and "unproportionality".

Having considered the history of Art 9 Professor Nowak concludes that "the prohibition of arbitrariness is to be interpreted broadly" and that "[c]ases of deprivation of liberty provided for by law must not be manifestly unproportional, unjust or unpredictable" ... Other commentators have expressed much the same view ...

In applying Art 9 in the performance of its functions under the ICCPR, the Human Rights Committee (the Committee) established under Art 28 has also interpreted the provision broadly and as containing an important element additional to, and beyond, compliance with the law ... The Committee concluded:"The drafting history of article 9, paragraph 1, confirms that "arbitrariness" is not to be equated with "against the law", but must be interpreted more broadly to include elements of inappropriateness, injustice and lack of predictability. This means that remand in custody pursuant to lawful arrest must not only be lawful but reasonable in all the circumstances ... "

(Footnotes omitted). The applicants submit that it may well be the case that there are members of the subgroup who have claims under s 9 which are similar to those made by the applicants, but accept those claims cannot as a matter of fact be determined in this proceeding. The respondents' submissions accepted this position. It is also well-established that Art 5(b) ***protects*** against racially discriminatory arrests and other interferences with personal liberty by government officials, including police officers: see P Thornberry, The International Convention on the Elimination of All Forms of Racial Discrimination (OUP, 2016) p 323. Therefore, if the first limb of s 9(1) is made out in relation to the arrests of Mr Wotton and the relevant members of the subgroup, their Art 5(b) rights have also been impaired or nullified. In the applicants' final submissions, there were references to a number of other sources for the rights asserted, such as Arts 31 and 38 of the Statute of the International Court of Justice, Art 17 of the UDHR and Art 5(d)(v) of the ICERD. These were not pleaded by the applicants, and aside from being briefly mentioned, ***no*** submission was made about their content and how that content might differ (for example) from Art 17 of the ICCPR. I do not consider them further.

Article 17 of the ICCPR: the right not to be subjected to unlawful interference with privacy, family or home The respondents did not dispute the authorities on which the applicants relied concerning the content of the right in Art 17. They accepted, correctly, that for each of the applicants (and, for that matter, the subgroup members) the arrests, entries and searches occurred at places which were the "homes" of the applicants and the subgroup members, and that the family members present fell within the concept of "family" as used in Art 17. The pre-eminent aspect of the Art 17 right is often described as privacy: see, eg, the commentary by Joseph and Castan at [16.01]. Interference with one's home, and family, are seen as aspects of the privacy right. The HRC has described privacy as "the sphere of a person's life in which he or she can freely express his or her identity, be it by entering into relationships with others or alone": see Human Rights Committee, Views: Communication ***No*** 453/1991, 52nd sess, UN Doc CCPR/C/52/D/453/1991 (1994) ('Coeriel v The Netherlands'). Forcible entry and search of an individual's house (in an apparently mistaken raid) has been found by the HRC to be a contravention of the individual's rights under Art 17: see Human Rights Committee, Views: Communication ***No*** 687/1996, 71st sess, UN

Doc CCPR/C/71/D/687/1996 (2001) ('Rojas Garcia v Colombia'). Where conduct such as an entry and search of an individual's home where other family members are present is concerned, it is not difficult to conclude that there has been an interference with the privacy of the individual and of her or his family members. That is the case with the entries and searches by SERT officers of the homes of the applicants and other members of the subgroup. The nature of the evidence which has been adduced in these proceedings, to which I refer elsewhere in these reasons, leaves ***no*** doubt that there was, for the purposes of Art 17, an "interference" with the private and personal lives and homes of the individuals affected. I include in this finding people, such as the witnesses who gave evidence in this proceeding, who were ***no*** more than innocent bystanders, without necessarily being members of the family whose house was entered and searched. In dealing with a similar right under the Charter of Human Rights and Responsibilities Act 2006 (Vic) (s 13), Bell J of the Supreme Court of Victoria (sitting as President of the Victorian Civil and Administrative Tribunal) in Kracke v Mental Health Review Board [2009] VCAT 646; 29 VAR 1 adopted an approach to the subject matter of the right which is consistent with the Committee's approach in General Comment 16. His Honour said (at [620]):The fundamental values which the right to privacy expresses are the physical and psychological integrity, the individual and social identity and the autonomy and inherent dignity of the person. The aspects of Art 17 which generate the most debate are the adjectival aspects: namely, that the interference must be either unlawful or arbitrary. That is also the case in this proceeding. Whether an interference is unlawful is, again, a relatively straightforward assessment because one examines the requirements of (here) Australian law, and Queensland law in particular, relating to the entry and search of private property and the arrest of individuals. The applicants contend that all the arrests undertaken on 27 and 28 November 2004 were unlawful, although there has been in the proceeding particular focus on the arrest of Mr Wotton, as the lead applicant. Similarly, they contend the entries and searches of the houses were unlawful. Arbitrariness, it is well-established, is to be given a different meaning from lawfulness in provisions such as Art 17. The HRC, in its General Comment 16, described its understanding of arbitrariness in the following way, noting that it can include an interference which is lawful:The introduction of the concept of arbitrariness is intended to guarantee that even interference provided for by law should be in accordance with the provisions, aims and objectives of the Covenant and should be, in any event, reasonable in particular circumstances. In Toonen v Australia, the Committee expanded upon the concept of reasonableness in the following way:The Committee interprets the requirements of reasonableness to imply that any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case. In R (Munjaz) v Mersey Care NHS Trust [2005] UKHL 58; [2006] 2 AC 148, a United Kingdom case dealing with ECHR rights (where there is an equivalent right to Art 17, namely Art 8), Lord Bingham's description of what the phrase "in accordance with the law" means also conveys an understanding of what it means to say something is "arbitrary":it is directed to substance and not form. It is intended to ensure that any interference is not random and arbitrary but governed by clear pre-existing rules, and that the circumstances and procedures adopted are predictable and foreseeable by those to whom they are applied. In Charter litigation, the Supreme Court of Victoria has expressed a variety of opinions about the width of the concept of arbitrariness. In Re Director of Housing and Sudi [2010] VCAT 328; 33 VAR 139 (at [63]-[82]), Bell J adopted a meaning which approximates that used in international and comparative human rights cases: namely, that it encompasses a lack of proportionality or justification and objective unreasonableness. This aspect of his Honour's decision was not relevant to the grounds of appeal, nor to the basis on which his Honour's decision was overturned: see Director of Housing v Sudi [2011] VSCA 266; 33 VR 559 at [4]- [5], [43] (Warren CJ), [61]-[63] (Maxwell P) and [283]-[284] (Weinberg JA). At first instance in WBM v Chief Commissioner of Police [2010] VSC 219; 27 VR 469, Kaye J took a narrower approach, preferring to construe the term "arbitrary" as meaning conduct not based on any identifiable criterion, but which stems from an act of caprice or whim: at [51], [56]. On appeal in WBM, the Court of Appeal did not need to determine whether Kaye J's approach was correct. In obiter statements, Warren CJ (with Hansen JA agreeing) expressed a preference for the approach adopted in the United Kingdom in relation to Art 8 of the ECHR, which would include capriciousness and unpredictability, but also unreasonableness, injustice and lack of proportionality to the legitimate aim sought: WBM v Chief Commissioner of Police [2012] VSCA 159; 43 VR 446 at [114]. In Victorian Police Toll Enforcement v Taha [2013] VSCA 37, Tate JA also preferred a meaning which followed that taken in jurisdictions applying human rights jurisprudence: at [198]-[199]. I prefer a construction of arbitrariness which includes, at least, lack of proportionality to the ends sought, and lack of justification. Such a construction gives independent operation to arbitrariness in contrast to unlawfulness. Exercises of statutory power which are capricious or irrational are unlikely, under Australian law, to be lawful: see Minister for Immigration and Citizenship v SZMDS [2010] HCA 16; 240 CLR 611 at [42](Gummow ACJ and Kiefel J), [119]-[120], [130]-[132] (Crennan and

Bell JJ). I would, with respect, adopt the approach of Tate JA in Taha. In construing and applying s 9 of the RDA and its express incorporation of identified human rights, it is preferable for Australian law to give content to those rights – and to concepts such as "arbitrariness" – which is consistent with the content given to them in other jurisdictions.

RESOLUTION OF THE APPLICANTS' CLAIMS

Structure of findings in this part and approach to the evidence The way in which I propose to set out my findings of fact, and my findings about whether or not the impugned conduct, or any part of it, constitutes a contravention of s 9 of the RDA, is to take the four categories of conduct identified by the applicants in their summary of their final submissions. Those categories are:(a) the police conduct in the investigation of Mulrunji's death;

(b) the police conduct during the 'intervening week' after Mulrunji's death and prior to the protests and fires of 26 November 2004;

(c) the emergency declaration issued under the PSP Act;

(d) the deployment of SERT and the arrests, entries and searches. I have set out my findings about the scope of this claim on the pleadings at [99]-[109] above. As I have noted earlier, the pleadings in this case divide the police conduct into small and specific parts. On some issues there can be ***no*** objection to that: for example, the making by DI Webber of the emergency declaration. On other issues, it becomes difficult to understand how it is said a single piece of conduct contravened s 9 of the RDA. Examples of the latter are the allegations that Inspector Richardson "was not adequately briefed on the contents of the Preliminary Autopsy Report", that appointing DI Webber and DS Robinson to the investigation team was "not appropriate"; the failure to electronically record conversations with SS Hurley; and that QPS members "commandeered the local school bus". The fragmentation is then complicated by using the specifically identified conduct as a basis to allege non-compliance with various legal duties, so that the non-compliance itself appears to become an "act". A good example of this is the pleading in [307] of the third further amended statement of claim, which states:In each of:

a. the commandeering of the school bus, the damage to property, and the other conduct pleaded under sub-heading J.2(e) hereof; and

b. the evacuation pleaded under sub-heading J.2(f) hereof;

in contravention of s 10.14 of the Code of Conduct, the QPS officers responsible for those events failed to:

c. demonstrate high standards of professional integrity and honesty;

d. perform any duties associated with their position diligently and to the best of their ability, in a manner that bears the closest ***public*** scrutiny and meets all legislative, Government and Service standards;

e. act with fairness and reasonable compassion;

f. provide conscientious, effective, efficient and courteous service to all those with whom they have official dealings. In particular, members are to be sensitive to the special circumstances and needs surrounding victims of crime;

g. perform their duties impartially and in the best interests of the community of Queensland, without fear or favour; and, or alternatively

h. act in good faith. At [309(f)] the non-compliance with the Code of Conduct is alleged to be an "act" for the purposes of s 9 of the RDA, read with s 3. I deal with the misconception involved in this approach, which was manifest throughout the pleadings, at [725] below. The point to be made here is that the fragmentation in the pleadings also led to similar fragmentation in the evidence, and it was only during final submissions, with some insistence from the Court, that the applicants attempted to draw their allegations together in a way which engaged with the task they faced under s 9 of the RDA. In response, the respondents also engaged directly with that task. This litigation challenges, in identified stages, the performance in an Aboriginal community of a series of policing functions and powers on behalf of the State of Queensland, first in response to the death of an Aboriginal man in custody, and second in response to community reactions to that death and the subsequent police investigation. The grouping of police conduct in broadly chronological stages and by identifiable subject matter, and the measuring of that conduct (as grouped) against s 9, is the only rational approach to a claim such as this. To do otherwise would be a triumph of form over substance and would allow some of the fragmentations and distractions in the pleading to obscure those parts of the pleading, and their development through the evidence and submissions, which were the gravamen of the case made on behalf of the applicants. For reasons similar to those given by Allsop J in Baird, I do not consider such an approach should be taken. To take this approach does not allow the applicants to depart from their pleadings in the sense of raising allegations not reasonably understood to arise from the pleadings. It is rather, as I have said, a question of substance and emphasis.

The applicants' premise of unlawfulness and non-compliance A significant part of the applicants' pleadings is occupied with allegations that the conduct of QPS officers was unlawful. On some occasions the unlawfulness was said to lie in non-compliance with statute. In others, it was non-compliance with orders in the OPM. In still others, it was non-compliance with policies or procedures in the OPM, or with the QPS Code of Conduct. Sometimes non-compliance was used as an alternative description to unlawfulness. I do not accept the direct link the applicants sought to draw between unlawfulness or non-compliance, and contraventions of s 9 of the RDA. The premise which underlies this approach is flawed. Where a claim under s 9 of the RDA identifies as the relevant "act" an exercise of statutory power, the lawfulness, or unlawfulness, of that exercise of statutory power will not necessarily answer the question posed by s 9. Similarly, where there are instructions or procedures given or issued as part of an internal disciplinary and regulatory regime such as that set out in the OPM, non-compliance with instructions or procedures will not necessarily answer the question posed by s 9. Broadly, the respondents are correct in their submission that, where the OPM sets out a policy or procedure and states that it may be departed from if there are "good and sufficient reasons" (in the case of a policy), or states that "generally" an objective should be achieved in a particular way (in the case of a procedure), ***no*** legal duties or requirements are imposed upon police officers in any given circumstance. The respondents are also correct to submit that there was ***no*** onus, legal or evidentiary, on them to justify admitted or proven non-compliance with policies or procedures – for example, by proving there were "good and sufficient reasons" in a particular situation for a particular policy not to be applied. The respondents carried ***no*** such onus. That does not mean, and I understood the respondents to accept as much, that the conduct of police officers is incapable of constituting a "distinction, exclusion, restriction or preference": rather the respondents correctly resist the rigid, legalistic approach to the terms of the OPM taken by the applicants, together with any suggestion of a reversal of the onus of proof. Contrary to the applicants' submissions, the status of unlawfulness or non-compliance, of itself, is not a "distinction, exclusion, restriction or preference" for the purposes of s 9 of the RDA. Instead, focus on lawfulness or compliance in my opinion may confuse the issues for determination, and that is what has tended to occur in the arguments made in this proceeding. An exercise of statutory power which is otherwise lawful may still contravene s 9 if it involves a distinction, exclusion, restriction or preference based on race and has the requisite purpose or effect. Similarly, an act complying with an order under the OPM may still contravene s 9 if it involves a distinction, exclusion, restriction or preference based on race and has the requisite purpose or effect. The status of lawfulness or compliance, or unlawfulness or non-compliance, says nothing about the discriminatory nature of an act. However, there may be circumstances where an act comprising an exercise of statutory power is so obviously beyond jurisdiction that its exercise in those circumstances is probative of the act involving a distinction based on race, rather than being based on a statutory purpose. Further, a statutory power exercised in contravention of s 9 of the RDA might (and I emphasise might) be said to have been based on an improper purpose and so made without jurisdiction, or to have been based on a misunderstanding or misconstruction of the power (it being likely most powers would be construed as not authorising racially discriminatory conduct). Both of those conclusions would arise from the conclusion of a contravention of s 9, not the

other way around. ***No*** contentions of that kind are made in this case. The approach I have taken does not render unlawfulness or non-compliance irrelevant to the questions posed by s 9 of the RDA. I give three examples of where it may be relevant. First, unlawfulness or non-compliance may inform a conclusion whether an act involving a distinction, exclusion, restriction or preference is based on race. Disregard for the law, or disregard for the need to comply with orders or procedures, may provide evidence of the basis for distinction or restriction involved in an act. Disregard for the law may make it easier to infer that basis is race. An example might be the arrest of a young African man as he stands on a street corner using his phone, on a charge of having stolen the phone. Let us assume the police officer is later shown to have had ***no*** basis whatsoever for a reasonable suspicion that the young man had committed the offence of stealing the phone he held. The arrest – the "act" for s 9 purposes – would be unlawful. The status of the act as being unlawful does not answer the question posed by the first limb of s 9(1). However, the reason for the unlawfulness – a complete absence of a reasonable suspicion of the commission of an offence – may be probative of a conclusion that the arrest (act) involving a restriction (the young man loses his liberty while he is taken to the police station to be charged and bailed) was based on race. Thus, the reason for the unlawfulness may assist in supplying the inference for a racial basis. Second, the reasons for the unlawfulness may, in some circumstances, inform the identification of a distinction, exclusion, restriction or preference. For example, an employer pays wages to her Indian employee which are below the level of wages set in the applicable enterprise agreement. The "act" is the payment of wages. The "act" is unlawful, or non-compliant with the enterprise agreement, because the wages paid are below what is stipulated in the agreement. The payment of wages (the act) involves a distinction (paying less wages than the employee is entitled to) and (we assume in this example) is based on the employee being Indian. In this example, the reason for the unlawfulness (payment of wages less than the entitlement set out in the enterprise agreement) is the distinction involved in the act: it is the differential treatment. It is not the status of the payment of wages (the act) as unlawful which is critical, or even relevant, to identifying a contravention of s 9. The third example is in a different category and relates to instances in which unlawfulness may be an element of nullification or impairment of a human right. Relevantly to this proceeding, Art 9(1) of the ICCPR provides that "***no*** one shall be deprived of his liberty except on such grounds and in accordance with such procedure as are established by law". As I note at [700] above, there is ***no*** debate that an unlawful deprivation of liberty, including an unlawful arrest, will nullify or impair the right ***protected*** by Art 9(1). Similarly, Art 17 of the ICCPR provides that "***no*** one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence". Therefore, assuming the first limb of s 9(1) is made out, an unlawful arrest would satisfy the second limb of s 9(1), as would an unlawful interference with privacy. But the unlawfulness of the arrest or the interference is not, of itself, relevant to whether the first limb of s 9(1) is satisfied. For example, police officers use a listening device to monitor conversations in the home of a man suspected of drug trafficking. They do so without lawful authority. The man's rights under Art 17 of the ICCPR are nullified or impaired because the monitoring is unlawful, but there is ***no*** suggestion the officers' conduct involved a distinction based on race. If the sole reason the officers suspected the man of drug trafficking was that he was from Sub-Saharan Africa, their conduct would involve a distinction based on race and the second limb of s 9(1) would be satisfied because of the unlawfulness of using the listening device. In both cases, the man's Art 17 rights are nullified or impaired because in both cases the use of the listening device is unlawful and interferes with his privacy. It is not the unlawfulness of using the listening device that satisfies the first limb of s 9(1) in the second case: it is the fact that the man was singled out for particular treatment based on his race. To focus on the unlawfulness as the "distinction" is apt to obscure the true reason that the first limb of s 9(1) is satisfied. All of these matters are fact and circumstance dependent. Aside from the third example, none flow inevitably from the status of an act as unlawful according to statutory or general law, or as non-complaint with instructions, directions or policies rendered binding on the actor by statute or by contract (to take two examples). The applicants also made a general and repeated contention that every time there was a breach of any "law, police obligation and police procedure" (being the description in the applicants' submissions at [595]) this amounted to a "distinction" for the purposes of s 9 of the RDA. That was said to be the case because the Court was, the applicants submitted, entitled to assume that "laws and QPS obligations and procedures are ordinarily adhered to". That is the effect, in particular, of two of the key paragraphs in the applicants' third further amended statement of claim: [246] and [247]. Those paragraphs allege: In November 2004, ordinarily in Queensland, the Second Respondent and QPS Officers: complied with QPS Policy, Orders and Procedures and all Acts and laws required to be complied with, in the provision of QPS services to residents of Queensland; conducted investigations into deaths in police custody according to QPS Policy, Orders and Procedures; complied with the PSAA, including ss. 2.3 and 2.4(2) of the PSAA; acted in partnership

with the community at large, and provided QPS services as were required under any Act or law or the reasonable expectations of the community or as reasonably sought of officers by members of the community; provided to communities in Queensland which were predominantly made up of members of the racial majority in Queensland: QPS Services and the rendering of help reasonably sought, as are required of officers under any Act or law or the reasonable expectations of those communities; QPS Services which considered the cultural needs of those communities; QPS Services which met the cultural needs of those communities; QPS Services which met the specific cultural and ethnic demographic characteristics of those communities and the needs thereby created. In 2004, residents of Queensland were entitled to expect that the QPS would uphold the law. The applicants' contentions as expressed in these pleadings are too broad and too absolute. While police officers can be expected to do their best to adhere to the requirements of law, policies and procedures, they are, like other human beings, capable of making mistakes, not following requirements as closely as they should, making errors of judgement and making choices in the performance of their duties that may be less than ideal, or making choices that fit the operational circumstances rather than the terms of a policy or procedure. The officers involved in the events on Palm Island know only too well the consequences of these issues, as they have been subject to a number of inquiries and reports in various jurisdictions. In order to involve a "distinction" (or exclusion, restriction or preference) for the purposes of s 9, it is critical to the purpose of s 9 that differential treatment can be identified. The differential treatment will not be found in an aspirational standard set out in orders, policies, codes or procedures. It will not be found by comparing conduct with such an aspirational standard. It will be found in the way a person or persons are treated, in comparison to others. Otherwise, as the respondents submit, a standard of perfection would be imposed in order to avoid contravention of s 9.

The contemporaneous video evidence Before I embark on explaining the conclusions I have reached in each category of conduct impugned by the applicants, it is important to set out in some detail certain key aspects of the contemporaneous video evidence from 2004 which have contributed to the findings I have made. The contemporaneous evidence of the events that took place in mid to late November 2004 consists mostly of video recordings, taken by a variety of individuals and therefore approaching the events from a variety of perspectives. Some show the same events, not only from different vantage points but also as taken by people with widely different interests (for example, a local resident versus a television reporter). Some of this video footage was shown to witnesses during the proceedings, but much of it was not. Sometimes only excerpts were shown. I have watched all of the video footage, several times. I have found it helpful in reaching my conclusions because of its contemporaneity and spontaneity, and because it comes from different sources and so cannot be said to have been taken with only one intention, or from one perspective. ***No*** evidence was adduced, nor any submission made, to suggest the footage was not authentic, nor that it was unrepresentative of the events depicted, or was inaccurate. The first set of footage comprises six videos taken by Stephen Arthur Hume between 22 and 27 November 2004, mostly recording all or parts of the community meetings held in the square near the police station. Mr Hume recorded these videos in his role as a camera man for Channel 10. The footage appears to be uncut, because sometimes interviews stop and restart. The first video begins with some footage of the central area of Palm Island, where the general store, the Council offices, the police station and the courthouse were located. It is raining, and there are not many people about. A few people, adults and children, are filmed walking along the roads. There is footage of the bay, the pier, forklifts doing deliveries, cars driving along the road which runs parallel with the bay, the sea with neighbouring islands in the background and rubbish bins with beer cans in them. An interview with Erykah Kyle, the Mayor at the time, then begins. She speaks about the "outpouring of anger" from the community which occurred the day before, as a reaction to Mulrunji's death. She describes how she needed to do a "lot of encouraging" to have the young men move away from the police. She said "there is so much anger ... [Mulrunji] was a great hunter, he had a lot of mates who go hunting ... he was a great diver, they don't use anything expect their spear guns ... we know him as a healthy young man except for his drinking". She describes his family as a quiet family. It would appear this interview occurred on Tuesday, 23 November 2004. That is clear because Ms Kyle speaks about the resolution at the meeting the day before that SS Hurley leave the island, which he did. Other evidence establishes this occurred on 22 November 2004. Ms Kyle said the feeling was "very high" against SS Hurley, because "he was the sergeant in charge of the whole situation". It appears she may not yet know about SS Hurley's personal involvement in the events leading up to Mulrunji's death. She describes other views of members in the community, stemming from other interactions, that are adverse to SS Hurley. She says that people have heard he had to leave another Aboriginal community and that the other community did not have a good experience

with him. There is ***no*** evidence about this before the Court, but I refer to it to demonstrate what the then leader of the Palm Island community had by way of information, how quickly speculation can become prominent in a tense and difficult situation such as this, and therefore how important it was for the QPS officers on the island to be transparent, which in my opinion, they were not. I should say at this point that Mayor Kyle appears throughout all the video evidence of her as a careful, measured and concerned leader, having some depth of experience with her community. She notes in the interview that she had not seen the level of anger then present "for years ... for a long time". She describes Palm Island as a "placid" community and expresses her shock at the level of anger she was witnessing. I did not take her use of the word "placid" as signalling any ignorance about some of the issues of violence, especially domestic violence, which other evidence revealed as problems within the Palm Island community. Rather, I took her description as one she applied to the general disposition of the community when its members were out and about in ***public***. This has some consistency with the video evidence showing Palm Islanders, as they gathered and moved about in ***public***, having a relaxed demeanour while they went about their daily lives. Ms Kyle describes the large numbers of young men in the community who were unemployed, with low levels of education, and who spent their time hunting and fishing. She acknowledges there was a considerable amount of drinking in the community, as the young men had nothing else to do. She described Mulrunji as a "low key fellow" and said he was not known in the community as a nuisance, and appeared to question the reasons for his arrest. She reports the family's observations that Mulrunji had bruises on his face. She emphasises her concern about the 339 recommendations coming out of the RCIADIC and how, with all these recommendations, nothing was in place to prevent this death. Ms Kyle expresses concerns about the state of the watchhouse, which she says had a "putrid smell". She relates what she had heard about the circumstances of Mulrunji's death, including that he died alone, which does not accord with the objective evidence from the cell video showing Patrick Bramwell in the cell with him. This illustrates again the consequences of the QPS failing to provide any reliable and transparent information to the community, up to and including the Mayor. Mayor Kyle describes there being four ***public*** meetings on 22 November 2004 – she emphasises how devastated all Mulrunji's friends were and says she does not know how the anger will subside. She emphasises the young people were "not listening" yesterday, and there was too much anger to speak rationally to them. She describes this as the first death in custody "for a long long time", and then describes how she lost her own son three years earlier to a death in custody that occurred in another community. She expresses concern for all the Palm Islanders incarcerated in Townsville at this time and what they must be going through. When asked what her advice to the community was, she urges everyone to "get together and focus on this beautiful young man that we lost ... to get past our anger to showing respect for his life and his family". She notes how unusual it was for the young men to be so outspoken and angry, and adds "it wasn't alcohol either" because the canteen was closed. She presents as obviously and genuinely worried about the level of anger. I am satisfied she would have expressed similar views to QPS officers. The video then moves to filming several police officers near a police vehicle, apparently speaking to drivers and locals and issuing tickets. Some local men are then interviewed, speaking about Mulrunji, describing him as "harmless" and a "pretty good bloke". The men are all calm, although they are expressing their unhappiness and frustration with the police. The men state that "everyone" is holding the police responsible for what happened. There is then some footage of the courthouse and the sign above the courthouse, which appears to have cracked glass: it may be that the cameraman assumed the damage was from a rock thrown at the sign, but there is ***no*** particular evidence to determine why that footage was shown. The second video in this series also commences with footage of the Palm Island courthouse, with some damage done to a wall, again I infer from a rock being thrown at it. The footage then focuses on a couple of rocks, perhaps 5 to 6 cm across, lying in the yard in front of the courthouse. Again, one can speculate about the point the cameraman was seeking to make, but that is all. It is common ground there were incidents of rock throwing, mostly at night, directed at the police station: the police logs record an event, for example, at 11 pm on 22 November 2004. As I set out at [755] below, Inspector Richardson had described rock throwing as generally a "common occurrence" on the island. The footage then moves to outside the Palm Island store, where groups of people are sitting down on benches, steps and walks around the store and the square. There are people of mixed ages, many children, and some people are laughing and chatting. The atmosphere is obviously relaxed. The footage then moves to an interview with Inspector Richardson (part of which I have extracted at [306] above). He begins the interview by calling the place "Mornington", as in "Mornington Island", but then corrects himself and the video restarts. He describes the watchhouse as "very basic" but disclaims any connection between the watchhouse and Mulrunji's death. He says he is "not exactly sure" about the cause of death. He describes that "all of a sudden, yesterday" (that is, 22 November 2004), questions were asked about Mulrunji's death. He describes what was being

said as “rumours” and says that “they can ask their questions when they get all the facts”, that is, once the autopsy report had been released. He says:These community problems frequently arise when there’s been a death in custody. ... they are emotional about the deaths ... There’s attacks made and allegations made. The majority of it is unfounded but it’s developed through rumours which are spreading throughout the community. He then says that, in these circumstances, it is “common practice” to take an officer involved out of the community. He also states that “The investigations at this stage have shown ***no*** improper police practice”, which is clearly not an accurate statement for him to make by 23 November 2004. ***No*** explanation was given in the respondents’ evidence about why Inspector Richardson would make such an inaccurate statement. One obvious explanation is that all of the Aboriginal witness’s allegations had been disregarded. He describes the rock throwing as “concerning”, but says that he understands it to be a “common occurrence” on the island, continuing:The government department houses are frequently pelted with rocks mainly by a lot of juveniles, that occurs at night time and unfortunately appears to be a way of life on Palm Island. This evidence is significant. Inspector Richardson himself is recognising that rock throwing at ***public*** buildings – antisocial and aberrant as it may be – was a “common occurrence” on Palm Island. Yet it was presented at the time of these events, and was again presented in this proceeding, as something unusual, terribly frightening, and indicating high levels of risk and violence. The footage then moves to various local people speaking, with a microphone, at a meeting. The date and time of this is unclear. The first speaker is talking about other allegations against SS Hurley and questioning why SS Hurley was allowed to be “in charge of us”. The speaker alleged SS Hurley had spoken to 16-year-olds by saying “Don’t talk smart, I’ll pig slap you”. I refer to this not to express a view about its truth but as an example of what was being said about SS Hurley, and the high level of dissatisfaction with the QPS and SS Hurley in particular. I do not accept that these sentiments were unknown to QPS officers during the first few days of their investigation into Mulrunji’s death. The footage of the crowd again shows a mixture of ages, with many children and babies, and a number of women obviously very concerned and listening intently. A number of young people are also listening intently to what was being said. There is applause when the speaker finishes, but it is a peaceful gathering. Each speaker emphasises the RCIADIC, the recommendations made and the failures to implement them, and expresses frustration that another Aboriginal person has died in custody. The speakers are male and female, mostly middle-aged or a little older. They speak with eloquence and passion. I estimate there to be perhaps 100 people sitting around and listening. Each of these speakers is rational, understandably outraged, and speaking about issues of policy, as well as speaking of the community’s grief at having lost one of their own. Speakers say that nobody is listening to Aboriginal people. At the end of the speeches, Mayor Kyle calls for a resolution that the police minister should come to Palm Island. She speaks, through tears, about her own family’s experience of a death in custody. She says:How many more of our people are going to die in custody, where there is much money spent to keep Aboriginal people locked away. They talk about programs. What programs ... this is the place where we want the programs ... programs we know will work for our people. She calls for a “full investigation” and for the police to “answer” and “respond”, implying that officers should not rely on any privilege against self-incrimination. Among the speakers is Roy Bramwell, who relates what he saw in the police station when Mulrunji was brought in. As he speaks, a man and a woman stand behind him with a poster calling to stop Aboriginal deaths in custody. Bramwell calls for Hurley to go to jail, and a man in the crowd calls out to similar effect. A woman then speaks about how Palm Islanders needed to “stand up” for all Aboriginal people and “stand up” about how police are working in their community. She speaks about how police “don’t even know us as a person or as a people ... how we think ... how our culture is ... how we respect death ... they don’t know us, they’re just talking about us”. She called for more Indigenous police officers and liaison officers. She called for the community to come together. The reporter then gives a speech to camera about tensions being very high in the community, through several takes. Each time he does a take, the emphasis on “tensions being very high” increases in what he says. As he says this, adults, children and dogs can be seen wandering about behind him near the store. His increasingly emotive description does not accord with the tenor of the meeting. The third video in this series begins with an aerial view over the island, and then moves to another community meeting. In his evidence, Mr Wotton confirmed that the events in the video took place on the morning of Thursday, 25 November 2004. Mrs Agnes Wotton is the first speaker at this meeting. She speaks strongly about Mulrunji’s death, asking “what are they doing”, and speaks about her concerns there would be a cover-up. She asks if the police were contributing to Mulrunji’s funeral expenses, since he died in their custody. In this video a few people can be heard calling out in the background. Mayor Kyle then speaks about how officers from government departments were being “held back” from coming to Palm Island “because of the violence”, and then began speaking about how Palm Islanders should start doing things for themselves and not relying on government.

"They're not staying away to show respect to us ... they're staying away because we are violent". It is difficult to understand what Mayor Kyle meant by this comment, but on balance it seems to me she was saying the community was being unjustly stereotyped as violent. Again, in this footage, family groups with a number of children can be seen sitting around, talking, going about their business at the store and in their cars. An interview then commences with Tracey Twaddle, Mulrunji's partner, and Elizabeth Doomadgee, Mulrunji's sister. It is still Thursday, 25 November 2004. They are standing outside the store. Both women speak with great sadness and considerable disbelief, but clearly and solemnly about their need to know what has happened. They speak about not being able to come to terms with why he died: "How can it be after just an hour ... he wasn't sick or seriously ill ... we just want to know what happened". Both describe themselves as being angry, but they are calm and solemn when doing so. A young child is standing with them. Ms Twaddle recounts how, when she was told Mulrunji had a black eye, and swelling around his eye, she stated that he had not fought with anyone that morning. Elizabeth Doomadgee describes Mulrunji as a hunting man, very fit, and just a "happy drunk". Both women speak again about how black deaths in custody must stop. Elizabeth Doomadgee says "we all want to know why ... why is the question". I should interpolate at this point that there is in evidence video footage of Mulrunji after he died. It is plain from that footage that his right eye and cheek were quite swollen. As Ms Twaddle and Ms Doomadgee speak, Aboriginal and non-Aboriginal people are walking around in the background. Children are filmed playing in the puddles; people are filmed in the store, and sitting outside. I note these details only to illustrate the apparent ongoing normality of life on Palm Island despite the subject matter of the women's interview. Ms Twaddle states how glad she is that people had come down to the square, spoken at the meeting and "stood up". The extended Doomadgee family are filmed – children, young people and older people. Concern is expressed again about the length of time it is taking to get the autopsy report and for the QPS to tell the family, and the community, what happened. There is then another interview with Inspector Richardson, who describes the situation as "pretty calm, but with an air of tenseness", although on the second take he drops the "pretty calm" part. There are then further takes, and each time Inspector Richardson emphasises tension and apprehension more strongly, moving away from the first take where he described the situation as "pretty calm". He describes rocks being thrown on the roofs of the police station and the barracks, and at a police car. This time he does not repeat what he said in the earlier interview about rock throwing being a common occurrence on Palm Island prior to Mulrunji's death. He says "most of the damage is being caused by juveniles ... ***no*** doubt they have got a bit of aggression in them" and "we'll just have to see what happens ... take it as it comes". He agrees with the interviewer it might be "normal" for Palm Island, and observes there "always seems to be some aggression" on the island. He speaks of local men working with the police on night patrols. He is asked what he said to the community and he says "they should sit back, wait for the report to come out, see what is in the report ... nothing's going to come out of this overnight ... don't go listening to rumours ... we need the facts to come out ... listen to people who have the ability to sensibly reason". In light of the facts that emerged during the police investigation, Inspector Richardson's comments demonstrate considerable partiality. His comments emphasise antisocial behaviour of local people and diminish the seriousness of what he knew by then had been alleged about SS Hurley's conduct. That of course would not have been apparent to a listener at the time he gave the interview. There is then some footage shown of damage to the police barracks, apparently to confirm what Inspector Richardson had just said. The fourth video in the series begins with an idyllic frame of the jetty on Palm Island and some general footage in the early evening of the courthouse and police station, with officers walking around. The footage then shows officers preparing to go out on night patrols. They all appear to be armed. Officers are shown standing around and talking. The atmosphere seems fairly casual. The video then cuts to a daytime scene, which appears to be the following day. This is the footage of Mayor Kyle's description of the autopsy results. A small number of people (perhaps 50) are filmed seated around the square, again with a predominance of women and children visible, but also a number of elderly people. The number of children present may be explained by Mr Koch's evidence that the meeting was taking place in the school lunch break. Bwgcolman school is physically located very close to the mall area. Once more, there are ***no*** signs of unrest: people are sitting and talking, gathered in small groups, others going about their daily business. Mayor Kyle emerges from the Council offices and tells the people that she is waiting for a member of Mulrunji's family to arrive. Various people are shown going into and out of the Council offices. The footage then ends. The fifth and final video is the fuller footage of the same meeting, where Mayor Kyle tells the community about the autopsy results. I have dealt with these events in the general narrative at [318] above. The point to emphasise is that, while the information that Mayor Kyle conveys is serious, there is nothing aggressive or agitated in the reaction of the people listening. Police helicopters can be heard and seen, but local people are sitting quietly, talking, watching. Many other locals can be seen coming in and

out of the store, walking past those sitting around. When Mayor Kyle starts to speak, she asks for a moment of silence for Mulrunji, which is respectfully observed by the whole crowd. The size of the crowd shown on this footage is larger than the fourth video, and is likely to be around 100 to 150 people. The moment's silence is one of the many points in this video evidence which is incompatible with the picture of the prevailing atmosphere on Palm Island portrayed by officers such as Inspector Richardson at the time, and by the QPS witnesses in this proceeding. Ms Kyle informs the meeting that she has spoken to the State Coroner and has been told she could share whatever was considered appropriate from the autopsy report to meet the needs of the community. QPS officers are noticeably absent. I do not understand why QPS officers were not making this announcement, or at least standing by the side of the Mayor. There was ***no*** evidence before me that the Mayor was given any assistance by QPS officers in compiling her remarks. As I have found at [318] above, what Mayor Kyle said was neither a complete nor contextually accurate summary of the autopsy findings, and it is clear the use of the word "accident" to describe what caused Mulrunji's severe injuries generated some shock and disbelief amongst community members. ***No*** QPS officer spoke, for example, to reassure the meeting that given the nature of Mulrunji's injuries the cause of those injuries would be vigorously and independently investigated. The circumstances called for such reassurance, at the very least. After Mayor Kyle finishes, a number of individuals take the microphone and express their views. First is David Bulsey. He says "put him in prison", referring to SS Hurley. Some people are calling out "that's not an accident" and "who caused the accident". Mr Bulsey can be heard saying "if I did something like this I'd be put in prison". Mr Wotton then says that "things gunna burn", a statement which seems to have been part of the reason he was identified as the ringleader of those who participated in the protests and fires. Mr Bulsey claims the police were inciting a riot and that they wanted a riot, asking "why should he [SS Hurley] get away with fucking murder". Both Mr Bulsey and Mr Wotton are speaking loudly. There is ***no*** doubt that they are angry. However, the content of what they are saying is about their sense of injustice: Mr Bulsey says that when he did the wrong thing he went to prison and that is all he wants to see for SS Hurley. He says:If you people don't stand up it's gunna happen again and again and again. If you people don't stand up its gunna happen again, maybe your children. PLO Bengaroo is accused of being an accessory to murder. Mr Bulsey asks why the police would not come out and give more answers. Some people in the crowd are audibly and visibly angry. One can be heard saying "we're not under the Act, we're all young generation now, you mob of cunts". Others using similar language can be heard. The footage then moves to the back of the police watchhouse where Mulrunji had been taken from the police vehicle. Men and women are yelling out; rocks or other items can be heard landing on the police buildings. There is then footage of Mr Wotton striding angrily into the police yard with a shovel, and being physically restrained and taken back out of the yard by Mr Bulsey. The footage then moves to the island airport, with various people arriving. DI Webber is shown at the airport. During this footage, an employee of the airline is told, by telephone, that the police station is on fire and people have surrounded the barracks. The employee is asked if he is thinking of getting off the island. He replies, "dunno, haven't had any problems before ... wouldn't like to, ***no*** ... depends how it turns out". He then says he might lock up the airport. He does not seem particularly concerned. The footage then shows a plane landing at the airport, and a group of people taking off in a plane. This is the plane Inspector Dini described in his evidence that he decided to let go, despite the Notice to Airmen (NOTAM) that was in place. I address the NOTAM in more detail at [1105] below. Some aerial footage then appears, showing smoke coming from the central part of Palm Island. The video concludes with some footage from Townsville airport of a number of police officers preparing to leave for the island. There is another video in evidence which also shows Mayor Kyle describing the autopsy results from another angle, and also shows Mr Wotton entering the yard of the police station with a shovel. It adds nothing of relevance to the description I have given above. Other video footage in evidence was taken by Mr Hal Walsh, who had previously worked for the Palm Island Council but in November 2004 was employed by Queensland Corrective Services. It is footage of some of the events on 26 November 2004. Several female voices can be heard from time to time throughout the footage. None of these people were identified in the evidence. The footage commences with a scene from the mall area, and shows, from a different angle, the speech by Mayor Kyle about the autopsy report, and the subsequent speeches by David Bulsey and Lex Wotton. The footage then cuts straight to scenes of smoke coming from the police station, and the sound of a fire alarm. About 20 people can be seen walking past, heading in various directions, some with their shopping bags. A person on a bike can be seen standing under a tree. The footage then shows flames as the police station is engulfed. By this stage there are several dozen people standing around watching. The sirens of the fire brigade can be heard, and then a fire truck can be seen arriving. The fire officers who get out of the truck appear to be Aboriginal, and I infer they may be local people. A local woman goes to help two of them. There is a heated shouting exchange between this woman and a

group of mostly men further away from the station. It is not possible to hear what is being said. However, it appears the men are angry that local people are assisting in putting the fire out. Cheers can be heard as the station burns. After ***no*** more than a few minutes, the crowd quietens and people continue to stand around, or sit. At this stage ***no*** more than a few dozen people are present. A group of about six local people are assisting to put the fire out. SS Hurley's house is then shown surrounded by smoke. The camera turns to face up to Reservoir Ridge, behind the main settlement, where a group of people can be seen although they are too far away to make out any individuals. Voices on the video identify these people as "the cops". I infer this is SS Dini and the other police officers who had not long before arrived on the island. Reservoir Ridge is located in between the airport and the main settlement. Inspector Dini gave evidence about standing up on Reservoir Ridge looking down towards the main settlement and watching the fires. The camera turns back to the fires. Local people, both young and middle aged, can then be seen pulling fire hoses along the road towards SS Hurley's house, which is now completely on fire. The footage then shifts to the front of the hospital, which in distance terms would be ***no*** more than approximately 100 m away from the police station and SS Hurley's house. I interpolate here that the events I describe at [792] below (from the footage taken by Constable Robertson) have occurred by the time this footage records officers standing outside the hospital. A female voice on the video states that "cops are having to wait at the hospital, running from the barracks, hiding out down here". Helicopters can be seen circling. There are approximately 100 people visible, including police. Some of the officers appear to be talking to some of the locals. Most local people are simply watching, there is some noise but it is mostly people talking and calling out. The footage then shows the line-up of officers outside the hospital, and a Rottweiler police dog aggressively barking. The crowd seem to be winding the dog up. Inspector Richardson and SS Whyte can be seen speaking to Mr Wotton. The footage then moves to some scenes at the airport of more police officers arriving, and also a helicopter landing near the hospital. A number of patients can be seen being evacuated from the hospital to the helicopter. More helicopters can be seen in the air. The remnants of the burnt-out police station are also shown, as well as SS Hurley's house. Again, as with all the footage, there are numerous local people simply standing around and there are still a large number of children visible. Some of the children are playing in the middle of what is going on around them, others are simply standing around watching. The next piece of footage is also from 26 November 2004. It was taken by Nicky Wills, about whom there is little evidence before the Court but who appears from the footage to have been a member of the local community. The footage begins with similar scenes of helicopters flying around; Ms Wills states "here is the burnt-out police station ... they've just flown in all these emergency people"; she then identifies "Uncle Molly" in the footage. This footage is clearly taken later in the day because the fire is mostly out and the burned out remains of the two buildings are visible. Ms Wills states "they've declared a state of martial law here on the island and they've flown in extra coppers, there's one there, and apparently they've all been told to shoot if there's any more harassment". The footage then shows a middle-aged woman and a young girl on the street, and a number of local people (perhaps 50 or so) sitting in the mall. Ms Wills then interviews some young girls in the mall, who express views about Mulrunji's death, including that "if he was white it wouldn't have happened to him". Mrs Agnes Wotton, who is sitting in the mall with some other women, is then asked for her views. Mrs Wotton says "we put our heart and soul into what happened last week ... and it came out ... knew something was going to give" and expresses the hope that the world will take notice. A group of men, including Mr Wotton, are then interviewed, saying the police could have prevented what happened. Negative views about the autopsy result are expressed by several of them. They assert that the kind of injuries Mulrunji suffered could not have been self-inflicted or accidental. Complaints about the police are also made. The footage then moves to a helicopter which had landed outside the front of the hospital, apparently with more police officers coming in. The buzzing of helicopters appears constant. Again, as Ms Wills moves around, there are still people standing, watching and walking around. Some footage of a Channel 7 news item about the day's events is then recorded, including interviews with police officers and the then Premier of Queensland Peter Beattie. Darren Curtis, the Channel 7 news reporter on the island, reports that it appears everything will now stay calm, that officers are patrolling on foot and taking time to stop and talk to local people, and that most police officers are now unarmed. He reports tension between local people about whether the buildings should have been burned down. The footage then shows interviews with more people sitting around in the mall area – again, the atmosphere is relaxed, although it is clear people are most concerned about the level of police presence. One elderly man remarks on how angry the young people were, how things could have been handled better. The footage then moves to the Council chambers, where Mayor Kyle can be seen talking to a group of approximately eight to 10 people, mostly middle-aged to older women, discussing whether anything could have been done to stop the buildings being burned down. There is also discussion about past injustices, including how

their people came to be put on Palm Island. The group then discusses the presence of the police, the occupation of the school by police, and the hospital. The group discusses their view that "blackfellas" are not able to sit in the back trays of vehicles, but people have seen "white coppers" doing just that. The footage then shows PSRT officers, in full riot gear, standing around the Council chambers. Ms Wills says this is a Sunday, so it must be Sunday, 28 November 2004. This is after the arrests, entries and searches and after the removal of those who had been arrested from the island. Ms Wills states that the Premier (Mr Beattie) has been in the Council chambers for over three hours. The footage then shows Mr Beattie emerging with Mayor Kyle and a large group of media. Groups of people are standing around shaking hands. The Premier then speaks, paying his respects to Mulrunji, describing how he sat down with the Council and the elders and how the important thing was to "move forward". He states that he wants to "get some good" out of what has happened: to re-establish law and order, to improve services on the island, to rebuild the police station and courthouse, to finalise an alcohol management plan, and to establish new governance arrangements to align the Palm Island Council with other local council structures as they operate around Queensland. The Premier emphasises that it is a time for mourning, and then the community must move forward. He finishes with assuring the crowd that the CMC will thoroughly investigate what had happened in relation to Mulrunji's death and urges people to respect the outcome of that process. The footage concludes with scenes at the Palm Island cemetery and the graves of Ms Wills' family. There is another video in evidence taken, apparently, by a local person. It also shows the aftermath of the fires, including burnt out buildings. It shows some of the people who are present in the mall areas, sitting around talking. The air is smoky. There is a young boy on a horse. There are people with bicycles, and children. There is some footage of children playing in the street with what looks like building material. Helicopters can be heard and seen in the air. The footage shows the scene outside the hospital, with a number of police officers standing around a helicopter which has landed. This footage shows a little more clearly groups of people standing approximately 50 m away from the hospital, about 100 people, in small to medium sized groups. They are talking, or watching. A woman with a baby on her hip walks into the hospital. In none of the video evidence to which I have referred have I seen a single person with any spears or sticks. One young boy, perhaps around 10 to 12 years old, could be seen outside the hospital with a small rock in his hand, which fitted inside the palm of his hand. Otherwise I saw ***no*** people with rocks. Some noises could be heard when the fire engine first arrived at the fire, which may well have been the fire engine being hit with rocks, but it is difficult to know. Overwhelmingly, the contemporaneous video footage shows groups of local people – never in the region of 200 to 300, in my opinion – sitting or standing around, talking and watching. There are large numbers of children and elderly people present. Some people appear simply to be going about their daily business without paying much attention to what is happening around them. Others are clearly watching. In my opinion all of this evidence shows a community concerned, frustrated, and at times angry, but it shows ***no*** indication of continuing risk of further property damage, and certainly ***no*** risk of physical violence of the kind which some of the contemporary media reporting and police commentary, and later descriptions of these events, suggested was likely. The video evidence also establishes that, as the applicants submitted, there was general suspicion amongst a significant number of people in the Palm Island community about the circumstances of Mulrunji's death, SS Hurley's possible role in it, and what other white police officers might be doing to 'cover-up' what had happened. Contrary to the respondents' submissions, the evidence on this issue is not limited to Mr Wotton, Mrs Agnes Wotton, Mr Blackman Senior and Ms Sailor, although each of those witnesses gave specific evidence to this effect, and linked their evidence to their knowledge of and reactions to the RCIADIC. The video footage from the community meetings in the week after Mulrunji's death is clear evidence of more widespread community suspicion and concern. Many of the individuals who are interviewed express concerns of this kind. The sense of anxiety, anger and mistrust is palpable and, as the applicants submit, there is a sense of outrage and frustration about the situation. One only has to watch and listen to Mayor Kyle's speech to those assembled at the community meeting about her own family's experiences to hear the trembling in her voice, and to hear the audible responses from the crowd, to get some sense of the level of concern. Finally, and in my opinion in stark contrast to the other video evidence, I turn to the video taken by Constable Robertson, a police officer stationed on Palm Island on 26 November 2004. There is also a transcript of what Constable Robertson and others say during this video recording, and that transcript was in evidence before me. Constable Robertson was not called to give evidence. The footage begins with a view of the crowd gathered in the mall, just after Mayor Kyle had told the people gathered there about the autopsy report. David Bulsey's voice can be heard, giving the speech to which I have earlier referred. Constable Robertson says "they've just been told how Doomadgee died ... riots with the police riots with the police." The footage then shows a group of local people walking towards the police barracks. I estimate in the footage one can see approximately 50 people. Constable

Robertson can be heard to say “we just got the call to kit up ... here we go ... game’s on ... we’re in trouble ... we’re in trouble”. He can then be heard to say “we’re on our way ... wait for me” as he moves with the camera still recording. Some commotion is then apparent as he and other officers appear to be looking for and putting on their gear, including finding their weapons. Constable Robertson can be heard to say, in a highly agitated voice:They said to get down there straight away. Hang on, we’ve all got to go down at once. Fuck. Fuck you’ve got to take your Glock they’re chuckin’ fuckin’ fair dinkum into the Station. They’ve just smashed all the windows. All right hang on mate, hang on, oh fuck. Wait up mate, wait up. Fuck. I interpolate here that a “Glock” refers to a handgun. The sound of smashing windows and rocks pelting the building can be heard. Footage is shown of some of the crowd outside. Again about 50 to 75 people are visible, some are shouting and calling out, and are gathered near the entrance to the police station. The time stamp on the video then moves from 1.03 pm to 1.30 pm on 26 November 2004. The camera moves around quickly and shakily and the footage is difficult to see clearly, but officers can be seen moving about from one direction to another. SS Whyte can be seen moving quickly across the frame of the camera. Constable Robertson then says:Fuck. We’re in trouble. Where are we holding them down now?

[another officer] Fucked if I know.226;128;

Watch out, watch out, pull back, pull back, back, back, watch em come over the roof

[another officer] Have you got a holster?226;128;

Yeah I’ve got a big pocket, chuck one in my pocket.

[another officer] Give us those spare ones mate. Constable Robertson can be heard puffing while he is speaking. Ten to 12 police officers can be seen moving around the yard. The camera then focuses on the back gates to the barracks, facing onto Mango Avenue. Constable Robertson also shows some footage of the Ruger Mini-14 rifle. From time to time, noises can be heard, it may be rocks or other items being thrown, it is difficult to tell. Constable Robertson gives the following narrative.I’ve got the mini 14. ... We’ve been chucked out of the Station, it’s been over run and we’ve had to move back to the barracks, we’ve reached barracks, we’ve reached the station, I’ve had to grab, we have to grab all the ammunition, all guns so they couldn’t get any and we’ve got nowhere to run, we’ve got nowhere to run. I don’t want to go in there, I don’t know where to go. Board up these windows. Watch out. They’re at Mango Ave, they’re at Mango Ave. Is everyone here? All right update, we’ve all been chucked out of the Station, they’ve now set it on fire, I have two Glocks and a semi automatic rifle on me. A mini 14 and we are in trouble, we are in fair dinkum trouble. They’ve just broken through the Compound, into the barracks, we have only had one garage shed, they have now the police vehicles, the police vehicles, they’ve got the vehicles. They have now broken through the Compound and we’re in trouble, dead set trouble. Now the last barracks we got nowhere to hide and we’re out of options. They’ve set fire to the Station, they’ve now set fire to the front barracks and we’re at the last barracks we are now surrounded. They’re upstairs now and we are downstairs in the garage, we are fully loaded. I’ve only got 30 rounds, I’ve got two Glocks and we are outnumbered. ... We’re in trouble, we’re in trouble, we’ve got nowhere to go now. They have both, there is only two police vehicles, they have both police vehicles, they are on fire I think. If we go anywhere our only option is to run, is to run and try and they’re trying to get through. The footage then moves back to the double metal gates at the rear of the barracks, opening onto Mango Avenue. These gates are approximately seven feet high. A small group of local people can be seen on the other side of the gates, and they can be seen throwing items, possibly rocks. Constable Robertson then calls out:Heads up heads up, heads up. He then says, apparently for the benefit of the recording rather than to his colleagues:The only option we have now is to run to the hospital which is about 100 metres away and there is a bus there to try and get back to the airport which we will not make, we will not make that airport. We will not make, we will not make that hospital. The only, the only option we have now is to open fire, is to open fire, that is all we have now, we’re in dead set trouble. There is three to four hundred people out there. The footage shows nowhere near 300 to 400 people. It may show about 10 to 20 people. The sounds one can hear in the background do not indicate a group of people any larger than 10 to 20 people. They mostly appear to be young men or teenagers. Mr Wotton’s estimate in evidence was that there were ***no*** more than 30 people. I agree that would be an upper limit. As I noted earlier,

footage of people at the mall showed around 50 to 100 people. It is unclear from where Constable Robertson could possibly get a figure of 300 to 400 people. Constable Robertson then records the following words:Jesus. Stephie I love ya. While not wishing to diminish the seriousness of the situation, and accepting that viewing something like this many years after the event on a video does not approach any similarity with being present in that moment, it is difficult to understand why Constable Robertson had the level of fear he represented in the video. One possibility is that there was some over-dramatisation by him while he was filming. He was not called as a witness so none of these matters could be explored with him. It will be apparent from the findings I have made about what can be seen in the video that I am not prepared to take Constable Robertson's recorded words at face value as an accurate depiction of what was occurring. SS Whyte can then be seen in the footage going out to speak to the young people on the other side of the gates. Again, the footage shows ***no*** more than 10 to 20 people. Constable Robertson can be heard calling out "Watch out Rodg watch out". SS Whyte speaks to the locals on the other side of the fence, and there is much yelling from them at him. He retreats, apparently because more rocks have been thrown. Constable Robertson yells out and appears to become quite unhinged. He states:We've got ***no*** option we gunna have, we gunna have to open fire. My impression is that Constable Robertson is not, at this point, over-dramatising about what he believed might need to occur. He is quite serious when he says that he considers police officers may "have to" open fire on an unarmed group of what appears to be approximately 20 Aboriginal people. The video then shows SS Whyte going out again to speak to the group on the other side of the fence. That he does so sits somewhat incongruously with what Constable Robertson has just said. Mr Wotton can be seen at the front of the group near the gates. While SS Whyte is out speaking to the group, Constable Robertson then continues, in an agitated voice:We have got nowhere to go, we've informed VKR on the mainland, we're in trouble. Even if we do get extra cops over to the airport we cannot go and pick them up and there is ***no*** vehicle to go get them. There is about 14 cops, there is a bus at the hospital but someone is gunna have to run to the hospital. You are not going to get it in, you're not gunna get that fuckin' bus here. As SS Whyte is speaking to the group, one local person can be heard to say "we're not going to hurt any individual". There appears now to be something more resembling a conversation between SS Whyte and several individuals in the group at this point. The footage then goes back to scenes of smoke, and Constable Robertson continues with his monologue. From what he says about being given one hour, I take this to be a reference to the conversation Mr Wotton had with SS Whyte immediately before, when Mr Wotton was standing behind the metal gates. Constable Robertson then says, in a tone inflected with some fear and frustration:There is Palm Island Police Station well on fire, well alight, that mini 14 I've got, I didn't get any bloody ammunition for it, I thought it was in the case that I was carrying. They've given us one hour to get off the Island. Spoken to Assistant Commissioner Roy Wall who has directed us that we are not to leave the Island, we are not to leave the Island. They're flying in only 20 more officers they'll be here in the next 20 hours [sic]. Only 20 more officers to come and help us and they have informed the Army, as well. The Army are on the way as well. So we're surrounded in our Compound and they've given us an hour to get off the Island however, we're not leaving. The footage shows the police officers grouped together, preparing to move, it seems, to the hospital. SS Whyte then speaks to the assembled officers. Some of what he says has been referred to elsewhere in these reasons. However, I consider it important to reproduce all of what he says. The transcript of Constable Robertson's video footage which is in evidence inexplicably does not contain all of what SS Whyte says. I have listened to the video several times and I find this is what SS Whyte says at this juncture:I have a couple of officers here just looking out there, a couple of officers to the side there, a couple of officers to there. Now we've all got to work together here, we don't do anything stupid. Mr Richardson is the boss and he'll give instructions if you need to utilise your firearm. I know he has given instructions before. I'd be very careful with the firearm. It may the case that you will have to discharge a few fuckin' rounds in the air, to scare the shit out of these cunts. I don't know about you but that's fuckin', that's just ridiculous, there's not one fuckin' court in the land or one cunt anywhere in Australia's gunna fuckin' put up with it when they see this shit. And when I, we were talking and carrying on they were on camera, there was a commercial tv station taking all that footage. A small explosion can then be heard and the officers comment that it must be a gas bottle going off in the fire. The footage then cuts to footage of the officers walking down Mango Avenue to the hospital in a group. There do not appear to be any local people around at all. The footage then cuts again to a view from the line-up of police officers outside the hospital, looking out towards the water, and the local people who are standing around. By the time stamp on the video, this is 16 minutes after the officers were walking down Mango Avenue. SS Whyte and Inspector Richardson can be seen talking to Mr Wotton and a number of other men. Erykah Kyle can also be seen in this footage standing near Mr Wotton. A few men are shouting out. My estimate is that about 50 to 100 local people can be seen in this footage. Again, none of these

people, as far as I can see, are holding spears or sticks, or indeed holding anything at all. Most of the officers, in contrast, are armed. As I have found, Constable Robertson's video footage, and his commentary, presents a very different perspective on the sequence of events which lasted, perhaps, an hour or so. His version is inflammatory, heightened, almost hysterical in parts. The references to the likelihood that officers would start shooting people is disturbing, to say the least. All the local people who were visible were unarmed, except for some who had thrown rocks. It is not possible from the footage to see anywhere near the numbers of people that Constable Robertson described, and that some police witnesses also described in their evidence in this proceeding. There are several interpretations which could be placed on the different impressions gained from the media and local footage, and the footage shot by Constable Robertson. Of course, the latter is the only one which shows the way the police officers were surrounded and had rocks thrown at them, and that must be taken into account. My finding is that there was real fear amongst the officers, and certainly Constable Robertson displayed that. He also displayed some exaggeration and over-dramatisation in what he said and how he presented what was happening, but it is difficult to know if that was conscious, or simply stemmed from his subjective fear. The objective basis for the level of fear he showed was harder to discern. I have found that he was speaking seriously and not over-dramatising when he suggested police offices may have to open fire on local people. That statement is extremely concerning. The way SS Whyte conducted himself in speaking to the group of local people on the other side of the gates indicated the situation was well capable of being brought under control and indeed that is exactly what SS Whyte did, with (it would seem) some co-operation from Mr Wotton and the other local people. In my opinion, it is likely that some of the fear arose from the fact that this was a group of white police officers, surrounded by a group of angry Aboriginal people. There was, I have ***no*** doubt, a racial element to it. So much comes across in Constable Robertson's video, and what he is recorded as saying. It also came across in Inspector Whyte's oral evidence in this proceeding. Inspector Whyte's evidence was, as I have found, often exaggerated. The explanation for the exaggeration is in part his personality and disposition but, in my opinion, in part because he was describing confrontations with groups of people who were not white, not like him and whom he did not really understand. For example, he said:It was a very precarious situation. There were other Aboriginal people in the area, hundreds of people. Very, very fearful of my own life, safety and welfare at that point in time but I needed to communicate with him to at least allay my own fears that I was going to get a plumber's Stillson across the head.

...

It wasn't something that was minor. I've been involved in riots on the communities in the past. This was something else. I guess, with experience, it's – it's the case that you need to make sure that you have another conversation – or, as best you can, with the identified leader, and I had ***no*** doubt Mr Wotton was the leader. He was the man – ***no*** doubt whatsoever – and the precarious situation that we were in is that what if they – that's the people that were throwing rocks and stuff – entered into that barracks. Now, the police need to know about use of firearms, and lethal force. How horrible – how bloody awful would it have been if police had to use lethal force to ***protect*** their own lives? Primarily to mitigate against that, I saw it upon myself that I needed to talk to Mr Wotton, and communicate and say, "Hey, listen. This can't go on. You know, fuck off. This – you know, this cannot go on.

...

I got pelted with rocks, and I went out unarmed, hands like this, and there were hundreds of people on the other side of Mango Avenue throwing rocks at me, so I went back into cover - - - ***No*** submission was made by either party about whether the reactions of these two police officers were typical or atypical of the reactions of the other officers present. The video footage of the officers lined up outside the hospital shows ***no*** officers visibly distressed or agitated, but there is simply insufficient evidence to make any findings about how fearful any other officers were.

First category: the police conduct in the investigation of Mulrunji's death The way I have structured this part of my reasons is to set out my findings on the impugned conduct and my conclusions whether it involved a distinction, exclusion, restriction or preference based on race. In the next section of my reasons (starting at [1463] below), I then consider whether any acts involving distinctions, exclusions, restrictions or preferences based on race, which I

have found proven, had the purpose or effect required by s 9: that is, whether they had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of any human right or fundamental freedom. For those acts which I do not accept involved a distinction, exclusion, restriction or preference based on race, I do not go on to consider the second limb of s 9(1). The applicants divide their allegations regarding police conduct in the investigation of Mulrunji's death into six categories: the interactions between investigating officers and SS Hurley; DS Robinson's involvement; failures in oversight by senior officers; the treatment of Aboriginal witnesses, particularly PLO Bengaroo; failures to assist the pathologist conducting the autopsy; and failures to meet or consider the cultural needs of the community. In the course of considering those allegations, I set out below a number of extracts from transcripts of interviews between investigating officers and witnesses to the events surrounding Mulrunji's death. Those transcripts are, for the most part, official QPS records of interview and the applicants put them into evidence. ***No*** party made any submission that they were inaccurate. However, audio of many of the interviews was also in evidence and, at certain points, the audio shows that a witness or investigating officer said something different to what is in the transcript. At various points below, I note instances in which a transcript is materially inaccurate and set out my finding on what the audio shows was actually said.

The purpose of the investigation It is as well to begin with the competing contentions about the statutory purpose of the police investigation into Mulrunji's death. While not the subject of detailed submissions by the parties, in my opinion a correct understanding of the statutory purpose of the investigation should inform the approach to be taken to this group of allegations made by the applicants. The respondents submit that the investigation was "for the purpose of a mandatory inquest" and "a fact finding process to place facts before a coroner" for the purposes of the coronial inquest required by s 27 of the Coroners Act. The applicants made ***no*** specific submission about the purpose of the investigation, although their allegations about the failure of QPS officers to treat SS Hurley as a suspect suggests they assumed at least one purpose was to determine whether any criminal offences had been committed. I accept that the primary purpose of the police investigation into Mulrunji's death was to provide evidence for the coronial inquest. It was at that inquest that a coroner would determine how Mulrunji died and what caused his death. Nevertheless, in the context of general policing functions (whether at common law or under the PSA Act) the investigation should also have been for the purpose of determining whether any crimes had been committed. DSS Kitching's evidence in his witness statement made in January 2005 described his function as being "the primary investigator to investigate the death". It is correct that significant parts of DSS Kitching's evidence in that witness statement deal with arrangements he made for an autopsy of Mulrunji's body and for liaison with the pathologist, the submission of the Form 1 to the Coroner, and further liaison with the Coroner's office. However, the part of his evidence dealing with his investigations on Palm Island once he arrived there are expressed in the way one would expect any competent police officer to express the steps he took to investigate a death, and in particular a death in custody. It would seem obvious that those investigations should also be directed to ascertaining whether there was any basis reasonably to suspect that the death might be the result of a criminal offence, or whether any other criminal offence had been committed: for example, assault. Under s 7(3) of the Coroners Act, QPS officers had a duty to report deaths in custody to the State Coroner or Deputy State Coroner. In this case, as I have set out at [241] above, DI Webber notified DI Aspinall of Mulrunji's death at 12.20 pm on 19 November 2004 and the State Coroner was notified immediately thereafter. Under s 447A of the PPR Act in force at the time of Mulrunji's death, QPS officers had a duty to assist coroners in the performance of their duties under the Coroners Act, including in the investigation of deaths and the conduct of inquests, and a duty to comply with every reasonable and lawful request or direction of a coroner. Part 4A of the PPR Act set out the powers available to the QPS when assisting a coroner. Section 15(2) of the Coroners Act also confirmed the duty of a police officer to help a coroner, referring to s 447A of the PPR Act as the source of that duty. In addition to those duties, the ordinary functions, duties and responsibilities of the QPS under provisions such as those in Ch 7 of the PPR Act and in s 2.3 of the PSA Act (see [76] above) were preserved. At the relevant time, s 5(2) of the Coroners Act provided:5 Relationship with other Acts

...

(2) This Act does not limit or otherwise affect the functions or powers of –(a) a police officer or other person to investigate a death under another Act; or

(b) a police officer to do something other than an investigation under this Act.Example –

A police officer helping a coroner to investigate a death may at the same time investigate whether the death was a homicide. In R v Cowan [2015] QCA 87, Margaret McMurdo P at [64] summarises the effect of various provisions of the Coroners Act and describes the effect of s 5(2) as being that the Act "does not limit or otherwise affect the functions or powers of a police officer investigating a death". This approach is supported by s 29 of the Coroners Act, which provided that an inquest must not start (or be continued, if it has already commenced) if the coroner investigating the death is informed that someone has been charged with an offence in which the question of whether the accused caused the death may be in issue. Neither the Explanatory Memorandum nor the second reading speech for the Coroners Bill 2002 (Qld) provide any further clarification or insight into the operation or effect of s 5. The legislative scheme of the Coroners Act does not suggest or require any change to this position once the CMC assumed responsibility for the investigation on 24 November 2004. Although s 5 of the Crime and Misconduct Act 2001 (Qld) (which has been renamed the Crime and Corruption Act 2001 (Qld)) made clear that the CMC was given additional investigative powers "not ordinarily available to the police service", its investigative functions are comprehended by the terms of s 5(2) of the Coroners Act. Any charges laid as a result of CMC investigations would also trigger the terms of the inquest stay provisions in s 29 of the Coroners Act. It seems to me inevitable from the terms of the legislation to which I have referred that a purpose of the investigation into Mulrunji's death was to ascertain whether any criminal offence had been committed in relation to his death. I do not accept the narrower proposition put by the respondents that the investigation was limited to a fact-finding role to assist the coroner. Such an approach would have involved QPS officers ignoring their statutory duties. I consider that DI Webber, DSS Kitching and the other investigating officers well understood part of their function in the investigation was to ascertain whether any criminal offences had been committed. They neglected that function in relation to SS Hurley. I set out my findings on the consequences of that neglect at [833]-[890] below.

The duty of QPS officers to act impartially I have addressed the general obligation of police officers to exercise their powers impartially at [77]-[83] above. Although they cavilled with the label "impartiality duty" in the applicants' pleadings, the respondents accepted that QPS officers comprising the investigation team on Palm Island (at any given time) were subject to the following obligations, being:(a) to expeditiously conduct an impartial investigation;

(b) to perform their duties in such a manner that ***public*** confidence and trust in the integrity and impartiality of the QPS is preserved; and

(c) to perform their duties impartially and in the best interests of the community of Queensland without fear or favour. As I understood the parties' position, these obligations arise from a combination of the provisions in the PSA Act and the OPM. By the time of final submissions, the applicants did not press for the officers' obligations to be any differently described. In other words, what the applicants described in their third further amended statement of claim as the "impartiality duty" was accepted by the applicants as comprehended by these three agreed obligations. The applicants continued to rely on what was described in their pleadings (at [115]) as the "integrity duty" and the "reasonable diligence duty". These were said to be: to preserve the integrity of the investigation and evidence obtained, collected or produced in the course of the investigation (Integrity Duty); and, or alternatively to conduct the investigation with reasonable diligence, and take all steps and make all decisions that would reasonably be expected of QPS officers in their position (Reasonable Diligence Duty). Where these obligations were relied on by the applicants, I refer to them below. It is fair to say they featured to a lesser extent than the applicants' submissions about impartiality, which underpinned their contentions about the first category of QPS conduct. There is ***no*** real debate about the importance of impartiality, and especially so in the ***public*** function of the investigation of a death in custody (for all of the purposes to which I have referred above). At [15] of his findings in the third inquest into Mulrunji's death, Deputy Chief Magistrate Hine said:Mr. Elliot Johnson QC observed in the National Report of the Royal Commission into Aboriginal Deaths in Custody [RCADIC]:-

A death in custody is a ***public*** matter. Police and prison officers perform their services on behalf of the community. They must be accountable for the proper performance of the duties. Justice requires that both the individual interest of the deceased's family and the general interest of the community be served by the conduct of thorough, competent and impartial investigations into all deaths in custody.

(Footnote omitted.) I respectfully agree with those observations.

Investigating officers and SS Hurley The material facts about SS Hurley's role on Palm Island after the discovery of Mulrunji's body are not in dispute. He remained on duty until the end of Saturday, 20 November 2004. He then had a rostered day off on Sunday, 21 November 2004, but remained on the island. He resumed duty on the morning of Monday, 22 November 2004, and it was later this morning he had a tense exchange of words with Mr Wotton in Police Lane: see [294] above. As I have noted in that paragraph, in my opinion it is unsatisfactory that the respondents led ***no*** evidence to explain when or how SS Hurley left Palm Island, nor who made the decision that he should leave. The absence of any rational explanation in the evidence about these matters lends support to the conclusion that, throughout the time from Mulrunji's death to the departure of SS Hurley from Palm Island, scant and insufficient regard was paid to what was appropriate in terms of SS Hurley's continued presence on the island, his continued interactions with local and investigating police officers, and his continued performance of police duties generally on the island. SS Hurley was the officer who met DI Webber, DS Robinson, DSS Kitching and some scientific police officers at Palm Island airport in the afternoon of 19 November 2004, to transport them into the police station. Sergeant Leafe also met the officers, in another vehicle, and transported some of them. DI Webber and DSS Kitching went with SS Hurley. DI Webber's evidence suggested that alternative transport options were not considered. The matter was simply overlooked. In my opinion, the thrust of DI Webber's oral evidence was that he was concerned first to get to Palm Island, second to get to the police station, third to start familiarising himself with what had happened, and fourth to get the investigation underway. Correctly, he was concentrating on those objectives, especially the latter two. He was not focussing at all on how he and the other officers got to the police station. It may well be, as the applicants submitted, that officers such as Constable Steadman and Constable Tonges, who were present at the police station on Palm Island but not on duty until later in the day, could have been ordered to replace SS Hurley and provide the transport. It is clear on the evidence that option simply did not occur to DI Webber, nor to any other officer. As I find in relation to other allegations made by the applicants, DI Webber did not pay any attention to the perceptions of the local community: they were not important to him. Nor was he concerned to observe the kind of separation, objectivity in behaviour and impartiality in fact that he would ***no*** doubt otherwise have considered appropriate to observe: this was an Aboriginal community and, from the outset, in my opinion DI Webber was disposed to act in a way which was protective and uncritical of his fellow, non-Aboriginal police officers stationed on the island. Unsurprisingly, the evidence revealed there were some discussions during the drive back to the police station. Neither DI Webber nor Inspector Kitching had much of a recollection about what was said and, given the events took place 11 years ago, that is understandable. DI Webber's evidence was that the men discussed whether the Tactical Crime Squad officers should take over policing duties on Palm Island, as well as the possibility of "unrest or ill [will]" in the community once the news of Mulrunji's death became more widely known. In his evidence, Inspector Kitching said the discussion was "minor" and "[n]ot about the death, but about what was going to transpire". What he meant by this was unclear, and he was not pressed to explain it further. I am not prepared to find that SS Hurley refrained from discussing Mulrunji's death, or his part in it, with DI Webber and DSS Kitching during the drive from the airport to the police station. However, there is insufficient evidence to make any positive findings about what was discussed. The inability to make any findings about what was discussed does not affect my conclusions about the inappropriateness of SS Hurley picking up investigating officers in the way he did. It is difficult to say whether, by this time, DI Webber or DSS Kitching knew SS Hurley was one of the last people to interact with Mulrunji before he was placed in the cell. Inspector Strohfeldt certainly knew what had happened and the extent of SS Hurley's involvement. This was his statement in February 2006:I was the Duty officer from Monday 15 November 2004 to Saturday 20 November 2004. The role of the Duty Officer is a Commissioned Officer and is responsible for the coordination of all major incidents occurring within the Townsville District. At about 1130hrs on Friday 19 November 2004 I received a telephone call from Senior Sergeant Hurley from Palm Island Police Station. He informed me that Cameron Francis

DOOMADGEE had died in the watchhouse at Palm Island. He informed me that the Ambulance had attended and found life to be extinct.

Senior Sergeant Hurley informed me that the Cameron Francis DOOMADGEE and Patrick Nugent were arrested in the Palm Island Community, for creating ***public*** nuisance and drunk respectively, by Senior Sergeant Chris Hurley who was assisted by PLO Lloyd Bengaroo, at 1026hrs. On arrival at the Watchhouse the deceased was uncooperative and violent - he punched S/Sgt. Hurley in the jaw as they were being removed from the police vehicle. They were placed in the cells and checked a couple of times before and at about 1120 hrs, the deceased was noticed to be pale and possibly have a weak pulse. QAS advised and responded whereupon he was found to be life extinct. Palm Island police presently making arrangement for notification of the next of kin. In evidence in chief, DI Webber gave this description of what Inspector Strohfeldt then told him in a conversation that occurred between approximately 11.40 am and 12 noon:In broad terms, he told me that an Aboriginal prisoner had died in custody at the Palm Island Police Station. In cross-examination, DI Webber said the following in response to questions from senior counsel for the applicants:So turning to Friday, 19 November, we've discussed that you were first advised by District Inspector Strohfeldt that there had been the death in custody on Palm?---Yes.

And were you told the first time that it was an aboriginal person?---I can't say for certain but I believe so.

And that it was an aboriginal man?---Yes, I think so.

So that you knew that it was an aboriginal death in custody from the outset?---Yes.

And that produced certain requirements in and of itself?---Yes.

That is, that it was an aboriginal death in custody?---Yes. However, DI Webber was not asked, and did not say, whether Inspector Strohfeldt told him about SS Hurley's interactions with Mulrunji prior to the death. Inspector Kitching's evidence was that he had "***no*** understanding at all of what had occurred" when he arrived on Palm Island. In my opinion, there is insufficient evidence to make a positive finding about whether DI Webber or (then) DSS Kitching had any knowledge of SS Hurley's involvement when they arrived on Palm Island. It may be that Inspector Strohfeldt told DI Webber that SS Hurley had arrested Mulrunji and struggled with him shortly before his death, or it may be that he did not. What is clear, however, is that SS Hurley knew, and his conduct as a QPS officer is just as relevant as that of DI Webber and DSS Kitching to the question whether there was an act involving a distinction based on race for which the first respondent is vicariously liable. As the respondents note in their submissions, in their oral evidence both DI Webber and Inspector Kitching accepted that travelling with SS Hurley from the airport to the police station created a perception of bias and a lack of impartiality. Each said this was not something which occurred to them at the time. I accept that evidence, although I do so having made the findings I set out at [890] below. In my opinion, having SS Hurley as the driver of the police vehicle carrying the investigation team is a good and representative example of some of the attitudinal problems shown by QPS officers who came to Palm Island to investigate Mulrunji's death. This attitude was evident in the oral evidence each of DI Webber and Inspector Kitching gave in this proceeding. It was also evident in the statements they gave at earlier times, although in those statements it was evident more by what was not said than what was said. In cross-examination in this proceeding, DI Webber said the following:And were you aware before you hopped on the plane that it was a very substantial aboriginal and Torres Strait islander community?---It depends on your – it depends on, I supposes, what you call substantial.

Well, over 95 per cent?---In numbers terms?

Yes?---I wasn't – I was aware that it was an aboriginal community, yes.

And is that all you knew about Palm Island on 19 November 2004?---I mean I was aware of its general locality and policing activities that occurred there.

Are you aware of its history?---In a raw sense.

How it was created?---Yes. Similarly, Inspector Kitching said:Now, when you arrived in Palm Island on 19 November – just leave those there, we will be returning to them – did you know much about the history of Palm Island?---***No***.

Were you aware that it comprised of a community that had very substantially been forcibly removed there?---In very basic terms – very general terms.

And or were descendants of people who had previously forcibly been removed there?---Yes.

And that all the persons who had been forcibly removed there by the government were Aboriginal?---I wasn't aware of the full circumstances, ***no***.

Or Torres Strait Islanders?---Yes.

So I would suggest to you that when you're on Palm Island, you never considered that this history, in that short form, had engendered a deep distrust of authorities by Palm Islanders?---I never considered that, ***no***.

And especially the police, because the police have, over the history of Palm Island, been the enforcers of the various regulations?---Correct.

And that was not something that you turned your mind to?---***No***. I find that DI Webber and Inspector Kitching had little awareness of the nature of the community they were entering and little knowledge of its history. They did not much care about either of those things. The oppressive role played by police officers on Palm Island in the past – a clear precursor to high levels of suspicion and mistrust, as the QPS remote policing review indicated – was not a matter they brought to account in the performance of their duties. They were not interested in how they were perceived by the Palm Island community. They were not thinking, at all, about any apprehensions of lack of impartiality which might arise from some of the conduct now impugned by the applicants. I detected ***no*** sense that any of the investigating officers saw themselves as performing their investigative tasks, even in part, for the Palm Island community itself. That community was simply the location, nothing more. In contrast, all the officers were intently focussed on the wellbeing of the other police officers, and on how what had happened affected those officers. They were, in large part, looking after their own. I return to this matter at several points in these reasons. Of itself, the transportation by SS Hurley of these officers from the airport to the police station on Palm Island, while unwise, was not an act which in my opinion involved any distinction, exclusion, restriction or preference for the purposes of s 9 of the RDA. If such transportation breached any provisions of the OPM this non-compliance did not render the transportation an act involving a distinction, exclusion, restriction or preference for the purposes of s 9. There was ***no*** differential treatment arising from the non-compliance. However, when considered together with the other conduct I refer to below, the transportation of investigating officers by SS Hurley was the first act in a pattern. It was a pattern of disregard for any objective need for impartiality, and a lack of interest by QPS officers in creating any sense or appearance of impartiality. The other interactions between SS Hurley and the investigating officers upon which the applicants rely are: the dinner at SS Hurley's house on the evening of 19 November 2004; the failure to treat SS Hurley as a suspect; and SS Hurley continuing to perform duties at the Palm Island Police Station and around the island itself. The respondents do not dispute the material facts about the dinner at SS Hurley's house and I have set those out at [260] above. It is clear that by the time of the dinner, all the officers present knew

the nature of SS Hurley's involvement in the events leading up to Mulrunji being placed in the cell. They knew he was the arresting officer, he had wrestled Mulrunji into and out of the police van, he had wrestled Mulrunji into the police station, he was involved in a struggle with Mulrunji, and he had dragged Mulrunji into the cell. By the time the dinner occurred DSS Kitching and DS Robinson had interviewed SS Hurley, PLO Bengaroo and Sergeant Leafe, all of whom had given accounts of this conduct. Before going to dinner, DSS Kitching had prepared, and DI Webber had reviewed, a draft of the Form 1, which included an account of SS Hurley struggling and falling with Mulrunji immediately prior to dragging him into the cell with Sergeant Leafe (see [290] above). The respondents, and their relevant witnesses, accepted that this event did compromise the appearance of impartiality of the investigation. DI Webber and Inspector Kitching accepted, with hindsight, they should not have gone to SS Hurley's house for dinner. To give one example, this was DI Webber's evidence on the issue:in my view, there was probably – and it's a perception, but I accept that the perception is there. And I'm sorry that it occurred, but I accept that the reality in relation to consuming a beer and having a meal at [SS Hurley's] residence on the Friday evening was – was inappropriate and in that – in that sense, I acknowledge that. But I don't believe that it went beyond that. I note the respondents also rely in their written submissions on a passage from the findings of DC Rynders, and appear to invite me to give the event the same characterisation given to it by DC Rynders. This is but one example of the inappropriate approach taken by both parties, to which I have referred at [118]-[119] above, to rely on findings made by other persons and bodies where those inquiries were undertaken for different statutory and non-statutory purposes, and on the basis of different material and evidence. The respondents' use of DC Rynders' findings here is a pertinent example because DC Rynders refers to evidence given by DSS Kitching to her, which he did not give in this proceeding. I decline to make any use of DC Rynders' report in the way the respondents suggested. The fact of her ultimate conclusions may be relevant to relief. The fact of her inquiry is relevant in terms of context and background. Beyond that, her factual findings cannot be adopted in this proceeding. I take the same approach with the CMC report, and the findings of the coronial inquests. The respondents submit that the decision to eat a meal at SS Hurley's residence was a decision "made by tired and hungry officers who made what they now accept was an error of judgment". I accept that may be part of the explanation. However, consistently with similar findings made elsewhere in these reasons, in my opinion none of the police officers who were on Palm Island for this investigation (nor those already stationed there) were in the slightest bit concerned about the perceptions and circumstances of the local community. Those matters were irrelevant to them. Mulrunji's death had to be investigated, and the officers would perform that task. But the effect of the death on the community, apprehensions of culpability in the police, awareness of the need to appear and be impartial – these were not matters that, on the evidence before me, the officers turned their minds to at all. The dinner at SS Hurley's house is emblematic of this attitude. The conduct next relied on by the applicants is the failure to treat SS Hurley as a suspect. As I have noted above, the statutory functions of the police during this investigation were not limited to assisting the coroner and extended to investigating whether a criminal offence had been committed in relation to the death of Mulrunji, including whether SS Hurley should be treated as a suspect. The applicants correctly submit, and the respondents accept, that the OPM procedure (at s 16.24.3(ii)) was that the commissioned officer in charge of the investigation (at this time, DI Webber) should "not presume suicide or natural death regardless of whether it may appear likely". I do not accept the respondents' submission that the terms of the order in s 8.4.2 of the OPM (that part dealing with what is required by officers who are first responders on the scene of a death) overrides or displaces what is required by s 16 of the OPM. The latter is specifically about deaths in custody, and is comprehensive in what it requires of officers in those circumstances. The former concerns every kind of death to which police officers may have to respond and s 8.4.2 is expressly about first responders. None of that applied to DI Webber or his investigative team. If anyone was a "first responder", it was Sergeant Leafe, Constable Steadman and SS Hurley, who were the first officers to examine Mulrunji and conclude he was dead. The respondents contend that there were ***no*** grounds to treat SS Hurley as a suspect during the period of the investigation until the CMC took over the investigation on 24 November 2004, especially since the cause of Mulrunji's death was not known until after the autopsy on 23 November 2004. Without the cause of death there was, they submit, ***no*** basis for any reasonable suspicion that SS Hurley had been involved in the commission of a criminal offence. They refer to the description of reasonable suspicion given by the High Court in George v Rockett [1990] HCA 26; 170 CLR 104 at 115-16 (the Court):Suspicion, as Lord Devlin said in Hussien v. Chong Fook Kam, "in its ordinary meaning is a state of conjecture or surmise where proof is lacking: 'I suspect but I cannot prove.'" The facts which can reasonably ground a suspicion may be quite insufficient reasonably to ground a belief, yet some factual basis for the suspicion must be shown. In Queensland Bacon Pty. Ltd. v. Rees, a question was raised as to whether a payee had reason to suspect that the payer, a debtor, "was

unable to pay (its) debts as they became due" as that phrase was used in s. 95(4) of the Bankruptcy Act 1924 (Cth). Kitto J. said:"A suspicion that something exists is more than a mere idle wondering whether it exists or not; it is a positive feeling of actual apprehension or mistrust, amounting to 'a slight opinion, but without sufficient evidence', as Chambers's Dictionary expresses it. Consequently, a reason to suspect that a fact exists is more than a reason to consider or look into the possibility of its existence. The notion which 'reason to suspect' expresses in sub-s. (4) is, I think, of something which in all the circumstances would create in the mind of a reasonable person in the position of the payee an actual apprehension or fear that the situation of the payer is in actual fact that which the sub-section describes – a mistrust of the payer's ability to pay his debts as they become due and of the effect which acceptance of the payment would have as between the payee and the other creditors."The objective circumstances sufficient to show a reason to believe something need to point more clearly to the subject matter of the belief, but that is not to say that the objective circumstances must establish on the balance of probabilities that the subject matter in fact occurred or exists: the assent of belief is given on more slender evidence than proof. Belief is an inclination of the mind towards assenting to, rather than rejecting, a proposition and the grounds which can reasonably induce that inclination of the mind may, depending on the circumstances, leave something to surmise or conjecture.

(Footnotes omitted.) In their reply submissions, the applicants contend the respondents failed to engage with the evidence relied on by the applicants to demonstrate the basis on which the investigating officers should have, from the start of the investigation, had a reasonable suspicion that SS Hurley may have committed a criminal offence. The applicants are correct in that submission: the respondents did fail to engage with the evidence. This was, in my opinion, a feature of the respondents' final submissions, and made their final submissions of less assistance to the Court than they otherwise might have been. The applicants rely significantly on what they submit was a failure to take the allegations of Roy Bramwell seriously. I deal with this at [959]-[987] below, where I find that the investigating officers discounted Roy Bramwell's account of what he saw and they did so because he was a local Aboriginal person. On any view of Mr Bramwell's account – which the investigating officers had by mid-morning on 20 November 2004 – there was a basis for, to use the language of Kitto J in Queensland Bacon Pty Ltd v Rees [1966] HCA 21; 115 CLR 266 at 303, " an actual apprehension" that SS Hurley may have committed a criminal offence. As the applicants point out, that suspicion should not, in the circumstances, have been limited to homicide, but should have included assault and, I find, also manslaughter, with which SS Hurley was in fact eventually charged. However, in my opinion there were other independent and more immediate reasons that, on any objective view, SS Hurley should have been treated as a suspect from the outset of this investigation. The first reason is what SS Hurley said in his record of interview with DI Webber and DSS Kitching. That interview began at 4.04 pm on 19 November 2004. After describing why and how he and PLO Bengaroo went to Dee Street, and describing the arrest of Patrick Bramwell, SS Hurley continued (with "H" standing for SS Hurley and "K" standing for DSS Kitching): Whilst we were making that arrest [of Patrick Bramwell] – whilst we were executing the arrest and placing him in the rear of the police vehicle – Cameron DOOMADGEE approached us and – he had words with LLOYD and the words were similar to the effect of – hey BENGAROO you shouldn't be doing this you're a black fella yourself you shouldn't be locking up black people – LLOYD ahh – told Mr DOOMADGEE to move on – otherwise he'd find himself under arrest. We continued with the arrest of ahh – BRAMWELL. Ahh – DOOMADGEE then walked down Dee Street toward ahh – Klump Point Road. The ahh – Dee Street's a ahh – horseshoe umm – type street. He was on the southern side of Dee Street Hhmm He aah – then mouthed off at us again. Ahh – calling out abuse. He then continued to walk down stopped again – turned again and mouthed off for a second time. By that stage I was just entering the police vehicle. I asked LLOYD who the male was that had mouthed off because I ahh – didn't know him and he said it was Cameron DOOMADGEE and ahh – I advised LLOYD that umm – DOOMADGEE would be going in as well for his behaviour. There was ahh – people umm – you know there was people's houses where he was umm – so I drove down to him – I asked him ahh – ahh – what his problem with the police was and ahh – I can't remember whether he replied or what the situation was but I told him he was under arrest and that ahh – he was going to the watchhouse. Now, he struggled a little bit – he didn't just step in the back of the van. I grabbed him by his arm – by the top part of his arm near his bicep and ahh – then umm – moved in towards the ahh – car – Lloyd opened the rear cage door of the police vehicle and then umm – I put him down on his backside in the ahh – cage and then umm – he ahh – ahh – resisted you might say to not going in the cage – so then I lifted his legs up and put them on the seat opposite him and ahh – closed the cage door. SS Hurley then described the trip back to the police station and recounted what happened when he pulled up in the car park behind the police station in Police Lane. ... Now from there what happened was I opened the rear door of the police vehicle to get the two people in custody out. As I did this, Cameron DOOMADGEE struck me with a closed fist –

that was on the back side of his fist – he came across my face. I then took hold of him by grabbing him on the shirt – up close to where they ahh the V of the shirt – a struggle ensued. What I was trying to do at the time was get a hold of – get a hold of one of his arms – but it was a confined area between the – police vehicle and the side wall of that police station – from there we ahh – the struggle moved into the station where we were on the ground – because the step up So you tripped over a step is that right Over the step as we came in – there's a step there How did you manage to fall on the ground I fell to the left of him and he was to the right of me What caused you to fall Just coming into the station I was trying to grab him and he was trying to get away Oh OK It can be seen that SS Hurley's account is that he fell one way and Mulrunji fell another: that is, SS Hurley does not say that he fell on top of Mulrunji. He confirms this later in the interview, saying he fell beside him. SS Hurley then describes putting Mulrunji, and then Patrick Bramwell, into the watchhouse cells. He subsequently describes checking on them in the following way: ... I did the first check – I actually did a physical check – where I opened up the cell and walked in – and the reason I did that was umm – because there were two prisoners there ahh – with one normally you can crouch down beside the cell and hear them breathing whatever – with the two I actually walked in they were laying down there – both asleep and both were snoring. This account is inconsistent with the cell video, which the evidence shows DI Webber and DSS Kitching watched before DSS Kitching interviewed SS Hurley, although as I have said at [285] above it is unclear whether they watched all of it. Inspector Kitching's evidence about this was:I don't recall whether I watched it up to the point where inspections were conducted of the deceased or not. But I certainly did watch that video before I interviewed Hurley. SS Hurley stated in the interview that he saw Mulrunji had a "small amount of blood" coming from a "very small injury" above his right eye. He said "I don't know" when asked how Mulrunji got that injury. The video of Mulrunji after he died is in evidence. It clearly shows considerable swelling of his eye and of the right side of his face. Any police officer objectively comparing what he saw on Mulrunji's face with SS Hurley's account would, I find, have had cause to suspect SS Hurley may have been minimising Mulrunji's injuries. SS Hurley was then asked again about the struggle with Mulrunji:K OK and you said you had a struggle between the police vehicle and the wall of the police station

H Yes

K Ok umm – who assisted you to get him from the police vehicle to the police station

H Nobody – I was the only one that was umm – wrestling with him

K And you said as a result of the struggle you fell into the police station because of a step is that right

H Yeah – I can only presume we fell over the step because when we were at the station I can remember that we were on the ground

K OK – and who was assisting you then

H Nobody – I stood up (ui) Michael LEAFE came and ahh – assisted me to drag him into the cell For SS Hurley to say that he "presumed" he and Mulrunji fell over the step is inconsistent with the answer he gave earlier, including in answer to DSS Kitching's leading and suggestive question. SS Hurley was asked about Mulrunji's demeanour when he first encountered him in Dee Street. SS Hurley described Mulrunji as aggressive and affected by liquor. He was asked what Mulrunji's demeanour was when SS Hurley and Sergeant Leafe got Mulrunji into the cell. SS Hurley replied: He just lay on the ground – he was umm – ready to go off to sleep I think but ahh – he wouldn't get up when we asked him to get up to go into his, to go into the watchhouse that's why we had to drag him in OK – umm was he speaking to you at that stage when he pulled you into the cell. ***No*** not that I can recall. DSS Kitching then asked SS Hurley if Mulrunji complained of any injuries, to which SS Hurley replied:H ***No***

K That he was aware of any injuries

H I wasn't, I wasn't, I wasn't able to ask him the questions because of his aggression and because of the fact we took him straight to the cell ... Therefore, SS Hurley was telling DSS Kitching that Mulrunji was so aggressive as he was being brought into the police station that he could not be asked if he had any injuries or medical conditions. Inexplicably (on the information before the investigators), within seconds the man is uncommunicative and has to be dragged into his cell, and less than an hour later he is dead. Later that evening, at approximately 7.50 pm, DSS Kitching interviewed Sergeant Leafe. In that record of interview, this was Sergeant Leafe's description of what occurred as SS Hurley was bringing Mulrunji into the police station:Now at that stage um I've gone through the back of the police door to go into the watchhouse area to make sure the cell door was open so DOOMADGEE could be placed straight in there because he was, was, well he appeared to be quite aggressive, he was struggling with Senior Sergeant HURLEY. When I come out from inside the watchouse area um DOOMADGEE was on the ground in the police corridor just inside the backdoor and longways to hall, longways running with the hallway that goes up to the CIB office

...

And he would've only been just inside the door um we tried to lift up DOOMADGEE um from, from behind in the shoulder areas to carry him into the cell but he felt, he felt like a dead weight like he, he wouldn't try and help us um so at that stage we, we both grabbed an arm. I think I was on the left arm um Senior Sergeant HURLEY was on the right arm, I recall and um dragged him into the cell. He then described finding Mulrunji:I opened up the door ah walked in I saw DOOMADGEE was flat on his back, his head was slightly tilted to the right and his, his eyes were partially opened um I tried to ah arouse him um to wake him, gave him a shake um a slight pat on, on the other side of the face um when I felt his face it felt strangely cold um I can't remember if I checked the pulse at that stage or ran into the Senior Sergeant HURLEY's office and told him um that DOOMADGEE didn't look well but I, I, I, at one stage I've gone back in and checked a pulse ah I was unable to locate a pulse um at that time.

(Emphasis added.) Sergeant Leafe placed the time at which Mulrunji was put in the cell as approximately 10.25 am and the time at which he (Sergeant Leafe) entered the cell as 11.15 am or 11.20 am. That is, Mulrunji was cold after only 50 to 55 minutes in the cell. Again, on this account the police investigators had descriptions of an aggressive individual, struggling with SS Hurley as he was brought into the police station, with Sergeant Leafe not witnessing what happened next between SS Hurley and Mulrunji but eventually seeing Mulrunji on the ground, before Sergeant Leafe dragged him as a "dead weight" into the cell. On Sergeant Leafe's account, 50 to 55 minutes later Mulrunji was not only dead, but already cold. In my opinion, any experienced, objective and impartial police investigator looking at that material would readily form an "actual apprehension" that the person who "struggled" with Mulrunji may have committed a criminal offence – at the very least, an assault. Further, in my opinion, any experienced, objective and impartial police investigator would also have formed an "actual apprehension" that the tall, well-built man who had wrestled Mulrunji into the police station may have committed an offence more serious than assault, given Mulrunji went from being aggressive to a dead weight in a matter of seconds, and then to being deceased in less than an hour. PLO Bengaroo's account was quite different to SS Hurley's. This is the first relevant portion of the record of interview (with "LB" standing for PLO Bengaroo and "RK" standing for DSS Kitching):LB um - so Chris (ui) Chris said he punched me in the face and Chris just lead him by the arm (ui) and walked him in through the front door

RK Yeah, what happened then

LB And through into the watchhouse ...

RK And where are you when Chris took him through to the watchhouse

LB I was at the front door (ui)

RK You were just out at the front door – did anything happen near the front door? The transcript of the interview states that PLO Bengaroo's answer to this question was unintelligible, but in the audio he answers "Nup" and then says a few words that are unintelligible. After PLO Bengaroo gave that answer, DSS Kitching went on to another question:RK Right, um, how was Cameron when Chris was walking him through to the watchhouse

LB He was aggressive (ui)

RK What was he actually doing

LB Oh he was probably (ui) flopping down or something, you know

RK Flopping down..

LB Yeah

RK So he wouldn't ...

LB ***No***, he wouldn't hardly walk was you know just flopped himself down

RK So he wouldn't walk to Chris and he just dropped himself down eh and what did Chris have to do now

LB Umm Chris tried (ui) picked him up (ui) and you know just dragged him past um just picked him up and (ui)

RK Okay – so where did um Sergeant Leafe go

LB Ah, Sergeant Leafe ah ... he was with Chris to the cells

RK With Chris to the cells and what was, what was he doing

LB Helping Chris (ui) put him in the cell

RK Helping Chris put him in the cell

LB Yes

RK OK, do you remember what he was actually doing to help Chris, how, how was he helping him

LB By the arms

RK By the arms

LB Yes

RK Okay – so what did they – was he walking or lying or ...

LB ***No***, he (ui) two legs on the floor – just grabbed him by the two arms

RK Two legs on the floor and then pulled him by the two arms, is that

LB Yes

RK What happened then ...

LB Hmm we just laid him, put him on the floor with ah, two fellas on the floor - it was Cameron and Patrick Yallop – on the floor

[I note that the audio of the interview shows that PLO Bengaroo said “Patrick together”, not “Patrick Yallop” in the last line of the transcript extracted above.] In my opinion, DSS Kitching asked several leading questions which directed PLO Bengaroo’s answers away from an account that would implicate SS Hurley: the “helping him” exchange is one example. DSS Kitching does not explore at all with PLO Bengaroo the account of the fall given by SS Hurley. He does not ask PLO Bengaroo about the injuries to Mulrunji’s eye, or about any injuries. He does not explore what PLO Bengaroo meant by “flopping down”. I find that the manner in which DSS Kitching interviewed PLO Bengaroo discloses a consciousness on the part of DSS Kitching of the risk that SS Hurley could be implicated and a method of interviewing which discounted information adverse to SS Hurley. PLO Bengaroo’s interview discloses a significant partiality on the part of DSS Kitching – a partiality towards accounts which would not implicate SS Hurley. The manner in which DSS Kitching conducted this interview contributes to explaining why SS Hurley was not treated as a suspect. There was clear partiality by the QPS investigating officers and an active determination not to accumulate information from witnesses such as PLO Bengaroo which would require him to be treated in that way. Although it is in a different category from some of the other conduct, in my opinion the failure to treat SS Hurley as a suspect is another indicium of the lack of impartiality, apprehended, but also actual, that attended the investigation. The apparently conscious steering of questions, in the interviews to which I have referred, away from blame on SS Hurley is further evidence that there was ***no*** open mind brought to this investigation about the possibility that SS Hurley could in any way be culpable for what had happened to Mulrunji. If one compares, for example, what happened, on the evidence of SS Hurley and PLO Bengaroo, in the arrest of Mulrunji in Dee Street with the manner in which SS Hurley was treated by the investigating team, one can easily see the different standards at work. Mulrunji had accused PLO Bengaroo of siding with white police officers rather than his own people, by assisting in the arrest of Patrick Bramwell. This is how PLO Bengaroo described, in his record of interview with DSS Kitching, what happened:LB ... there was a struggle, person named Cameron Doomadgee walked towards me and said ‘Ah you’re a black man, like me, I said ah – what do you lock him [Patrick Bramwell] up for

RK So he said, Bengaroo you black like me

LB Yeah

RK What are you locking him up for

LB Yes – And I told, myself I told ah Cameron to, just walk down the road otherwise he’d get locked up

RK So, you, you told Cameron to keep walking down the road or he'd get locked up

LB Yes,

RK Yeah – What happened then

LB Um, Chris started the vehicle, ah Chris had (ui) gone a couple of metres down the road, Chris said Cameron was calling out (ui)

RK Uhm, do you know what Cameron was calling out

LB I can't recall

RK Okay, what happened then

LB Ah, all of a sudden Chris said to me who was that (ui) – we pulled up and – next to Cameron and Chris said to me "I'm going to have him – lock him up" – so both of us jumped out of the police vehicle and I went down to the rear end of the police vehicle to the cage part and I opened the door for Chris – and Chris grabbed Cameron and put him in the back of the vehicle As the extract at [860] above shows, Mulrunji is said by SS Hurley to have "mouthed off" and to have been abusive to PLO Bengaroo. For that, he was arrested. The police log refers to the nominated offence as "Create ***Public*** Nuisance". Whether there was or was not a valid basis for that arrest, my point in referring to it here is to illustrate the double standards at work on the very same day on Palm Island. A young Aboriginal man who protests about what he saw as the partisanship of a PLO is arrested, roughly and with some aggression, by SS Hurley. But when, on all accounts, that same young Aboriginal man punches SS Hurley and a considerable struggle ensues at the door of the police station which has both men ending up on the ground and only Mulrunji being limp and unresponsive afterwards and then dead in less than an hour, ***no*** white police officer considers there should be a reasonable suspicion about SS Hurley's conduct at all. Even allowing for the benefit of hindsight, I can see on the evidence before me ***no*** justification or explanation for this, other than the fact SS Hurley was a white police officer and the victim was an Aboriginal resident of Palm Island. The assumption that SS Hurley was acting lawfully, while arresting Mulrunji for the most minor of matters, with force, was never questioned by any investigating officer. Finally, in this category of conduct, is the allegation that SS Hurley was permitted to continue to perform policing duties until he left the island on 22 November 2004. This allegation is connected to the orders in the OPM to which I have referred at [158]-[165] above. It is developed in a slightly different form in the applicants' "intervening week claim" as a failure to suspend SS Hurley. In this first category, the focus is on the continued performance of duties by SS Hurley, and why this was permitted to occur. The respondents submit that SS Hurley did not continue to perform any duties in association with the investigation. The applicants rely on admissions by both Inspector Kitching and DI Webber in cross-examination that SS Hurley was present and performing duties in the police station while DSS Kitching, DS Robinson, DI Webber and Inspector Williams were conducting interviews and video re-enactments. They contend that, since the police station was obviously small (so much can be seen from the video re-enactments), there was a "high probability" that SS Hurley had overheard at least some of the interviews and re-enactments being conducted in the station. They contend that his presence in the station and the likelihood he overheard some of the interviews and re-enactments "compromised the integrity of the evidence gathered in the course of the investigation by permitting SS Hurley to have an opportunity to be aware of what other interviewees had been saying and to adapt his version of events accordingly". Accordingly, the applicants submitted the investigating officers had not conducted the investigation with reasonable diligence nor with integrity, as the applicants alleged was their duty. Insofar as the applicants rely on non-compliance with subpara (v) of the orders applicable to the regional duty officer in s 1.17 of the OPM for this allegation, the respondents are correct that there is ***no*** evidence SS Hurley undertook or continued to perform any duties associated with the investigative process, in terms of what he did at the police station. Of course, he had transported investigating officers from the airport, shown them Dee Street, relating what occurred there on his account, and participated in video re-enactments (all while on duty and in uniform, so far as the evidence establishes), and he had hosted investigating officers for dinner at his home. In other words, he was certainly not quarantined away from the investigative process, or the investigating officers. That could only really have occurred if he had been stood down from duties when the investigation team arrived, or as soon as practicable thereafter once statements from him and re-enactments with him had been obtained. However, I note that subpara 1.17(v) also prohibited a member involved in the incident continuing to undertake "other duties at the scene", and is not necessarily limited to investigation. The applicants have established on the evidence non-compliance with s 1.17(v)

by SS Hurley being allowed to continue to perform policing duties at the station, but the question is: what flows from this? As the respondents also correctly submit, it is ***no*** more than speculative to suggest that SS Hurley may have seen or heard things which caused him to alter his account of what occurred. Even if it were more than speculation, I would have been reluctant to draw such an inference in circumstances where neither party elected to call SS Hurley himself. Thus, the way the applicants put this allegation is not one I accept. In my opinion, however, the fact that SS Hurley was permitted to continue to perform policing duties, and to do so in uniform around the island, in the days after Mulrunji's death is another indicium of the lack of impartiality, actual and apprehended, that attached to the QPS investigation. Contrary to the respondents' submissions, the explanation for it does not lie in any error of judgment, or simple human mistake. It lies in disregard for the Palm Island community. On the evidence before me, I am satisfied none of the QPS officers with command or investigative responsibilities cared what the Aboriginal people of Palm Island thought about their investigation. They did not care whether the investigation seemed impartial or not; they did not care if it was deeply offensive to that community that the white police officer who arrested Mulrunji and who brought him into the police station and locked him up was still going about his duties in uniform on the island as if nothing had happened. The commanding and investigating officers of the QPS had ***no*** regard for any sense of (justifiable) outrage that might have been generated in some or all of the members of the Palm Island community from the way the investigation team interacted with, and treated, SS Hurley. I am satisfied the QPS commanding and investigating officers on Palm Island at this time would not have had that attitude if this tragedy occurred in a remote, close-knit, but overwhelmingly non-Aboriginal community: for example, a pastoralist community in rural Queensland. But on Palm Island, QPS commanding and investigative officers operated with a sense of impunity, impervious to the reactions and perceptions of Palm Islanders, and very much with an "us and them" attitude.

The role of DS Robinson The applicants mount a wholesale challenge to the involvement of DS Robinson in the investigation into Mulrunji's death. They submit that DS Robinson had an actual or an apparent conflict of interest and his involvement in the investigation created a reasonable apprehension of bias. They allege he was not impartial, and his appointment to the investigation team was not appropriate in the circumstances, as he was from the same police establishment as SS Hurley. There is also an allegation of the same kind, made more faintly, against DSS Kitching in relation to his own appointment which has ***no*** foundation and need not be considered further. DSS Kitching was appointed by DI Webber and was clearly qualified for the task. I have found, for reasons expressed elsewhere, that DSS Kitching did not conduct his investigations in an impartial manner, but that is a separate issue. There is ***no*** dispute between the parties that DS Robinson was also stationed at Palm Island, having lived there and worked with SS Hurley on Palm Island for about two years in a context where there were approximately seven police officers stationed on the island at any one time. SS Hurley was DS Robinson's direct line supervisor for operational matters. SS Hurley was the most senior officer stationed on Palm Island, and DS Robinson was the next most senior. DSS Kitching and DI Webber were aware of those matters. Other officers with local knowledge (but who were ***no*** longer stationed on Palm Island) were brought in by the CMC the following week (Inspector Trevor Adcock and Sergeant Anthony Melrose) and at least one other officer (Greg Baade, whose rank was not in evidence) was available. The applicants contend that other officers should have been deployed instead of DS Robinson for any appearance of impartiality in the investigation to be maintained. As the respondents submit, DS Robinson's role changed through the course of the first few days after Mulrunji's death and, after Inspector Williams arrived on 20 November 2004, he did not participate in the interviews and video re-enactments, nor did he take statements. However, he then again assumed a critical role in the identification and arrest of suspects after the protests and fires on 26 November 2004. Mrs Agnes Wotton's evidence was that "everybody knows when a new detective coming to Palm, and everybody know who the person is and what their role is in the community". It was apparent during the evidence that DS Robinson was known by most of the group member witnesses. There may well be advantages in having community members interviewed by an officer who is familiar to them. The applicants' evidence and submissions on how Aboriginal witnesses should be treated would tend to support such a proposition. I did not detect in the applicants' witnesses any particular difficulties with the role of DS Robinson. I did not, for example, detect that any witness was more concerned about the role he played than the role played by DI Webber, DSS Kitching or Inspector Williams. In my opinion, what came through in the evidence of the applicants' witnesses was a general mistrust of the way the QPS would investigate the death of an Aboriginal man in custody, and on Palm Island in particular. And what most troubled members of the community was that SS Hurley was not being treated as a suspect, and was free to go about his duties. That is what comes across strongly

in the video evidence, and in the witness evidence. I reject the applicants' contention that DS Robinson's involvement in the investigation, of itself, indicated a lack of impartiality, or the appearance of a lack of impartiality. Unlike DSS Kitching, there was ***no*** particular evidence relied on by the applicants to establish DS Robinson was not impartial, or did not appear impartial. Nevertheless, what the evidence reveals DS Robinson did not do, and was not asked to do, supports my later findings about failures to communicate with the Palm Island community: see [1052] below. So far as is apparent from the evidence, the fact that DS Robinson was a locally based police officer did not mean that he engaged with the local community in any more of an empathetic or appropriate way. There is ***no*** evidence he was proactive in trying to communicate effectively with the local Council. He does not appear on any of the video evidence at the community meetings, although given he was known to the community this would have been an appropriate role for him to perform. There is ***no*** evidence he played an active role in how the next of kin should be notified, or in determining the best way to inform the community about the results of the autopsy report. There is ***no*** evidence he used his local knowledge and familiarity in the intervening week to reduce tensions and address the legitimate concerns of the local community that, despite the autopsy results, Mulrunji's death was not being treated as suspicious and ***no*** officer (especially SS Hurley) was being held accountable for it. In that sense, the only use to which his "local knowledge" seems to have been put was one that was disadvantageous to members of the community, in that he assisted in identifying and arresting suspects.

"Failures in oversight" by senior officers This is a collection of allegations (set out at [244(f)] and [244(n)(ii), (v), (vi) and (vii)] of the third further amended statement of claim and summarised at [254(q)-(v)] of the applicants' closing submissions) which comprise: the appointment of DSS Kitching to the investigation team; the failures by each of DI Webber and Inspector Strohfeldt to instruct officers not to talk to each other about Mulrunji's death and the surrounding events; the fact of officers talking to each other about Mulrunji's death and the surrounding events; the failure by DSS Kitching to ascertain what had been discussed by witnesses; the failure of DI Webber to ensure Constable Steadman was interviewed as soon as practicable; the failure by Inspector Williams to overview, advise on, and confer with DI Webber and the CMC to resolve issues regarding the integrity of the investigation. The parties are agreed that s 1.17 of the OPM is again relevant to these allegations. In their final submissions, the respondents accept that that neither DI Webber nor Inspector Strohfeldt advised or directed SS Hurley not to discuss the circumstances surrounding the death in custody with other QPS officers. They also accept that before the investigation team arrived on Palm Island SS Hurley, Sergeant Leafe and PLO Bengaroo discussed Mulrunji's death, and that DSS Kitching took ***no*** steps to ascertain what had been discussed by those three officers. I am satisfied that all these matters confirm the conclusion I have reached and expressed elsewhere that none of those in charge of the investigation, nor those officers participating in and subject to it, had any regard for whether the investigation appeared impartial. They were not at all concerned about what perceptions the Aboriginal community on Palm Island had of the investigation. As I have found elsewhere, the investigation was not impartial, but none of the allegations in this category illustrate that lack of impartiality. That is because, as the respondents submit, the applicants' contention that there was collusion between those giving accounts (with or without the alleged assistance of DS Robinson) is not made out on the evidence and is simply speculation. None of the people who are the subject of these allegations were called by the applicants and none of these allegations were put to them. There are many examples in the applicants' submissions where allegations are made against SS Hurley to the effect that he colluded with others, and consciously altered his version of events to exculpate himself. For example, at [266] of their written submissions, the applicants contend that what they describe as these "compromises" of the investigation provided:multiple opportunities to SS Hurley, the person most closely involved with the incident under investigation, to be aware of the progress of the investigation and to take measures to influence its [that is, the investigation's] findings. The applicants did not come close to making out their allegations of collusion, and these allegations should not have been pressed in the absence of calling SS Hurley to give him an opportunity to respond to them. Although the respondents made ***no*** express concession, it is apparent from the evidence that Inspector Williams was not, at the time of the investigation or shortly thereafter when the CMC took over, concerned to review whether the investigation had been and continued to be impartial. Rather, the investigation took its course, and these allegations about lack of impartiality emerged in inquiries well after the events themselves. However, I do not consider this circumstance adds anything to the conclusions I have reached about the lack of impartiality in the investigation. It is agreed between the parties that Constable Steadman was not interviewed by the investigation team before the CMC took over the investigation on 24 November 2004. He was interviewed in Townsville on 27 November 2004, principally about the week following Mulrunji's death and the day of the protests and fires. It was

not until 8 December 2004, several weeks after the events, that he was interviewed in detail by the CMC about the struggle between SS Hurley and Mulrunji at the police station. The applicants contend s 2.5.1 of the OPM contained a policy that "primary investigation techniques should be followed in order to ensure that potential witnesses are identified and that complete information is obtained", as well as a procedure which required the identification of witnesses and potential witnesses. The omission to interview Constable Steadman on 19 or 20 November does seem inexplicable. Constable Steadman is plainly visible in the cell video. All those officers who were present in the police station at the time of Mulrunji's death must have known Constable Steadman had been one of the officers who entered the cell. DI Webber and Inspector Kitching both agreed that they had watched the video whilst on Palm Island on the Friday afternoon and DI Webber indicated that they again watched the video on the Saturday morning, with Inspector Williams. It was also the case that Constable Steadman was present when SS Hurley brought Mulrunji into the police station and witnessed SS Hurley getting Mulrunji out of the police van. DI Webber agreed that Constable Steadman was a witness to the fall recounted by SS Hurley in his interview. Both DI Webber and Inspector Kitching agreed that Constable Steadman was an important witness yet neither offered any real explanation for the omission to interview him. It was put to Inspector Kitching that the failure to interview Constable Steadman at the same time everyone else was interviewed deprived the investigators of critical information, in particular information which might have been seen as inconsistent with SS Hurley's account. Senior counsel relied on what was recorded by Deputy Chief Magistrate Hine in the second inquest decision on this issue. It is worthwhile extracting the relevant parts of Deputy Chief Magistrate Hine's decision, beginning at [311]:There is only one contemporaneous written record of the relevant events concerning this incident, that of Constable Steadman's notebook, which first came to light during his cross-examination before the DSC inquest. These notes were made about 4 pm on the day of the death, in his official notebook, in the knowledge that there had been a death in custody, and in the interests of keeping an accurate and complete record of events for evidentiary purposes.

The notes, which are Exhibit D35.2, record: "Attended Palm Island Station to make inquiries regarding movement of my furniture. Observed the marked cruiser in the parking bay. Could hear two persons saying something from the cage. S/Sgt Hurley opened the rear door and spoke with one of the persons in the rear of the van. I walked to the front right hand side of the van. I heard a scuffle at the rear of the van. I then saw S/Sgt Hurley grapple with an Aboriginal male. He was dragging him towards the station entrance. He appeared to slip as he walked in the door. Chris was yelling something at the ATSI male. I could not see the top half of the ATSI male as they were obscured by the doorway. I then walked into the station and sat down at the computer."

As it can be seen, these notes make ***no*** mention of any fall, let alone a heavy one. They record only "he" (i.e. one person) "slipping". There is ***no*** mention of seeing Hurley's feet, let alone seeing them on top of Mulrunji's (as later recalled in evidence in support of the proposition that Hurley fell on top of Mulrunji.

The notes, per se, provide ***no*** support for Hurley's position now, that he must have fallen on top of Mulrunji to have inflicted the fatal injuries. They also record that Hurley was 'yelling' at Mulrunji; but that Steadman could not see him and that he could not see the top half of Mulrunji's body at this time.

Steadman maintained his position about Hurley yelling at Mulrunji after the fall, when interviewed on 8 December 2004, when giving evidence at the original inquest, when giving evidence at the trial, and finally, when giving evidence at the re-opened inquest. Before the DSC inquest:"You've heard Senior Sergeant Hurley say something at that time? – Yes.

It was something abusive? – I – it was loud, it was yelled.

It was something abusive? – Possibly, yes.

It was abusive or it wasn't Constable? – It was loud. I don't remember what he – I don't know what he said.

No. But you got a sense – a sense of what he said? – Yes.

And it was at least to an extent abusive, wasn't it? – Yes.

Yes. And it was in a raised voice? – Yes."Before the re-opened inquest:"... and you accept that the yelling bordered on being abusive, correct? – Yes.

And the volume and manner of the yelling suggested to you that Senior Sergeant Hurley was angry; correct? –

Yes.Before the trial:"it sounded angry."Steadman did not water down this evidence at the inquests or at trial. Being angry and yelling in response to being punched, struggled with, and after a fall caused by the resistance to his authority by a prisoner, might be considered an ordinary human response.

However Hurley claimed:" It was a heavy fall? Yes.

It was a hard fall? Yes.

That floor is hard? Yes.

At that point, I suggest you snapped? ***No***.

You yelled? Yelled what?

You yelled abuse at him? ***No***.

You spoke abusively to him? ***No***.

You yelled loudly? ***No***.

Constable Steadman is not someone who would have a grudge against you is he? ***No***."Hurley's denial can be seen as a calculated and tactical stratagem particularly in light of earlier statements that show he may not really remember what occurred in the fall.. It was untrue. It affects his overall credibility. There would seem to be ***no*** reason to lie about this material issue other than that the truth would implicate him in a physical assault by providing further evidence that his response to Mulrunji's provocation was an angry response.

Steadman appeared to me to be the most consistent and honest of all the witnesses. Steadman's evidence on this point is consistent with Bramwell's version; Bramwell probably did not see the initial fall into the police station, but became conscious of their presence because of the accompanying racket.

This evidence also ties in with the fact that Bengaroo saw the fall into the police station, heard the angry yelling, and did not want to be involved in case he got into trouble. I have set out this extract from Deputy Chief Magistrate Hine's findings, not for the purposes of agreeing or disagreeing with it, but because it shows how critical Constable Steadman's account may have been. It shows also that there were contemporaneous notes kept by an eyewitness which did not come to light, or were overlooked, at the time. It shows how one decision-maker, looking at all the evidence, found that SS Hurley's account should be disbelieved on this point having given, it would seem,

significant weight to the evidence of Constable Steadman and to his contemporaneous notes. Deputy Chief Magistrate Hine's findings show that this omission by DI Webber and DSS Kitching cannot be brushed off as insignificant human error. Constable Steadman had just arrived on Palm Island. He was, to that extent, something of an unknown quantity to the other police officers. Perhaps it was the case that some or all of the investigating officers knew he had seen something and any account he might give could be inconsistent with their view that SS Hurley should be ***protected***. Constable Steadman was not called as a witness in this proceeding, so just as with other hypotheses to which I have referred, the Court remains without sufficient evidence to proceed beyond speculation. Whatever the explanation – innocent or otherwise – the glaring omission to interview Constable Steadman is in my opinion another example of the lack of actual impartiality in the investigation. I cannot reconcile an investigation that was in search of the truth of how Mulrunji had died (and whether any criminal offences may have been committed) with an omission to interview an eyewitness to both the precursor events to the man's death, and then to his death being discovered. Particularly not in a small community, with a small number of police officers and ***no*** other potential eye witnesses.

The treatment of PLO Bengaroo There are two categories of allegations relating to the treatment of Aboriginal witnesses. The first category relates only to PLO Bengaroo, and sets up a contrast between the way he was treated by the investigating officers and the way other police officers were treated. The second category relates to the way the investigating officers dealt with the other Aboriginal witnesses who were interviewed as part of the investigation. As I have already set out, PLO Bengaroo was interviewed by DSS Kitching and DS Robinson in the late afternoon on 19 November 2004. He also participated in a video re-enactment conducted by Inspector Williams and DI Webber on 20 November 2004 in the middle of the day: see [257] and [268] above. In the interview with DSS Kitching and DS Robinson, PLO Bengaroo had given this account of what had happened just before Mulrunji's arrest, part of which is also extracted at [880] above but which I extract here again for the purpose of addressing this category of allegations ("RK" standing for DSS Kitching and "LB" standing for PLO Bengaroo):LB Chris had Patrick put in the Police vehicle – I stood, I stood besides the police vehicle and I helped open the back door for Chris to put um Patrick in and um ... there was a struggle, person named Cameron Doomadgee walked towards me and said 'Ah you're a black man, like me, I said ah – what do you lock him up for

...

LB ... And I told, myself I told ah Cameron to, just walk down the road otherwise he'd get locked up

RK Yeah – What happened then

LB Um, Chris started the vehicle, ah Chris had (ui) gone a couple of metres down the road, Chris said Cameron was calling out (ui)

RK Uhmm, do you know what Cameron was calling out

LB I can't recall

RK Okay, what happened then

LB Ah, all of a sudden Chris said to me who was that (ui) – we pulled up and – next to Cameron and Chris said to me "I'm going to have him – lock him up" – so both of us jumped out of the police vehicle and I went down to the rear end of the police vehicle to the cage part and I opened the door for Chris – and Chris grabbed Cameron and put him in the back of the vehicle

...

RK And what did Chris do

LB He grabbed um Cameron

RK Yep, he grabbed Cameron, yep

LB (ui) opened the back of the vehicle and Chris put Cameron in the vehicle – in the rear

RK How did he do that?

LB (ui) force, by force (ui)

RK By force – how come (ui) why

LB (ui) grabbed his two arms and two legs and helped him in that way into the vehicle

RK Just helped him in?

LB Yeah The italicised part above is not reproduced in the typed record of interview but is clearly audible in the tape recording. The "Yeah" from PLO Bengaroo is inconsistent with what he had said when he was able to give unprompted answers. There is ***no*** evidence that PLO Bengaroo's statement that SS Hurley used force to put Mulrunji into the vehicle was pursued by QPS investigators. There is also ***no*** evidence investigators pursued whether there was a proper basis for Mulrunji's arrest in the first place, given the statement of PLO Bengaroo. Certainly DSS Kitching's inaccurate and leading questions in the interview with PLO Bengaroo would suggest he had ***no*** intention of pursuing any such inquiries. However, it was what PLO Bengaroo said during the video re-enactment with Inspector Williams and DI Webber which was the focus of the applicants' criticism in this proceeding. To recap, this is what PLO Bengaroo is recorded as saying during the video re-enactment, in answer to a question from DI Webber about what he did after he saw SS Hurley and Mulrunji "struggling" through the doorway into the police station ("MW" standing for Inspector Williams, "W" standing for Inspector Webber and "LB" standing for PLO Bengaroo):MW: Okay. And they went through the doorway and what happened then?

LB: I just stood up here. I stood a bit further here. They struggled through the door and down the hallway.

MW: Went down the hallway? Okay. Did anything happen here?

LB: Mmm. - I can't recall. ***No***.

W: They walked into anyone?

LB: ***No*** they didn't. They struggled.

W: He was struggling?

LB: Yeah.

W: Struggling - what happened?

LB: Ah - I think he flopped against the floor and Chris fell on him ... Chris fell on him. I ... I cant't tell you ... Mmm - they fell down I think ... Chris was trying ... trying to pick him up.

MW: Just take your time. So you're saying that Cameron fell down?

LB: Yeah

W: They both fell down?

LB: They both fell down (ui) on it.

W: They both fell down.

MW: And you said Chris was trying to pick him up?

LB: Yes.

MW: Okay. How was Chris trying to pick him up?

LB: Mmm

MW: Can you remember how he tried to do that?

LB: Well I just stood here and I just seen him ...

W: From behind like this or (ui)?

MW: What, what did you see from here? What could you see from where you're standing?

LB: He was behind (ui) behind ah Cameron, - just like that - just trying to pick him up that way.

MW: Was he?

LB: Yes.

MW: Okay. And did you go inside?

LB: ***No*** I didn't.

MW: What about Sergeant LEAFE? Did you see Sergeant LEAFE

LB: Yes I did.

MW: Yeah, what did he do and where was he when you saw him?

LB: Ah he was in the hallway.

[Then a little later.]

LB: I was just there and um I moved a bit further and then I was just inside the door

W: And so they both ended up on the floor just in here?

LB: Yeah

W Just inside here?

LB: Mmm

W: Did you see ah Cameron hit his head or anything like that?

LB: ***No*** I didn't. Nothing at all.

MW: So what did you do after you saw them go in there?

LB: I just stood and moved a little bit further. I just stood on the matt.

MW: Can you show us where you stood? Yep. You stood up there?

LB: Yeah. And I seen Chris and Michael just took Cameron that way um they sort of dragged him towards ....

W: From behind (ui)

LB: Yeah.

MW: So they dragged him from behind? Okay. And what did you do as they were dragging him down the hallway?

LB: I stood right here

MW: You stood there?

LB: Yeah.

MW: Were you watching?

LB: ***No*** I wasn't.

MW: What were you doing? What, how come you were standing there?

LB: Um ... I can't remember. I just stood here because I was thinking um if I see something I might get into trouble myself or something ... the family might harass me or something you know ...

MW: Oh okay

W: While, while Cameron was on the ground did you see Senior Sergeant HURLEY do anything?

LB: Um he scruffed him - like he sort of a bear hugged him ... just has his arm around his shoulder - around this part here.

MW: To hold him?

LB: Yeah

MW: Okay. And you still had the other chap in ah, in the back of the van?

LB: We did, yeah.

MW: Okay.

W: You see Senior Sergeant HURLEY punch Cameron (ui)?

LB: ***No*** I didn't ***No***.

(Emphasis added.) During the inquests and during the Palm Island Review, DI Webber was challenged about why he did not investigate further what PLO Bengaroo meant by the remarks I have italicised. He was challenged again on this issue in this proceeding. Steadfastly, DI Webber has maintained that he did not understand PLO Bengaroo's comment in the way the series of people who have questioned him about it over the years have suggested it should be understood. In cross-examination in this proceeding, DI Webber accepted that he did not ask any follow up questions of PLO Bengaroo about this comment. He insisted he did not interpret it in the way the applicants' senior counsel suggested it should be interpreted:Well, it's a pretty remarkable thing for someone to say, isn't? He's a long-term PLO. And he's telling you that he stands outside the police station because he doesn't want to see what's happening?---I didn't interpret it as that.

Well, that's his clear words. "Because I was thinking, if I see something, I might get into trouble myself"?---Well, I took that on the – in a different sense.

Well, what sense did you take it in?---I took it in the sense that he doesn't want to be involved, doesn't want to have anything to do with it because then he would potentially be in trouble with the rest of the community.

And it's a remarkable thing to say?---As in fact he was.

Leave the benefit of hindsight. He's telling you a very serious proposition, isn't he?---Well, as I say, I didn't take it as a serious proposition at that point.

Well, he's worried – might be – see something that might get him into trouble. You didn't ask him had he seen something that Hurley had done before that might get him into trouble?---Well, the point was that he didn't say that he saw anything. After some further exchanges which are not in my opinion material, DI Webber then said, apparently in an attempt to explain why he may not have understood what PLO Bengaroo said in the way that others appear to have, that:not every piece of the conversation was easily understood. The remainder of the cross-examination on this issue concerned putting to DI Webber what had been found in the other inquiries – an exercise,

as I have said, that I did not find of any assistance to the Court's task in this proceeding. The applicants also rely upon, and DI Webber was cross-examined about, the fact that PLO Bengaroo was not taken to the re-enactment in Dee Street. Instead, only SS Hurley was taken. DI Webber explained this in the following way:But you only took Mr Hurley?---Yes.

Despite the fact that he was one of the two QPS officers there at the time of the arrest?---Yes.

You didn't ever take Mr Bengaroo on a similar view, did you?---***No***.

But there's ***no*** reason, is there, why his version would have been any less important than Mr Hurley's?---***No***.

Except that Mr Hurley is white and Bengaroo is Aboriginal?---***No***. Mr Hurley was the primary person of interest at that point in time, so - - -

But wasn't it important to know what Mr Bengaroo's account of what it was, in case it differed from Mr Hurley?---It was – it was primarily to identify the actual location of where the arrest had occurred.

And you could have taken Bengaroo for that?---Subsequent - - -

He didn't need to be seen in ***public*** in the company of Hurley?---Subsequently, we could have, yes.

But you didn't?---***No***. DI Webber's evidence was that SS Hurley was never a suspect in the investigation and I do not understand his use of the phrase "person of interest" in this evidence to change that position. I do not accept DI Webber's evidence that the primary purpose of going to Dee Street was to identify the location. That could have been done without SS Hurley, or in other ways – including by a simple description and a mark on the map. In my opinion, DI Webber was giving SS Hurley an opportunity to give his account, alone, of what happened in Dee Street. That is because, as I have found at [859] and following above, neither DI Webber nor DSS Kitching conducted themselves so as to allow for the possibility that SS Hurley was responsible for Mulrunji's death, or for any other criminal offences in relation to Mulrunji. In my opinion DI Webber did not believe PLO Bengaroo had any real contribution to make to the investigation. He found the man hard to understand but made ***no*** real effort to understand him. DI Webber found PLO Bengaroo "reluctant", whereas Dr Eades' impression of PLO Bengaroo's answers was that he was taking his time and being careful. DI Webber did not appear, in the contemporaneous video footage nor in his oral evidence, to be interested in such nuances. Instead, PLO Bengaroo's hesitation in the re-enactment video meant his accounts were put to one side. When PLO Bengaroo made statements in his record of interview or the re-enactment which could reflect adversely on SS Hurley, those statements were not followed up. Instead, there were efforts made to discount PLO Bengaroo's statements to a level where they could not assist in implicating SS Hurley. My impression was that DI Webber had little regard for PLO Bengaroo, and was prepared to disregard what he had to say. He took that approach because PLO Bengaroo was an Aboriginal man from Palm Island, and DI Webber did not want to see a senior, white QPS officer such as SS Hurley implicated in the commission of a serious offence on the say-so of an Aboriginal PLO or (as I set out below) Aboriginal witnesses.

The treatment of other Aboriginal witnesses These allegations are separate from the allegations about the treatment of PLO Bengaroo, although because of the nature of the allegations there is some overlap. There were separate allegations made about the treatment of Roy Bramwell and I deal with those at [959] below. In relation to the Aboriginal witnesses as a group, the applicants contend: first, that there was a failure to organise for a support person for Aboriginal witnesses during their police interviews (if needed); and second, that the way the interviews were conducted "did not account for the cultural needs of the witnesses". There were, relevantly, seven Aboriginal witnesses interviewed in the first few days after Mulrunji's death. They were PLO Bengaroo, Roy Bramwell (who

was at the police station when Mulrunji was brought in by SS Hurley), Patrick Bramwell (who was in the cell with Mulrunji), Penny Sibley (who saw Mulrunji being taken out of the police van at the station), Gladys Nugent, Edna Coolburra and Gerald Kidner (all of whom were in Dee Street at the time of Mulrunji's arrest). Section 6.3.2 of the OPM (which is an order) obliged police officers to establish, prior to interviewing a person, whether any special need existed in relation to that interviewee. Criteria were specified, but to make the position completely plain s 6.3.6 of the OPM contained a policy that persons who were Aboriginals or Torres Strait Islanders were to be assumed to have a special need unless the contrary was clearly established by reference to the criteria for identifying whether a need existed. That was because of not only cultural concerns, but also, the OPM stated, sociological ones. The particular, and well-recognised, features associated with interviewing Aboriginal witnesses were addressed by Dr Eades in her evidence. Dr Eades commenced with a general description of the problem for Aboriginal people with interviews as a method of gaining information:Many of these problems arise from the culturally-based nature of the interview as a speech event in which a person requiring information asks questions from a person who is expected to provide the information. Interviews are mostly one-sided in this way, and the expectation is of a smooth Question-Answer iterative pattern. Interviews are not a speech event typically found in Aboriginal societies, where information is often provided in a much less direct and one-sided way. When Aboriginal people want to find out substantial information, such as details about an event or a situation, or why someone has done something, they typically talk around a topic, engaging in conversation (or yarning) rather than a Question-Answer session. Dr Eades identified three main problems which affect the way some Aboriginal people communicate information. The first is 'gratuitous concurrence' which Dr Eades defined as a:sociolinguistic term which refers to a speaker saying yes (or yeah or mm or nodding their head) in answer to a question (or ***no***, nuh or shaking their head to a negative question), regardless of whether or not they agree with what they are being asked, and sometimes regardless of whether they even understand the question. The second feature is silence. Dr Eades said:In Aboriginal interactions, silences are often used productively and positively ... But many Aboriginal people respond to some direct questions from non-Aboriginal people, especially those on important personal topics, with a period of silence, often lasting more than one second. When the questioner allows for some silence, it is often followed by an answer. But many non-Aboriginal people feel uncomfortable with a silence of more than about one second. Thus it is easy in interviews of Aboriginal people in legal contexts for the interviewer (e.g. police officer or lawyer) to effectively interrupt the first part of the answer, that is the silence that often begins an Aboriginal answer. The third feature is a different way of providing specific information in answer to a question that required a specific answer:Another difference concerns the way that people provide specific information. It is common for interviewers to ask for specific information with such questions as "how many? what time? how far? how long"? These questions often expect an answer with some quantifiable specification, such as "seven, 10.30, half a kilometre, 20 cms, 6 inches". But many Aboriginal people give specific details in relational rather than quantifiable terms: that is relating the question to social, geographical or similar situations or events, rather than using numbers. Answers might involve for example listing the names of people present, giving time information in terms of social comings and goings (eg "he came just after the kids went to school"), and calculating distance in relation to known places. It is not that Aboriginal people are not able to give specific detail, but that their ways of being specific may not involve numbers. Asking Aboriginal people questions that expect a quantifiable specification (such as questioning clock time: "what time was it?") can be an invitation for less accurate information than inviting people to provide other details about the event. Dr Eades also gave evidence about the usefulness of a support person for Aboriginal people who were being interviewed. In summary, her evidence was to the effect that while having a support person might give an Aboriginal witness some comfort and put them more at ease, it was not likely to improve any of the three features she had identified as problematic in interviewing Aboriginal witnesses. For the purposes of her report, Dr Eades examined the interviews conducted by DSS Kitching of the seven Aboriginal witnesses. As the respondents submitted, her evidence having examined the interviews did not particularly assist the applicants' contentions on these allegations, and the applicants made ***no*** submissions to the contrary. Suffice to say Dr Eades found few of the three features she had described present in the interviews. Where she did have some criticisms, it was of matters such as the pace of DSS Kitching's questions and his use of clock time. Neither Dr Eades, nor the applicants in other evidence or submissions, suggested that the presence of those features had any material impact on the nature and quality of the information provided by any or all of the seven Aboriginal witnesses. The applicants did make a separate submission about DSS Kitching's interview with Patrick Bramwell, which (there was ***no*** dispute) was substantially uninformative, and plainly wrong in places (such as Mr Bramwell telling DSS Kitching he was alone in the back of the police car and in the cell, when it is clear Mulrunji was in both locations with him).

The applicants attempted to lay the blame for those features of the interview with the interviewing technique of DSS Kitching, assessed in accordance with Dr Eades' evidence. However, Dr Eades' own assessment of Patrick Bramwell's interview did not support this contention. In my opinion, there may have been a number of reasons for Patrick Bramwell's interview being so uninformative. I do not propose to speculate about them. The point is that the applicants have not discharged their burden of proving DSS Kitching's questioning technique was responsible. It is important not to generalise or stereotype about what an Aboriginal person may or may not need by way of assistance or support. To do so is to engage in the very kind of attitude of which the applicants complain in this proceeding. The witnesses who appeared in this proceeding were mostly articulate, careful, informative witnesses who dealt with the questioning they faced as well as non-Aboriginal lay witnesses might have done in a similarly stressful situation. Some were subjected to leading questions and, ironically, it was possible to see some gratuitous concurrence occurring in those situations. I am sure there are many Aboriginal people living on Palm Island who are perfectly capable of communicating well through a question and answer process; or, at least, as well as many non-Aboriginal people can communicate. The cautions and factors to which Dr Eades refers are matters which should inform the judgement and approach of those charged with conducting interviews, or seeking information, but they are by ***no*** means to be treated as rigid rules, to be applied in all circumstances. What is important is awareness in the questioner, and those responsible for organising questioning, of what might be required by particular individuals. The respondents accept that none of these witnesses were asked if they would like a support person present during their interviews, and none were offered a support person. They submit, correctly, that a support person is not required by ss 6.3.2 and 6.3.6 of the OPM. These sections of the OPM do not refer to arranging for a support person to be present for interviews of individuals who are not charged with an offence. The only evidence from the respondents about any particular efforts made to accommodate the special needs of Aboriginal witnesses was given by DI Webber. That evidence was that he tried to involve Legal Aid. He said:We attempted to consider those things earlier – earlier in the piece by involving ... the Legal Aid service, etcetera, and contacting them and communicating with them. Unfortunately for one reason or another, they ... weren't able to ... be engaged or to participate. Taking into account evidence given later in cross-examination, it is apparent by "the Legal Aid Service" DI Webber meant ATSILS. Ms Sailor was the person resident on the island who worked for ATSILS, as well as Mr Marpoondin. DI Webber was aware of this because these were the two people he sought to assist him in going to see Mulrunji's family to notify them of his death. Ms Sailor's evidence was very clear that she was not contacted. She said she was in the ATSILS office all afternoon, after Mr Marpoondin went with DI Webber to tell Mulrunji's family the news of his death, and she stayed in the ATSILS office until Mr Marpoondin came back. It is clear she was still on Palm Island the next day. It is clear ***no*** police officer asked for her assistance, or that of Mr Marpoondin, in interviewing the seven Aboriginal witnesses. This is despite her describing having previously had a good working relationship with DS Robinson, and sitting in, as matter of course, on interviews when people were taken into custody. Although both DI Webber and DSS Kitching stated that they contacted Ms Sailor and Mr Marpoondin, in their capacity as ATSILS representatives, at the outset of the investigation and that Ms Sailor "did not feel comfortable" assisting them, I do not consider their evidence on this question to be as reliable as Ms Sailor's evidence. Her evidence, which I accept, is that she found out about Mulrunji's death from her cousin, who was a paramedic. After that, she and Mr Marpoondin went to the police station to see what had happened. Mulrunji's body was still in the cell at this time. Ms Sailor then described what she and Mr Marpoondin were told:So you then spoke to an officer from Townsville?---Yes.

And do you recall that conversation?---Vaguely. I – we were notified that there was a death and that the forensic team would be sent to Palm Island. They were awaiting the forensic team to come across. They – then we – the family at that stage hadn't been notified, and we were asked to accompany the police to the family, but I spoke with Uncle Owen, and I didn't feel comfortable with doing that business, and I just couldn't face giving news such as that, particularly because I've lost a brother in custody as well, so I didn't want to have to relay that message. So Uncle Owen went himself to the family. I note also that Deputy Chief Magistrate Hine made arrangements for support persons for all Aboriginal witnesses giving evidence before him on Palm Island: see [88] of the inquest findings dated 14 May 2010. I find DI Webber made ***no*** real attempt to secure the assistance of ATSILS or anyone else to support the Aboriginal witnesses interviewed between 19 and 21 November 2004. That omission, of itself, does not take these contentions of the applicants very far. Inspector Kitching gave evidence that he considered all the witnesses could be interviewed by themselves, that he had ***no*** difficulty in understanding them and he considered

they were understanding him. On my own review of the transcripts of interview, the witnesses do not appear to have had much difficulty understanding what they were being asked, or answering it. As I find below, for example, Ms Penny Sibley volunteered at several places during her interview that she saw SS Hurley hit Mulrunji and "rough him up". At least from the written transcript, there is ***no*** indication Ms Sibley felt inhibited in giving this account, which she gave at least twice during the interview. There were also other difficulties with the interviews in terms of witnesses not being followed up on what they meant by various statements, but I do not consider any Aboriginal witness appeared as if they would not, or could not, give a full and truthful account of what they saw or heard. It is difficult to assess from the evidence before me whether providing a support person would have made any difference to the information provided by the seven people interviewed. As I have outlined, Dr Eades did not find anything of real substance to criticise about the interviews. That is not necessarily the end of the matter, but the fact is that not a single one of these seven witnesses gave evidence before me. None stated, for example, that they felt unable to give a full account of what they saw. None said they were intimidated by the circumstances. There was simply ***no*** such evidence. As I have noted, Patrick Bramwell's account was uninformative and plainly wrong in places. While there may be other reasons for this, for present purposes the critical point is that DSS Kitching seemed to simply push through the interview, ***no*** matter what answers were given. While I accept that in some circumstances it will be necessary for police officers to consider what means might be available to make witnesses with special needs (including some Aboriginal people) comfortable enough to give their best account of what they are being asked about, and that such means might include a support person, I am not satisfied on the evidence before me that any of the seven witnesses the applicants identify were in need of such support. I am not satisfied it should have been apparent to either DI Webber or DSS Kitching that any of them needed a support person, or any other special considerations. In the absence of any evidence from the witnesses themselves, I am also not satisfied that their evidence was in any material way inhibited by the manner and circumstances in which DSS Kitching questioned them (in contrast to his questioning of PLO Bengaroo). There was, accordingly, ***no*** act involving a distinction, exclusion or preference for the purposes of s 9. However, the content of Ms Sibley's interviews is another feature which makes plain the lack of impartiality in this investigation. Twice during her interview Ms Sibley gave a clear account of SS Hurley assaulting Mulrunji. On the first occasion this is how she described what she saw (with "K" standing for DSS Kitching and "FS" standing for Ms Sibley):K Alright. Can you tell us what you saw then after you saw the police car turn up

FS Ah we just stood there waiting for Lloyd. Lloyd said 'I'm busy at the moment wait for me'

K Ahm

FS Um,

K What happened then

FS They just got out and opened the back of that police van there. Cameron was going off swearing and being abusive there for awhile.

K Yeah

FS And BRAMWELL was asleep on the floor.

K Yeah

FS So they grabbed hold of Cameron and pulled him out Cameron made a swing at Chris and punched him in the face and them they got him outside. Chris - Chris hit him back and they roughed him up into the side door. And I didn't see anything else after that. The door closed behind us.

(Emphasis added.) DSS Kitching did not follow up on this account immediately, or really at all. Instead, a few minutes later, he went back to Ms Sibley's account of Mulrunji punching SS Hurley. He asked:K Okay. And how ah - who opened the cage of the police car

FS Chris

K Chris opened the cage. And you said then Cameron hit Chris

FS Yes

K How did he hit him

FS He just punched him like that

K He just punched him.

FS (UI) .... punched Chris yes. []

(Emphasis added.) Thereafter, it was only when DSS Kitching asked another (properly) open ended question that Ms Sibley returned again to her account of SS Hurley punching Mulrunji:K Alright and what happened when Cameron got out of the police car.

FS He was there going off drank singing out Hey-ee

K And what happened then.

FS That's when Chris hit him

K How did he hit him

FS He jabbed him you know to the good side of the head (slapping noise) a clip – just once that's all

K Just once that's all ... (overtalk)

FS ... and then they grabbed, grabbed him by the his two arms and they dragged him to the door.

K And what was Cameron doing then

FS He was still singing out Ms Sibley's account here of how Mulrunji was brought into the police station was quite different to that of SS Hurley. She said quite clearly, on several occasions, that he was dragged through by the arms. She then said a few minutes later: "And his two legs were dragging, you know". The other accounts (including those of SS Hurley, Constable Steadman, and Sergeant Leafe) give descriptions suggesting Mulrunji was upright and walking, although struggling, when he was taken out of the police vehicle and to the doorway leading into the police station. A little later when Ms Sibley was asked what happened as Mulrunji was dragged away, this was the exchange: Okay. When, when the police and Cameron got to the door, did anything happen then. There was ... a bit of a roughing up there, but I couldn't see properly, you know what they were doing. And I then could hear Cameron saying – "oh eff off" you know, "leave me, eff off". Was Cameron standing up then or.. ***No***, ***no*** they had him by the two arms and then the door closed and I couldn't see anything else. Were both the policemen, were

they still standing up. Yeah, they were still there, standing up And when they were dragging Cameron they were standing behind him or in front of him or beside him On the side of him One each side of him Yeah The final account she gave was as follows:K And you say then during that struggle ...

FS Yeah

K ... he hit Chris

FS Yeah

K And then once Chris got him out of the van, you said ....

FS Chris hit him

K You're indicated to the hip area.

FS He sought [sic] of hit him there

K Hip ... hip ... hip ahh – the side here somewhere ...

FS Yeah

K And were they still struggling to get (UI)

FS Yeah and he was still singing out - Cameron at the time

K So when they were walking down to ahh the door, were they still struggling as they walked down ...

FS Yeah

K And (overtalk)

FS Then they got inside, they just closed the door behind..

K Did you see who closed the door ***No***. I don't know who it was. ...[I note that the transcript that was in evidence showed DSS Kitching asking the questions in this passage, but in the audio of the interview, which was also in evidence, it is clear that Inspector Williams was asking the questions with DSS Kitching present.] This seemed, at least on one view, to be an account of a second time when SS Hurley hit or punched Mulrunji, in a different part of his body. In this exchange it is notable, in my opinion, that again a question was put to Ms Sibley which did not reflect what she had told the officers who were interviewing her, and which was more consistent with the account given by the other police officers. Ms Sibley had clearly said, several times, that the officers dragged Mulrunji through the door by his arms. Yet here DSS Kitching puts back to Ms Sibley a question premised on Mulrunji walking through the door, struggling. In this interview, and in his subsequent failure to pursue or even highlight Ms Sibley's account, in my opinion DSS Kitching was intent on pursuing a narrative which was consistent with what his fellow police officers had told him. Consciously or unconsciously – it does not matter for the purposes of s 9 – whatever he was told by Aboriginal eyewitnesses was neither as important nor as compelling to him. Ms Sibley's account of what she saw SS Hurley doing was either downplayed or disregarded. That was, in my opinion, in substantial part because she was an Aboriginal person giving an account of potentially incriminating behaviour by a

white police officer. This evidence contributes to and supports my findings about the lack of impartiality in the investigation. However, the applicants have not proven any of their separately formulated allegations concerning the treatment of Aboriginal witnesses.

The way Mr Roy Bramwell was dealt with The applicants singled out the treatment of Mr Bramwell. I agree his treatment was quite different from that of other Aboriginal witnesses. It is the most obvious example of differential treatment of an eyewitness because he was an Aboriginal person, and not perceived by the investigating officers as likely to have an account of events that was reliable, or truthful. Again, it supports and contributes to my finding concerning the lack of impartiality in the investigation. Mr Bramwell was first interviewed at 8.15 am on 20 November 2004 by DSS Kitching and DS Robinson, having been collected from his house that morning and taken to the police station for the purposes of that interview. Apparently he had not been held overnight despite having been arrested the previous morning. He participated in a video re-enactment with DI Webber and Inspector Williams later that morning. Both his interview with DSS Kitching and the video re-enactment were in evidence in this proceeding. Mr Bramwell had been arrested on the morning of 19 November 2004 on charges relating to an assault of Gladys Nugent. That led to Mr Bramwell being in the watchhouse, sitting in what was known as the yellow chair, directly facing the door through which SS Hurley would subsequently bring Mulrunji. During his interview Mr Bramwell told DSS Kitching he had seen Mulrunji in the police van outside, as he (Mr Bramwell) had walked into the police station. He recounted how he had seen Mulrunji punch SS Hurley after he had been removed from the police van. On Mr Bramwell's account, SS Hurley then dragged Mulrunji inside. During his first interview Mr Bramwell gave the following account of what he had then seen:Chris started punchin' him just in the hall there, Chris started punchin' him. "You want more Mr Doomadgee?" He went like that. "You want more Mr Doomadgee hey that's enough for ya?" Just kept on going like that. Chris. Ah I just sat down and (ui) I seen Mr Doomadgee's legs sticking out.

... And Chris started punchin' him. I seen Chris goin' at – I seen Chris goin' at him like that, you know.

[In my view, the audio shows Mr Bramwell said "Chris was goin' like that", not "I seen Chris goin' at him".] When Mr Bramwell spoke about Mulrunji's legs "sticking out", the parties agreed this was a reference to the fact that Mulrunji was lying on the floor of the watchhouse, but Mr Bramwell's view was obscured by a filing cabinet, so that he could not see the whole of Mulrunji's body on the floor. DSS Kitching asked Mr Bramwell how he could have seen SS Hurley punching Mulrunji from where he was sitting, and this was what Mr Bramwell said:Well he tall, he tall you know. I just seen the elbow comin' down like that you know. Must have punched him pretty hard didn't he. Well he a sober man, and he was a drunken man.

[In my view, the audio shows Mr Bramwell said he saw "the elbow goin' up and down like that", not "I just seen the elbow comin' down like that".] On Mr Bramwell's account, there was ***no*** fall of both SS Hurley and Mulrunji. Mr Bramwell said only Mulrunji fell over, and when asked why, he said "he was drunk". Subsequently, when DS Robinson took a written statement from Mr Bramwell, Mr Bramwell's account was recorded in the following way:From where I was sitting I could see Cameron's feet and I could hear Chris saying "you want more Mr DOOMADGEE, you want more". I could not see what Chris was doing, I could see his elbow going up and down into the air. As the applicants submit, DS Robinson, who had been present during the interview DSS Kitching conducted, had heard Mr Bramwell say at least twice that SS Hurley had punched Mulrunji. Yet when he typed up Mr Bramwell's written statement, DS Robinson did not include anything about SS Hurley punching Mulrunji. After Mr Bramwell's account, and as the applicants submit, the investigating officers did not put his account back to SS Hurley, Sergeant Leafe or PLO Bengaroo. Instead, they continued to interview other witnesses, turning their attention to people who had been present at Dee Street. Later that morning, after Inspector Williams arrived, he suggested a video re-enactment should be conducted. DSS Kitching was also present during Mr Bramwell's re-enactment. The applicants criticise the conduct of the re-enactment, submitting that Mr Bramwell is questioned more closely (whether he had been drinking, whether he was okay, whether his memory was good) than the non-Aboriginal (police) witnesses. They also submit he was asked to go through events numerous times, whereas the non-Aboriginal police witnesses were not. All this combines, the applicants submit, to create the impression that the investigating officers were either dismissive of Mr Bramwell's allegations, or were actively trying to discredit them, at

an early stage of the investigation before they had been put to SS Hurley. I have watched the video re-enactment several times. Mr Bramwell's emphasis is on what he saw SS Hurley doing to Mulrunji – that is, punching him. He commences his narrative almost immediately with this. He is also clear that SS Hurley dragged Mulrunji through the door, that Mulrunji was drunk but was saying he wanted to stand up, telling SS Hurley to let him go and let him stand up. On Mr Bramwell's account, the two did not fall through the door and both end up on the floor. On his account, there was ***no*** fall: rather, Mulrunji was dragged through the door and ended up on the floor. Mr Bramwell was asked to show the officers where SS Hurley and Mulrunji were when the punching occurred. He did so. He went into the corridor behind the filing cabinet. From the camera angle as it panned back towards where Mr Bramwell was sitting, although part of Mr Bramwell's body is obscured by the filing cabinet, the top of his body, and the elbow coming up and down mimicking what Mr Bramwell said was how SS Hurley punched Mulrunji, could be easily seen. The filing cabinet appears to come up to about the chest level of Mr Bramwell, who is not a tall man. Further when DI Webber played the role of SS Hurley and Mr Bramwell lay on the ground playing the role of Mulrunji, it is clear to an observer that DI Webber could be seen, from the chair Mr Bramwell was sitting in, performing the punching actions Mr Bramwell recounted. Mr Bramwell also explained why he did not say anything at the time: he said, if he had said something, "Chris" would have locked him up. Towards the end of the interview, Mr Bramwell described SS Hurley punching Mulrunji in the face three times and Mulrunji trying to cover up his face. On the video re-enactment, it is objectively difficult to see how Mr Bramwell might have been able to observe that. In other words, there are aspects of Mr Bramwell's account, viewed objectively, which are less plausible than other aspects. Having watched the video re-enactment with SS Hurley, however, the same observation might be made of his account. His account in the video, for example, does not recount him falling very much at all, and certainly not falling onto Mulrunji – indeed later in the re-enactment SS Hurley describes ending up on his knees. In my opinion there was ***no*** material difference between the quality or reliability of Mr Bramwell's interview and video re-enactment and those of the QPS officers, especially SS Hurley. Each had omissions and contradictions. Yet Mr Bramwell's account was quickly discounted. His account was not put to SS Hurley during the re-enactment. Nor was it put to Sergeant Leafe and PLO Bengaroo during their re-enactments. Nor, as I have dealt with above, was it included in the Form 1. When pressed in cross-examination about why he never considered SS Hurley a suspect during the first few days of the investigation (until he was relieved from his investigative duties), Inspector Kitching maintained that:I had an open mind. I had ***no*** preconceived ideas at all about what caused the death. It was a completely open investigation to identify the facts of the matter. For reasons I have already set out, I do not accept this was the case. I emphasise that the recounting of these events is not designed to establish one way or the other what SS Hurley did or did not do to Mulrunji on 19 November 2004. Rather, the focus is on what an objective, thorough and impartial investigation should have identified. The applicants repeatedly referred (in their written submissions and in the lengthy factual annexure to those submissions) to findings adverse to SS Hurley made by both Acting State Coroner Clements, the CMC, and Deputy Chief Magistrate Hine. This is an example of the applicants' submissions:Deputy Chief Magistrate Hine concluded: "Another instance of collusion is the mimicking of Bramwell's actions by Hurley in the video re-enactment of 20 November 2004, which conveniently explained earlier actions depicted by Bramwell in his re-enactment, and which were mentioned to Sergeant Robinson in Bramwell's interview and statement earlier that day. The suspicion is compounded by Hurley's failure to mention his repeated attempts to raise Mulrunji from the floor by grabbing his shirt when he was interviewed for the first time on 19 November 2004.["] Anyone observing the video of Mr Bramwell's account of how SS Hurley was punching Mulrunji, and then watching SS Hurley re-create how he pulled Mulrunji up by the shirt, could see the similarity. It is not this Court's function to decide whether to make the kind of finding Deputy Chief Magistrate Hine made, and I have not approached the parties' submissions on this basis. Rather, like Deputy Chief Magistrate Hine's findings about Constable Steadman, what reference to later findings in later inquiries shows is the potential probative value of Mr Bramwell's account. It was that potential probative value that I find QPS investigating officers ignored in November 2004. To make that finding is not to reach any conclusions about where the investigation should appropriately have ended up: rather, it is to emphasise how it should have been conducted, if it was to be conducted impartially and objectively, with equal attention and respect being paid to the evidence of Palm Islanders as to that of non-Aboriginal police officers. The relevance of examining how Mr Bramwell was treated is to determine, at the time this re-enactment occurred, what one might reasonably have expected the investigating officers to do with this kind of account. Whether or not SS Hurley's re-enactment had been modified to address Mr Bramwell's account, the point to be made here is that any investigating officer at this early stage of the investigation would, it seems to me, have been taking all accounts seriously. An investigating officer might have watched what SS Hurley did and

considered whether he was adjusting his account on purpose, whether there was in fact a similarity that meant Mr Bramwell might be mistaken, or whether there was enough consistency that Mr Bramwell might be correct. All those were reasonable possibilities on what was known to the investigating officers at this time. At the time (rather than in hindsight), there was ***no*** obvious reason to discount or dismiss what Mr Bramwell had said. Yet this is what in substance occurred. Inspector Kitching denied that he decided Mr Bramwell's account was not credible. He said he did not recall any discussion with DI Webber in which they agreed to ignore Mr Bramwell's account. He stated that "all the information from all the witnesses was – was taken credibly and it was to be produced at any time". He denied dismissing Mr Bramwell's account because he was an Aboriginal man. He accepted it was part of his task as an investigator to analyse information, not simply collect it. He appeared to say that he was too short of time to review properly the information he had collected. If this was proffered as an explanation for the disregard of Mr Bramwell's statement, and the failure to put its substance to SS Hurley, or to include it in the Form 1, I do not accept it. The more likely explanation, and the one I favour, is that DSS Kitching had made up his mind to accept the account of events given by SS Hurley, and not to emphasise, or further investigate, any information that might contradict what SS Hurley had said, especially information coming from local Aboriginal people. DI Webber's evidence was that he thought Mr Bramwell might have been "gilding the lily or telling lies, furthering the – increasing his status in the community by telling lies". He also confirmed that another possible explanation for what he considered were Mr Bramwell's "lies" was that he had been drinking on the Friday night and listening to community gossip. I note that DI Webber appeared to have ***no*** compunction about using the term "lies" about what Mr Bramwell had said: a view DI Webber has ***no*** doubt reached in hindsight after considering all the inquiries and findings. However, DI Webber did not characterise the evidence of any non-Aboriginal witness in this way, despite having the same advantage of hindsight and the same access to adverse findings about the evidence of certain police officers, including SS Hurley. DI Webber gave ***no*** acceptable or persuasive explanation to justify the way Mr Bramwell's account was disregarded, was not put back to SS Hurley, and was not included in the information provided to the coroner. He offered justifications which involved a pejorative judgment, now made in hindsight, but which in fact reflected the preconceived views DI Webber held of Mr Bramwell on 20 November 2004. In my opinion, at that time, DI Webber, like DSS Kitching, was simply not prepared to take seriously the account of a local Aboriginal man, in part because of his stereotyping about the motivations and weaknesses likely to affect what an Aboriginal man such as Mr Bramwell would be prepared to say. It may well have been that, in due course, later in the investigation, or in any prosecution process, those weaknesses or improper motivations might have been established as affecting the reliability of what was said by a range of witnesses, including Mr Bramwell. At the early stage of this investigation on 19, 20 and 21 November 2004, that could not possibly have been a reason to discount and disregard Mr Bramwell's account. In my opinion, the reason was the source of the information: a local Aboriginal man, known to drink. To accept Mr Bramwell's account, implicating SS Hurley, inevitably led to a rejection or questioning of SS Hurley's account. Neither DSS Kitching nor DI Webber were in my opinion prepared to allow the account of an Aboriginal man affected by alcohol to impugn the account of a white police officer. I accept that in the circumstances of this investigation it might have been appropriate to ask an eyewitness whether she or he had been drinking, whether during the events witnessed or before any interview. That is especially so where, on the evidence, alcohol consumption was a considerable social problem on Palm Island and it was not uncommon for people who ended up at Palm Island Police Station to have been affected by alcohol. However, a person affected by alcohol may still be able to give a truthful and reliable account of something she or he saw, heard or experienced. In the situation under consideration, questions of that sort as a first line of inquiry do seem to set up a different approach towards, and reveal different underlying assumptions about, local Palm Islanders from that taken with other witnesses. I also note that the investigating officers did not ask Mr Bramwell more objective questions that might have gone to the credibility of his account. For example, when SS Hurley returned to the police station with Mulrunji he had been assisting Mr Bramwell's partner, Gladys Nugent, after Mr Bramwell had been arrested for assaulting her and SS Hurley had also arrested Mr Bramwell's nephew, Patrick Bramwell, and had him in the paddy wagon with Mulrunji. Whether these circumstances coloured Roy Bramwell's account was not explored with him by the investigating officers. One explanation for that is that DSS Kitching and DI Webber were never going to take what Mr Bramwell said seriously. In circumstances where a local Palm Island Aboriginal man is giving an account that inculpates a white police officer, including saying at the end of the interview that he did not speak up because he was certain that white police officer would arrest him if he did, and in the absence of any satisfactory explanations in the evidence, I am satisfied that Mr Bramwell's account, and Mr Bramwell himself, was not taken seriously because he was an Aboriginal man from the Palm Island community. The Aboriginal race of the people

involved cannot be separated from their status as Aboriginal people from Palm Island. Palm Island is an Aboriginal community – that is its nature. The community is defined by race, and defined by the racially discriminatory and negative treatment that Aboriginal people in that community have suffered since its inception. On 19 and 20 November 2004, there was ***no*** respect from the investigating officers for the members of this community, there was ***no*** understanding of them, and there was ***no*** sense that what they had to say might be more truthful than what a white police officer had to say. There was, quite simply, ***no*** objective, racially neutral starting point.

Conduct surrounding the autopsy There are four allegations made about the way QPS officers provided information to the pathologist conducting the autopsy on Mulrunji. Most of these allegations concern the conduct of DSS Kitching. They are: a failure to submit the Form 1 for the autopsy as soon as possible; the statement in the Form 1 that "the deceased laid on the floor of the cell and went to sleep immediately"; the failure to include the allegations that SS Hurley assaulted Mulrunji in the Form 1 or in a supplementary Form 1; and the failure to advise the pathologist, Dr Lampe, of the assault allegations during the autopsy. I have set out the agreed circumstances concerning the 'Form 1' for the autopsy being sent to the Coroner at [282] above. The applicants criticise the delay in sending the Form 1, contending it was a breach of the requirement in s 8.4.8 of the OPM for that form to be submitted "as soon as possible" to enable an autopsy to be "carried out on the next working day". It is unclear on the evidence when it was decided that the autopsy would be performed on Tuesday, 23 November 2004, nor is it clear when DSS Kitching knew it would be performed on the Tuesday. This was his evidence about why, although the Form 1 was complete and checked by DI Webber on the Friday night, he did not send it until Monday morning:The next working day, which was the Monday, when – before the autopsy, I had to get the – the purpose of the form 1 is to inform the – the coroner and to substantiate a reason for an autopsy. So I certainly submitted it on the – the next working day, which was the Monday. Inspector Kitching seems to have misunderstood the "next working day" reference in s 8.4.8: it relates to the conduct of the autopsy on the "next working day" after the submission of the Form 1, not the submission of the Form 1 on the "next working day". Inspector Kitching also gave evidence that, at 7.25 pm on Friday, 19 November 2004, he contacted the local Townsville Magistrate to inform him of the death and then also contacted the government undertaker and made arrangements for Mulrunji's body to be collected and taken to Townsville. Mulrunji's body was moved on the Saturday morning, according to Inspector Kitching. This seems to be confirmed by the contents of DS Robinson's witness statement from February 2005, which was in evidence before me. That being the case, it seems wholly inexplicable that DSS Kitching would forget, omit or neglect to submit the Form 1, as such a critical step in an investigation into a death in custody. The investigation team worked over the weekend, and ***no*** distinctions appear to have been made between "working days" and "non-working days". It was not suggested that the State Coroner's office in Townsville operated in a fashion which meant it would only receive documentation about a death in custody, which the Coroners Act mandated be provided, between Monday and Friday. It may have been conceivable that DSS Kitching decided to wait until more interviews were conducted over the weekend, so he could give the pathologist a fuller picture. However, he did not give that as a reason in his evidence. Indeed, his evidence was that he intended to include information collected over the weekend in a Supplementary Form 1, not in the original Form 1. ***No*** Supplementary Form 1 was prepared or submitted. As it turned out, some of the accounts which emerged over the weekend were inconsistent with SS Hurley's account, and involved allegations of injuries inflicted on Mulrunji by SS Hurley. It was that feature, combined with the contents of the Form 1 as completed on the Friday evening, which the applicants contend demonstrates that DSS Kitching decided to present to the coroner a picture of what had happened that was exculpatory for SS Hurley, and which disregarded what Aboriginal witnesses had said. Similarly, Inspector Kitching's evidence about why, in the Form 1, he described what happened to Mulrunji as that "the deceased laid on the floor of the cell and went to sleep immediately", was unsatisfactory. As the applicants have submitted, this description in the Form 1 conveys a wholly inaccurate impression of what occurred. Mulrunji did not "lay" on the floor: he had been dragged into the cell by two police officers and was limp (or a "dead weight" in Sergeant Leafe's words) when this occurred. There is ***no*** possible way for DSS Kitching to have been certain that what happened was that Mulrunji went to sleep, as opposed to losing consciousness. The only person who described it that way was SS Hurley. The description is at odds with the cell video, which Inspector Kitching agreed he had viewed. In cross-examination of Inspector Kitching, senior counsel for the applicants described Mulrunji as "writhing in pain". While, to an observer of the video, that description also makes several assumptions, it is true that the cell video shows Mulrunji moving in ways that are not consistent with a person who is sleeping. Many of those movements are not, as DI Webber described it, "tossing and turning" during sleep. The cell video also clearly records audible noises

being made by Mulrunji, which were not mentioned in the Form 1. However, the point is (as Inspector Kitching eventually conceded in cross-examination) that it was not the task of any of the investigating officers to make assumptions or draw conclusions of this kind, especially about an issue so critical to the investigation. Inspector Kitching was prepared to accept he should not have described Mulrunji the way he did:And he did not lie on the floor and he was not asleep?---He was lying on the floor.

He didn't lie himself on the floor?---***No***.

No. He was limp - - -?---He was taken to the cell. Yes.

- - - unresponsive, and taken there by two police officers?---Correct.

But you don't set any of that out?---Not in the form 1. ***No***.

It would have been helpful for the coroner – the autopsy conductor to know that, wouldn't it?---I would accept that. Yes.

But you didn't tell him?---***No***. Nor did Inspector Kitching include on the Form 1 an adequate description of how Mulrunji's face appeared shortly after he was found deceased, and still lying in the cell. As I have noted, the state of Mulrunji's face is clearly evident in the video taken by Constable Tibbey while his body was still in the cell. In that video, Mulrunji's face is bruised and quite swollen. In evidence in chief, Inspector Kitching confirmed that he had viewed Mulrunji's body while it was in the cell, albeit briefly, and said he was aware of the injury to Mulrunji's face. He described that injury as "a small cut or mark just underneath one of his eyebrows". Based on the video that is in evidence, I find that description is inaccurate and minimises the nature of the injury. Having failed to convey relevant information to the coroner, DSS Kitching nevertheless provided information to the coroner that included a number of stereotypical and negative comments about Mulrunji, based it appears either on assumptions or comments from DS Robinson, for which there was ***no*** foundation in the evidence. These included that he might have been drinking bleach and sniffing petrol. To make allegations of that kind, and to omit the assault allegations, was capable of steering the initial pathologist inquiries in one direction (self-inflicted or pre-existing harm), and away from another (the conduct of SS Hurley). That is not the conduct of an objective and impartial investigator. In my opinion, DSS Kitching was not focussed on giving the coroner an accurate and fulsome description of the state Mulrunji was in when he was placed in the cell. He was not, I find, inclined to offer a description that was in any way inculpatory of the police officers responsible for putting Mulrunji into that cell and leaving him there, especially SS Hurley. He chose to provide information, stereotypical of Aboriginal people (a drunk sleeping his inebriation off, an Aboriginal person consuming bleach and sniffing petrol) that suggested Mulrunji was responsible for his own death. I am unable to place a benign construction on DSS Kitching's conduct. It was another example of the lack of actual impartiality in the investigation. I reach the same conclusion about the omission of the accounts of Mr Bramwell and Ms Sibley from the Form 1. Inspector Kitching again, in cross-examination, conceded they should have been included. He had ***no*** real explanation for why they were not. He accepted he was able to (and indeed, proffered that he intended to) complete a Supplementary Form 1 containing additional information gleaned from interviews over the weekend. That Supplementary Form 1 could also have been used to correct misinformation. It is clear Inspector Kitching was able to submit this supplementary form whether or not he had submitted the original Form 1, but as it turned out he had not submitted the original form, so there was really ***no*** practical or logistical difficulty at all in having the additional information included. Inspector Kitching's evidence on this issue should be set out:And you accept that there's ***no*** mention of Mr Bramwell's allegation of assault?---I didn't know that when I completed the form 1. ***No***.

But you well and truly knew it before you lodged it, didn't you?---Yes. I did. Yes.

And there's ***no*** mention of Ms Sibley's assault allegation - - -?---***No***. That's right.

- - - even though you well and truly knew that before you lodged it?---That's correct.

...

Now, you were able to include an allegation that the deceased has assaulted Senior Sergeant Hurley, weren't you?---Yes.

But you were not able to include an allegation by two different people of two different assaults by Mr Hurley?---I didn't have that information when I completed this form 1, and I didn't - - -

No, but you had it by the time that you submitted it, didn't you?---That's correct. Yes.

So by Saturday morning, you had the Bramwell allegation?---Yes.

By Sunday you had the Sibley allegation?---Yes.

And the form was submitted around 10.30 or so on the Monday?---Yes.

You could have easily amended it to include those matters. Would you agree?---I could have. Yes.

And you didn't?---***No***.

And during the course of the Monday, before the Tuesday autopsy, you did not cause to be submitted a supplementary form 1 - - -?---***No***.

- - - which included that important information, that is, of the two allegations?---Correct.

And at the time you were on Palm Island, the faxes were working?---I've got ***no*** idea

The computers were working?---The computers were working. Yes.

Well, there is ***no*** logical – there's ***no*** organisational reason why you couldn't have lodged it while you were on Palm?---***No***.

And then you instructed Constable Paul Harvey at 10.40 on Monday when you were in Townsville to submit it. Do you agree?---That's correct. Yes.

And I would suggest to you that you didn't include Mr Bramwell's allegation because you had rejected them completely out of hand as soon as you heard them and you never took them seriously?---***No***. That's incorrect.

And you also didn't accept Ms Sibley's allegations?---***No***. That is incorrect.

Because – the demonstration that you never took them seriously is that you didn't put them on the form 1 and you didn't include the other option of a supplementary form 1 prior to the autopsy?---***No***. That's incorrect.

That's not incorrect. You didn't do it?---***No***. That's correct. I didn't do it, but the form 1 was submitted with the information I had at that time when I briefed the coroner. I accept that further information could have been put into that form. However, I – I hadn't put it in there – not on purpose, certainly not on purpose. It was simply a matter of time, everything else going on at the same time, and when the form 1 needed to go to the coroner to get a post-mortem authority – and I certainly hadn't had time at that stage to update the form, and that's why it was faxed through at the time.

But it was critical information to confer – convey to the person conducting the autopsy, wasn't it?---I accept that. Yes.

And it never happened?---It didn't happen. ***No***.

No?---It had always been my intention to complete a supplementary form 1. However, I didn't have an opportunity to do that. Yes, it should have been done. I accept that.

See, I suggest to you that because it was an Aboriginal death in custody and the two allegations were made by Aboriginal people, you just dismissed them and failed to act on them. Would you agree?---***No***. I do not agree.

And that the allegation of the Aboriginal person assaulting the white person – that was included, wasn't it, in the form 1?---That was the information I had at the time. Yes.

Well, the information you had at the time from at least some people was there was a scuffle?---Correct.

You didn't include that, ie, a joint enterprise. You only included an allegation of assault by the deceased?---That's correct. Yes.

And I would suggest to you that you deliberately failed to meet the requirements imposed on you by the OPM because of the Aboriginality of the three people involved?---I certainly included in the form 1 about the struggle, which outlines:The deceased became aggressive and punched Hurley in the side of the face. Hurley then physically restrained the deceased and struggle – struggled with him to the rear door of the police station, where they both fell to the ground –which was the information I had at the time.

It was the information you had at the time you completed the form, and you lodged it two and a half days later. So it was not the information you had when you lodged the form, was it?---That's correct. Yes. The only explanation in this evidence is that "with everything else going on at the time", he could not prepare a more complete Form 1. He accepted he should have prepared a Supplementary Form 1, and said he intended to do so. He offered ***no*** adequate explanation for failing to complete a Supplementary Form 1, stating only that:I didn't have an opportunity to do that. Although Inspector Kitching did not expand on this statement, it appears to be a reference to the fact that the CMC took over the investigation into Mulrunji's death on the evening of Wednesday, 24 November 2004. Mr Bramwell was interviewed on 20 November 2004 and Ms Sibley was interviewed on 21 November 2004. He therefore had ample opportunity to complete a Supplementary Form 1 which included the allegations made in their

statements. The respondents' submissions seek to diminish the significance of DSS Kitching's conduct by pointing to the conclusion reached by Dr Lampe on the preliminary autopsy report that he could find ***no*** evidence that the use of direct force (such as punching or stomping) caused Mulrunji's injuries. Dr Lampe did note this did not exclude that either or both of those two possibilities may have occurred at some time prior to Mulrunji's death. The respondents also submit that the pathologist who conducted the second autopsy (Dr David Ranson) on 30 November 2004 (by which time the CMC was in charge of the investigation) had access to all the police interviews and had watched the cell video. They point out there is still ***no*** reference to the accounts of Mr Bramwell and Ms Sibley. The respondents then also rely upon the findings of Deputy Chief Magistrate Hine, first, concerning the inconsistent accounts given by all witnesses who were present at the police station when Mulrunji was removed from the police van, and second, concerning the medical opinion before him, which was to the following effect:(a) none of the medical witnesses nor any of the parties disputed Dr Ranson's rejection of the possibility that the punches described by Mr Bramwell (and, I infer, Ms Sibley) could have caused the fatal injuries;

(b) Dr Ranson agreed with Dr Lampe that there was ***no*** evidence to suggest that the use of direct force (such as punching or stomping) caused the injuries; and

(c) the medical experts agreed that the fractured ribs, liver lacerations and partial vein rupture likely occurred as a result of a single injury, and the medical evidence suggests only a single blow rather than a number of blows. Indeed, at [47], Deputy Chief Magistrate Hine made the disconnect between Mr Bramwell's allegations and the cause of Mulrunji's death very clear:It is not possible to make a finding that the punching by Senior Sergeant Hurley caused the fatal injuries because, as the Court of Appeal said at paragraph [39] "...even if Mr Bramwell's evidence inculpatory of Mr Hurley were to be accepted, the conclusion that the punches of which Mr Bramwell gave evidence caused the rupture of the portal vein and the near-severing of the deceased's liver, was a conclusion which was not reasonably open to the Coroner." I do not accept that any of these factors diminish the seriousness of DSS Kitching's omissions. Whether or not blows struck by SS Hurley (if that occurred) caused Mulrunji's fatal injuries, those actions could nevertheless be assaults and should have been the subject of a separate investigation. More importantly, the respondents' submissions are made with the benefit of hindsight, which is the very perspective that in other aspects of this case the respondents urged the Court not to take. What, eventually, was the cause of Mulrunji's death was the subject of a careful and exhaustive examination by Deputy Chief Magistrate Hine, including a great deal of medical evidence, but also with careful consideration given to the account of all eyewitnesses, Aboriginal and non-Aboriginal. All of that evidence was subject to detailed scrutiny, including cross-examination. Further examining the cause of Mulrunji's death is not the purpose of this proceeding. Rather, these current allegations are about how the police officers went about their statutory (and non-statutory) duties in those first few days after Mulrunji's death, and whether the way they went about those duties contravened s 9 of the RDA. For that purpose, Deputy Chief Magistrate Hine's eventual conclusions are not determinative. Nor are the ultimate conclusions of Dr Lampe and Dr Ranson. The Court is concerned here with how the relevant QPS officers performed their policing tasks during the period 19 to 22 November 2004, whether their conduct involved a distinction, exclusion, restriction or preference based on race, and whether their conduct had the purpose or effect of nullifying or impairing human rights, as provided for by s 9. In looking at effect, it is critical in a context such as this not to do so with hindsight. As the applicants submit, it is not in any event possible to rule out a different approach to the autopsy if complete and accurate information had been provided by DSS Kitching in a timely way. That is something which can never now be known. In my opinion, like the other features which I have identified, the conduct of DSS Kitching in providing information to the coroner shows, once again, a lack of impartiality in the investigation, a disregard for information provided by Aboriginal people, and a stereotypical presentation of information about an Aboriginal man who had died. The "effect" to which s 9 directs attention is an effect on the human rights of the class members (which I address below), not an effect on the outcome of the coronial process.

Allegations of failures to consider cultural needs The last category of conduct during the initial part of the investigation concerns what the applicants contend was a failure to "meet the cultural needs and expectations of the community". Included in this category are allegations about the failure of the QPS to utilise its own Cultural Advisory Unit (CAU), a failure to employ the assistance of a Cross Cultural Liaison Officer in the first week or so after Mulrunji's death, deficiencies in the notification of next of kin and a more general allegation of "failure to take

account of cultural needs". This latter allegation was scarcely developed in final submissions. Its main component appears to be a contention that QPS investigating officers took ***no*** reasonable steps to keep the Palm Island community informed of the progress of the investigation, including a failure to contact community leaders and to consider "cultural issues". The problem for the applicants in this allegation is that they never made clear what these "cultural issues" were. I have addressed elsewhere my conclusions that the investigating officers seemed to have little appreciation of the particular and unique characteristics of the Palm Island community (including their historical reasons for mistrust of police), did not take any meaningful steps to engage with the local community after Mulrunji's death, and indeed did not seem to know how to do so. All those conclusions have been reached in the context of the disregard I have found officers had for Palm Islanders, and are relevant again to some of the applicants' allegations about the intervening week between Mulrunji's death and the protests and fires of 26 November 2004. Those findings notwithstanding, I do not consider the applicants have made out independent claims of a contravention of s 9 by a failure to deal with cultural issues, or to engage with the community. In my opinion those matters are properly characterised as attitudes and behaviour of QPS officers contributing to the failure to conduct a thorough and impartial investigation into Mulrunji's death and the failure to communicate and defuse tensions in the community in the week before the protests and fires. I turn to the other allegations in this category. SS Dini, who gave evidence in the proceeding, did not arrive on Palm Island until around midday on 26 November 2004. Prior to this he was on leave: the respondents seemed to submit this explained the absence of a CCLO until that time. In his oral evidence, Inspector Dini did not see himself as having any particular role to perform during the events following Mulrunji's death:Now, in the context of Palm Island, your role was not only to assist QPS to liaise with the community, was it; it was more extensive than that; you had to identify the needs of the Palm Island community?---Well, what would happen is – because I'm not based on Palm Island, the police on Palm Island would identify if there were any issues or anything that they needed assistance with, and they would contact me, and we would provide advice and support.

So you didn't see your role as a proactive one to ascertain what the needs in the community were?---Well, I was doing that for Townsville.

But not for Palm?---Not for Palm.

So you relied on the local police to feed to you what they identified as maybe specific needs?---Yes. Well, Senior Sergeant Hurley is a very experienced officer with regards to working in Indigenous communities and probably knew as much as I did about Indigenous matters. So yes. If he called and asked for help, I was there to help.

But if he didn't identify a particular need, then you wouldn't know what was happening?---***No***. It was not suggested to Inspector Dini that another CCLO could have gone out to Palm Island on and from 19 November 2004. It appears he was the only occupant of that office in the region. He was not recalled from leave, but ***no*** witness was challenged about why that was not done. It seems to me that the lack of any proactive involvement of SS Dini earlier in the week is consistent with the findings I have made elsewhere about a disregard for the local community, and the potential effects of these events on them. As it turned out, that disregard had tragic consequences in the following week, consequences which in my opinion could well have been preventable. Inspector Dini appeared to me to be a capable and experienced officer, with considerable dedication to his role as CCLO. Indeed he described in his evidence the proactive and substantive steps he had taken since the events of November 2004 to improve QPS awareness about the best ways to interact with Aboriginal people and Aboriginal communities, and the development of closer and more respectful relationships between police and elders and community leaders in Aboriginal communities. He described:(a) meeting with elders, the community justice group, the Mayor and the Palm Island Council to discuss protocols on the island, the make-up of the island and the cultural sensitivities;

(b) developing a cultural appreciation project;

(c) developing a community specific package (CATPRO) for QPS officers working on Palm Island;

(d) establishing community police consultative groups; and

(e) developing three culturally specific self-paced learning modules for QPS officers, relating to Aboriginal people and Torres Strait Islanders. It may well have been the case that SS Dini could have made an active and positive contribution to easing tensions on Palm Island after 19 November 2004 and during the intervening week when community meetings were occurring. It seems to me that he, or another CCLO, could have constructively and empathetically worked with elders, the local Council, and those members of the community who had a great sense of injustice about what had happened, and he – leading a different attitude and approach by the QPS – could have alleviated the tensions which built up during that week. The evidence suggests there was little or ***no*** positive working relationship during this time between other police officers and the island Council, or other elders. There is very little evidence before the Court about what PLO Bengaroo was doing during this time (the running log for the Palm Island Police Station records that he was on duty between 8 am and 4 pm on 22 November 2004, but there is ***no*** evidence about what he may have done during that period), but it seems he may well have been lying low and that he was not asked to do otherwise. Rather than the failure to make arrangements for SS Dini, or another CCLO, to be present and providing assistance on Palm Island shortly after Mulrunji's death being itself a contravention of s 9, in my opinion the better approach is that this failure is yet another feature of the QPS officers' disregard for the local community, their (rightful) search for explanations, their need for a sense of justice and probity about Mulrunji's death, and their (rightful) concern that the lives of Aboriginal people were seen as worth less than the lives of white people. In that disregard was a distinction, exclusion or preference from the way an isolated and close-knit non-Aboriginal community would have been treated if a white person from that community had died in local police custody. I am satisfied adequate and sympathetic community liaison would have occurred in those circumstances. The CAU was part of the Commissioner's office in Brisbane, whereas the CCLOs were more regionally based. Sergeant Dini, for example, was based in Townsville. The evidence shows the only involvement of the CAU during November 2004 was as an initial conduit for rather inaccurate and incomplete information about Mulrunji's death. The emails in evidence from 19 November 2004 assert that Mulrunji was found to be "ill"; they note he was arrested for being a ***public*** nuisance and was intoxicated; they note that he punched SS Hurley, but do not note any other violence; they say nothing about the fall; they note Mulrunji's next of kin were not (at 12.30 pm) identified or advised of the death (although, as I note at [242]-[245] above, it appears Ms Twaddle may have been to the police station asking about Mulrunji). A file note made by the relevant CAU officer also recorded that a "contingency plan" was "being implemented for policing Palm Island in event of an increase in ***public*** disorder". The emails note that a "significant event message" would be sent, and would be copied to the CAU. What that message said, and what its purpose was, were not the subject of any evidence. Like the "cultural issues" allegation, this allegation made by the applicants was never given any real content. ***No*** evidence was led about the role and functions of the CAU. ***No*** evidence was led about what they might have been expected to provide by way of assistance. That is not to suggest there was ***no*** role for them, but the evidence does not reveal what it could have been. The applicants have not discharged their burden in relation to any of the allegations in this category.

Delay in notification of the next of kin I have set out at [182] above the provision of the OPM (s 16.24.3(vi)) which deals with the notification of the next of kin where there has been a death in custody, but for ease of reference I will set it out again:Where responsibility for the investigation of a death in custody or in police company reverts to a commissioned officer pursuant to s. 1.17 ... that commissioned officer should, as part of the investigation:

...

(vi) immediately arrange for the next of kin or person previously nominated by the deceased to be notified. Cultural interests of the person being notified should be respected by using the cross cultural liaison officer, if practicable. Where the deceased is an Aborigine or Torres Strait Islander and there is a delay or inability to notify the next of kin, efforts to notify the next of kin should be recorded; This is an example of an allegation where the applicants approached the "duties" they contended fell on the QPS officers with considerable strictness, seeing any deviation from the OPM as evidence of a contravention of s 9. As I have set out at [253] above, DI Webber performed the

notification task, with Mr Marpoondin and Sergeant Leafe. Ms Andrea Sailor gave evidence she had been asked to go, but felt she could not as she had had a brother die in custody and found it too upsetting and confronting. DI Webber and Mr Marpoondin saw Ms Twaddle, Mulrunji's partner, first at about 3.40 pm in the afternoon, then went to see Mulrunji's mother after that. The applicants' basic contention was that the delay in notifying the next of kin was a breach of the duty to "immediately arrange" notification, and that the requirement of the OPM for DI Webber (as the commissioned officer responsible for the investigation) to "arrange" notification did not mean he had to perform the notification task himself. Mrs Agnes Wotton confirmed that, earlier in the afternoon, Ms Twaddle had gone down to the police station to see what had happened to Mulrunji. Read in conjunction with DI Webber's evidence and SS Hurley's record of interview, it appears that Ms Twaddle was met by SS Hurley himself at the station and, upon her asking about Mulrunji, she was told she should go home. As I have noted at [242]-[245] above, there are gaps in the evidence about when Ms Twaddle went to the police station, and what SS Hurley told her. There are findings in the CMC Report that Ms Twaddle went to the station twice, at 11.30 am and 1 pm. There was ***no*** evidence to that effect in this proceeding. SS Hurley mentioned in his record of interview that Ms Twaddle came to the station and that he did not tell her anything. The most that can be said is that Ms Twaddle did go to the police station looking for her partner at some stage on that day, probably after he was dead; she encountered SS Hurley, who chose to say nothing about his death; and she had ***no*** choice but to simply go home and wait. DI Webber's evidence was that he firmly believed it was his responsibility to notify the next of kin, so that is why he explained it was not done until mid-afternoon. He maintained in his evidence that mid-afternoon was "as soon as practicable" for him to do the notification, given his other responsibilities after arriving on Palm Island. I see nothing unreasonable, disrespectful, or insensitive, in his approach to this issue. As the OPM suggested, DI Webber took Mr Marpoondin, an ATSILS officer and a local Palm Island man, as someone who could provide cultural support. He had wanted also to take Ms Sailor. The time in which next of kin should be notified of the death of a family member may be, reasonably, affected by any number of circumstances. ***No*** comparative evidence was led to inform assessment of the applicants' submissions that notifying the next of kin about three and a half hours after a death in custody was outside the reasonable parameters of what could be expected in similar circumstances. There was ***no*** evidence at all about what had occurred in similar situations prior to this death in custody. Although DI Webber conceded in cross-examination that things could have been done differently, and he could have used another local officer to notify the family sooner, I accept his evidence that he gave careful consideration to the most appropriate way for the notification to occur and, reasonably, determined that he should do it personally. I have ***no*** evidence from Ms Twaddle herself on this allegation, nor from any other member of Mulrunji's family. Thus, there is ***no*** evidence before me whether his own family felt they had been neglected, disrespected or sidelined. There is ***no*** evidence they considered they were not notified as soon as reasonably practicable. There was hardly any evidence about what seemed to me to be the more concerning aspect of the factual circumstances giving rise to this allegation: namely, SS Hurley's reaction when Ms Twaddle turned up at the police station during the late morning or early afternoon, having apparently heard something may have happened. The bare facts as they emerge on the evidence suggest she was very poorly treated by SS Hurley, and possibly deliberately misled. However there is simply not enough evidence to make any findings in relation to s 9 about this incident and it is not, in any event, put forward by the applicants as part of their case on s 9. This conduct could not, in any event, have nullified or impaired the human rights of the group members (as opposed to Ms Twaddle personally). The applicants make some submissions about whether DI Webber "misread" the policy in s 16.24.3(vi), but in my opinion this submission is beside the point. This is not an administrative law case or a disciplinary inquiry, and these kinds of arguments from the applicants (which were numerous) were distractions from the central issues arising under s 9.

Conclusions on the investigation claims By reference to the applicants' final submissions at [254]-[276], and the applicants' summary submissions at [5]-[7], read with the third further amended statement of claim at [244]-[250], I am satisfied on the balance of probabilities that the following conduct constituted acts involving distinctions based on race for the purposes of s 9 of the RDA. As I have noted, I consider that a fair reading of the applicants' pleadings and submissions reveals that the applicants put their allegations in a cumulative as well as an individual way. First, the inappropriate and partial treatment of SS Hurley by the investigating officers DI Webber, DSS Kitching and Inspector Williams constituted by the failure to treat SS Hurley as a suspect and allowing him to continue to perform policing duties on Palm Island. SS Hurley's conduct in his interactions with the investigating officers and continued performance of policing duties should be viewed as part of those acts. The acts involved distinctions – namely a disregard of usual policing standards of independence and impartiality, and a departure

from the usual levels of objectivity brought by police officers to an investigation. These distinctions were based on race. That is because those officers in charge of this investigation did not care what the local Aboriginal community apprehended or thought about their investigation; they had a sense of impunity because they were operating in a wholly Aboriginal community and their partiality was because a white police officer was being accused of causing the death in custody of an Aboriginal man. The evidence about allowing SS Hurley to collect them from the airport, and the dinner at his residence, are supportive of the conclusions I have reached. So too is the evidence about the failure to interview Constable Steadman. Second, the treatment by DI Webber and DSS Kitching of Aboriginal witnesses, in particular PLO Bengaroo, Roy Bramwell and Penny Sibley. These acts involved a distinction – namely the treatment, at an early stage of the investigation, of these people as less reliable and material witnesses. This distinction was based on race, because the officers involved were disposed to disregard or downplay witness accounts given by local Palm Island people, especially where those accounts were adverse to a white police officer. The evidence is unclear about the role played by Inspector Williams in the decision-making about what weight to give to the information provided by Aboriginal witnesses, although he participated in the video re-enactments. Accordingly, I make ***no*** finding about Inspector Williams' conduct. Third, the conduct of DSS Kitching in submitting the autopsy report to the Coroner with the descriptions he gave of Mulrunji prior to his death, and his failure to include the allegations of assault made by Roy Bramwell and Penny Sibley. These acts involved distinctions – namely a disregard of usual policing standards of independence and impartiality, and a departure from the usual levels of objectivity brought by police officers to an investigation. These distinctions were based on race, because stereotypical assumptions were made about what might have might have caused an Aboriginal man to die (substances he could have ingested). It was also because DSS Kitching did not care what the local Aboriginal community apprehended or thought about the investigation; he had a sense of impunity because he was operating in a wholly Aboriginal community and his partiality in the information he provided was because a white police officer was being accused of causing the death in custody of an Aboriginal man. The investigation as conducted by the QPS until the time the CMC took over was not, in fact, impartial. This was not just a matter of appearance. Despite the approach required of them by the PSA Act, the OPM and the general law, the officers were not interested, during this early part of the investigation, in preserving ***public*** confidence on Palm Island, nor in preserving trust in the integrity and impartiality of the QPS investigation. The officers did not turn their minds to the best interests of the Palm Island community, and that was not because they saw any conflict between the best interests of that community and the best interests of the broader "community of Queensland". They were not interested in what people on Palm Island thought about what they were doing. They did not see their role as supporting or assisting the community to come to terms with what had happened, or to be fully informed about what had happened. They were not interested in addressing the fear and mistrust of the police identified by the Queensland government's 1994 review of policing in Aboriginal communities. They were interested in a style of investigation which treated persons in the Palm Island community as little more than sources of information – yet, sources that were regarded as less reliable than other police officers or what could be independently observed. All this occurred because the officers were operating in an Aboriginal community, and one where domination of Aboriginal people by white authorities was the historical norm. In this community, white police officers were not, and did not see themselves, as accountable to the Aboriginal members of that community, nor as required to work in partnership with that community. Policing was conducted very differently in that community than in non-Aboriginal communities. As for conducting themselves without "fear or favour", to use the respondents' expression, there was clear favour given to the views and interests of white police officers on the island, with ***no*** real respect or consideration paid to the justifiable concern and bewilderment amongst Palm Islanders about how Mulrunji could have died so soon after being taken into custody. I turn now to the second group of conduct relied on by the applicants.

Second category: the police conduct during the 'intervening week' after Mulrunji's death and prior to the protests and fires of 26 November 2004 Five categories of conduct are impugned by the applicants under this heading. They are: the failure to suspend SS Hurley from duty; failures to take culturally appropriate policing measures; failures to liaise with the community and address its concerns; deployment of police without adequate cross-cultural skills; and failures regarding the autopsy report.

Failure to suspend SS Hurley A/AC Wall had determined to remove SS Hurley from his post at some time during Monday 22 November 2004. There is ***no*** direct evidence about how this happened – this is one of the many examples of evidence that one might naturally expect to be led by the respondents, but was not. In their final submissions, the respondents conceded that it was "reasonable to infer SS Hurley was stood down from his

position as a result" of the confrontation between SS Hurley and certain residents of Palm Island described at [1044]-[1046] below. Why evidence to confirm that could not have been led is difficult to understand. The failure to suspend and remove SS Hurley is in substance a challenge to the same conduct of the investigating officers that I have already found involved distinctions based on race. It flows directly from the failure to treat SS Hurley as a suspect. The lack of impartiality in the investigation, and the lack of care about the concerns of the local Palm Island community, led the investigating officers to ignore the obvious impropriety and conflict of interest in having SS Hurley remain in uniform and on duty on the island. The QPS running log records SS Hurley as having a "rest day" on 22 November 2004, but it also records him as giving a briefing to officers arriving on the island between 3 pm and 4 pm. Again, that DI Webber and DSS Kitching had considered it appropriate for SS Hurley to remain on duty, and therefore to perform functions such as providing those officers with such a briefing, demonstrates the extent of their partiality and how determined they were to ignore the perception and the reality of what had occurred on Palm Island over the preceding 72 hours. Community members had raised concerns with the police about SS Hurley's role in the events that led to Mulrunji's death from the day Mulrunji died. Mr Zacchias Sam gave evidence that, on 19 November 2004, the Council went to the police station and met SS Hurley and some other officers. This was his evidence about the meeting:And what was talked about at that meeting?---Well, Chris just – just said that he – he – he – he – he didn't kill him or he didn't mean to hurt him or anything like that, really, and that was more or less all he was saying, all he kept saying. We just sort of left it at that.

And so were you satisfied with that reply?---Well, not – not – not really. We really wanted to find out what really happened. ***No*** one – you know, because the community wanted to know, and the family of Mulrunji wanted to know too. So we didn't really have an answer for anyone. Whether or not DI Webber and DSS Kitching knew about that meeting, it should have been immediately apparent that people in the community would want to know how Mulrunji died and whether SS Hurley was responsible. It should have been apparent that the community wanted to know if any police officer had committed any criminal offences in relation to Mulrunji's death. In those circumstances, it was clearly inappropriate for SS Hurley to remain on duty. Nevertheless, ***no*** decision was taken by DI Webber and DSS Kitching to remove SS Hurley from the island and the evidence is that he was visibly and actively on duty on 22 November 2004. Ms Cecilia Wotton gave evidence that on the morning of 22 November 2004, in response to a call she had made to police concerning a domestic violence incident occurring across the road from her, she saw SS Hurley, DS Robinson, PLO Bengaroo and two other police officers respond to the call. I accept Ms Wotton's evidence as to her observations. It takes only a little imagination to understand how this must have looked to local people on Palm Island: it was as if nothing had happened on the previous Friday. Both DI Webber and Inspector Kitching gave evidence that it did not cross their minds that SS Hurley should not be on duty although DI Webber conceded that "perhaps" it would have been sensitive to community needs for SS Hurley to have been removed from the island, but he did not turn his mind to the issue. Particularly given Mr Bramwell's allegations, and even once they had heard SS Hurley's own account, I find this evidence extraordinary. It is inexplicable, other than by a disregard for what the local community thought and a discounting of the sense of grief, outrage and injustice being felt in that community. Having SS Hurley remain on the island and on duty was for the QPS to set its face squarely against an understandable and entirely predictable reaction of a community like Palm Island, which had been so badly oppressed in the past by authorities (including police), because of the race of people comprising the community. The failure to remove SS Hurley led to a community meeting on the morning of Monday, 22 November 2004, where a resolution was passed calling for his removal. Mr Wotton placed the meeting at approximately 11 am and I accept that evidence. That was the meeting at which Mr Bramwell spoke, recounting what he said he had seen in the police station. There is ample evidence of the antagonism towards SS Hurley that existed by this stage. To jump ahead somewhat, by the time SS Whyte arrived that afternoon (to replace SS Hurley as Officer in Charge) he clearly understood the community had demanded that SS Hurley be removed from the island. In evidence, Inspector Whyte also conceded that at the community meeting which he attended on the Monday afternoon, it was "articulated that the community wanted Hurley removed and charged". He also agreed that he came to learn while he was on Palm Island that there was a perception within the community that SS Hurley would not be held to account for what had happened to Mulrunji. On Tuesday, 23 November 2004, Mayor Erykah Kyle gave an interview to Mr Flynn from Channel 10, the recording of which was in evidence. As I noted earlier, Ms Kyle was not well enough to given evidence in this proceeding, although her daughter Andrea Sailor did give evidence. The respondents did not dispute the authenticity of the video recording, nor challenge its admission. In that interview,

Ms Kyle describes the anger at the community meeting on the Monday morning about SS Hurley, and describes the resolution passed which called on the QPS to have him leave the island by the end of the day. The video recordings of that meeting, and of some of the other community meetings during that week, do show a level of anger in some people, but it is controlled. The speakers at the meetings are articulate, and genuinely expressing high degrees of frustration and outrage not only at Mulrunji's death, but at the fact of yet another young Aboriginal man dying in custody, and (from their perspective) yet further disregard, lack of concern, and "cover-up" from the police, the authorities and the government of the day. Mr Wotton's evidence was that during the morning ***public*** meeting he had seen a police vehicle containing SS Hurley, DS Robinson, PLO Bengaroo, and two other police officers drive into the police station with a local resident named Tony Palmer locked in the cage at the back of the vehicle. That any QPS officer – including SS Hurley himself – could possibly have considered it appropriate that SS Hurley should be actively involved in arresting another Aboriginal man and bringing him in custody into the police station after what had happened on Friday, and during the active conduct of an investigation into those events, is extraordinary. It is explained, in my opinion, by the level of impunity SS Hurley felt, and the investigating QPS officers shared. Approximately 150 to 200 people then surrounded the police station and began shouting abuse at the police in response to cries from Mr Palmer that he was "going to be the next one". The "next one" was plainly a reference to Mr Palmer suffering the same fate as Mulrunji if placed in the police lock-up. There was then a confrontation between members of this crowd (including Mr Wotton) and SS Hurley. Mr Wotton's evidence was:we observed -- the police paddy-wagon at the time was one of the old paddy-wagons where you could see inside, and it had – they had a local person in the back, and we could recognise his voice, and we actually saw him, and he actually sang out his name. He said, "Get me out of here. Otherwise I'm going to be the next one," and that really riled a lot of people up. People were starting to sing out abuse towards the police and stuff, and so they pulled up. I walked in, halfway in through the garage, and Chris Hurley jumped out of the vehicle, and others, and I said, "Chris, could you come out here and explain what happened on Friday, because the community wants to know what happened." So he walked out, and people are upset and then Tony Palmer was going off in the back of the police car, kicking in the doors and everything, singing out, "Let me out of here. Let me out of here. Otherwise I'm going to be the next one. You're going to find me dead." So we, sort of, went – as you go out of the police station, we walked to the left. The crowd – Chris was right beside me, and other officers were ..... Robinson and all others were pretty close. We were all amongst each other. I think the crowd – probably 150 to 200. Could be less; could be more. Anyway, I said, "Chris, can you now please explain?" and he said, "What? Two years of service not good enough for you people?" and that really fired them off again, abuse and stuff, and in one of those things I heard my brother-in-law, David Bulsey, say, "Lloyd, you know what happened. You seen what happened. Tell the truth." So I looked at the people and I said, "Now, here's your answer. You heard what he said," and I'm actually this close to him. "You heard what he said. You either do something to this man, or walk away, because I'm walking away." So at the same time, I think through – just before that, I observed Darren Robinson walk back into the police station, and my thoughts were, "Here they go. He's going to call reinforcements." So I walked away. Everyone started to walk away. Tony was still going on. I see ***no*** reason not to accept Mr Wotton's account of these events. ***No*** evidence was called to contradict it from SS Hurley or DS Robinson, or any other police officers present on Palm Island that morning. In cross-examination, his account was not seriously challenged. Although there were aspects of Mr Wotton's evidence I found less reliable, his account of what happened during these key meetings and confrontations was, I found, based on a real recollection, although I accept he was very likely paraphrasing what was said. It is notable that despite this being an encounter between a large group of local people who were frustrated and angry about Mulrunji's death and were talking of a cover-up, on the evidence ***no*** QPS officer sought to engage with this crowd. ***No*** QPS officer took this as a face-to-face opportunity to express sorrow, or regret, that a young member of the community had died. ***No*** QPS officer took this as an opportunity to reassure the community that if Mulrunji did not die from natural causes, that would be discovered and action taken against those responsible. ***No*** QPS officer spoke about the law being enforced to the benefit of the Palm Island community: instead the use of the law on the island at this time, and the show of force which was building, was against the community and against its interests. Further, the situation should not have come to a group of local people having to confront QPS officers with the impropriety of SS Hurley remaining the Officer in Charge on Palm Island. Those officers responsible for the investigation should have been well aware of how inappropriate it was. DS Robinson, familiar as he was with Palm Island, should have readily recognised that SS Hurley should have left as soon as he had been interviewed on the Friday. As for SS Hurley himself, his reaction as recalled in evidence by Mr Wotton is revealing, and consistent with the attitude taken by the QPS: ***no*** Aboriginal person was going to impugn him. The

failure to suspend SS Hurley and remove him from the island very shortly after the events on Friday (and, at least, after his interviews had been concluded) was in my opinion an act (that is, an omission) involving a distinction based on race. SS Hurley was the person responsible for the physical manhandling of a healthy, active man, taken into custody with ***no*** afflictions or injuries, who died less than an hour later. The obvious, prudent, rational and impartial course would have been to remove that person from any official duties and to ensure he left what was, on any view, a close-knit community expressing high levels of discontent and outrage at what had happened. That course did not occur because, as I have found, QPS officers – especially those tasked with the investigation, but also SS Hurley himself as the officer still in charge on Palm Island – had ***no*** regard whatsoever for the reaction of the community, for how this event affected them, or for their perceptions of how the rule of law would operate in those circumstances. That finding applies especially to DI Webber, DS Robinson and DSS Kitching. Clearly, it applies with greater force to SS Hurley himself, who was still the Officer in Charge of Palm Island. His sense of professional responsibility to the community rather than to himself, and his adherence to the values set out in s 2.3 of the PSA and the QPS Code of Conduct, entirely failed him. None of these officers cared what Palm Islanders thought, how outraged they were, or about their sense of injustice, although through the community meetings and community gatherings those feelings were on ***public*** display. They apparently paid ***no*** regard to the perceptions of Mulrunji's extended family. I am satisfied those QPS officers would have cared if these events had occurred elsewhere, in a non-Aboriginal community – if for ***no*** other reason than that QPS officers would have well and truly understood that in a less invisible and powerless community they would have been held to account more quickly for what was occurring. Yet, on Palm Island – seen as a disaffected, remote and troublesome place – there was a sense of impunity at work. ***No*** complaints by groups of Aboriginal people – stereotyped as disaffected, disconnected, transient, uneducated, drunken, violent, unworthy and unimportant – would be allowed to have any effect on how the white QPS officers would conduct themselves. Those white QPS officers saw themselves as charged to impose law and order on Palm Islanders, from the outside. This was not an attitude of community ***protection***, or community service. It was the imposition, by force, of norms of behaviour that white police officers considered should be observed. I find SS Hurley was, until the afternoon of 22 November 2004, at the centre of that attitude. It shows the extent of his own sense of impunity and lack of judgement that he did not seek to leave the island voluntarily.

Failures to communicate with the community and defuse tensions There are three sets of allegations which I consider can be grouped under this heading: failures to take culturally appropriate policing measures; failures to liaise with the community and address its concerns; and deployment of police without adequate cross-cultural skills. The applicants' submissions attempt to separate them out, somewhat artificially in my opinion. The respondents have agreed as a fact in this case that QPS officers situated on Palm Island knew there was a feeling of anger held by some residents over Mulrunji's death in custody, and a perception by some residents that SS Hurley was not being held to account for his death. The respondents also appear to accept that, because about 150-200 people were present at the meeting on 22 November 2004, "most if not all of those present were aware that that perception was being voiced". They accept that DS Robinson, Inspector Richardson and SS Whyte attended the afternoon meeting on 22 November 2004 and some Palm Island community members expressed their dissatisfaction to those three officers about Mulrunji's death. The police running log records the following:WOTTON vocal and protesting criminal actions of police relating to death of Cameron DOOMADGEE. WOTTON demanding with support of persons present that S/Sgt. HURLEY be arrested and in custody. WOTTON is demanding and with the support of the persons present that S/Sgt. HURLEY be taken off the island immediately. They also accept that SS Bennett "observed" a meeting mid-morning on 23 November 2004. He provided situation reports to SS Whyte. There is video footage in evidence of this meeting. Various community members take a microphone and express dissatisfaction and frustration about why Mulrunji was arrested and about what happened after that, saying also that they feel the Police Commissioner and Police Minister have not engaged with the community and have neglected Palm Island. Those people also express frustration at the lack of real communication and information from the QPS about the investigation and autopsy, and their opposition to Palm Island people being perceived as violent. The respondents led little evidence about the response and reaction of QPS officers to the ***public*** sentiments being expressed. Inspector Whyte was asked about meetings with Mayor Kyle and other Council members. He stated there were three meetings – one on 24 November 2004 and two on 25 November 2004, one in the morning and another in the afternoon. Inspector Whyte gave ***no*** evidence about what transpired at those meetings. The police log in evidence gives a brief description of each of the three meetings, all of which Inspector Richardson and SS

Whyte attended. An entry at 3 pm on 24 November 2004 reads:Meeting with Chairperson Erica Kyle re issues presently effecting [sic] the stability on the Island. Arranged to meet daily am and discuss issues which occur overnight. Council officer advised ***no*** electronic security available at Canteen tonight as Chubb were reluctant to attend to fix the system due to problems on the island. An entry at 10.30 am on 25 November 2004 reads:Meeting

Held with Erica Kyle and Denise Geia at the Palm Island Council Chambers. Current situation discussed. Advice later received from Geia that a number of male persons have volunteered to assist with prevention of rock throwing activities tonight. An entry at 3.30 pm on 25 November 2004 reads:MEETING

Requested to attend Council Chambers in relation to an issue with police. Further meeting had with Erica Kyle and Denise Geia where they stated that an issue has arisen this morning over the actions of a police officer. They introduced use to a [redacted] and [redacted] 16yrs and [redacted] 16 Yrs. It was explained to police that they didn't like the way that a uniformed officer spoke to juveniles this morning at their residence. The complainant stated that she would be happy for RICHARDSON and WHYTE to look further into the matter, moreover she would be happy with an ***apology*** from the officer involved.

The Police Officer was spoken to in relation to this matter and he provided a different version of events. Attempts made by S/Sgt Whyte to arrange another meeting. Further contact made with Denise Geia to ascertain whether the complainant was happy to meet personally with the police officer and hear his version of events in the company of senior police and Erica Kyle. Geia to contact S/Sgt Whyte within the hour. The police log records a further attempt by SS Whyte to contact Ms Geia in relation to this complaint approximately two hours after the meeting, but it does not record any resolution of the complaint. The principal focus of these discussions, such as they were, was on controlling lawless behaviour. The entries in the police log for this period show, even in relation to the behaviour of individual Palm Islanders, an intensity of policing that I doubt applied in non-Aboriginal communities. The arrest of Mulrunji provides another example. From the evidence before me, while control of unlawful behaviour was an important function for QPS officers on Palm Island, as in any other community, the particular circumstances on Palm Island at this time required a more sophisticated and multi-faceted response. The OPM contemplated such a response. It did not occur. That frustration, anger, a sense of injustice and being kept in the dark were pervasive sentiments on the island during this week was confirmed by several of the applicants' witnesses, including Mrs Agnes Wotton, William Blackman Senior, William Blackman Junior, John Clumpoint, Collette Wotton, Zacchias Sam and Mr Wotton. As the applicants submitted, a theme throughout this evidence was that people wanted "answers", in respect of how and why Mulrunji had died and whether the police would be held to account. Further, from some of these witnesses, the link with the treatment of Aboriginal people generally, and in particular the history of Palm Island, was most apparent. These are not extraneous matters, or footnotes. They are the lived experiences of the community which was in November 2004 trying to come to terms with a death in custody of one of their family and friends, a person many had known since childhood. Although it is lengthy, I propose to set out the evidence of William Blackman Senior, which not only captures the feeling about Mulrunji's death, but also places it in the context of the life experiences of the people who were affected by it.And can you tell the judge what people were saying at the meetings?---Well, they were asking – they were asking the question now. You know, we needed answers. Who was – who was going to answer to us and the family and the community and the friends and the family of how he died and why he died and, you know, who's responsible and what's going to – what's going to be the outcome? Nothing. Everything fell on deaf ears.

And were there any questions being asked about Senior Sergeant Hurley?---Yes.

What sort of questions?---We wanted him to answer of how – how Cameron died. And even the PLO that was with him at the time.

Was that Mr Bengaroo?---Yes, Bengaroo.

And did Mr Bengaroo come to any of the meetings?---I don't recall seeing him.

He didn't speak at any of the meetings?---***No***

And did you see any of the investigation team on the island?---I didn't know who was investigating, yes. I don't know if they were plain clothes, had uniforms on, or what, because I – I'm not really a person to look at their face and, you know, to say "This – this is", just, "I remember him, but ***no***. I'm not good at that, because if they come over to investigate, I'm taking notice of it, because I know there's going to be a cover up. So I'm – actually I'm – yes, don't look at names, you know, not good at names or faces. I just know it's going to be a cover up. You know, doesn't matter who they're bringing to investigate it.

And why did you think there was going to be a cover up?---Because look at our history, the black people of this country. Look at our history of – you know, of European invasion, or what my grandparents – you know, not only my family, but a lot of other Aboriginal people went through.

And were your grandparents on Palm Island?---Were they? Sorry.

Were your grandparents on Palm Island?---Yes, my grandfather, not originally from here. He got brought from another country, and they all got sent here for – yes, taken off their country.

And do you know when that was, when your grandfather came here?---Yes.

When was that?---1918, after the Bwgcolman mission settlement destroyed by a cyclone.

And your grandmother, was she here?---I think she was here, yes. She would've came later on when they had dormitories and everything set up here, and everything.

And both your parents were from here?---***No***.

So one of them was. Did your grandparents stay on the island?---Yes. Well, they were under the Act. They were – they were under the white man's Act to stay here, yes, so from their country they got sent here, to stay here.

They weren't allowed to leave then?---***No***, they wasn't allowed to leave.

And what about your parents?---My mum, well, she – she was – I think she was born – she was born here, 1943, just after the war.

And was your father born here too?---***No***, he was born at Winton.

I'm sorry. I didn't catch that?---Winton. He was born at Winton up here, west.

But you used to come here as a child?---Yes. Not with my – my dad, my original dad, but my mum and her partner, my stepdad, we used to come over, because my mum was born here and she could've grew up living here with her father, her grandfather.

And on the Friday after Cameron died, the following Friday, were you at the meeting in the mall when Mayor Kyle spoke?---Yes.

And you heard what she said?---Yes.

And how did that make you feel – sorry. Go back a step. Do you remember what she said?---Well, I remember her reading the autopsy report, and how he – the damage of – yes, of – of how he died.

Right. And how did you feel about that?---Shattered, you know. My mind was gone. We were – all of our minds were gone, because we wanted answers, you know. You can't – you don't even get those injuries falling from a – you know, from that high, so how could that happen just from a fall on a step?

But there were ***no*** - - -?---We wanted answers. Yes, we wanted answers. Everyone was, you know – the community was angry about it. ***No*** QPS witness demonstrated any semblance of understanding about these issues. Nor did any understanding of these matters emerge from the contemporaneous video evidence, or the documentary evidence. There was ***no*** sense that any QPS officer was concerned to try to understand the people he or she was responsible for serving on Palm Island, and why the particular injustices and subjugation in the history of people on Palm Island would incline that community to mistrust of police, and to a heightened sense of injustice, oppression and discrimination, despite those characteristics being clearly expressed in the QPS review of policing Aboriginal communities which I have extracted at [138] above. Perhaps some QPS officers on Palm Island during these events, or involved in these events from Townsville, did possess that kind of understanding. I am not discounting that possibility. Since he was on the organising committee of the QPS review in 1994, one might speculate Inspector Strohfeldt had such an understanding. However, there was ***no*** evidence of any such understanding before the Court. That, it seems to me, may be one of the consequences of the forensic choices made by the respondents in which police officers they chose to call. One only needs to spend time watching the contemporaneous video recordings of the community meetings, beginning on 22 November 2004 and going through to 26 November 2004, to see that "anger" is far from the only emotion and reaction on display. There is grief, there is sadness and disbelief, there is frustration, there is outrage, there is a palpable sense of injustice. The sense of disbelief should be emphasised – it is apparent in the video recording that people at the meeting on 26 November 2004 (when Mayor Kyle announced the autopsy result) are calling out with observations (in my opinion rational and substantive ones) that call into question how Mulrunji could have died so quickly after being taken into custody following an "accident" (Mayor Kyle's term) from a "fall" (also her term). A likely explanation for QPS officers being less aware, or unaware, of the depth and intensity of the grief, frustration and sense of injustice in the community lies in one of the facts I have found to lead to a contravention of s 9: QPS officers did not engage with the community very much at all. QPS officers were not key participants in the community meetings and, where they did participate, their attitudes were condescending and rigid. As I have found, the evidence about their interactions with the Council shows a singular focus on prevention of lawlessness by extra security measures. QPS officers were not intent on working with the Palm Island community through this tragedy: they saw the community as their opponents, or as the perpetrators of lawlessness who needed to be subjugated. I find the attitude of QPS officers such as DI Webber, Inspector Richardson, and SS Whyte was that community protests were unjustified, and were representative of a tendency to lawlessness that needed to be controlled. The ***public*** statements of Inspector Richardson clearly express the view that the community should passively and quietly wait. That attitude was both unrealistic and patronising. When the protests continued and escalated, the QPS quickly resorted to a battle mentality. All of this, in my opinion, occurred very much by reference to the fact that Palm Island was an Aboriginal community. The attitudes of Inspector Richardson and SS Whyte during this week, as revealed by both the oral evidence before me and the documentary and video evidence from the time, are consistent with the findings I have made. As to Inspector Richardson, the principal evidence available about his attitude during this week, and to his responsibilities on Palm Island generally, is what he said during two media interviews to which I have referred at [306], [752] and [769] and above. He was not called as a witness by the respondents, so there was ***no*** opportunity for the Court to understand, from him, why he might have made the remarks he did. All the Court has is what he said, and evidence about its context. The applicants submit that in those interviews:he derided the community's

concerns regarding Mulrunji's death as "rumours" and "not factual", he made repeated calls for the community to "sit back and wait" for more information and he remarked that the community "can ask their questions, when they get all the facts". The Applicants submit that these remarks indicate a patronising and insensitive approach to the deeply felt grief and anger within the community and denigrates the community because it is Aboriginal. I have watched the interviews several times. There is some force in the applicants' submission. Remarks like that from the police officer in charge of policing on Palm Island could only have inflamed tensions. They conveyed to the local people that QPS officers were disinterested in what this death had done to their community, and in why they might have a sense of injustice. They were going about their policing tasks without any real regard to the circumstances in which they were working. I have set out my impressions about Inspector Whyte earlier in these reasons. They are not favourable. In my opinion Inspector Whyte was simply not capable of adopting the kind of culturally sensitive approach required during this week. He appeared to have ***no*** respect for Aboriginal people he encountered. As I have noted in my impressions of him earlier in these reasons, he tended to engage in stereotyping about Aboriginal people. My impression from his oral evidence is that he was disinterested in the decision-making and authority structures of the elders and the Council. The evidence that exists about his interactions with the Council indicates he was principally concerned to impose extra security measures and further restrictions on community members. He was not proactive at the single community meeting he did attend. He did not speak at that meeting and he did not respond to what had been said. He did not engage in any of the conduct I set out below, which, as the officer in charge of the police station, he could have done. Alternatively, if he considered (as some of his answers in cross-examination seemed to suggest) that it was not his place to speak about the investigation, he could have taken steps to have another QPS officer, or someone from the CMC, provide more information. He did none of these things. Instead, he appears to have ensconced himself, with a confrontational battle mentality emerging, in the police station. There are agreed facts concerning an increase of antisocial conduct during the week, including property damage (mostly through the throwing of rocks) and threats (or rather, the passing on of information about threats) to damage the police station and barracks, including by a fire bomb. The rock throwing appeared from the evidence to occur mostly at night. So far as I can ascertain from the evidence, aside from the rock throwing which was witnessed, and the damage done as a result (such as a hole in a prefabricated wall of a building which was evident in one of the video recordings), the remainder of the threats (excluding what people such as Mr Wotton said at ***public*** meetings) came by way of information provided to officers such as DS Robinson. Some of this information made its way into the running logs, for example (at 2.30 pm on 23 November 2004):THREATS

Meet with confidential informant who advised that there are small numbers of people who are going to fire bomb the police station or police barracks. The informant stated that it will depend on what happens at the ***public*** meeting that is planned for 3pm. The informant stated that if it does not happen tonight it will in the next few days. The informant stated that the persons responsible are Dwayne BLANKET and Jason POYNTER. The identity of the informant is known to D/Sergeant ROBINSON and known to be reliable. Aside from such entries in the running logs (of which there are four in the logs spanning 2.10 pm on 22 November 2004 to 7.15 am on 26 November 2004), the content of the threats and the reliability of the information provided was not explored in the evidence. Accounts of property damage and rock throwing tended, in my opinion, to be overemphasised by some of the police witnesses, especially Inspector Whyte. His evidence tended to suggest the atmosphere on the island was a violent and explosive one, with very significant risks to life and limb. There were, however, as the applicants pointed out in cross-examination, ***no*** physical attacks on police officers (although once the situation escalated on 26 November 2004, it seems to be agreed that at least one officer was hit by a rock). The threats were against the property of the institution (the police) which the community held responsible for Mulrunji's death. That is not to condone any violence or property damage which did occur, but in my opinion there is a different, and more accurate, perspective on it to the one presented by the respondents. Especially telling is the footage from the community meetings and gatherings during this week – there are children everywhere, there are many older people, there are ***no*** weapons or implements. People are sitting or standing around listening and talking, others are going about their business in the shops in the background or simply passing by. Mothers are nursing babies, children are playing, young men and women are sitting in groups laughing and talking. A minute's silence is called for and observed in the meeting on 26 November 2004, before Mayor Kyle announced the autopsy results. From what she says in her introduction, this was not the first time she had called for that at one of these meetings. Many in the large crowd have heads bowed and are silent. There is, as I have said, a clear sense of grief, frustration and anger in what individuals say in the

video footage. Yet what is going on behind them while they express their views is the daily life of a community. These circumstances were, in my opinion, capable of giving rise to a very different course of events to the one which followed, had police officers engaged in a way which would have encouraged that different course. Centrally, that would (and should) have involved treating SS Hurley differently, and then listening to and engaging with the community about the investigation process, the autopsy and what changes might be made to ensure a death like Mulrunji's did not happen again. There was ***no*** impediment to the QPS implementing changes immediately, or at least consulting with the community about changes. There was ***no*** need to wait for coronial recommendations. They had the RCIADIC recommendations, the Queensland government response, and the review of policing in Aboriginal communities. They had ample information and advice on which to begin discussion with the community about change and improvement. Indeed, as the respondents concede, the principal reaction of the QPS to what they saw as rising tensions was to increase the numbers of police officers on Palm Island threefold. The numbers went from seven to approximately 20 before the protests and fires on Friday, 26 November 2004. I return to the additional influx of police officers which occurred at that point below. The other reactions, undisputed on the evidence, were that the fire brigade was placed on standby (on 23 November 2004 in the early evening), a fire evacuation plan was drawn up and extra fire brigade staff were sent from the mainland. Of course, as it turned out precautions about fire were prescient of what happened on 26 November 2004. In and of itself such precautions cannot be criticised, particularly given the information about the threat of fire-bombing to which I have referred at [1072]-[1073] above. Nevertheless, the applicants are correct to identify the absence of any proactive measures to address community anger, frustration (at lack of information) and the overall sense of injustice. They are correct to identify the absence of steps by the QPS to prevent the escalation of those attitudes to the point which tragically occurred on 26 November 2004. On the afternoon of 23 November 2004, police officers were instructed to take their weapons to their sleeping quarters with them. That morning, Mr Wotton noticed police wearing guns whilst pulling people over for traffic offences. He said (and Inspector Whyte and Inspector Dini agreed) this was unusual as police officers did not ordinarily carry firearms on Palm Island. Again, the message this sent to the community was that the police were intent on imposing their version of law and order, which did not involve applying the law to those responsible for Mulrunji's death. In the context of Palm Island at this time, that was an understandable perspective for the community to hold; the QPS as an institution had recognised such perspectives in the past, but chose not to acknowledge or address them in November 2004. There was obvious apprehension amongst police officers. Sergeant Leafe, in his record of interview on 19 November 2004, described how shortly after Mulrunji's body was discovered he tried to call his wife (who was also on the island, and pregnant) "to tell her what had happened and to advise her not to leave the police compound for um just for fear of um any sort of retribution if word had got out". At one level, that is an understandable human reaction. It also shows the way a newly arrived officer viewed the Palm Island community. It reveals a consciousness of the seriousness of what had occurred. Finally, it is in stark contrast to the approach taken to telling Mulrunji's family what had happened. In their written submissions, the respondents spend some time criticising the lack of particularity surrounding this aspect of the applicants' case. The respondents submit there were ***no*** pleadings about what should have been done, and that the applicants refused to give particulars of what should have been done. That is correct. For example, one of the answers to a request for particulars stated:The Applicants do not ask the Court to make findings on precisely which special measures ought to have been put in place or undertaken, nor could they. The allegation is that ***no*** special measures were put in place or taken, and that special measures ought to have been put in place or undertaken. It is straightforward to set out the kinds of measures, and actions, which might have been taken by the QPS during this week. The existing evidence provides an ample basis to set them out. In the first place, some clear measures relied on by the applicants were the proactive use of CCLOs, which did not occur. There was also – briefly – another PLO sent to the island, but there is ***no*** evidence his skills and cultural familiarity were put to any use. The QPS running sheet in evidence records that in this intervening week, PLO Buttigieg arrived from Townsville on the Monday afternoon and departed the island on the Wednesday morning. Inspector Whyte seemed to consider it important to note PLO Buttigieg was a "former Cowboys player" without identifying how that might better qualify him for his police role. Inspector Whyte said he came "under the banner of cross cultural" (an expression I am far from confident he really understood) but did not give any evidence about what PLO Buttigieg actually did. This exchange occurred in cross-examination:And what tasks did you – specific tasks did you give Mr – the PLO to perform- - -?---I can't - - -

- - to liaise with the community?---I can't recall.

And I suggest to you, you didn't give him any. Would you agree?---***No***, I don't.

And there's nothing recorded in the log about any special tasks given to him to liaise with the community?---I can't recall.

Well, just take it from me. We've read the log a number of times?---Yes, ma'am.

There's nothing – the only time he gets mentioned is when he arrives on the island and he's only mentioned with another group of other people who have arrived on the island?---Yes.

In the log there's ***no*** special tasks assigned to him as the PLO to go and meet with the council, meet with the mayor meet with the community justice group, nothing like that?---But there were - - -

And I suggest that's because it didn't happen?---There were oral briefings facilitated at the station, so during the course of the oral briefings then tasks are given to officers or PLOs, so it's possible that the PLOs were tasked to undertake certain duties during the course of that oral briefing.

You're just making it up now as you go along, aren't you?---***No***, I'm not.

You didn't take the PLO with you when you [went] to meet the council and Erykah Kyle on the Thursday, did you?---***No***. In my opinion, there was some force in senior counsel's suggestion to Inspector Whyte that he was reconstructing some of this evidence as he went along. I consider that was the case. It is significant, for example, that ***no*** PLO was taken to the Council meetings: this seems like an obvious step to have taken, to try to bridge some gaps in understanding and information and to assist in easing tensions. If it was the case that officers formed the view, after consideration, that a particular PLO could not undertake such tasks, that would be one thing: but there is ***no*** such evidence before me. Nor was a PLO sent to speak at any of the community meetings: if PLO Buttigieg's profile as a former Cowboys player was so significant, it would seem to have been a short step to using that profile at the ***public*** meetings so that information about the investigation could be given to the community, perceived delays in release of the autopsy results addressed, and the positon of SS Hurley clarified. If there was some particular impediment to such steps being taken, it was not identified by the respondents in their evidence. This was Inspector Whyte's evidence about SS Dini (the CCLO who did arrive on the Friday):And sergeant – Senior Sergeant Dini, you know him?---Yes, I do.

And you're aware that, at this stage, he was a CCLO – sorry – a cross-cultural liaison officer?---I can't recall.

And do you recall that he arrived on the Friday afternoon?---He was on the island, yes. I can't recall when he arrived, ma'am.

And he was involved in things like providing administrative duties and the provision of food. Do you recall that?---***No***, I don't.

And he didn't perform any cross-cultural liaison duties while he was on the island?---I don't recall.

And he would have been under your command when he was on the island?---Yes.

And you didn't direct him to do so; would you agree?---***No***, I don't.

Well, where in the log do I find the directions you gave him to liaise with the community?---It may have happened during the course of the oral briefings when they arrived on the island. This, in my opinion, was also a reconstruction by Inspector Whyte. I find he had ***no*** memory of what SS Dini did once he arrived. To be fair, that may well be explained because SS Dini arrived about the time the protests and fires started on Friday, 26 November 2004, and SS Whyte would have had his attention elsewhere. Obviously SS Dini, from the evidence in the logs, was also put to other tasks, and that may also be understandable given what was happening on the island. However, the applicants' focus is on the period leading up to the protests and fires and they are correct to identify ***no*** activity at all by the QPS to utilise CCLOs to defuse the situation on the island. Thus, the use of PLOs and CCLOs was an obvious measure that was not employed. Other obvious measures were also available. ***No*** officer, for example, offered ***apologies*** or explanations for circumstances such as the fact that there was still ***no*** autopsy report as of mid-week. ***No*** officer explained the autopsy process at the community meetings. ***No*** officer revealed to the general community the timing of sending off the details of the autopsy material, nor the proposed timing of the autopsy. ***No*** officer outlined the steps in the investigation. ***No*** officer explained why SS Hurley was still on duty and still on the island. ***No*** officer, so far as the evidence showed, even publicly offered the sympathy of the QPS to Mulrunji's family and all those who knew him. ***No*** officer took any steps to emphasise how tragic it was that there had been yet another death of an Aboriginal person in custody. ***No*** officer accepted that another Aboriginal death in custody was the opposite of the intention of the recommendations of the RCIADIC, and the implementation of those recommendations in the OPM. ***No*** officer sat with the Council, or the community elders, and went through the RCIADIC recommendations, or the Queensland report on policing in Aboriginal communities, and began a conversation about what could be done differently to avoid more deaths. None of these matters trespassed across the investigative functions being performed: they were matters of simple decency and transparency. They were consistent with, and inherent in, the function of the QPS and the standards of conduct expected of QPS officers arising from the legislation and other instruments to which I have earlier referred. None of these steps needed to be spelled out in a document such as an OPM. QPS officers can be expected to understand that their roles and responsibilities in crisis situations. Circumstances of death and injury require sensitivity, proactivity, care and consideration. Policing is often undertaken in situations of great human tragedy and emotion: the need to bear those matters in mind is obvious. It is especially obvious in the context of the particular and unique circumstances of the Palm Island community. I should note here that in their reply submissions the applicants sought to explain why they had not particularised the measures they contended the QPS ought to have taken by reference to authorities concerning limits on the power of courts to direct executive action (for example, Bare v Independent Broad-Based Anti-Corruption Commission [2015] VSCA 197; 326 ALR 198 at [367] (Tate JA)). In my opinion, those submissions are not of any relevance. ***No*** orders of that kind are sought by the applicants from this Court against the executive. I find that during the intervening week between Mulrunji's death and the protests and fires on 26 November 2004, QPS officers failed to engage in any substantive or appropriate way with the Palm Island community, including by not participating in community meetings; not explaining to the community why SS Hurley had not been arrested and continued on duty, nor why there were ***no*** autopsy results; engaging in a minimal and passive way with the Council and thereby not assisting the elders and leaders of the community to reduce tensions; and failing to utilise the specific cultural communication and liaison strategies contemplated by the OPM (ie the CCLOs and the PLOs). The result was that tensions and frustration in the community rose, a sense of injustice and disrespect increased, and violence against police property continued and increased. In my opinion the conduct of the QPS involved a distinction in the way the QPS performed its functions under s 2.3(g) of the PSA Act, which requires:the provision of the services, and the rendering of help reasonably sought, in an emergency or otherwise, as are –

(i) required of officers under any Act or law or the reasonable expectations of the community; or

(ii) reasonably sought of officers by members of the community. This was a community seeking the help of the QPS as the institution charged to uphold the law – to investigate and determine whether any offences had been committed in relation to the arrest and death of Mulrunji, to prepare information for an autopsy and a coronial investigation, to explain how people would be held to account under law, and to keep peace and good order on the

island during a tense and difficult time. The community had, and had expressed, its expectations, which in my opinion were reasonable ones, about the removal of SS Hurley and him being treated as a suspect, and about the need for timely explanations of why Mulrunji was arrested, why he died, who would be held accountable, and what must change to prevent or reduce the numbers of Aboriginal people dying in police custody. QPS officers did not respond to those expectations in the way they would in a non-Aboriginal community. They were not respectful, they were dismissive. They were not consultative, they dictated. They did not recognise grief and frustration, they over-policed. They behaved in this way because this was an Aboriginal community where the police had a sense of impunity and separateness, and an intention to exert control. The distinction was based on race.

QPS handling of the autopsy report Finally, in this group of allegations, the applicants also expand on their criticism of the way QPS officers handled the results of the autopsy. They contend that there was a failure to adequately brief Inspector Richardson on the contents of the preliminary autopsy report; a failure to conduct what the applicants describe as "strategic planning" to respond to the autopsy report once it was known the kind of injuries Mulrunji had sustained; and lastly a failure of the QPS officers on Palm Island to make "special or other arrangements" prior to the autopsy report being released to the community. I have made findings above concerning the approach of DSS Kitching to the provision of information for the autopsy report. I have also made findings concerning the inadequacy of QPS officers' engagement and communication with the Palm Island community, including over the autopsy report. There are ***no*** other or separate acts involving distinctions based on race which arise from these allegations. Additionally, whether or not Inspector Richardson was briefed properly is not a matter that could impair or nullify the rights of the Palm Island group members, nor the subgroup.

Conclusions on the intervening week claims By reference to the applicants' final submissions at [312]-[375], and the applicants' summary submissions at [9]-[11], read with the third further amended statement of claim at [256]-[274], I am satisfied on the balance of probabilities that the following conduct constituted acts involving distinctions based on race for the purposes of s 9 of the RDA. First, the decision not to suspend SS Hurley from duty. I am satisfied this decision rested with Inspector Strohfeldt as SS Hurley's immediate supervisor, and/or with A/AC Wall. Given the acceptance of vicarious liability by the first respondent, precise identification of the QPS officer with whom the decision rested is not critical. This act involved a distinction: namely a disregard of usual policing standards of independence and impartiality, and a departure from the usual levels of objectivity brought by police officers to an investigation. The distinction was based on race. That is because the supervising or commanding officers paid ***no*** real regard to what the local Aboriginal community apprehended or thought about the QPS investigation. There was ***no*** respect or concern for the justifiable shock and outrage at what had happened to Mulrunji. There was ***no*** respect or concern for the justifiable outrage that SS Hurley had not been arrested, suspended or even removed from the island. The evidence suggests those in command positions were impervious to these issues and in my opinion that is because they were dealing with a powerless, remote Aboriginal community, and in particular one where the authorities (including police) were quite accustomed to being 'in charge' of Aboriginal people and controlling how they lived. Second, the failures to communicate with the Palm Island community and defuse tensions. These acts were ongoing throughout the week and manifested in the conduct I have set out in [1052] to [1093] above. They involved distinctions – namely, adherence to lesser standards about the preservation of peace and good order, and a focus on increasing security and police numbers without regard to other methods. Further, the acts involved a distinction in the way QPS officers performed their functions under s 2.3(g) of the PSA Act: see [1091] above. The acts also involved a preference: preference was given to ***protection*** of the interests and safety of the non-Aboriginal police officers on the island, at the expense of engagement with the local community. Instead of defusing tensions and addressing the justifiable concerns expressed at the meetings about what was being done about SS Hurley, and why the autopsy report was taking so long, QPS officers (led by SS Whyte and Inspector Richardson) geared up for confrontation, and subjugation. These distinctions and the preference just identified were based on race. That is because the nature of engagement by the police in this community was historically, and also in 2004, skewed towards a controlling and domineering style, and was characterised by over-policing rather than partnership. There was ***no*** real respect or consideration given to the role of elders and the local Council; lip service was paid to their roles. There was ***no*** inclination to understand family and community structures, nor how Mulrunji's death affected people across the Palm Island community. There was ***no*** appetite to talk about changes to policing on the island, nor about prevention of future deaths. All that would have been taken for granted in a non-Aboriginal community. In an Aboriginal community, officers needed special

knowledge, special interest and particular kinds of communication skills. They did not have those things and they were not interested in attempting to engage with the community in any event. The late and lacklustre attempts at using CCLOs and PLOs are a good example of the attitudes that prevailed.

Third category: the emergency declaration issued under the PSP Act In this category of conduct, the applicants challenge both the making and the revocation of the emergency declaration. The revocation is challenged on the basis that the declaration, if lawfully and properly made, should have been revoked much sooner. The applicants also challenge conduct arising from the emergency declaration: namely, the restriction of transport to and from the island, and the "presence and behaviour of police".

The making of the emergency declaration by DI Webber The basic course of events is set out at [328]-[330] above. It is necessary to begin with the evidence about the oral declaration. DI Webber was at Mundingburra police station, where A/AC Wall's office was close to his. DI Webber said that A/AC Wall told him that:a riot was occurring at – on Palm Island, that the police station had been set on fire and that demands had been made for all the police officers to – to leave the island within the hour. He – he asked me to do certain things and as a result of which I arranged various officers to – to attend at Townsville Airport. This was how DI Webber described the decision to make the emergency declaration:I was. I was – I was listening to the police radio and I was also making telephone calls to the police communication centre and also to – to regional office to ascertain exactly what was – what was occurring. It was during those – during – or hearing those conversations and – and the details concerning officers' accommodation then being under attack etcetera that I made a determination to – to – to announce a call for an emergency situation to be declared. He had also been told the police station and SS Hurley's house were alight. As I explain in more detail below, in my opinion, what the officers on Palm Island were articulating as their fears and apprehensions were substantially affected by their sense of being under siege from a group of Aboriginal people, and there was some material stereotyping at work in the officers' reactions, as well as considerable disproportion of reaction stemming from that. Those matters are not ones DI Webber could have perceived, and I accept his evidence that what he was listening to made the situation sound grave indeed. DI Webber had made emergency declarations before, in relation to siege and hostage situations, and was broadly but not intimately familiar with the PSP Act. He telephoned police communications and asked them to make a broadcast about the declaration, and also to contact the Department of Transport to put in place a "Notice to Airmen" (NOTAM) because, he said, of the "safety issues" on Palm Island. A NOTAM could be issued pursuant to r 4.12 of the Air Services Regulations 1995 (Cth). The NOTAM was not in evidence, so its terms cannot be ascertained. It was agreed between the parties that commercial flights to and from the island were suspended between 1.45 pm on 26 November 2004 and 1.30 pm on 27 November 2004. Thus, one of the practical effects of the NOTAM (and the emergency declaration) was that some Palm Islanders were stranded in Townsville (or elsewhere) and unable to return to their families, and Palm Islanders who wished, or needed, to leave the island were unable to do so by commercial flights as they usually might. On flying into Palm Island, DI Webber could see there were buildings alight and could see a crowd around them. SS Dini and Inspector Kachel also arrived around the same time, by plane and helicopter. A helicopter was sent to see if the road to the central area of Palm Island was blocked (as had been suggested to DI Webber – it is unclear on the evidence by whom, but it seems to have been information passed to him by police officers at the barracks). DI Webber then described how the group of officers came to leave the airport:Well, initially, we did actually remain at the airport whilst reinforcements arrived, I suppose, and we then at that point in time were – whilst we were at the airport, we received communications to indicate that a code 1 was being issued that the officers at the police station were – were in imminent fear of losing their lives, so at that point in time I made the determination that a group of us would immediately travel to the – to the police barracks there to effect a rescue if necessary.

...

So we immediately proceeded from the airport to the Palm Island township basically in a convoy of vehicles. By the time we got to the township, a number – the officers had made their way from the police barracks to the vicinity of the hospital, and we drove to the hospital and met them there. Once at the hospital, this is how DI Webber described what happened:We arrived at the rear entrance to the hospital. There were a number of officers there, including Inspector Richardson who was in charge of the police contingent at that point on Palm. The officers all appeared quite, I suppose, drawn, tense and I suppose upset. We received a very quick briefing from Inspector

Richardson as to what had occurred. There were a number of officers at the front of the hospital where a larger group of locals were gathered out the front and we went out and joined those officers to effectively, I suppose, demonstrate a show of numbers.

...

There were a number of local Aboriginals milling around, I suppose, to the front. There were Inspector Richardson and I think Senior Sergeant Whyte moved forward and had a conversation with a male person who I now know to be Lex Wotton and I think Erykah Kyle, the chairperson of the council there was also speaking. Inspector Richardson had a conversation with them. I didn't participate in that conversation; I basically stayed four or five yards away in a direct line with the other officers.

And could you hear any of the conversation between Inspector Richardson, Senior Sergeant Whyte and other people?---Periodically I heard bits and pieces or whatever. At one point in time – and I'm pretty sure it was the mayor that said something about – because they were demanding that the police leave the island. We were told that we were not under any circumstances to leave the island and I believe the mayor said something about, you know, he will look after the women and children or something – words to that effect. And at that point in time, there were a large number of people milling around, some with sticks and clubs, some with rocks in their hands or whatever out the front. And then basically, I suppose, over the next 15, 20 minutes people started to dissipate and move away.

All right. And the other people standing around, were they silent or were they saying things?---There was – there were a few yelling out chants of abuse, etcetera, but there were ***no*** other acts of violence that I saw.

All right. Well, you mention the crowd sort of dispersing. I assume the line of police out the front of the hospital also dispersed at some point?---Yes. Eventually it dispersed and a number of went back into the hospital and worked out a plan of action. The reference to a code 1 and officers being in fear of their lives is a theme which runs through a good deal of the evidence about this period. It is present in the sentencing remarks of Judge Shanahan in relation to Mr Wotton, on which the respondents rely heavily in their submissions about the emergency declaration and the seriousness of the situation. It is a theme present in the audio which can be heard in the recording made by Constable Robertson of the protests and confrontations. It was present in the evidence of some of the officers who gave evidence before me, notably Inspector Whyte. I return to this at various points in these reasons, but note again that, in my opinion, while the fears may have been genuinely held, there was less objective justification for them than seems to have been previously assumed, and was assumed in the respondents' submissions. At least, not when one removes stereotypical assumptions and baseless fears made about crowds comprising Aboriginal people. Again, it must be borne in mind that I can only base my findings on the evidence before me. I had ***no*** evidence from the large number of officers who were present on Palm Island during these events, other than Inspector Whyte, about whom I have not made favourable findings. DI Webber, it must be recalled, arrived after these so-described "life threatening" events. What I do have is the contemporaneous footage, and I have evidence from several witnesses for the applicants. I have set out at [740]-[815] above my findings about what can be seen from the contemporaneous video footage of the events from 22 November 2004 through to approximately 27 November 2004, including the footage from outside the hospital. I do not accept DI Webber's evidence about people having sticks, clubs and rocks. I do not accept his later evidence about people having spears. It is too inconsistent with what is visible in video footage. Some people were certainly angry, and Inspector Dini gave evidence that people were calling QPS officers "police cunts and murdering dogs". ***No*** statement of that kind is audible in the video evidence, but I accept it is entirely possible statements like that were made. Nevertheless, the only people capable of doing really serious physical harm at that point on Palm Island were the police officers: they were armed with a variety of firearms and batons, and one officer had a baseball bat. The police had already spoken amongst themselves in the barracks about shooting people. The sentencing remarks in relation to Mr Wotton record victim impact statements from officers stating they had talked about Mr Wotton being the first person

they would shoot. There was ***no*** such evidence before me and I make ***no*** such finding. However, in his record of interview from 26 November 2004, which was in evidence before me and which Inspector Whyte did not disclaim, (then) SS Whyte stated that Mr Wotton "had pushed us to the limit where we were of the view that some of those people were gonna get hurt because we would have to utilise and discharge our weapons". The QPS officers also had police dogs aggressively barking at the local crowd. My conclusion is that, contrary to the evidence of QPS officers, if any people had cause to be fearful for their lives at the point QPS officers lined up outside the hospital, it was members of the local community who were standing in front of armed police officers and police dogs. However, ***no*** such apprehensions are apparent: in part, perhaps, because at the time none of the local people were aware of how close QPS officers were to using their weapons. Once the crowd at the hospital had dispersed and the police stopped standing in a line in front of the hospital (on DI Webber's evidence, this seemed to be only about half an hour after he arrived, at the most), DI Webber then described how he, Inspector Kachel and SS Whyte decided that the local school would be an appropriate place to establish a command centre, which is what occurred. DI Webber was not asked but it would appear to be the case that the source of power relied on to occupy and use the school and its property was assumed to be the emergency declaration. There being nowhere else for officers to be based (including to eat and sleep), classrooms were used for that purpose, as well as for planning and operational functions. Officers were despatched to patrol around the island. Plans were made to move all officers who had been present during the protests and fires off the island, except Inspector Richardson and DS Robinson. Fresh officers would be flown in. DI Webber said:There was a large number of officers – because of the incident that had occurred – in my declaration, there were a large number of officers flown basically from all over south-east Queensland and up the coast to Townsville. There were also members of the ***public*** safety response team, general duties officers, detectives, tactical comms ..... officers, etcetera, flown in from ...various areas. Overall, as I note at [332] above, between approximately 59 and 82 QPS officers (excluding SERT and PSRT) came onto Palm Island in response to the incident. DI Webber then described how the responsibility and decision-making for the conduct of an investigation into what offences may have been committed that day rested with officers in Townsville:Now, normally I would have had a probably more direct involvement in that process but, because I was actually on Palm Island itself, that was more difficult, but the determination was made that a major incident room, as we call it in the police, would be established at Mundingburra and that major incident team would be responsible for the oversight and tasking of the operations involved. So they – the NYR [sic; "MIR"], which was led by two detective senior sergeants, was responsible for, I suppose, bringing the witnesses together, obtaining their statements, identifying persons of interest and suspects for offences, and then deploying staff and managing the deployment of those staff to effect those arrests, whereas, on the island itself, we were actually, I suppose, more directly engaged in the direct deployment of those staff, deploying those staff to effect those arrests, and then arranging for their movement back to Townsville. He said that he had only:a minimal role in the circumstances as far as I had ***no*** involvement in determining what evidence existed against any particular party or didn't exist in relation to any particular party. In terms of DI Webber's role (and those of the other officers on Palm Island as he had described it) in the deployment of officers to effect the arrests of suspects, DI Webber then described what was done on the island in this respect:During the early hours of Saturday morning, in consultation with Inspector [Kachel] and Inspector Underwood who had arrived from the specialist services branch, a determination was made and it was worked out exactly what action would be taken to actually effect those arrests, which included – I think Inspector – the decision that Inspector Underwood would be involved directly in attendance at scenes, Detective Sergeant Robinson was to be involved in actually identifying particular persons and locations of interest, and that the dog squad and specialist emergency response team would actually attend to actually assist in the effecting of any arrests, if required, and from memory, I believe there was also a negotiated deport for each arrest as well. I understood DI Webber's phrase "negotiated deport" to mean the police arrangements to take those arrested in custody off the island and across to Townsville. On the basis of DI Webber's evidence, I find that the decisions about how SERT and PSRT officers would be used on the island were made by Inspector Kachel and Inspector Underwood, together with DI Webber. The applicants challenged the formation of the requisite state of satisfaction by DI Webber for the making of the emergency declaration under the PSP Act, together with a number of other aspects of the making of the declaration. I have set out the relevant provisions of the PSP Act at [186] above, but I extract the key provisions here again for ease of reference. In November 2004, the long title to the PSP Act stated:An Act to provide ***protection*** for members of the ***public*** in chemical, biological, radiological or other emergencies that create or may create danger of death, injury or distress to any person, loss of or damage to any property or pollution of the environment and for related purposes Section 5 provided:Declaration of emergency situation

(1) Subject to section 6, if at any time a commissioned officer (the “incident coordinator”) is satisfied on reasonable grounds that an emergency situation has arisen or is likely to arise the commissioned officer may declare that an emergency situation exists in respect of an area specified by the commissioned officer.

(2) The incident coordinator, as soon as practicable after he or she declares that an emergency situation exists, shall issue a certificate to this effect signed by the incident coordinator which certificate shall set out the nature of the emergency situation, the time and date it was declared to exist and the area in respect of which it exists. Section 4 of the PSP Act refers to a Dictionary contained in a Schedule to the PSP Act, which includes a definition of “emergency situation”:“emergency situation” means –

(a) any explosion or fire; or

(b) any oil or chemical spill; or

(c) any escape of gas, radioactive material or flammable or combustible liquids; or

(d) any accident involving an aircraft, or a train, vessel or vehicle; or

(e) any incident involving a bomb or other explosive device or a firearm or other weapon; or

(f) any other accident;

that causes or may cause a danger of death, injury or distress to any person, a loss of or damage to any property or pollution of the environment, includes a situation arising from any report in respect of any of the matters referred to in paragraphs (a) to (f) which if proved to be correct would cause or may cause a danger of death, injury or distress to any person, a loss of or damage to any property or pollution of the environment. The use of the word “means” at the beginning of this definition indicates that it is intended to be exhaustive: see YZ Finance Co Pty Ltd v Cummings [1964] HCA 12; 109 CLR 395 at 398 (McTiernan J, Taylor J agreeing at 404, Windeyer J agreeing at 406), 402-04 (Kitto J); Sherritt Gordon Mines Ltd v Federal Commissioner of Taxation [1977] VicRp 42; [1977] VR 342 at 353 (McInerney J); Douglas v Tickner [1994] FCA 1066; 49 FCR 509 at 519 (Carr J); Transport Accident Commission v Hogan [2013] VSCA 335 at [47] (the Court); cf Owen v Menzies [2012] QCA 170; [2013] 2 Qd R 327 at [106] (Muir JA). The powers conferred on the incident coordinator (and those officers subject to her or his direction) are then set out in s 8:Powers of incident coordinator

(1) Where during the period of and in the area specified in respect of an emergency situation the incident coordinator is satisfied on reasonable grounds that it is necessary to effectively deal with that emergency situation he or she (and any other police officer acting on his or her instructions) may–(a) direct the owner or the person for the time being in charge or in control of any resource to surrender it and place it under the incident coordinator’s or police officer’s control (“resource surrender direction”);

(b) take control of any resource, whether it is in the charge or control of any person or not;

(c) in respect of any resource under the incident coordinator’s or police officer’s control, direct any person who is capable of operating that resource to operate it as directed by him or her (“resource operator direction”);

(d) direct the evacuation and exclusion of any person or persons from any premises and for this purpose may remove or cause to be removed (using such force as is necessary for that purpose) any person who does not

comply with a direction to evacuate or any person who enters, attempts to enter or is found in or on any premises in respect of which a direction for the exclusion of persons has been given;

(e) close or cause to be closed to traffic and pedestrians, any road, street, motorway, private road, private way, service lane, footway, right of way, access way or other way or close any place to which members of the ***public*** have access whether on payment of a fee or otherwise;

(f) enter or cause to be entered (using such force as is necessary for that purpose) any premises;

(g) search or cause to be searched (using such force as is necessary for that purpose) any premises and anything found therein or thereon;

(h) remove or cause to be removed from any premises (using such force as is necessary for that purpose) any animal or anything;

(i) direct any person to assist him or her in the manner specified by him or her ("help direction").(2) The incident coordinator or police officer must not give a resource operator direction or a help direction to a person if giving the direction would expose the person to imminent danger.

(3) A person given a resource surrender direction, a resource operator direction or a help direction must comply with the direction, unless the person has a reasonable excuse.

Maximum penalty for subsection (3) – 40 penalty units or 1 year's imprisonment. It can be seen that these include coercive powers of entry, search and seizure. There is ***no*** express power of arrest without warrant conferred by s 8. The applicants have put the lawfulness of the emergency declaration in issue in several ways. I have set out at [725]-[739] above why I consider a focus on lawfulness can distract from the task under s 9. However, since the applicants have placed such emphasis on the lawfulness of the emergency declaration, I consider it is appropriate to decide the question. I accept lawfulness may be relevant to the second limb of s 9(1). In my opinion, the state of satisfaction formed by DI Webber about the precondition in s 5(1) to the making of the declaration was lawfully formed. There was, by 1.45 pm on 26 November 2004, obviously a fire consuming ***public*** buildings on Palm Island, "fire" being one of the definitions of "emergency situation". Section 5 required a commissioned officer to be satisfied that an emergency situation (here, a fire), "has arisen" (that is, prior to the making of the declaration) or "is likely to arise" (that is, after the making of the declaration). The applicants do not contest, nor could they, that by the time DI Webber made the emergency declaration the police station and barracks, and SS Hurley's house, were well alight. In other words, a fire had arisen. On the evidence, the fact that these buildings were on fire had been reported to him. DI Webber's reliance, in the certificate he issued on 28 November 2004, on there having been "any other accident" within para (f) of the definition of emergency situation in s 4 of the PSP Act need not be justified. Even in the context of statutory powers conditioned on the formation of an opinion by the repository of the power (as s 5 of the PSP Act is), if there is a lawful basis available for the exercise of the power, then any mistake by the repository in identifying an incorrect source of power does not affect the validity of the exercise of the power: see Brown v West [1990] HCA 7; 169 CLR 195 at 203 (Mason CJ, Brennan, Deane, Dawson and Toohey JJ); Eastman v Director of ***Public*** Prosecutions (ACT) [2003] HCA 28; 214 CLR 318 at [124](Heydon J); Australian Education Union v Department of Education and Children's Services [2012] HCA 3;248 CLR 1 at [34] (French CJ, Hayne, Kiefel and Bell JJ); Attorney-General (SA) v Corporation of the City of Adelaide [2013] HCA 3; 249 CLR 1 at [175] (Crennan and Kiefel JJ). If I had needed to consider whether DI Webber could lawfully form the requisite state of satisfaction based on the existence of "any other accident" in the definition of emergency situation, I would have found he could not lawfully have done so. Since fires and explosions are expressly covered in para (a), I do not consider as a matter of construction that those events would also be covered by a general catch-all such as para (f), especially given the language "any other" accident. That language suggests the legislature is characterising most of the events in paras (a)-(e) as accidents, and then seeking to incorporate, in para (f), other kinds of

accidents. The respondents are correct that there is ***no*** reference to intentional conduct, or lack of it, in the definition of "emergency situation". The definition assumes, rightly, that where an accident or disaster occurs, the cause (or responsibility for it) may be unknown or contentious. The definition focusses on the nature of the event, and what needs to be done to alleviate the situation itself. I do not consider the exhaustive definition is intended, by the presence of para (f), to include the activities of a group of people throwing rocks, yelling abuse, engaging in protest and causing property damage. That is not, in any sense, an "accident", although those activities may have some or all of the consequences set out in the remainder of the definition of "emergency situation". As the use of the word "incident" in para (e) demonstrates, if the legislature had intended broader coverage for para (f), a word other than "accident" would have been selected. In many circumstances what might colloquially be called a "riot" may well be an "incident involving ... a weapon" for the purposes of para (e). The respondents did not rely on para (e), nor did DI Webber in his certificate. It may have been an available source of power. Whether or not that was the case is immaterial, given that para (a) provided a clear source of authority for the making of the emergency declaration. Finally, s 5 contains a residual discretion, and DI Webber retained a choice whether to make a declaration even if the preconditions in s 5(1) were met. The applicants did not mount any challenge to the exercise of the residual discretion: the focus of their legal argument was on the precondition contained in s 5. For my own part, I see ***no*** legal error in the exercise of the residual discretion by DI Webber.

The revocation of the emergency declaration Section 5(3) of the PSP Act provides:The declaration that an emergency situation exists shall continue until revoked by the incident coordinator. The respondents accepted, correctly, that for an emergency declaration to remain lawfully in place, the commissioned officer needed to continue to have a state of satisfaction about the matters in s 5(1) of the PSP Act. That this should be the case is reinforced by the use of the present tense ("exists") in s 5(3). However, as I have already noted, this proceeding is only concerned with whether there was a contravention of s 9 of the RDA in the emergency declaration remaining in force for the period of time it did. DI Webber was asked about his consideration of when the emergency declaration should be revoked:Was that a matter, the possible revocation of that declaration, that you turned your mind to on the Saturday?---I had. But at that point in time, there were still a few factors under consideration, one being the fact that there was a missing police firearm which had not been located. A number of persons had still to be taken into custody. And there was also, I suppose – there was still an air of tenseness, I suppose, around the – around the community, and there was still a – still, I suppose, a fear that there could be further incidents on – during that evening and night.

All right. And by comparison, how did you view the situation – or how did it appear to you on the morning of the 28th, the Sunday?---Well, by the Sunday morning, most, if not all, of the persons of interest had been – been arrested and taken into custody. Whilst the police firearm had not been located, to my knowledge, the – we were comfortable with the situation. There were ***no*** further acts of violence or whatever overnight. So we felt that it was appropriate to – time to revoke the emergency situation. It can be seen from this evidence that the fact of a missing firearm seemed to have become less important in the assessment of risk. Nor is there any real evidence, other than the assertion by DI Webber, of any further protests or riotous behaviour. There is nothing of that nature recorded in the running logs between the later evening of 26 November 2004 and the morning of 28 November 2004 when the emergency declaration was revoked. In my opinion it is clear from the evidence that one purpose in maintaining the emergency declaration was to facilitate the arrests of those suspected of involvement in the events of 26 November 2004. The respondents accept that the entry, search and seizure power in s 8 of the PSP Act was one of the sources of authority on which the QPS officers relied, and in my opinion was the source, DI Webber had in mind for the conduct of the entries and searches by SERT officers, assisted by DS Robinson. I accept the implication in DI Webber's evidence that once those suspected of responsibility or involvement in the events of 26 November 2004 were in custody, then in his opinion it was more likely there would be ***no*** further attacks on police property, or on police, and the declaration could be lifted. Other evidence given by DI Webber about the continuing situation on Palm Island confirms my opinion. There was the following exchange in cross-examination:And I suggest to you that the reasons for the emergency situation before and during the fire ended when the crowd of protestors dispersed from outside the hospital. Would you agree?---***No***. I don't. I believe there was an ongoing and continuing threat and a risk of harm to the community.

And that there was ***no*** emergency situation from Friday afternoon onwards?---I disagree.

Well, there were ***no*** incidents on Friday night, were there?---Not that I recall, ***no***.

And none on Saturday?---There were a number of arrests made on the Saturday morning.

But they were arrests arising from Friday, weren't they?---Yes, but - - -

And they had nothing to do with any civil unrest on Saturday, did they?---But they were still police actions that could have resulted in injuries – injuries to people and to officers.

(Emphasis added.) I consider this evidence significant. I consider it accurately reflects DI Webber's understanding at the time. What it indicates is that although he said he was concerned about threats to the community, he did not identify any. That is because there were not any. What did exist, in his mind, were threats to police officers and to police property. There had never been any indication of threats to the non-Aboriginal members of the Palm Island community. There had never been any indication of threats to Aboriginal members of the Palm Island community. The aggression, anger, verbal threats, and acts of property damage were all directed at, first, police property, and second, police themselves. That is because the whole reason and genesis for the protests and fires was Mulrunji's death, the failure to charge and suspend SS Hurley, and the lack of police transparency about the investigation and autopsy results. At the most, what DI Webber's apprehension about "the community" might have amounted to was damage to community buildings. Again, however, the only buildings targeted and damaged were those associated with the QPS. And, it should not be forgotten, the building which was primarily targeted was the building in which Mulrunji had died. There is insufficient evidence that any kind of riotous situation continued after the early evening on Friday, 26 November 2004. There is insufficient evidence to suggest that, at any time after that, any further riotous situation was likely to arise. The police presence was overwhelming and what angry crowds there were around the barracks and the hospital had dispersed very quickly after the fires and the subsequent confrontation at the hospital. The evidence suggests this occurred in less than an hour. There were many locals around, but they were simply gathering in small groups, talking about what had happened, watching, and otherwise going about their daily lives. There were children everywhere and older people as well – there was nothing approaching any sense of violence, or threats to property. The police logs show nothing but all being quiet. There was ***no*** "emergency situation" within the meaning of s 5 of the PSP Act (read with s 4) existing up until the declaration was revoked. The principal emergency situation within the PSP Act that had existed (the fire and any "accidents" which might arise from, or coextensively with, it) had ceased, at the latest, on Friday evening. It is possible, reading the PSP Act generously in the context of what had happened on Palm Island, that a person in DI Webber's position could be reasonably satisfied that another fire might be "likely to arise" overnight, given the level of anger in the community and the proximity in time of the fire at lunchtime on Friday. After this point (Saturday morning), in my opinion DI Webber maintained the declaration to facilitate the apprehension of suspects and to ***protect*** the police and police property while those apprehensions occurred. The declaration remained in force also to emphasise the total authority of the QPS over the island. His view was that the arrests and the entry onto private property could be justified under s 8 of the PSP Act while an emergency declaration was in place. That view was legally erroneous, but more importantly that view reveals the real purpose of maintaining the emergency declaration. He wanted the island kept in some form of lockdown, until suspects were arrested and removed from the island. That may have been a legitimate approach to his policing task, on one view, but it did not meet the requirements of the PSP Act. For those reasons, the continuation of the emergency declaration until after all suspects were arrested and in custody was outside the purposes for which the power to maintain an emergency declaration was conferred.

Was the making and continuation of the emergency declaration an act involving a distinction, exclusion, restriction or preference based on race? An emergency declaration gives a wide range of coercive powers, affecting private citizens and their property. It was the declaration which was taken to authorise DI Webber to close the airspace around Palm Island, to seize (through SS Dini) a vehicle and the Catholic school bus, to use the school as a police command centre (although the applicants do not complain about this), to suspend ferry services to and from Palm Island, and (at least in one case) prevented an individual Palm Island resident from returning to the island. It

appears, at least from the evidence of DI Webber (see my findings on the arrests, entries and searches below), that the emergency declaration was also the occasion, or perhaps the source, of the request for SERT teams to attend the island and apprehend suspects. It is ***no*** coincidence, in my opinion, that the emergency declaration was revoked after the SERT teams had completed their arrest tasks. Facilitating the arrests of suspects by SERT teams was, it seems to me, inextricably linked to the making of the emergency declaration and the existence of the powers in s 8 of the PSA Act. Therefore, I deal with the applicants' allegations about a "visible and militaristic presence" below, in the section where I deal with the conduct of the SERT teams. Closing airspace, suspending ferry services, commandeering the school, a school bus and vehicles were all consequences constituting restrictions, as that word should be understood in s 9. In my opinion, the making and continuation of the emergency declaration therefore involved restrictions within the terms of s 9. The calling out of the SERT teams to effect the searches for and apprehension of suspects might be characterised as a distinction and a restriction involved in the making of the emergency declaration, but I consider the better approach is to treat it as a separate alleged contravention of s 9, as the applicants' submitted. I refer to the "making and continuation" of the emergency declaration because the preferable characterisation for the purposes of s 9 is to see DI Webber's conduct as one "act". The evidence is that once he made the declaration DI Webber intended it would continue to facilitate and support the SERT operation. Only once that operation was complete did he turn his mind to revocation. Did the act of making and continuing the emergency declaration involve restrictions or distinctions based on race? In my opinion, only some of the restrictions and distinctions arising from, or involved in, the emergency declaration, were based on race. Those were: the closing of the island to air traffic, and the suspension of ferry services except for the evacuation of 'civilian non-ATSIs'. Why there was a need to shut down air and ferry services was not explained in the evidence. If there was concern about suspects fleeing, officers could have been stationed at both the airport and the ferry. All people who left the island would have been conspicuous and identifiable. The areas at the airport and the wharf where the ferry docks are both small and confined, and highly visible. These restrictions were disproportionate, but in my opinion the QPS was not concerned about proportionate reactions because there was ***no*** real regard for the Palm Island community, nor for the effects of police conduct on them. The police did not care. It was an Aboriginal community, a remote one at that, and the police were responding to what they saw as an uprising against them. There was, as I have found earlier, a strong sense of impunity in QPS conduct and responses. Indeed, in my opinion, as I explain below in relation to the arrests, entries and searches, the lack of proportion was deliberate. There was a deliberately heavy-handed and extreme reaction. It was an assertion of authority, a subjugation. The QPS officers conducted themselves in an authoritarian manner, which is the way Palm Island had historically been run, lest this community of Aboriginal people think they could take matters into their own hands without severe consequences. The arrangements for the departure from the island of non-Aboriginal people, mostly teaching staff, is a clear example of how these restrictions were based on race, and how the administration of the restrictions was based on race. I should note here that patients at the hospital (Indigenous and perhaps non-Indigenous, it is unclear on the evidence) were evacuated by the QPS from the hospital at approximately the same time as the confrontation in front of the hospital and shortly after the protests and fires. I consider this evacuation to be in a different category because, at the time, the hospital was the location perceived to be at the centre of the confrontation. Apart from the medical evacuation, the evacuation of non-Aboriginal people from Palm Island occurred in two ways: through a flight SS Dini allowed to leave from the airport despite the NOTAM being in place, and through an organised ferry departure on the evening of 26 November 2004. I consider each separately. Much of the evidence about these events is contained in the running logs maintained (at this time) by DSS Kitching in Townsville. The entries in the running logs constantly used the terms "ATSI" and "non ATSI", where "ATSI" meant (as the parties and relevant witnesses accepted) "Aboriginal and Torres Strait Islanders" or Indigenous people and "non ATSI" referred to non-Indigenous people. The word "civilian" was sometimes used in the phrase "Civilian non ATSI" and, despite Inspector Kitching's prevarication in evidence, clearly referred to white people who were not police (or perhaps army) officers. Thus, in the QPS universe of discourse there were white police and army officers, and white civilians. And then there were Aboriginal people. Where entries in the running log proved to be controversial, I found Inspector Kitching's explanations to be self-serving and unreliable. This was a busy time and ***no*** doubt (then) DSS Kitching was pressed in his duties. As with some of Inspector Whyte's evidence and language, it is often the case that when people are pressed and busy, there is not time to tailor or modify what they say or do, and it can be the case that people's true perspectives and understandings come through more clearly. However, Inspector Kitching was reluctant to accept responsibility for the entries, where it was obvious he was responsible. In my opinion, (then) DSS Kitching used the terms and language he did in the running log because he

was quite comfortable describing people in those ways, and describing them by reference to their race. That was his perspective on how things were on Palm Island: there were the 'ATSIs' and there were the 'non ATSIs'. The reason for using those terms was so that people could be assigned to one group or the other, identified by race, and treated accordingly. There were many other ways to describe people who lived on Palm Island. The immediate example is simply to say "locals". So when describing that some people left on the ferry on Friday night, a non-racially based approach would have been to say a group of locals, or local teachers and families, left the island. When the logs describe the arrest of an Aboriginal person, or the questioning of an Aboriginal person, the non-racially based way to record that would simply be to say that a local man or woman was arrested or questioned. But that is not what occurred. This evidence is significant because it is emblematic of the attitude which pervaded many aspects of life on Palm Island: there were the white people, and there were the Aboriginal people. This was a racially divided place and the division was maintained, at least up until 2004, by those white (or non-Aboriginal) people who over the years had charge of the lives of Aboriginal people on the island. During the events which are the subject of this proceeding, the QPS, perhaps without any conscious thought (cf Qantas Airways v Gama [2008] FCAFC 69; 167 FCR 537 at [76] (French and Jacobson JJ)), continued that divide. Turning first to the departure of people by plane. It was an agreed fact that between 1.45 pm on 26 November 2004 and 1.30 pm on 27 November 2004, all commercial flights to and from Palm Island were suspended, and this was because of the NOTAM issued by DI Webber as a consequence of the emergency declaration. It is clear on the evidence that once he had landed at Palm Island airport (or, at the latest, once he had information back from the helicopter he sent on a reconnaissance) DI Webber knew there was ***no*** threat to the airport, or for that matter to the roads around Palm Island. The QPS continued to use the airport flying officers in and out, on both helicopters and planes. DI Webber also accepted in cross-examination that a number of media representatives landed on the island on the Friday night whilst the NOTAM was in effect (although, as I note at [1164] below, it appears the media representatives arrived by boat). DI Webber sought to disclaim responsibility for the effect of the NOTAM:I simply asked for a notice to airmen to be issued in relation to the situation on Palm Island to alert air – alert – alert pilots, air crew, etcetera, of the situation, of the risks and dangers of landing at the airports, etcetera. I didn't take any control over vetting what aircraft should or shouldn't be landed. This evidence does not disclose the real effect of the NOTAM, which in my opinion DI Webber well understood. The effect of it was that those with the means (and the power) to use their own aircraft – the police, the army, government authorities – could still fly in and out. However, ordinary Palm Island residents, who were dependent on commercial flights, would be at the mercy of the decision of commercial operators. Not surprisingly, and despite the evidence suggesting there were in fact ***no*** "risks and dangers" in landing at Palm Island airport and that DI Webber knew this shortly after he arrived on Palm Island, the decision taken by commercial operators was to suspend ordinary commercial flights. Although the NOTAM was lifted at approximately 1.30 pm on Saturday, 27 November 2004, commercial flights did not resume (allowing in practical terms for some organisational time, as the applicants submit) until approximately 12.30 pm on 28 November 2004. Further, DI Webber's evidence is inconsistent with some of the contemporaneous records from the police running logs. At 2.15 pm on 26 November 2004 there is an entry which reads:10 Mile exclusion zone around airport around Palm Airport now secured At 6.07 pm on 26 November 2004 there is an entry which reads:[Redacted] from Brisbane Control Tower - Brisbane Airport advised Official flight exclusion zone 5 mile radius to 4000 feet in effect until 10am tomorrow 27/11/04 or until advised other wise by command centre. At 9.30 am on 27 November 2004 there is an entry which reads:[Redacted] of Brisbane Traffic Control [redacted] re: exclusion zone which expires at 10.00am. Advised emergent situation is still in force. Exclusion zone time frames are extended until at least 1600hrs. MIR will advise Brisbane Traffic Control prior to 1600hrs if exclusion zone is required after that time. And at 1.33 pm on 27 November 2004 there is an entry which reads:Exclusion zone has been lifted by Acting AC. Phone call made to [redacted] Brisbane Air Traffic Control. Comco advised. The executive briefing notes that were being prepared also referred to an "air craft exclusion zone" designed "to exclude any non police related aircraft". Therefore, if the situation on Palm Island was as dire as the QPS projected it was, if people were in fear of their lives and the situation was so dangerous that an emergency declaration needed to be made, it appears that QPS officers were unconcerned whether the Aboriginal residents on Palm Island might also want to leave. Or, as I discuss below, whether Aboriginal people stuck in Townsville might wish to rush back to be with their families. There are two explanations for why ***no*** regard was paid to these issues. First, because the QPS officers were not concerned about any risks or dangers to Aboriginal people on Palm Island, nor to any inconvenience and anxiety caused by separating Aboriginal people in Townsville from their families. Second, these measures were all part of a heavy-handed response, and in order to justify that heavy-handed response, the risks and dangers said to be

present on the island had to be elevated and emphasised. It had to look like there was a siege or a battle underway. That was how calling in SERT could be justified. In my opinion, it is likely that both explanations were at work. Although, aside from the hospital patients, the QPS did not allow any Aboriginal people to travel to or from Palm Island, the QPS did arrange for SS Hurley's dog to be removed from the island. At 12.15 am on 28/11/04, the QPS log records:Call from Comco that S/Sgt HURLEY's dog has just arrived on the police launch from Palm Island in a distressed condition. Comco advised by S/Sgt LAST to contact HURLEY re approval for vetinary [sic] treatment for dog. ***No*** oral evidence was led about SS Hurley's dog. The point is not to criticise the compassionate approach taken by QPS officers to the dog. It is to contrast it with the approach to the Aboriginal people who lived on Palm Island. Neither DI Webber nor any other witness called on behalf of the respondents offered any explanation for the inconsistent approach to who could leave and who could arrive on Palm Island. None was given in submissions. Rather, what was emphasised was the short period of time during which the NOTAM was in effect. As I have noted above, the evidence shows that the practical effect was for a day or so longer. The period of time does not affect the inconsistencies in the way people were treated and does not affect my findings that the acts involved distinctions based on race. The respondents are correct to submit that the evidence discloses only one certain example of an Aboriginal resident of Palm Island who was affected by the suspension of commercial flights. At 8.55 am on 27 November 2004 there is an entry in the police running log which reads as follows (with names redacted):Contacted by Det. M WYTE from State. Op comm.. advising that a [redacted] who resides on Palm Island is currently waiting at Inland Pacific airway, at the airport wanting to know who to get back to PI. Tried contacting [redacted] nil answer. WHYTE can be contacted on [redacted] concerned about family members. Contacted WHYTE referred information in case [redacted] contacted again. However since there are several commercial flights each day, it is a reasonable inference that there were other people, both on Palm Island and in Townsville, who would otherwise have been travelling between the two places. I am prepared to infer that was the case. This may be contrasted with access to the island provided by QPS officers to the media. The police running log records that additional media personnel began arriving on the island at 1.45 am on 27 November 2004, prior to the commencement of the arrests, entries and searches. It appears, from an executive briefing note that was in evidence (exhibit A133), that those individuals arrived by boat and that the QPS officers at the command post on the island were aware of their arrival. Indeed, it is likely, and I am prepared to infer, there was some conscious arrangement in place, despite the emergency declaration. At 8.41 am and 8.51 am on 28 November 2004, after the NOTAM had been lifted but before commercial flights or ferries had recommenced, two media helicopters also arrived on the island. Thus, QPS officers were prepared to facilitate media personnel coming to the island while local residents who were on the mainland were unable to do so. Similarly, Palm Island residents could not leave. The second aspect is the departure by air of some non-Aboriginal people who were living on Palm Island. At 2.40 pm on 26 November 2004 there is an entry in the police running log which records:20 Civilian Non Atsi at airport DSS Kitching was responsible for these log entries. He was asked in cross-examination whether this was an entry about getting these people off the island and said he could not recall. About 20 minutes later, at 1500 hours, this was recorded as a report from Inspector Kachel:20 + dog handler on the island have landed. Concerns that civilians will be at risk if left by the police at airport alone. Instructions for police on Palm to go to the hospital via Mango Avenue only due possible. Instructions from HOWELL - leave 5 at the airport to look after civilians.

(Emphasis added.) I accept the applicants' submissions that this entry refers to the 20 "Non Atsi" civilians to which the earlier entry relates. That is, there was group of non-Aboriginal people gathered at the airport who wanted to leave the island. Five police officers were apparently left to "look after" these non-Aboriginal people. The only information about any violence on the island at this time was the rock throwing, abuse and threats being directed at police officers in the town area, and the fires that had been lit at the police buildings. However, the police conduct in leaving five police officers (armed, it would appear from other evidence, as all officers arriving on the island were armed to some extent) to "look after" non-Aboriginal residents indicated the extent of the racial divide which permeated all police conduct on the island. The assumption was made that all non-Aboriginal people could be attacked and that the attackers would be Aboriginal. The assumption was that ***no*** Aboriginal people could be attacked, and there was ***no*** need to assign police officers (in a 1 to 4 ratio) to look after any Aboriginal people. Inspector Dini, who was present at the airport, gave evidence that the persons waiting there were eventually allowed to leave because:if we kept them on the island then we would be responsible for them and we didn't want them – to put them in a dangerous situation so when the pilot asked if he could leave the airport and take the passengers with him it seemed to me a logical idea at the time. I wasn't aware that there was an exclusion zone in

place or that I couldn't let them go so I made a decision to let them go and I did. When this evidence is read with Inspector Dini's earlier evidence about the commandeering of the QBuild vehicles, it is a reasonable inference that many of the people waiting at the airport to leave were contract workers who had completed their working week and were due to head back to Townsville for the weekend. They were not local residents fleeing from danger. This may make SS Dini's decision to allow the plane to take off and take these people off the island more explicable. However, why it was seen there was a need to have five police officers remain to "look after" this group of people can only be explained as stemming from the stereotypical apprehension of what the local Aboriginal residents intended to do, and were capable of doing, to a group of non-Aboriginal workers unconnected with the reasons that local people were directing their anger towards the police. I turn now to the use of the ferry to allow non-Aboriginal people to leave the island. Much of the evidence about what happened is drawn from the police running log. At 1.10 pm on 26 November 2004, the following entry is recorded:Call from a [redacted] at SunFerries. He normally has a run to Palm Island and arrives at Palm. Not taking any passengers. Has himself plus 3 can take 150 There is then a series of entries, starting at 4.15 pm, which indicate first that the Catholic Education Office staff on the island had been told a ferry was arriving at 5.20 pm. Then at 4.17 pm Inspector Richardson called to advise that he was "organising civilians for the 5.30 ferry". At 4.51 pm, Education Queensland and Catholic Education staff were told they should board the ferry at 6.20 pm. At 5.20 pm there is the following entry:Request from - Captain of ferry "Harding Explore" requesting direction on collection of passengers. RICHARDSON contacted and requesting that ferry wait in the channel until 6pm at this stage before entering harbour. Contact made with [redacted] on vessel. Will be advised when safe. RICHARDSON will advise when safe to enter jetty. At 5.32 pm, there was a request from the State Emergency Service (SES) in Townsville for numbers of people returning to Townsville on the ferry. At 6.11 pm, the following entry appears:Advice from (Sun Ferries) 30 people on board Ferry from school staff and returning to Townsville. Includes children. Some have chosen to stay on the Island. Includes both EQ and private school members. Will be docking at Sun Ferries at 2020hrs Townsville. reports that blowing a gale and will be very rough for passengers. QAS will dispatch units upon arrival in Townsville. At 8.08 pm, this entry described the arrival of the ferry in Townsville:Advice from "Harding Explorer" ferry preparing to dock in Townsville. Some sea sick persons on board. Advised QAS, Counsellor from Lifeline and SES would be on hand. SES will transport persons to accommodation or organise for those who do not have any accommodation. The evidence shows an orchestrated operation to allow predominantly non-Aboriginal people who wished to leave the island to do so. The ferry had, in my opinion, been specifically commandeered for this purpose. The only contact prior to the ferry's departure about who would be getting on it was with Education Queensland and Catholic Education staff. Again, if the fear was of generalised violence and lawlessness it is inexplicable why police were not out contacting all members of the local community to see who wanted to leave (especially since the focus of these records seems to be on women and children, of which there were many on Palm Island). If the fear was of lawlessness and violence from Aboriginal people targeting non-Aboriginal people who just happened to be resident on the island (such as teachers) there was ***no*** objective basis for such a fear and in my opinion it arose from the racially based stereotyping of Aboriginal people and how they were inclined to behave. It is true that in answer to a question from me, Inspector Dini gave evidence that if Indigenous people had arrived at the ferry and indicated they wanted to get on and leave the island, he would not have stopped them, and he would have "blown up" if anybody tried to stop them. I accept his evidence that he personally may have had this reaction, but the more pertinent question is why ***no*** local Palm Islanders did turn up to try to leave on the ferry. The ferry and the ferry dock are very close to the school and ***public*** buildings in the 'town' part of Palm Island. In my opinion there are several answers. First, for the reason I have given, it was clear that QPS officers were in charge of that ferry service at that time – they dictated when the ferry would arrive, when it could dock, when it could leave, and QPS officers had arranged for identified non-Aboriginal people to be the primary passengers. The reason for the ferry being allowed to dock at all was, in my opinion, to allow non-Aboriginal people on the island to leave, if they wished to. I consider it highly unlikely any local Aboriginal people would have felt at all comfortable or safe approaching the ferry in those circumstances and asking to leave on it. Just as importantly, however, in my opinion the evidence does not support the existence of any widespread or substantial fears amongst the local community for their safety and wellbeing because of what had happened on Friday, 26 November 2004. Fear existed amongst the non-Aboriginal police officers and it was the police officers who were gearing up for confrontation and whipping up apprehensions of all sorts of potential conflicts and violence, most of which turned out (quickly) to be false. For example at 4.59 pm the following is recorded in the running log:Brief that Islanders are presently breaking into Palm Island Service station and concern is that Islanders may light service station leaving ***no*** fuel on the Island. Then, at 5.38 pm, this entry:Service Station was not broken

into and is now secured by police and under guard. From the contemporaneous video evidence and the evidence about the arrests, entries and searches, most people on Palm Island (families, children, the elderly) were going about their daily lives. The militaristic battle impressions of the situation on the island came almost wholly from the police officers, and were without a doubt occasioned by the extraordinary increase in police presence on the island. Finally, a police log entry at 8.08 pm records the Lifeline counselling facilities which had been put in place for the people who left on the ferry when they arrived in Townsville. This is in stark contrast to the absence of any such efforts for the Palm Island community after the death of Mulrunji a week earlier. ***No*** Lifeline counsellors were sent to Palm Island. I refer to one more topic of evidence to underline why I have found that the restrictions imposed as a consequence of the emergency declaration were based on race. There was a meeting of the Palm Island Council on the Saturday night, attended by SS Dini and Inspector Kachel. The applicants' submissions focus on the attitudes shown by Inspector Kachel to the community concerns raised at that meeting, including by Ms Kyle, the mayor. It can now be seen from other evidence in this proceeding that one reason QPS officers such as Inspector Kachel were not taking very seriously the complaints made by Mayor Kyle is that she was considered one of the two major suspects in the events of 26 November 2004, along with Mr Wotton. An entry in the police running log at 6.16 pm on 26 November 2004 makes this clear:Person of interest 2

Erica Kyle. Chairwoman of council. KYLE was with victims family as post mortem results were explained to them by the doctor. During the riot she was positioned with the crowd with a loud hailer to incite the crowd. Her claims were that the deceased had several ribs broken, had a liver punctured and bled to death in half an hour. Suspicions are that she was involved in some capacity behind the scenes inciting the affray. At one point KYLE invited the Inspector to come from the hospital to the Council Chambers to discuss the circumstances of the situation. It is remarkable that an official police record would describe what Mayor Kyle said about Mulrunji's death as "claims". She was, DSS Kitching well knew, announcing the results of the autopsy report. It was not a "claim". The falsity at work in this entry indicates the lengths to which QPS officers were going to portray decent, responsible local people as criminals, and to diminish the tragedy of Mulrunji's death. Inspector Dini gave evidence about the Council meeting, which was held at the school turned police command post on Saturday, 27 November 2004. I accept Inspector Dini's evidence about what occurred at the meeting. Members of the Palm Island Council and other community members were present. Inspector Dini described being aware of significant anger towards the police. Council members said the police should leave the island. Inspector Dini described Inspector Kachel's concern as mostly about recovering the 'missing' rifle. The contemporaneous police log is consistent with Inspector Dini's evidence. It also records that Mayor Kyle expressed concerns about "the scale of police presence", why the police had "occupied the school as a command post" and "how long the police would remain on the island". Inspector Dini accepted the police were concerned only about "security" and not about the effect that the police operation was having on the community. Mr Blackman Senior, a witness who attended the meeting, gave this evidence:What happened? Can you tell the judge what happened, what you recall happened?---Well, they called a meeting, like, in the council chambers with – with a PLO again, Police Liaison Officer Danny. Danny, I think his name was, at the time, and went into the meeting and all they were talking about was a rifle missing from the barracks up there. That's all they were – that's all they were talking about. You know, I thought they were going to give us answers to, you know, a bit more about what happened to Cameron.

But they were just talking about the rifle?---That's what they was talking about, just the rifle. That's all they was worried about, was a rifle. This evidence is consistent with the findings I have made on other allegations made by the applicants about the attitude of QPS officers. It was most apparent during this weekend, when taking into account all the evidence relevant to this period, the death of Mulrunji had been entirely forgotten and replaced with an obsessive concern by QPS officers to re-establish police authority in a forceful way on the island, and to avenge the burning of the police station and the frightening of police officers. Not because it was wilful property damage, but because it was the police station that was burned, and because it was their own officers who were frightened and abused. I see ***no*** concern for the community of Palm Island in the conduct of police over this weekend. As I have said, there was in any event ***no*** evidence of any threats to the safety of all the ordinary people living on Palm Island. One aspect of the declaration which was expressly challenged was that it extended to the whole of Palm Island, when on the applicants' submissions the only emergency situation, if there was one, was concentrated around the police station and the police barracks. Given the evidence to which I refer above, in my opinion there

was some basis, at least at the time the declaration was made, for DI Webber reasonably to be satisfied it was appropriate to make a declaration covering the whole island. The characteristic of Palm Island, as an island, lent itself to an approach to containment which extended across the island, especially given the airport (one of the two main means of getting on and off the island) was some distance from the township area where the police station was located. It seems to me the real issue about the coverage of the declaration is the same as that concerning the duration of the declaration: once DI Webber was on Palm Island, and the fires were extinguished and the confrontation between police and some locals in front of the hospital had dispersed, what was the continuing purpose for the declaration over the entire island? Asking that question assists in answering the first limb of s 9(1) of the RDA. Making and continuing the emergency declaration could have led to conduct authorised under the PSP Act which was protective of the safety of all members of the Palm Island community, and which was aimed at addressing the risks and damage from the fires. Restrictions (such as travel or movement restrictions) might have been imposed, equally, on all persons on Palm Island. That is not what occurred and therein lies the contravention of s 9. Rather, a series of distinctions and restrictions flowed, giving rise to differential treatment which was based on race. Similarly, for there to be a contravention of s 9, it is not necessary that all consequences flowing from an act such as the making of the emergency declaration involve restrictions and distinctions based on race. There may be some restrictions and distinctions which were not at all racially based. In the present case, any restrictions imposed by QPS officers so as to deal with the fires and damage to buildings (such as cordoning off areas and the like) could be an example, although there is ***no*** evidence about any such activities. In my opinion, the commandeering of vehicles, the school bus and the school were not distinctions and restrictions involved in the emergency declaration that were based on race. They were the kinds of conduct flowing from an emergency situation that may have occurred in any remote and inaccessible community. If most of the consequences fell equally on all persons without distinction as to race, but certain of the consequences resulted in differential treatment for some persons based on race, that may be factor affecting relief. However, it would not preclude a conclusion of a contravention of s 9.

The Court of Appeal decision in Poynter In responding to allegations about the emergency declaration and the existence of an “emergency situation”, the respondents placed reliance on observations by the Queensland Court of Appeal in R v Poynter, Norman & Parker; ex parte A-G (Qld) [2006] QCA 517, especially at [3]-[6] and [34]-[38] (de Jersey CJ, Chesterman J agreeing). This case concerned appeals by the Attorney-General of Queensland against the sentences initially imposed on Jason Poynter, Alissa Norman and Russell Parker Senior as described at [371] above. The Court’s observations are partially descriptive, partially opinion. They involve characterisations by members of the Court of Appeal about what happened during the protests and fires. I am not aware what evidence the Court of Appeal had on which their Honours based their observations. It may or may not be the same evidence that was before this Court. It most certainly was in a different context. This Court has ***no*** information concerning what facts were placed in issue in the Court of Appeal (or at trial) between the parties and what were not. The applicants are correct to identify s 91 of the Evidence Act as having application to the submissions of the respondents based on the Court of Appeal decision. The findings of fact in the Court of Appeal’s judgment are not admissible in this proceeding to prove the truth of those facts. As the applicants also submit, many of the adverse findings by the Court of Appeal were not put to Mr Wotton in cross-examination in this proceeding. Apart from the provisions of the Evidence Act, I do not consider this Court is bound or should be influenced by the opinions expressed by the Court of Appeal about the nature of the threats to police, nor the characterisation of other events related by the Court of Appeal. Their Honours’ function was quite different to the Court’s function in the present proceeding.

The delay in issuing the emergency declaration certificate There was some extensive cross-examination of DI Webber about why he filled in this certificate well after the event (his evidence was he filled it out on 28 November 2004 and the approval parts were not signed off by his commanding officers until well into December 2004). The delay was also one of the grounds of attack on the making of the declaration. The certificate was, as s 6 indicates, to be completed “as soon as practicable” after the declaration. Thus, s 6 contemplates the sequence of events which in fact occurred on this occasion: namely that an oral declaration would be made by a commissioned officer, and the basis for that declaration would subsequently be made clear in the relevant certificate. That process is a rational one for emergency situations where swift action is likely to be required. DI Webber’s evidence was that he filled out the form on 28 November 2004, on the Sunday morning, while he was still on Palm Island but after the

communications and command centre at the school was up and running, at approximately the same time he revoked the emergency declaration. Although it may not be best practice, DI Webber can hardly be criticised in the circumstances of having his priorities elsewhere than in completing the s 6 certificate. As he pointed out in his evidence, he was on his way to Palm Island when he made the declaration, and when he arrived there, the police station had burnt down: there were ***no*** computers, ***no*** forms to fill in, and the police officers were still in a confrontational situation with a group of local people out the front of the hospital. After the situation at the hospital defused, the focus was on setting up a command centre and pursuing those responsible for the fires, a not unreasonable course of action. It is true that an emergency declaration triggers authorisation to use a range of coercive powers and therefore the certificate is of some significance as evidence that the preconditions contained in s 6 existed. I do not consider that DI Webber's delay in completing the certificate, of itself, had any effect on its lawfulness or, more importantly involved any contravention of s 9 of the RDA.

Other aspects of the applicants' contentions regarding the emergency declaration Some of the conduct I have discussed above is relied on independently by the applicants as a contravention of s 9. This conduct is, in my opinion, properly characterised as a restriction or distinction involved in the making and continuation of the emergency declaration. This conclusion applies to the following conduct: the commandeering of the school bus, the use of the school (although the applicants do not complain about that), the suspension of air and ferry services, and the departure of certain people on the ferry and by air. They should not be seen, in this context and for the purposes of s 9, as separate "acts" involving distinctions or restrictions. They were the restrictions or distinctions involved in the act of making and continuing the emergency declaration. The applicants also contend that the certificate issued by DI Webber contained "inadequate particulars" because it did not set out the nature of the emergency situation on Palm Island and instead simply included a reference to para (f) of the definition of "emergency situation" in the Schedule to the PSP Act. This is not a contention which can properly be seen as an act involving a distinction, exclusion, restriction or preference for the purposes of s 9. Nor, if that point were reached, could it be said to have impaired any rights of the Palm Island group members.

Conclusions on the emergency declaration claims By reference to the applicants' final submissions at [376]-[433], and the applicants' summary submissions at [13]-[15], read with the third further amended statement of claim at [269]-[278], [289]-[292] and [297]-[299], I am satisfied on the balance of probabilities that the following conduct constituted acts involving restrictions or distinctions based on race for the purposes of s 9 of the RDA. The act of DI Webber in making and continuing the emergency declaration involved restrictions and distinctions. The restrictions were the closing of the island to commercial aircraft and the limit on access to the ferry. The distinctions were the arrangements made for "non-ATSI" people to leave the island and the arrangements made for the ***protection*** of "non-ATSI" people on the island. The way in which non-Aboriginal people (primarily teaching staff, it would seem) were given particular opportunities to leave the island by ferry, with those opportunities apparently being planned and executed especially for them, is also capable of being characterised as a preference for the purpose of s 9. The restrictions, distinctions, and preference were based on race. The effective closure of the island and the imposition of a disproportionately large police presence on the island, including armed SERT officers, occurred because the unrest had taken place in an Aboriginal community, and in the Palm Island Aboriginal community in particular. An overwhelming show of force against that community was the instinctive reaction of the QPS officers responsible. The burden of the restrictions fell disproportionately on local Aboriginal people – such as the closing of the island's air and ferry transport services. The criterion of difference, directly or indirectly, was whether a person was "ATSI" or "non-ATSI". Further, the evidence shows some services were offered conspicuously to the non-Aboriginal people who had been allowed to leave the island – such as the Lifeline counselling services. The way Mayor Kyle and the other local Aboriginal people were treated at the local Council meeting when they complained about the police and SERT presence, and the way their complaints (including about the lack of progress on the investigation into Mulrunji's death) were ignored, is evidence of the disregard shown by QPS officers for the concerns and anxiety of the Palm Island community about the police presence. In their view, this was an Aboriginal community which was to be controlled, including by restricting access to the island, and the persons to be ***protected*** (by force if necessary) were the police officers and the non-Aboriginal residents of the island.

Fourth category: the use of SERT There was considerable debate in final submissions about what exactly it was that the applicants challenged about the deployment and use of SERT over the three days of 26 to 28 November 2004. The respondents correctly submitted that there were ***no*** allegations in the third further amended statement of

claim or in the applicants' written submissions that the initial decision to deploy SERT (or PSRT) to Palm Island was an act contravening s 9 of the RDA. The applicants' written submissions on this topic were somewhat difficult to follow, raising a plethora of arguments which were not necessarily connected to each other in a readily understandable way. In final oral submissions, senior counsel for the applicants clarified that what was under challenge was the entries and searches of the applicants' houses, and the houses of the subgroup members, and the manner in which those were conducted. She accepted there was ***no*** challenge to the decision to deploy SERT and PSRT to Palm Island. It was submitted that the use of SERT to conduct the arrests, entries and searches was unnecessary, unwarranted, and occurred (at all, and in the manner it did) only because Palm Island was an isolated Aboriginal community. The applicants apparently accepted that even though completed after the event, the "mission" part of DI Webber's request for the SERT team (see [335] above) was an accurate description of what the SERT teams were deployed to do. Based on this document, the applicants submitted there were a number of general "peacekeeping" tasks the SERT teams could have performed on Palm Island. Sending SERT officers to effect the apprehension of suspects was, the applicants submitted, an overreaction and over-policing and only occurred because Palm Island was an Aboriginal community. In other words, the act of racial discrimination is said to be the way the operation was executed once the SERT officers arrived on the island: sending teams of officers in riot gear, the way suspects were apprehended, the way houses were entered and searched, the way firearms were used (although not discharged). This is the principal area of the applicants' claim where the contentions made on behalf of the subgroup, and on behalf of the applicants personally, diverge somewhat from the contentions applicable to all Palm Island group members and require separate consideration. The claims in this category made on behalf of the applicants and all Palm Island group members (aside from those I have considered in these reasons already) appear to be:(a) the establishment by the QPS on Palm Island of a visible and militaristic presence; and

(b) the behaviour by QPS members in a disrespectful and intimidatory manner. The claims which are made on behalf of the applicants and the subgroup (being all persons whose houses were entered and searched by SERT officers and those who were present at or around the houses) are:(a) the formation of an action plan which required that DS Robinson identify the persons to be arrested;

(b) the preparation of a list of persons to be arrested by DSS Miles in Townsville on the night of 26 November 2004; and

(c) the failure to obtain a warrant for the arrest of any person arrested in the presence of SERT and PSRT officers in connection with the events on Palm Island of 26 November 2004. In closing submissions, the applicants also contended that the arrests, entries and searches were carried out in an arbitrary way. I address those contentions afer addressing the first three claims made on behalf of the applicants and the subgroup. The claims which are currently made on behalf of the applicants only are:(a) the entry and search by SERT officers of the dwelling of the first and third applicants on 27 November 2004;

(b) the entry and search by SERT officers of the dwelling of the second applicant on 27 November 2004;

(c) the use of unnecessary force and unnecessary disturbance of occupants in the entry and search of the home of the first and third applicants;

(d) the use of unnecessary force and unnecessary disturbance of occupants in the entry and search of the home of the second applicant;

(e) the ransacking of the home of the first and third applicants;

(f) the damage to property in the home of the second applicant;

(g) the arrest of the third applicant;

(h) the use in the arrest of the first applicant of more force than was necessary;

(i) the use in the arrest of the third applicant of more force than was necessary;

(j) the subjection of the first applicant to violence including the use of a taser;

(k) the holding of the first applicant at gunpoint whilst he was unarmed;

(l) the holding of the third applicant at gunpoint whilst she was unarmed;

(m) the forcing of the first applicant to lie face down with guns pointed at him;

(n) the forcing of the third applicant to lie face down with guns pointed at her;

(o) the pointing of guns at the children of the first and third applicants; and

(p) the forcing of the children of the first and third applicants to lie face down with guns pointed at them. Into this last category (claims made on behalf of the applicants only) falls much of the evidence from the applicants' witnesses about what happened during the entries and searches. The applicants submit, and the respondents accept, that the Court is at this stage confined to considering relief in this category only in relation to what happened to the first, second and third applicants at their homes. Although the applicants accept there is some considerable overlap in the evidence, they submit that the claims of the subgroup members can only be determined after the Court's determination of the first, second and third applicants' claims in this respect. The respondents' written submissions (at [489]) appear to accept this position. The parties therefore agree that the Court's findings of fact and law concerning s 9 in relation to the applicants will, insofar as those findings are common to the claims of the subgroup members, be applicable to them. Returning to the list at [1207] above, as with other aspects of the applicants' case, it is not apparent why the applicants have chosen to divide what they identify as an "act" for the purposes of s 9 into so many individual pieces of conduct. This is an artificial way to approach the application of s 9. Appropriately, it was not an approach maintained by the applicants in the summary of their final submissions. By that stage, the applicants grouped their contentions about the arrests, entries and searches into three categories: the SERT action plan and methodology; the arrests by SERT officers; and the entries and searches by SERT officers. These categories however were difficult to match up with the way the claims were put in this part of the proceeding in relation to all the group members, the subgroup, and the applicants alone, and for that reason I do not propose to use them. The way I propose to structure this part of my reasons is to begin with some preliminary findings about the way in which the SERT teams came to be deployed to Palm Island. These findings are relevant to the claims made on behalf of all the group members, but they also establish the foundation for my findings about the claims of the subgroup and of the applicants. I will next consider the claims put on behalf of the group members, such as the disproportionate and militaristic policing response. I will then consider the three aspects of the use of SERT said to contravene s 9 in relation to the applicants and the subgroup members. Finally, I will consider the aspects of the use of the SERT teams said to contravene s 9 only in relation to the first, second and third applicants, although elements of these claims involve questions common to the subgroup members.

How the SERT teams came to be deployed In s 2.26.1 of the OPM, SERT's role and function was described in the following way:The primary role of the SERT is to:

(i) respond to terrorist incidents within the arrangements agreed to under the State Antiterrorist Plan;

(ii) provide specialist police capability to resolve high risk situations and incidents which were potentially violent and exceed normal capabilities of the QPS;

(iii) provide assistance to all police with low risk tasks which require specialist equipment, skills or tactics; and

(iv) provide a rescue function in incidents which require specialised recovery techniques. DI Webber saw a clear connection between the emergency declaration he had made and the ability to deploy PSRT and SERT officers:Well, when I declared the emergency situation to exist, I suppose that initiated an activation plan for them – for them to actually attend to assist other officers. At the actual determination of what involvement – I suppose – they have, it has to be – I suppose – agreed to by one of the deputy commissioners. The request for SERT officers was not made in writing on or about 26 November 2004, and the call out procedure set out in s 2.26.3 of the OPM was not followed by DI Webber. DI Webber's evidence was unclear about when he completed the written document which the OPM directed be completed as the formal request for SERT. There are two versions of the SERT request in evidence: the first has 2 cover letters, and the authorisation sections are incomplete. The second has the authorisation sections completed. The first version (exhibit A79) includes a memo from DI Webber to A/C McDonnell which attaches the SERT request. This is dated 9 December 2004, almost two weeks after the events. In that memo, DI Webber informs A/C McDonnell that the request for SERT form has been completed and recommends it be forwarded to the A/C Operations Support Command "as requested". Despite his uncertainty in oral evidence, DI Webber did clearly concede that he did not fill out this form until "some days later" after returning to Townsville. In my opinion it is likely he completed it on or about the date he sent it to A/C McDonnell: namely, 9 December 2004. As to why the document needed to be produced after the event, DI Webber's evidence was:This was not produced for anything other than the information and the records of the police service. He denied the delay in completing it signified this documentation requirement was unimportant, but he contended there were other priorities at the time. I have set out the text of the completed form at [335] above. The content of the form is divided into a number of parts. The first is an outline of the incident or situation. In this part DI Webber gives a detailed description of the incident, in terms the applicants strongly contested. There were several statements to the effect that offenders could be armed, and would pose a serious threat to safety and good order on the island, and serious threat to life. Then there is a heading for identifying the offenders or suspects, and other possible "occupants", including any criminal histories. ***No*** identifying information about suspects or occupants is included there, although those identities were all known to DI Webber at the time he filled this out. There are then sections for particulars of vehicles (which DI Webber marked "N/a", although the QPS had seized and used vehicles) and particulars of weapons offenders may have had access to. In the general section outlining the situation, DI Webber wrote that:Persons on the island are capable of using lethal force including rocks, molotov cocktails and have access to other weapons including knives, machetes, spears and possibly stolen police firearms. In the weapons section, he wrote:It is suspected a QPS Mini-14 rifle may have been looted from the Police Barracks prior to it being burnt down. Offenders have shown a propensity to use rocks, molotov cocktails and iron bars as weapons. Offenders have ready access to other weapons including knives, machetes, and spears. While it was "suspected" on the evening of 26 November 2004 that a QPS rifle was missing, the rifle was found in the police barracks on 8 December 2004, the day before DI Webber appears to have filled out the form. It is the rifle Constable Robertson had taken with him, so he could use it as needs be, as shown in his video taken on 26 November 2004. I return to the missing rifle at [1446] below. The document identified the request to SERT as being to perform the function outlined in s 2.26.1(ii) of the OPM, namely to "Provide a specialist police capability to resolve a high risk situation which is potentially violent and exceed normal police capabilities; (i.e. defeat fortification, detain armed high risk offenders)". Under the heading "Mission", DI Webber stated:SERT to travel to Palm Island and undertake the following tasks: To provide security to police members on Palm Island and regain control of ***public*** order on the Island. To assist investigators to locate and detain wanted persons and associates by tactical methods. To assist in provision of ongoing policing of Palm Island and to provide security and ***protection*** of QPS employees and property on Palm Island. Inexplicably, DI Webber signed and dated the form with the date of 26 November 2004 at 1400 hours, which he admitted he knew to be incorrect. He agreed in cross-examination that this presented a false picture to the reader. DI Webber insisted under cross-examination that the content of this document was "completed in relation to what was acting upon my knowledge and my request at the time", and was not an attempt after the event to make the situation seem more dire than it was. This exchange occurred, in relation to those parts

of what he had written that turned out not to be true, and which he knew not to be true before he typed up the document:So why would you include something that's patently false?---Because that's what was acting upon my mind at the time of – of the original request. I accept that in some respects DI Webber may have put the date he did on this document, and included matters he later knew to be incorrect, as a way of indicating that what he wrote was what was operating on his mind at the time he made the emergency declaration. Nevertheless this does not explain the whole content of the document and indeed is inconsistent with it. DI Webber wrote factual assertions in this document that he did not know on 26 November 2004. Statements from the transcript of what David Bulsey said at the community meeting, which DI Webber inserted word for word into this document, are a good example. Another is the missing rifle, which according to the police logs was first recorded as missing by DSS Kitching at 8.54 pm on 26 November 2004, so it is untrue that DI Webber knew it was missing when he made the emergency declaration and asked for SERT around the middle of that day. In my opinion DI Webber drafted this document in a way that elevated the impression of risk on 26 to 28 November 2004, and located the risk in generalised violence of the Palm Island community, as well as violence towards police officers. He presented an account that sought to justify, as much as possible, the calling in of SERT officers to Palm Island. The applicants sought to use the reconstruction of those events as evidence that DI Webber was prejudiced towards Aboriginal people. I have already made findings that DI Webber, like other QPS officers, tended to stereotype Palm Islanders; was dismissive of, and disinterested in, their frustration and sense of injustice over Mulrunji's death; and did not take their accounts of events seriously. However, in filling out this form in my opinion DI Webber had other purposes. He was concerned to justify what was a tremendous deployment of personnel and equipment, all flown to the island at enormous cost, ***no*** doubt, and the conduct of a heavily armed and militaristic style of operation which ended up arresting people who were unarmed, sometimes not even fully dressed, and mostly at home with their families. In my opinion it is likely DI Webber knew there may be accusations of an overreaction by police, and accusations that a heavy-handed and disproportionate policing reaction had been authorised in an Aboriginal community where the threats were not of the scale suggested. What he wrote in this form was not an act of racial discrimination for the purpose of s 9 of the RDA, it was an attempt to justify the level of police response. Nevertheless, its content was consistent with the stereotyping of Palm Islanders in which I have found QPS officers engaged, and in that sense fortifies some of the conclusions I have reached. The state of the evidence concerning which QPS officer in fact decided to deploy SERT is unsatisfactory. Although the applicants have the burden of proof in relation to their claims, this fact was clearly within the knowledge of the respondents and they chose not to lead any specific evidence about it. Mr Campbell's evidence was that when he arrived on Palm Island on 26 November 2004, Inspector Kachel was in charge of the "overall policing response" on the island. DI Webber, in cross-examination, described himself, Inspector Underwood and Inspector Kachel as the three officers "in charge" and working on the "action plan" for SERT. His evidence was that Inspector Richardson left the island late on the Friday night and was not involved in the preparation of the action plan, which took place in the early hours of the Saturday morning. Notwithstanding that he held such a position, Inspector Kachel was one of the QPS officers conspicuously missing from the respondents' witness list. Inspector McKay gave evidence about the role of SERT, and confirmed that it was not a unit which deployed on its own initiative. He described its role in the following terms:It's very much dependent on the task. What we – what we try to do is to fit the resource to – to the task. At the end of the day, we're asked to solve problems, and – and in there it speaks about situations which exceed the capability of other police. So it's about us trying to fit the resource to the task to achieve the outcome that has been requested by the requesting officer. Inspector McKay accepted that it was his responsibility to organise how the apprehension of the identified suspects would take place, once SERT teams had been deployed to the island. Inspector McKay met with Inspector Kachel when he arrived on the island to get an "overview" of the situation and SERT's role. Inspector Underwood, who was attached to PSRT, had overall command of the "apprehension teams" with Inspector McKay being in charge of the SERT officers. Inspector McKay's evidence was that it was either Inspector Kachel or DI Webber who told him, later in the afternoon of 26 November 2004 and once the SERT officers were on the island, that SERT officers would be used to apprehend suspects. DI Webber confirmed that sequence of events in his evidence: that is, that Inspector McKay was not told until later in the afternoon of 26 November, once the SERT officers were on the island, that the SERT officers would be used to apprehend suspects and search houses. At or about the same time as the assistance of SERT was requested, the QPS also called on the army, or as it was sometimes described in the running logs, the "military". In fact, the first entry in the running log for the "State of Emergency" on Palm Island records that at 1.20 pm on 26 November 2004 Superintendent Howell contacted an unidentified "Warrant Officer" requesting "urgent assistance from Military re: unrest/violence on Palm Island". An

executive briefing note records that the Member for Herbert, Peter Lindsay, lent his support to the request. Given the timeline of events, this request was made almost immediately after police on the mainland were advised of the protests and fires that began on the island at approximately 1 pm. It was also made before an emergency situation was formally declared by DI Webber at 1.45 pm. Just over an hour later, at 2.50 pm, the following entry appears:Situation report – A/Chief Super HOWELL

Palm Island subject of emergency situation. Police are under siege due to outcome of PM being released to the family today.226;128;

2 large ATSI's broken in and set fire to station. Police barricaded in barracks. House belonging to HURLEY has been set alight226;128;

Up to 40 police approximately are at airport awaiting for transportation to airport

Have a report but source unknown is that the road to the airport between the airport and the town is blocked by ATSI person.

...226;128;

Defence Force and Civil aviation request has been made.226;128;

One request has processed for a Chinook helicopter (will transport 40 police + vehicles)226;128;

Defence Minister has been contacted226;128;

Insp Ron Walmsley to airport. Airport is secure at this time on Palm and can land at this time.226;128;

Need riot gear to be obtained – [redacted] (Army)226;128;

No reports of injuries at this time. ***No*** reports of firearms use. At this stage it is rocks, sticks, fire.226;128;

Army have been requested for a low fly over.226;128;

Must maintain police presence on account of civilian presence on the Island.226;128;

Request to be made of army to secure the airport on Palm226;128;

ATSI's have possession of the police vehicle with radio access.

(Emphasis added.) The use of the word "civilian" in the third last entry above seems to refer to non-Aboriginal civilians, because it was, of course, Aboriginal "civilians" who were reported as being the perpetrators of the violence. I refer to what I have said at [1149]-[1167] above about the use of the word "civilian" and its juxtaposition with "ATSI" in the QPS running log. This wording was also used in executive briefing notes approved by A/AC Wall:Civilians on Palm Island are either self evacuating or seeking assistance to evacuate the island. The civilians include Teachers and Q. Build Staff. Arrangements in this regard are in place with ferry and aircraft transport being arranged. This can only be a reference to non-Aboriginal people on Palm Island. The briefing note continues:In addition to setting fire to the police station and police residence, a police vehicle was taken by the mob rendering police communications insecure. These briefing notes again reveal that the concern was to ***protect*** only non-

Aboriginal people on the island. The “civilians” were non-Aboriginal teachers and QBuild staff seeking to evacuate the island; those involved in the protests and fires were “the mob”. ***No*** express reference is made in the briefing note to the vast majority of Aboriginal people on Palm Island who did not participate in the protests and fires, although they were clearly not considered “civilians”. The police numbers were extraordinarily heavy, recalling that Palm Island had a total population of less than 2,000 people, many of whom were children. The evidence about the groups of people who were suspected of actively engaging in property damage and threats of violence numbered only in the tens. Only 10 people were arrested in relation to the protests and fires in the arrests, entries and searches that followed (Mr Blackman is excluded from that number, as is Mr Nona) and only 16 people were ultimately convicted of offences in relation to those events, although another 11 people were charged with offences and were either acquitted or had the charges withdrawn. At 4.04 pm on 26 November 2004, the following entry appears in the running log:MCKAY seeking advice on whether to send more number. Advised that 53 have gone and 29 waiting to board aircraft. Advised to load all 82. As I have noted at [341] above, 14 SERT officers and seven PSRT officers flew to the island that day, and between approximately 59 and 82 other QPS officers were on the island over the course of the period covered by the emergency declaration. An executive briefing note drafted on the afternoon of 26 November 2004 and approved by A/AC Wall confirms that the number of additional police to be flown to the island was “estimated to be 79”, indicating that the numbers were likely to have been at the high end of that range. In any case, the evidence shows that between approximately 88 and 111 police officers were on the island on 27 November 2004 (including SERT and PSRT officers), or approximately one police officer for every 20 residents of Palm Island – including the elderly, the infirm and children. Inspector Kitching conceded that ultimately the army declined to provide any assistance. There was ***no*** evidence as to why. To contextualise again the arrival of the SERT teams with the approach and reaction of the QPS to the protests and fires, this was the description given by DI Webber in examination in chief about what he and the other commanding officers decided to do after the confrontation at the hospital ended peacefully:All right. Well, you mention the crowd sort of dispersing. I assume the line of police out the front of the hospital also dispersed at some point?---Yes. Eventually it dispersed and a number of [officers] went back into the hospital and worked out a plan of action.

All right. Now, what did working out that plan of action involve? Firstly, who was involved in working out the plan of action and then tell me what the plan of action was?---Well, by this point in time, there was Inspector [Kachel], myself and Inspector Richardson. We were the three senior inspectors in attendance on the island at that point in time. We had some discussion with ourselves about what we should do about securing of various infrastructure, I suppose, and areas of concern and how we might go about that. We discussed the necessity to establish effectively a police force command post to take charge of our operations seeing as the other police station had been burnt and was ***no*** longer available to us. So we had to work through then where we could locate ourselves and the significant number of officers that were, by that stage, coming to the island.

All right. Well, was a location for the forward command post settled upon?---Yes. It was. It was – at that stage, it was determined to be – that the school would be a suitable location. It is true this was still only shortly after the police station and SS Hurley’s house had been destroyed by fire, after what was described in the running log as the “siege” at the police barracks and after the tense confrontation at the hospital. The applicants criticised this evidence, and the approach it disclosed, as militaristic and as the QPS taking up the function of the army (which had declined to attend) in undertaking tasks such as “securing infrastructure”. Although in my opinion the entire reaction of the QPS should be seen as heavy-handed and disproportionate, ***no*** criticism can reasonably be levelled at the senior QPS officers at this stage (Webber, Richardson and Kachel) for considering it important to secure fuel supplies, the airport, the ferry terminal, communications infrastructure and the like. This was, after all, a remote island and once destroyed or damaged, those sorts of necessities and infrastructure would be difficult to replace in a timely way. In the 24 hours or so after the protests and fires, it was not in my opinion unreasonable for the QPS to consider there remained a risk of further property damage. To reach that conclusion is not to suggest there was a need for any specialised police such as SERT officers, but rather to recognise that there was a reasonable basis, at least until the morning of 27 November 2004, for QPS to take steps to ***protect*** infrastructure on the island from further property damage. After they had arrived on the island, SS McKay and the SERT officers took one of the classrooms at the school as ‘their’ room. In the early evening of 26 November 2004, SS McKay was told that

SERT's role, in addition to supporting the QPS generally, would be to "also be involved in the apprehension of the nominated offenders the following morning". His evidence was:Detective Sergeant Robinson was aware of who the offenders were and I'm not sure how that – when that – it was exactly articulated to us in relation to the exact – the exact people. But from there I – I knew what the task was from there – that we were to move out and apprehend the – the people the following morning. I had some situational awareness as to where the people would be or the types of residents that they would be and I went about formulating a plan involving all of the resources that we had available to us to be able to go to those residents. Inspector McKay then described how he went about planning the entries and searches:One of the key aspects – and the planning that goes into this is extremely detailed. We use a process called the appreciation process which is a Queensland Police Service decision-making model. Now, one of those – one of the – there's four phases to that: (1) we establish the aim; secondly, we identify all of the factors that are relevant at that point in time; thirdly, we will identify the courses of action open to the person of interest that we want to apprehend; then we will identify the courses of action open to police to close the gap to be able to apprehend that person; and then we establish a plan. The reason I say that is because the information about the environment that you're operating in is one of the key factors that impacts on our decision-making particularly in this situation where you're operating in an Aboriginal community where there are nuances and peculiarities that people who may not be in those communities understand and are aware of. So, I went to great lengths to make sure that Detective Sergeant Robinson, who had the best situational awareness of anyone that we had available to us on the island, gave us a full brief with regards to what had occurred in the lead up to the riot and then, more importantly, how people behaved on the island and what we could expect when we went to peoples' addresses so that the officers were under ***no*** illusion as to what they might find. The reliance on information provided by DS Robinson was a plank of the applicants' case. The applicants contended DS Robinson was responsible for providing information to SERT which was stereotypical and unfairly or baselessly adverse to Aboriginal people on Palm Island. In total, 21 officers went on the entries and searches, in four vehicles. In his oral evidence, Inspector Mackay described the basic methodology to be adopted, involving two SERT teams performing different functions at each address:But in – but, in essence, that was the concept that as we moved to the address one team would contain the address. The other team – led by Detective Sergeant Robinson – would go to the front door of the address. They would then go inside. Detective Sergeant Robinson would identify the people that he had identified as offenders. They would be taken into – into custody. The PSRT guys would then remove that person from the house, put them in a van, take that person to the school and we would then move on to the next address where the teams would then alternate. The team that was on the outside of the first address would then go in with Detective Sergeant Robinson to the next address. At this point, it is important that I clarify the basis for the findings I make in the several sections which follow, concerning the conduct of the SERT teams. Inspector McKay, Superintendent Kruger and Sergeant Folpp struck me as reliable witnesses, doing their best to recall accurately events of now more than 10 years ago. They were all highly trained officers, who were acutely conscious of the need to perform the tasks for which they had been trained with a level of seriousness, dedication and precision which reflected their training in situations that were classified as 'high risk'. It was not their task to second guess the characterisation of the situation as high risk. It was not their task to question the appropriateness of SERT's deployment to Palm Island, nor the use to which the teams were to be put once there. Their task was to carry out the instructions they had been given. Unsurprisingly, they did so in the manner in which they had been trained. There were many points in the applicants' cross-examination of these witnesses where it appeared to be suggested to them that, as individual officers, they could have behaved differently – more kindly, less aggressively, and the like. The cross-examination often seemed to suggest these officers had broad levels of discretion about how they performed their tasks. An example was the tasering of Mr Wotton and the persistent cross-examination about whether Mr Wotton was intending to flee and whether A/S Kruger and SS McKay were justified in perceiving (as they did) a "threat cue". This line of cross-examination, and then argument, missed the point. Similarly, the criticism of the conduct of SERT officers when they entered properties and houses – how they yelled at children, ordered them to get down, pointed rifles at them, turned places upside down and sometimes broke down doors. Criticisms of how the SERT officers behaved once engaged in the task they had been instructed to perform was, in my opinion, misplaced. It would be unrealistic to expect such specifically and highly trained officers to behave otherwise than how they had been trained to behave. They dressed as they would usually dress for SERT operations. They were armed as they would usually be armed, and they used their weapons (in terms of when they raised them, how they pointed them and so on) as they had been trained to do when conducting searches and apprehensions. They yelled out instructions as they usually would. As Inspector McKay agreed in his evidence, one

of the objectives of the manner of dress, the numbers, the weapons and the general behaviour of SERT officers is to instil compliant behaviour in those who are the subjects of police action – in part, through fear. Thus, in relation to the tasering of Mr Wotton, it does not matter whether Mr Wotton intended to flee, or even whether a lay person in the position of A/S Kruger or SS McKay would have seen the threat cue they saw. What matters is that they were each trained to detect and react to those threat cues, which they did. I accept their evidence that this is what they did, and that tasering was one of the range of reactions they had been trained to have. The problem, in terms of s 9 of the RDA, was having the SERT officers there at all to perform these arrests, entries and searches, rather than any criticism of the way individual SERT officers behaved. On the evidence before me, I am satisfied the officers behaved as they had been trained to behave. Therefore, the findings which follow do not reflect adverse conclusions against those individual officers for doing what they had been trained to do. I turn now to deal with the claims made on behalf of all group members, as they relate to the use of SERT.

The two claims made on behalf of the applicants and all Palm Island group members The applicants alleged that during the period on and after 26 November 2004, the QPS established a visible and militaristic presence on Palm Island and QPS officers behaved in a disrespectful and intimidatory manner. There was not a great deal of content given to these allegations in the submissions. The 'disrespectful' aspect was not developed in detail. It was submitted that QPS conduct (apparently, generally) was in breach of s 10.14 of the QPS Code of Conduct, which provided:In the performance of official duties members are to:

(i) demonstrate high standards of professional integrity and honesty;

(ii) apply themselves to the efficient and effective achievement of the functions of the Queensland Police Service;

(iii) perform any duties associated with their position diligently and to the best of their ability, in a manner that bears the closest ***public*** scrutiny and meets all legislative, Government and Service standards;

(iv) set and maintain standards of leadership that are consistent with corporate goals and policies, and be seen at all times to act in support of those corporate goal and policies;

(v) promote and encourage members of the Service under their supervision to exercise high standards of personal and professional conduct;

(vi) act with fairness and reasonable compassion;

(vii) provide conscientious, effective, efficient and courteous service to all those with whom they have official dealings. In particular, members are to be sensitive to the special circumstances and needs surrounding victims of crime;

(viii) while members will put family responsibilities first, duty to the people of Queensland will always be given priority over the other private interests of members;

(ix) perform their duties impartially and in the best interests of the community of Queensland, without fear or favour;

(x) act in good faith; and

(xi) actively contribute to the achievement of the Service's corporate goals. Without any specific identification of the evidence said to prove such a breach of the Code of Conduct, the applicants have not discharged their burden of proof that there was an act involving a distinction based on race for the purposes of s 9. What was said to be the 'disrespectful' conduct (as distinct from the 'militaristic' conduct, discussed below) was simply not identified. Further, in my view, even if the applicants had proved the alleged breaches of the Code of Conduct, such breaches would

not be sufficient to prove, and indeed would be barely material to whether, there had been a contravention of s 9. The pleading on the second aspect of claims made on behalf of the general class can be found at [290(c)] of the third further amended statement of claim, which states:During the period that the emergency situation was in effect, and the days immediately after it was revoked, the QPS members:

...

c. established a visible presence throughout the island and patrolled the island in a manner which resembled a military occupation force; ...Particulars

SERT officers armed with assault rifles and dressed in black uniforms, including body armour, patrolled up and down the streets in unison and with ***no*** apparent purpose other than making their presence felt. By [307] of the third further amended statement of claim, this is also alleged to be a breach of the Code of Conduct. Again, I do not consider such allegations sufficient to ground a finding that there has been a contravention of s 9 by reason of the impugned conduct. By [309(f)] and [313], the 'militaristic presence' conduct (if I might describe it in that way) is said to be an act involving a distinction, exclusion, restriction or preference based on race, colour, descent, or national or ethnic origin for the purposes of s 9 of the RDA. One is left to try to piece together what else the applicants have in mind on this issue. There are references in the relevant part of their submissions to officers pointing guns at children and forcing children at gunpoint to lie face down, which go to the claims of the applicants and the subgroup members rather than to the claims of the general class. The evidence did not establish how the general Palm Island population was affected by this conduct. There are also references to the commandeering of the St Michael's school bus (and indeed Collette Wotton gave evidence about this), but although these contentions are located in the submissions under a heading referring to these allegations, ***no*** submissions are developed about these matters. The respondents submit:The QPS did establish a visible presence throughout the island. Police numbers were increased following the riot. That was an appropriate reaction to an unprecedented riot in which police officers were given an hour to leave the island or be killed. The functions of the QPS included the preservation of peace and good order and the ***protection*** of communities from unlawful disruption of peace and good order: see s.2.3(a) and (b) of the PSA Act. The particulars of this allegation are that SERT officers armed with assault rifles and dressed in black uniforms patrolled up and down streets in unison and with ***no*** apparent purpose other than making their presence felt. It is an agreed fact that over the course of the emergency situation and in the days after it was revoked the QPS established a visible presence throughout the island by patrolling the island. That was not done by patrolling the streets in unison.

(Footnotes removed.) I accept that the establishment by the QPS (as opposed to the SERT officers) of a visible police presence on the island was a reasonable reaction, especially in the first 24 hours or so after the protests and fires, when on any view the risk of further unrest and property damage to ***public*** buildings could not be discounted. That finding is not an endorsement or acceptance that the number of police officers on the island was appropriate, nor that it was appropriate to use SERT or PSRT officers. Rather, it is a finding that some level of visible police presence was an appropriate response. As I have noted at [1242] above, securing the island's infrastructure was also a justifiable and appropriate course of action for QPS to take. I do not consider that in establishing a "visible presence" with general QPS officers on Palm Island in the immediate aftermath of the protests and fires, the respondents engaged in an act involving a distinction, restriction, exclusion or preference based on race for the purposes of s 9 of the RDA. Whether or not there was a need for SERT and PSRT officers to supply that 'visible presence', in additional to general QPS officers, is not a matter I need to decide because the deployment of SERT was not contended to be a contravention of s 9 of the RDA, and for the reasons I set out below, there is ***no*** evidence of how SERT was used to establish such a visible presence. However, these reasons should not be taken as accepting the justifications put forward by the respondents for the deployment of SERT, whether by reference to s 2.26.1 of the OPM or otherwise. There is ***no*** real evidence about which QPS officers (general police officers, PSRT or SERT) secured infrastructure, engaged in patrols or engaged in any other policing activities that could be described as a "visible presence". There are some photos in evidence of PSRT and SERT officers but the only evidence about those photos concerns who is in the photos and what kind of gear the officers were wearing. There is little or ***no*** evidence about what the PSRT officers did on the island, if indeed they performed any functions

separately from the SERT and other QPS officers. The applicants submitted the QPS approached its task after the events of 26 November 2004 as "a quasi-military operation". The applicants say this is apparent because the QPS in fact requested military assistance and then performed "quasi-military duties" themselves. Mr Koch, whose evidence I found persuasive, compared what he saw with his experiences soon after an actual military occupation on the Solomon Islands. As a journalist sent to the island during these events, Mr Koch was there as an observer and reporter. He had ***no*** stake one way or the other in matters concerning Palm Island, although it is ***no*** doubt correct to say he had his own opinions, which came through in the way he described what he observed. However, based on the evidence before me, I do not find that Mr Koch's descriptions were unreliable, or unbalanced. Indeed, save in one respect, they appear accurate to me:What was of concern about the police presence: the fact that they were there, the fact that they were there in such numbers? What was the concern?---***No***. Well, the way – the way that – the manner in which they were there, dressed and carrying firearms around the island. I mean, it was peaceful. There's ***no*** grog there. Nobody was – except for the women at the store, nobody was yelling out. There were ***no*** threats that I could see. There were ***no***–I–I just thought it was a–an over the top response to a situation – I mean, for goodness' sake, again it's reported in the paper and never corrected. They asked the Air Force to send Black Hawk helicopters over here. The one respect in which these observations are clearly inaccurate is Mr Koch's reference to "***no*** grog". On the evidence it is clear there was alcohol on the island, and it was being consumed by some people in sufficient quantities for some of the applicants' witnesses to describe several people they referred to as drunk. I mention this because in my opinion it must be recognised, as QPS officers did recognise, that access to and consumption of alcohol by some local residents of Palm Island could exacerbate the risk of further property damage and lawlessness. The problem, in terms of s 9, is how that risk seems to have been extrapolated by QPS officers to the community as a whole, and used to justify a disproportionate policing response. Mr Koch's observations about the situation after the protests and fires set out at [1263] above accord with my own. They also accord with the witness evidence. Consistently with findings I make below about entries and searches by SERT officers of the houses of the applicants and subgroup members, in my opinion the methodology employed by the QPS in using SERT officers was a show of force, a retaliation, and an exercise in the subjugation of local residents. It would not have occurred in comparable circumstances in non-Aboriginal communities in Queensland, particularly in a community with a small population. In relation to the alleged contraventions of s 9 by this conduct, the applicants in their pleading again collapse the facts said to constitute the "act" with the facts said to constitute the "distinction". This can be seen from the pleadings in [309] and [313]. However, read with their submissions, especially at [556]-[558] and [586]-[603], it is tolerably clear that the allegation is that the militaristic way in which the QPS went about its policing operations during these few days (with a focus on the way the SERT officers were used) was an act involving a distinction based on race, said to impair the human rights of all members of the class. Aside from evidence concerning the arrests, searches and entries into houses, the applicants have not established the manner in which the QPS officers (whether general police, PSRT or SERT) went about their tasks on the island. They have not adduced sufficient evidence to persuade me that the general policing operations on the island at this time had a 'militaristic' character to them. I set out below my reasons for finding that the use of the SERT teams to search for suspects and arrest them, and the way in which the searches and entries into houses were conducted, was disproportionate and unnecessary, and constituted acts involving distinctions and restrictions based on race. That is a finding in relation to the applicants and the members of the subgroup, which includes all persons present at the houses while the arrests, searches and entries were conducted. The current allegation is one made in relation to all the group members. The only relevant evidence is that of Mr Koch. It is insufficient to establish the allegation, although I do not doubt the genuineness of Mr Koch's opinion and his opinion is consistent with my findings about the arrests, searches and entries. Nevertheless, more would be required to make out an act of establishing a 'militaristic presence' across the inhabited parts of the island. Further, and in contrast to my findings about the applicants and the subgroup members, it would have been difficult for the applicants to establish that the effect or purpose of any such 'militaristic presence' was to impair or nullify the human rights of the general class members. The applicants did not, for example, rely on the freedom of movement rights of all group members, although that is not to say that, if they had, such a right would have been found to be impaired.

The first three claims made on behalf of the applicants and the subgroub members At [588] of the applicants' submissions, they state:For the reasons set out above, having regard to all of the evidence adduced at trial, the Applicants submit that the following acts comprising the Further Failures and occurring on or after 26 November 2004 have been proven: the formation of an Action Plan which required that DS Robinson identify the persons to be arrested; the preparation of a list of persons to be arrested by DSS Miles in Townsville on the night of 26

November 2004; the failure to obtain a warrant for the arrest of any person arrested in the presence of SERT and PSRT officers in connection with the events on Palm Island of 26 November 2004.

(Footnotes omitted.) This submission contained footnotes to the following paragraphs of the applicants' third further amended statement of claim: [284], [285], [286], [300], [309(d)]. In fact, none of these three matters are identified in the pleadings as acts of unlawful discrimination contrary to s 9: rather, it is the arrests which are, in [309(d)], so identified. That is consistent with my understanding of the way the case was conducted. If I had been required to determine the issues I would have found none of these three matters constituted acts involving distinctions or restrictions based on race. It is correct that DS Robinson was involved in the formation of the so-called "action plan", along with SS McKay, Inspector Kachel and DS Campbell. While it may constitute an "act", it was not one involving any differential treatment which could be characterised as a distinction, restriction, exclusion or preference. If by this, it is intended to refer to some of the information passed by DS Robinson to SS McKay as part of the briefing about what SERT officers could expect (which I address in more detail at [1445] below), then this is evidence I have taken into account in determining whether the distinctions involved in the use of the SERT officers to effect the arrests, searches and entries were based on race. The claims about the preparation of a list of persons to be arrested by DSS Miles in Townsville and the failure to obtain warrants of arrest for those suspects who were arrested over 27, 28 and 29 November 2004 do not appear to be developed anywhere in the applicants' written submissions. Accordingly it is difficult to understand what is being alleged about the conduct of DSS Miles and about the failure to obtain warrants, separately from the allegations which I deal with below about the unlawfulness of the arrests of some of the subgroup members. It is common ground ***no*** warrants of arrest were obtained. The respondents' case is that they were not required and these were circumstances where the suspects could be arrested without warrant. These issues are engaged in the separate allegations made below about the arrests themselves. Insofar as these are alleged to be separate contraventions of s 9 of the RDA they have not been made out.

An 'arbitrariness' claim on behalf of the applicants and the subgroup members? The applicants contend that the arrests, entries and searches were carried out in an arbitrary way, where every occupant was treated as a "dangerous criminal", a description taken from McMeekin J's reasons for judgment in Bulsey [2015] QCA 187 at [127], where his Honour was describing the way, in his opinion, David Bulsey was treated during these entries and searches. The examples of arbitrariness given in the applicants' submissions are: that Mr Clumpoint's home was entered after he was arrested outside, that Mr Blackman's home was entered after he was seen fleeing out the back; and that Ms Barry's home was entered "essentially on a whim" in order to search for Jason Poynter, although (the applicants submit) the SERT officers and the QPS had ***no*** basis to believe that he was there. Other criticisms are made of the SERT teams' efforts to find Mr Poynter, who handed himself in later on 27 November 2004. Berna Poynter's home was entered in search of Mr Poynter because a person on the street told the police officers that he might be there and, despite what the applicants suggested was slight information, the same level of force was used in the entry of Berna Poynter's home as was used at the other homes. In total the SERT teams entered six houses looking for Mr Poynter on the morning of 27 November 2004, but did not find him. The applicants then contend that the allegedly arbitrary character of that conduct was based on race. There are ***no*** pleadings which support, even indirectly, allegations of arbitrary conduct by SERT officers in effecting the arrests and the searches of houses. In other words, there is ***no*** separate allegation of arbitrary conduct constituting an "act" for the purposes of s 9. The only references in the pleadings to arbitrariness are in the pleadings dealing with the nature of the interference of identified human rights (see [319] and [320]). The application of arbitrariness in the context of Art 17 and the second limb of s 9(1) is a separate issue altogether. I deal with this at [711] above. The apparently additional allegations in relation to the first limb of s 9(1) put by the applicants in closing submissions should not be accepted. Further, even if allegations can be discovered in the pleadings which are said to support these submissions, I do not accept the submissions that the matters to which the applicants refer establish that the SERT teams were acting in an "arbitrary" way, whatever the applicants' submissions intend that to mean. There was nothing capricious or irrational about the method adopted by the SERT officers. To the contrary, it was methodical and calculated to address the task the teams had been assigned. As I find elsewhere in relation to the arrests, entries and searches, in my opinion it was both reasonable and to be expected that at each house the SERT officers attended, they would search it for other suspects. That was the purpose of the operation – to search for, locate and apprehend suspects. I see nothing irrational in the suspicion which clearly sat behind the entries into each house that some of the

suspects may have been present with other suspects, especially since the activities said to constitute offences were alleged to have been committed, as I understand the evidence, by suspects when in the company of other suspects: that is, while all suspects were members of the crowds present at the community meeting and afterwards on 26 November 2004. The applicants' allegations of contravention of s 9 based on the arbitrariness of the conduct of SERT officers must be rejected. To be clear, these findings stand quite separately from the findings I make later in these reasons that the use of SERT to conduct the arrests, entries and searches impaired the rights of the applicants and the subgroup members under Art 17 of the ICCPR because (in addition to being unlawful) the use of SERT constituted an arbitrary interference with the privacy, safety and homes of those individuals. Those findings are based on the use of SERT officers at all, with their concomitant appearance and methods. In this context, arbitrariness is concerned with lack of proportionality and justification. The distinction is critical to understanding my reasoning. The applicants' criticisms which I have set out in this section of my reasons go to the appearance of and methods used by the SERT officers. As I have found, the underlying theme of the applicants' contentions is that SERT officers could or should have behaved in a more nuanced, less aggressive and less violent way. That is to misconceive the nature and function of SERT. Of course, SERT officers (especially those in command and control) have some discretion as to how they and their fellow officers behave. However, SERT officers are strictly and highly trained to behave in certain ways, to operate in accordance with strict procedures designed to accommodate the high-risk situations in which they are deployed. That is why there is nothing "arbitrary" or "capricious" about what they in fact do. That is why, in my opinion, ***no*** substantive criticism can be made of the individual SERT officers in this case. They performed their functions as they were trained to do. Indeed, that was, I have found, the intended consequence of the decision by DI Webber and other QPS officers in command and control to use SERT to undertake the arrests, entries and searches. Those QPS officers, such as DI Webber, were well familiar with SERT operations. They well knew how SERT officers looked in "riot gear", that they were armed with assault rifles, operated in large teams, smashed down doors if need be, pointed rifles at people and yelled orders at them. It was a conscious decision to treat the suspects and occupants of the houses in this way, and my findings below are made on the basis that SERT officers acted as they were trained to do, and as those QPS officers in command (such as DI Webber) knew they would. That is why it is quite distinct from the applicants' allegations dealt with in this section of my reasons.

Conclusions on the claims other than claims about the arrests, entries and searches by SERT None of the allegations in these two groups of claims have been made out. Even with a holistic approach to the pleadings and submissions, some of the claims made in the submissions are well outside the case as advanced by the applicants.

The arrests, entries and searches by SERT: claims of unlawfulness and excessive use of force The matters in this group of claims are common to the applicants and the subgroup. I have already set out in the narrative section of these reasons an account of the houses the SERT officers went to, insofar as the evidence is not controversial or contested. Where appropriate I will set out my findings of fact on the more contentious aspects of what happened at each house to which the SERT teams went, to the extent that the pleadings, the division of claims (between all group members, subgroup members and the applicants), and the parties' submissions require me to do so. Neither of the parties' final submissions descended into any details about what findings the Court should make concerning the events at each house, even the houses of the first, second and third applicants. The respondents' submissions barely descended into factual issues at all. The applicants' submissions descended into factual issues only to illustrate an argument. The "events" on which the applicants' allegations are based are set out in Part J of the third further amended statement of claim. It is in this section that one finds a series of allegations of material facts which go to more than the lawfulness or unlawfulness of the arrests, entries and searches. Paragraphs [279]-[283] of the third further amended statement of claim should be set out: On or about 26 November 2004, senior police officers on Palm Island, including DI Webber, formulated the following action plan (Action Plan): a. DS Robinson to identify addresses of interest;

b. Special Emergency Response Team (SERT) and ***Public*** Safety Response Team (PSRT) officers to acquire addresses of interest;

c. DS Robinson to enter residence and identify persons of interest;

d. DS Robinson accompanied by SERT and PSRT officers who would apprehend the person or persons of interest with minimum force necessary, secure that person and that person would then be taken from the residence;

e. If doors were locked and secured, SERT would use force to gain entry;

f. Other occupants within the dwellings would not be disturbed, if possible;

g. Team would then move on. Chief Superintendent Wall approved the Action Plan on or about 26 November 2004. SERT and PSRT were heavily armed police units with specialist training for dealing with particularly dangerous suspects and situations. On or about 26 November 2004, around 60 SERT and PSRT personnel were flown on to Palm Island by helicopter.(c) The Raids In the early morning of 27 November 2004 and throughout that day and the next day, SERT and PSRT officers, heavily armed and with their faces covered by balaclavas, entered and searched dwellings of Aboriginal Palm Island residents, purportedly pursuant to s 8 of the ***Public*** Safety Preservation Act 1986(Qld) (the "Raids"). While the structure and headings of the applicants' third further amended statement of claim appear to challenge the arrests (K4, [300]-[302]) and the entries and searches of homes (K5, [303]-[306]) only on the basis of their unlawfulness, there are also allegations of the use of more than the minimum force necessary, which appear to be separate allegations from unlawfulness. For example, [300] alleges:In the circumstances pleaded in paragraphs 283 to 288 above, the arrests conducted in the course of the Raids were not conducted in accordance with the Action Plan, as they were not conducted with the minimum force necessary, and neither were they conducted lawfully.

(Emphasis added.) And [303] alleges:In the circumstances pleaded in paragraphs 283 to 288 above the entry into dwellings by QPS members during the Raids was not conducted in accordance with the Action Plan, as the occupants were unnecessarily disturbed, and neither was it conducted lawfully.

(Emphasis added.) Nevertheless, when one reaches the s 9 pleadings, unlawful arrests of the applicants and unlawful entries and searches of the applicants' houses are described as the "Further Failures" of the QPS during 22 to 28 November 2004. It is those "Further Failures" which are then alleged to be the "acts" for the purposes of s 9. Taking into account what I have said at [1275]-[1277] above, and reading the pleadings fairly and in conjunction with the applicants' submissions, it is tolerably clear that the applicants' challenge is to the arrests, entries and searches as the "acts" for the purposes of s 9, and those acts are said to involve distinctions based on race being first, the unlawfulness of the arrests, entries and searches, and second, the use of SERT officers to effect the arrests, entries and searches and how the SERT officers went about their tasks. For the reasons I have already expressed, I do not accept the applicants' contention that if an arrest was unlawful, it necessarily involved a distinction based on race. Nevertheless, as I have explained, particular facts or circumstances of unlawfulness may inform aspects of s 9. Unlawfulness is also part of the content of some of the human rights and freedoms relied on. For those reasons, it is appropriate to determine whether the arrests, entries and searches were or were not unlawful.

Was the arrest of Mr Wotton unlawful? The first issue to deal with is who was arrested. The applicants claim Ms Cecilia Wotton was arrested, as well as Mr Wotton. The respondents accept Ms Cecilia Wotton's liberty was restricted for a short period of time, but submit this was not an arrest. I agree. The evidence discloses that Ms Cecilia Wotton was indeed unable to move around her house and was forced to lie on the floor. I accept this action was taken by the SERT officers so that they could search the house for other suspects. Ms Cecilia Wotton was not a suspect in the offences for which people were being apprehended. If there was ***no*** lawful authority for such a restriction, there may have been a false imprisonment, but there was ***no*** arrest. An arrest requires, first, communication of an intention to make an arrest, and second, a sufficient act of arrest or submission: see Woodley v Boyd[2001] NSWCA 35 at [38] (Heydon JA, Davies AJA and Foster AJA agreeing); Wilson v New South Wales [2010] NSWCA 333; 278 ALR 74 at [59] (Hodgson JA); Bulsey [2015] QCA 187 at [12]- [14] (Fraser JA). On the evidence, there was ***no*** arrest: ***no*** officer communicated to Ms Cecilia Wotton an intention to arrest her, and Ms Wotton was not taken into custody. Although it can be said there was an act of "submission" in the sense that she complied with the orders to lie on the floor, that was so the house could be searched, it was not so she could be arrested. She did not submit to an arrest, where the intention to do so had been communicated to her. Accordingly,

I will consider only Mr Wotton's arrest, and whether it was lawful. The parties were agreed that the fact that Mr Wotton was subsequently convicted of certain offences in relation to the events on 26 November 2004 did not affect the question whether his arrest was lawful. The respondents submitted it may affect the damages he should be awarded, were the Court to find a contravention of s 9 through his unlawful arrest. The applicants submit his arrest was unlawful because the requirements in s 198 of the PPR Act were not met, that being the only authority in a QPS officer to arrest without a warrant. The same issue was accepted by the parties to arise in relation to each of the other individuals arrested. In November 2004, s 198 of the PPR Act relevantly provided:(1) It is lawful for a police officer, without warrant, to arrest an adult the police officer reasonably suspects has committed or is committing an offence if it is reasonably necessary for 1 or more of the following reasons –(a) to prevent the continuation or repetition of an offence or the commission of another offence;

(b) to make inquiries to establish the person's identity;

(c) to ensure the person's appearance before a court;

(d) to obtain or preserve evidence relating to the offence;

(e) to prevent the harassment of, or interference with, a person who may be required to give evidence relating to the offence;

(f) to prevent the fabrication of evidence;

(g) to preserve the safety or welfare of any person, including the person arrested;

(h) to prevent a person fleeing from a police officer or the location of an offence;

(i) because the offence is an offence against section 444 or 445;

(j) because the offence is an offence against the Domestic and Family Violence ***Protection*** Act 1989, section 80;

(k) because of the nature and seriousness of the offence;

(l) because the offence is –(i) an offence against the Corrective Services Act 2000, section 103(3); or

(ii) an offence to which the Corrective Services Act 2000, section 104 applies.(2) Also, it is lawful for a police officer, without warrant, to arrest a person the police officer reasonably suspects has committed or is committing an indictable offence, for questioning the person about the offence, or investigating the offence, under chapter 7. As s 198(2) indicates, the investigation of offences was governed by Ch 7 of the PPR Act (ss 227-268). Chapter 7 authorised the detention of an arrested person for questioning, subject to certain conditions and restrictions which are not presently relevant. The applicants' submissions did not address whether the exceptions in Ch 7 precluded s 198(2), from applying but the respondents' submissions appeared to rely upon it. The respondents did not rely, correctly, on s 8 of the PSP Act. Although s 8 authorises the use of a number of coercive powers in emergency situations declared under that Act, the power of arrest is not one of them. DI Webber was mistaken in his understanding about the scope of s 8. Mr Campbell gave evidence that he had instructions "from above" (later indicating this was either DI Webber or the MIR) that warrants were not required because of the existence of the emergency situation under the PSP Act. He later confirmed in his evidence that he therefore did not believe warrants were necessary. Inspector McKay gave evidence to the same effect. In his evidence, DI Webber himself confirmed that one of the purposes of the emergency declaration was to facilitate the arrests of suspects. In

examination in chief, he said:Was that a matter, the possible revocation of that declaration, that you turned your mind to on the Saturday?---I had. But at that point in time, there were still a few factors under consideration, one being the fact that there was a missing police firearm which had not been located. A number of persons had still to be taken into custody. He then said that he decided to revoke the emergency declaration on the Sunday morning because by that time "most, if not all, of the persons of interest had been – been arrested and taken into custody". He also stated:it's my understanding that the ***Public*** Safety Preservation Act actually enables us to actually take possession of items such as those [vehicles] and use them during that incident. I find that DI Webber did consider that the emergency declaration provided a basis for houses to be entered and searched, and suspects arrested, without warrants. As I have already found, he kept the emergency declaration in force in order to facilitate the SERT operations aimed at achieving those objectives. I note here that the respondents submit, and Inspector McKay gave unequivocal evidence that, it was DS Robinson who arrested each suspect as they were apprehended. ***No*** submission was made that the suspects were merely "apprehended" by the SERT officers and then "arrested" at the school sometime later. In evidence, Superintendent Kruger made some reference to a distinction between an "apprehension" and an "arrest", but he conceded he could not clearly recall the "distinctions and terminologies" used by the QPS. Were it necessary to decide the issue, I would be inclined to agree with the submission of senior counsel for the applicants that there is in law ***no*** distinction. The authorities to which I have referred at [1292] make ***no*** such distinction. However, given ***no*** party submitted that the arrests took place anywhere other than at the scene of an entry and search of a house where a person was placed in custody, it is unnecessary to consider the issue further. Mr Blackman Senior's arrest, which took place at the school, may be in a different category. The following exchange occurred in the cross-examination of Mr Campbell:And you would agree that not all of the targets at the SERT raids would have been arrested?---That's correct.

Some would – you have previously said some would have been brought in for interviews?---That's correct.

So you sent out balaclavaed, helmeted, fully uniformed with large guns to just bring people in for interviews?---I think you've got to keep it in the context of what had occurred in the previous 24 hours. We had had - - -

No. I just ask you to answer the question. You sent fully uniformed SERT officers

- - -?---Yes.

- - - to bring people in for interviews?---That's correct. This evidence may have been sufficient to engage s 198(2) of the PPR Act. The conduct remains, under s 198(2), but the purpose of the arrest is different. However, as I set out below, there are other difficulties in the application of s 198(2). During the course of the trial and prior to final submissions, the Queensland Court of Appeal handed down its decision in Bulsey. The applicants relied on arguments which were successful in that case, although the extent of the reliance might be said to have increased as submissions progressed. There is ***no*** difficulty in that having occurred, because the respondents also sought to use the Court of Appeal's decision in Bulseyto their advantage in relation to the allegations concerning Mr Wotton's arrest. Since both parties sought to deploy the approach taken by the Court of Appeal, it is appropriate to consider Bulsey in some detail. The appeal turned on legal arguments concerning the formation of the reasonable suspicion required by either ss 198(1) or 198(2) of the PPR Act. Mr Bulsey had brought a common law claim about the circumstances of his arrest and the entry into his home on 27 November 2004. His then partner was also a plaintiff. He was unsuccessful at trial but the Court of Appeal overturned that decision on appeal, and awarded him $165,000 and his then partner $70,000 in damages. In relation to the possible lawful bases for Mr Bulsey's arrest, the trial judge (unreported, Sup Ct, Qld, North J, 20 February 2015) said (at [79]-[80]):It may be accepted inferentially from the evidence of Inspector Webber that he and other police officers assumed that the inspector's declaration under the ***Public*** SafetyPreservation Act 1986 authorised the forcible entry into the house at Puttaburra Lane and the arrest of Mr Bulsey without warrant. There is reason to doubt that the declaration authorised those actions and the defendant did not rely upon the declaration or the Act at trial.

At trial the defendant relied upon powers under s 198 of the Police Powers and Responsibilities Act 2000 authorising the arrest without warrant and also s 376(1) ofthat Act as authorising the force used to arrest and apprehend Mr Bulsey in thecircumstance that applied.

(Footnotes omitted.) The trial judge found that DSS Miles was the person who held the reasonable suspicion for the purposes of s 198(2), and that there was a justifiable basis for that suspicion. He also found the level of force used by the SERT officers to be justified for the purposes of s 376 of the PPR Act. In the Court of Appeal, three judgments were delivered: Atkinson J agreeing with the reasons of both Fraser JA and McMeekin J, although her Honour observed (having referred to authorities concerning the importance of personal liberty) at [119]:The appellants in this case were not treated as one might expect in a civilised society governed by the rule of law and it is appropriate that they should be adequately compensated for the grievous wrong done to them. McMeekin J agreed with Fraser JA but added his Honour's own observations about why the damages ordered were appropriate. Those observations also emphasised the importance of personal liberty in a society under the rule of law, and the loss of dignity involved in false imprisonment. His Honour concluded at [127]:This was not a case of human fallibility. A deliberate decision was made to make a dawn raid on a citizen's home by armed, masked men and to treat those found within as one would dangerous criminals with ***no*** regard whatever for their dignity or rights. The imprisonment continued for days. The hurt was great. The principal arguments on appeal which are directly relevant to this proceeding go to the trial judge's conclusion that s 198(2) of the PPR Act authorised the arrest of the first appellant. In Bulsey, the appellants contended that conclusion was wrong because DSS Miles, who was found by the trial judge to hold the suspicion required, did not arrest the first appellant and the police officer who did arrest the first appellant was found not to hold the required suspicion. Fraser JA noted that, at trial, the State's arguments had been that DSS Miles held the suspicion but delegated the power of arrest to officers on the island, who need not have held the suspicion required by s 198(2). On appeal, the State's arguments changed, and its case became that DS Robinson held the relevant suspicion. Unlike in the present case, in Bulsey, the State explained by evidence the absence of DS Robinson from the trial, and also relied on his statements given to investigators shortly after the events to prove he held the requisite suspicion. Ultimately, the Court of Appeal held ***no*** such inference could be drawn from DS Robinson's statements. Fraser JA said (at [15]-[16] and [20]-[21]):Section 198 is in this respect indistinguishable from the statutory provisions in respect of which the House of Lords in O'Hara v Chief Constable of Royal Ulster Constabularyconfirmed that although an arresting officer may in appropriate cases form the necessary reasonable suspicion upon the basis of information supplied by another police officer, the suspicion must be held by the arresting officer; it is not sufficient that it is held by a superior officer who ordered the arrest. Again, in Hyder v The Commonwealth of Australia the New South Wales Court of Appeal adopted the literal construction of the relevantly indistinguishable language of s 3W(1)(a) of the Crimes Act1914 (Cth) in holding that the person who must hold the belief required by that provision is the arresting officer. (That section provided that "[a] constable may, without warrant, arrest the person for an offence if the constable believes on reasonable grounds that: (a) the person has committed or is committing the offence...") McColl JA endorsed the statement by Lord Steyn (Lords Goff, Mustill and Hoffmann agreeing) in O'Hara v Chief Constable of Royal Ulster Constabulary that this requirement is intended to ensure "[t]hat the arresting officer is held accountable" and is "the compromise between the values of individual liberty and ***public*** order". In Dumbell v Roberts & Ors Scott LJ said:"The power possessed by constables to arrest without warrant, whether at common law for suspicion of a felony, or under statutes for suspicion of various misdemeanours, provided always they have reasonable grounds for their suspicion, is a valuable ***protection*** to the community; but the power may easily be abused and become a danger to the community instead of a ***protection***. The ***protection*** of the ***public*** is safeguarded by the requirement, alike of the common law and, so far as I know, of all statutes, that the constable shall before arresting satisfy himself that there do in fact exist reasonable grounds for suspicion of guilt."That construction and explanation of the requirement that a police officer who makes an arrest must suspect on reasonable grounds that the person arrested has committed a relevant offence are equally applicable in relation to s 198(2). Any differences between the office of constable under the common law and the powers and functions of a Queensland police officer under the PPRA have ***no*** bearing upon that conclusion. So much is also consistent with the context in which s 198 appears. The respondent's construction would render s 198(2) incongruous with the provisions for arrest under warrant in Pt 2 of Ch 6 of PPRA. Section 202 makes it lawful for a police officer acting under an arrest warrant issued under any Act or law to arrest the person named in the warrant. Under the respondent's construction, an order by a superior officer has substantially the same effect as an arrest warrant even though it lacks any of the statutory ***protections***

of personal liberty in Pt 2 of Ch 6: a sworn application stating the grounds on which the warrant is sought (s 203), a decision by a justice that there are reasonable grounds for the specified suspicion and that (other than for an indictable offence) proceedings by way of complaint and summons or notice to appear would be ineffective (s 204), and a written warrant identifying the alleged offence and other matters (s 205).

...

If a police officer who makes an arrest does not hold that suspicion, s 198(2) does not render the arrest lawful. If, contrary to my own opinion, there is any ambiguity in s 198(2) in that respect, that construction nonetheless should be adopted because of the principle that a statute which affects personal liberty should be construed strictly in favour of the citizen.

"It is of critical importance to the existence and ***protection*** of personal liberty under the law that the restraints which the law imposes on police powers of arrest and detention be scrupulously observed." Upon the trial judge's findings of fact, the restraints imposed upon the power of arrest in s 198(2) of the PPRA were not observed in the important respect that the police officer who arrested the first appellant did not reasonably suspect that the first appellant had committed an indictable offence. If Detective Miles held such a suspicion (as the trial judge found, but the appellants disputed) that is irrelevant because Detective Miles did not arrest the first appellant. The arrest of the first appellant was therefore unlawful.

(Footnotes omitted.) Fraser JA went on to find (at [22]) that if s 198(2) did not authorise the arrest, then the use of force could not be authorised by s 376(1):It follows that s 376(1) of the PPRA did not justify the use of force by the police officers who arrested or assisted in the arrest of the first appellant. The respondent did not challenge the appellants' contention that the provision in s 376(1) making it lawful to use reasonably necessary force in exercising or assisting in the exercise of a power under the PPRA was capable of application in this case only if the arrest of the first appellant was made lawful by s 198(2). It should be noted that Bulsey was an action in tort: assault, battery and false imprisonment. A claim of malicious prosecution was not pursued. The State ultimately conceded, and the Court of Appeal accepted as correct, the proposition that the acts of the police in detaining and imprisoning the first appellant amounted to torts actionable by the first appellant unless the respondent proved that those acts were authorised or excused by law: see Bulsey at [4] (Fraser JA). In the present proceeding, it is not the case that the onus of proof under s 9 of the RDA shifts to the respondents at any stage. The applicants must prove all allegations said to establish a contravention of s 9 of the RDA. If one of those allegations is that the arrest of Mr Wotton was unlawful and, when placed together with other allegations, contravened s 9, then the applicants must prove the arrest was unlawful. The applicants' submissions often read as though they assumed the respondents bore the kind of burden of proof the State bore in Bulsey. That is not the case. Nevertheless, the Court of Appeal has set out clearly, and in directly related circumstances, what the law is concerning the scope and operation of s 198(2) of the PPR Act, as well as the scope and operation of s 376(1). Whether at trial or appellate level in this Court, the Court of Appeal's decision is not binding as a matter of precedent. Nevertheless, there are important considerations of certainty and predictability in the development and application of the law in a federation that mean that intermediate appellate courts and trial judges should not depart from decisions in intermediate appellate courts in another Australian jurisdiction on the interpretation of Commonwealth legislation or uniform national legislation, or on non-statutory law, unless they are convinced that the decision is plainly wrong: Farah Constructions Pty Ltd v Say-Dee Pty Ltd [2007] HCA 22; 230 CLR 89 at [135] (the Court). In the present case, the legal question involves the construction and operation of a Queensland statute. The Queensland Court of Appeal is the highest court of that state and its interpretation of Queensland statutes is subject only to appeal by leave to the High Court. In those circumstances, the principles set out in Farah apply with equal, if not greater, force. Just as Farah requires a single judge of a state Supreme Court to follow an interpretation of Commonwealth legislation by the Full Court of the Federal Court unless convinced the interpretation is plainly wrong, a single judge of the Federal Court should apply the same approach to an interpretation of state legislation by the appellate court of the relevant state, unless that single judge has a fundamental disagreement with the approach taken by the appellate court. As it happens, and with respect, I share the views of the members of the Queensland Court of Appeal that it is the arresting officer who must hold the reasonable suspicion. There are additional reasons the Court of Appeal's construction of s 198(2)

and s 376(1), and its application of these provisions to the circumstances of Mr Bulsey's arrest, should be followed by a single judge in this proceeding. First, Mr Bulsey is a class member, and a subgroup member. The State is bound, as between at least Mr Bulsey and it, by the findings of the Court of Appeal. Second, the factual substratum considered by the Court of Appeal is the same factual substratum applicable in this case. That is, the question here (on the pleadings) is also whether DSS Miles formed and held the relevant suspicion for the purposes of s 198(2), although he did not arrest Mr Wotton. The role of DS Robinson, and whether he held the requisite suspicion, is also an issue here. Neither of the parties' submissions really grappled with these issues at all. The respondents sought to avoid the finding in Bulsey by submitting that DS Robinson should be found to have arrested Mr Wotton. As the applicants noted, this was a departure from the respondents' pleadings in their defence in this proceeding (at [201]) which identified DSS Miles and DS Campbell as the two QPS officers responsible for identifying who should be arrested. Further, in pleading to the allegation about the tasering of Mr Wotton, the respondents admit Mr Wotton was tasered because he was resisting arrest, and then refer only to the evidence of Inspector McKay, Superintendent Kruger and Sergeant Folpp. There is ***no*** reference to DS Robinson. Notwithstanding their pleadings, the respondents' final written submissions stated as the factual basis for their contention that DS Robinson was the arresting officer:Robinson was present during the riot and had knowledge of Mr Wotton's involvement in the riot. In oral submissions, senior counsel for the respondents pointed to the evidence about DS Robinson's "involvement in the investigation" and "presence at the riot" to support an inference that DS Robinson was the arresting officer. He also submitted:[Section] 198(2) provides it's lawful to arrest without a warrant if certain circumstances are satisfied about the reasonable suspicion and, your Honour, we submit that on the basis that Robinson was the arresting officer, it can be inferred that he held such a suspicion.

...

And he [Campbell] said it was recommended by Robinson and himself that Mr Wotton, who was viewed as the principal offender, be apprehended first. That evidence appears at page 1331, line 25. His evidence that Mr Wotton remained at the top of the list is at page 1342, line 35. Now, there is ***no*** direct evidence from Robinson, obviously, but we say that that evidence of Robinson's involvement in the investigation, being interviewed by Campbell, the other evidence about Robinson's presence at the riot is sufficient to support a reasonable inference that Robinson had the necessary reasonable suspicion under 198(2) ... In that respect also, your Honour, the action plan that was formulated contemplated, we submit, that Robinson would be the arresting officer. Unlike in the Bulsey trial and appeal, the respondents in this proceeding did not adduce any evidence about the current circumstances of DS Robinson, and did not seek to explain by way of evidence why he was not called. The respondents did not rely on his statements given after the events for the purpose of persuading the Court to draw the inference that he held the requisite suspicion: that is, the respondents did not undertake the task the State sought to undertake in the Court of Appeal in Bulsey, which was ultimately unsuccessful in any event. There is a wholly insufficient evidentiary basis in this proceeding to draw an inference that DS Robinson arrested Mr Wotton. Even if such a task had been undertaken, like the Court of Appeal, I doubt I would have been persuaded. The suspects were identified in Townsville by DSS Miles. A list was provided to officers on Palm Island, of whom DS Robinson was one. DS Robinson's role was as a local officer with local knowledge. His task was to assist SS McKay and the other SERT officers to find the right houses to attend and search, to identify the persons on the list and other persons who might be present, and to accompany the SERT officers to the door of each house. This was Superintendent Kruger's account:You understand that some people stayed near the vehicle – Mr McKay, for example?---Yes.

He didn't come with you?---***No***, he didn't.

That's not his job?---***No***.

His job is to monitor the overall activity - - -?---Yes, yes. - - - and the implementation of the action plan?---Yes.

So you then entered through a side gate and approached Mr Wotton?---I believe so, yes.

And were you – as the leader, do you go first?---Yes, I would have gone first in that instance.

And Mr Robinson would have been behind you?---I can't recall but he would have been close.

And I suggest to you that as you approached there was a distance of about five metres from where Mr Wotton stood to where you were when you started speaking to him?---Possible.

And you could see that he had his hands slightly raised and to his side, by the time you got to the five metre spot?---***No***. I – I – I can't recall that.

You said eight to 10 officers went around the house. So they did the – I think you called it the cordon?---Cordon, yes.

I think Mr McKay called it the containment line?---Yes.

So they were in position as you walked towards Mr Wotton, or do you wait for them to be in position before you walked towards him?---I feel it all happened simultaneously.

And there were some officers still standing the near the vehicles?---Mmm.

And in fact I suggest to you that on the inside of the fence there were two PSRT officers with their shields held up. Do you remember that?---If they were behind me then I didn't see them, but I would assume that that's a sound tactic, so yes they would be.

And Mr Robinson had positioned himself behind you and perhaps some other SERT officers?---Yes.

And you said to Mr Robinson, "Is this the suspect"?---Possibly.

And he replied yes?---Yes.

And you then said to Mr Wotton, "Are you Lex Wotton" and he said yes?---Possibly.

So he was engaging with you?---Yes.

He responded to you?---Yes.

And then you told him to get down on his knees?---To raise his hands and get down on his knees.

[There then follows Superintendent Kruger's account of Mr Wotton being tasered.] In my opinion, the description of DS Robinson identifying Mr Wotton to A/S Kruger makes it clear that DS Robinson was not adopting the role of the arresting officer, and behaved consistently with A/S Kruger being the arresting officer. Superintendent Kruger's evidence in chief is even clearer:Yes?---Now, this is where things were a little bit different as well in relation to how we did business. It was his role to – to call on the residences and call them out of the residences, because he obviously knew them.

Had that been discussed?---Yes, that had been discussed. And also to identify them. As you could well imagine, we saw a lot of pictures. There was a lot of information that – that we were to try and absorb that evening and just to have somebody you could say, "That's definitely the person" certainly alleviated some of those risks around identifying the right person.

And so was Detective Sergeant Robinson in the yard at the time you're describing?---Yes, yes, he would have been in the yard. He was basically on our shoulder as we moved forward, so - - -

Okay. So please proceed. What do you recall happened next?---So he has – he has identified him as – as Mr Wotton.

Identified him - - -?---To me. Added to this is his earlier evidence in chief, describing what he understood his task to be: namely to be the arresting officer. Although Superintendent Kruger used the word "apprehend", there is ***no*** material difference – the conduct and function are the same. So much is clear from the authorities concerning what constitutes an arrest. The evidence reveals that the relevant role played by DS Robinson was to identify the person at each property who was listed as a suspect. The following evidence confirms, in my opinion, that A/S Kruger had patently insufficient information to form any suspicion, reasonable or otherwise, that Mr Wotton had committed an offence. Indeed, his evidence suggests he did not even attempt do so: rather, he carried out the instructions he was given, which was to arrest a number of identified people, once DS Robinson confirmed, at each house, they were the identified people.And did you receive some briefings at the command centre?---Yes, there were a few briefings; I can't remember how many, over the course of the early evening and right up until the early morning of the next day.

Just in general terms, what did those – what were those briefings about? What were you briefed about?---Sure. So at the front end of it it would have been intelligence briefings and information briefings to tell us what had happened. To bring us basically up to speed with the current situation and the lead-up to it. Some information about particular suspects. So on the front end of that they were really just names. As the evening developed and more information came in there were photographs, etcetera, briefings around criminal histories, backgrounds. There were also some – and that's fairly standard fare.

So at some stage you became aware that SERT was to be involved in apprehending –in the apprehension of suspects. Is that correct?---Yes, I did.

And when did you become aware of that? Do you recall?---Well, there was definitely a briefing for all at about 4 o'clock in the morning where that was apparent to everybody, but before that, in the lead-up to and the small amount of input I had into the planning process, then it was obvious to me that that was going to be the intent. Inspector McKay had ***no*** recollection of what DS Robinson said, or what A/S Kruger said, except for the commands to Mr Wotton to get down on the ground. However, he conceded it was "more than likely" an exchange occurred to identify the person to be arrested. Just as in Bulsey, there was ***no*** evidence in this proceeding that DSS Miles communicated anything to DS Robinson to the effect that DSS Miles held the suspicion required by s 198(2), and certainly not any evidence that DSS Miles said anything to DS Robinson about the material he relied on or the grounds for his suspicion. There was also ***no*** evidence DSS Miles had communicated with A/S Kruger. I find that, if anyone held the reasonable suspicion required by s 198(2) of the PPR Act, it was DSS Miles, although that conclusion can be reached only by inference from the evidence about the task he performed of drawing up lists of suspects to be apprehended, rather than from any direct evidence. However, the evidence does not establish whether DSS Miles held that suspicion in any event. I find that DS Robinson did not arrest Mr Wotton: he was simply attending the premises as an officer with local knowledge of Palm Island and many of its residents, who could assist in identifying the suspects on the list that the SERT teams had been given, as well as assisting in identifying any other local people found at any of the nominated addresses. Even if he was found to be the arresting officer, I am not satisfied DS Robinson held a reasonable suspicion. There is ***no*** evidence before me about the

material on which any suspicion he held was formed, or the grounds for that suspicion. As such, it is impossible to reach a view whether any suspicion he held (if he held one) was reasonably formed. A/S Kruger was the officer who arrested Mr Wotton. He could have held a reasonable suspicion, but on his own evidence he did not purport to have formed one. He simply carried out the task he had been given, which was to arrest Mr Wotton. Since A/S Kruger, as the arresting officer, did not hold the reasonable suspicion required by s 198(2) of the PPR Act, the arrest of Mr Wotton was unlawful. The next allegation is that Mr Wotton's arrest was unlawful because it involved excessive force. The use of force in an arrest pursuant to s 198 is controlled by s 376, which relevantly provided:Power to use force against individuals

(1) It is lawful for a police officer exercising or attempting to exercise a power under this or any other Act against an individual, and anyone helping the police officer, to use reasonably necessary force to exercise the power.Example –

A police officer may use reasonable force to prevent a person evading arrest.(2) Also, it is lawful for a police officer to use reasonably necessary force to prevent a person from escaping from lawful custody.

(3) The force a police officer may use under this section does not include force likely to cause grievous bodily harm to a person or the person's death. Section 14.3 of the OPM also instructed QPS officers that it was lawful to "use such force as may be reasonably necessary to overcome any force used in resisting the execution of any lawful process or arrest. However, it is unlawful to use more force than is justified by law to effect a lawful purpose". Given my findings about the unlawfulness of Mr Wotton's arrest, it will be apparent that s 376 cannot be relied upon to authorise the force used in the arrest of Mr Wotton. It is also apparent that the premise of s 14.3 of the OPM for the use of reasonable force (lawful arrest) is not present. Accordingly, there was ***no*** lawful basis for the use of force in the arrest of Mr Wotton. This includes the tasering of Mr Wotton, which the respondents did not dispute fell within the concept of the use of "reasonable force". The respondents did not suggest there was any lawful justification of the use of force (including the use of a taser) outside s 376. Similarly, what was done to Ms Cecilia Wotton and the Wotton children could not be justified under s 376 as a use of reasonable force to effect the arrest of Mr Wotton. If, contrary to my findings, I had determined that Mr Wotton's arrest was lawful, I would in any event have found that the use of a taser meant his arrest was effected with more force than was reasonably necessary in the circumstances. That is, I would have upheld the applicants' alternative pleading in [300] of the third further amended statement of claim. This would have led me to conclude, as I have in any event, that the arrest of Mr Wotton was an act involving a distinction based on race: the distinction was the disproportionate and unnecessary force applied to effect his arrest arising from the use of SERT officers to apprehend him.

Was excessive force used in the arrest of Mr Wotton? The first step in reaching this conclusion is to repeat my finding that there was ***no*** reasonable and objective basis for the use of SERT teams to effect Mr Wotton's arrest, nor those of any of the other individuals arrested in the days after the protests and fires. It was disproportionate, and it was intended to subjugate and frighten those who were present at the houses entered and searched, and to subjugate and frighten the entire Aboriginal community on Palm Island. In the same way, the 'show of force' later in the day at Butler Bay, observed by Ms Sailor, of SERT teams striding around in unison in search of Mr Blackman Senior, was also intended to instil fear into the Aboriginal community. It was intended to be a show of force, which indeed it was. However, there was ***no*** objective justification for it. The use of the taser on Mr Wotton was a direct consequence of the use of the SERT officers to effect the arrest of the suspects. To the extent the applicants suggested otherwise, I do not accept that submission. Whether or not Mr Wotton intended to flee, or even thought about it, or how far he might have got, are all matters beside the point. I accept the evidence of both Inspector McKay and Superintendent Kruger that SERT officers are trained to look for 'threat cues' and react accordingly. As their evidence made clear, one kind of 'threat cue' is body language, or body movements, that indicate a person might be about to flee and try to escape apprehension. Their evidence, which I have accepted, was that they saw these cues in Mr Wotton's behaviour. The arrest of Mr Wotton was the first arrest in the planned sequence, and the situation was obviously tense, made all the more so because of the disproportionate and militaristic approach adopted by the QPS. The individual SERT officers are not to be criticised for doing what they were trained to do, and reacting in the way they were trained to react. That is what I find A/S Kruger did in tasering Mr Wotton. It was

excessive and unnecessary not because of any lack of justification in A/S Kruger's conduct, or his tactical approach (or that of SS McKay). It was excessive and unnecessary because there was ***no*** objective basis for an armed arrest of the kind the SERT officers are trained to perform. Whether or not there was any reasonable justification for SERT officers being on Palm Island at all is not, as the respondents have noted, a material question of fact in this proceeding because the decision to deploy SERT officers was not pleaded as a contravention of s 9. Just as I have accepted there was a lawful basis for the initial making of an emergency declaration by DI Webber, there may well have been a lawful basis – in the immediate wake of the protests and fires and given the situation for police at the barracks and at the hospital and the level of tension and unrest on the island – to deploy the SERT officers to the island. I harbour some doubt whether that would have happened in a non-Aboriginal community, but I need not express a concluded view.

Subgroup members: lawfulness of the arrests There is less evidence about the circumstances of the arrests of all the other individuals who are members of the subgroup. Given I have found DS Robinson did not arrest Mr Wotton, I am satisfied on the evidence there is ***no*** basis to make a different finding in relation to his role in the arrests of the other subgroup members. All the evidence suggested DS Robinson played the same role at each house. Accordingly, I find that at each house where a member of the subgroup was arrested, it was a SERT officer who arrested the person, not DS Robinson. None of the SERT officers held a reasonable suspicion that the persons they were arresting had committed offences for which they were being apprehended. As with Mr Wotton's case, the SERT officers had been given a list of suspects to apprehend, with DS Robinson identifying them. In each case, as with Mr Wotton, the suspicion was likely to have been held by DSS Miles who compiled the list of suspects in Townsville. Whether it was a reasonable suspicion or not is not a finding that can be made on the evidence in this proceeding. It does not matter, because the suspicion must be held by the person who effected the arrest, and that did not occur. Subject to two matters, each of the arrests of the individuals set out at [351] was unlawful. The two matters are the arrests of William Blackman Senior and Solomon Nona. Mr Blackman Senior turned himself in, accompanied by his mother, at the school. Thus, there is ***no*** evidence relating to who held the requisite reasonable suspicion. I am unable to make a finding that Mr Blackman Senior's arrest was unlawful. On the approach I have taken to s 9, that conclusion does not preclude a finding that his arrest, and the entry and search of his home, contravened s 9(1) of the RDA. As to Solomon Nona, the evidence reveals there was an outstanding warrant in respect of him. The evidence is unclear whether the SERT officer who arrested him relied on, or could rely on, this outstanding warrant. I cannot be satisfied on the balance of probabilities, given the complete inattention given by the parties to this matter, that Mr Nona's arrest was unlawful for the reasons articulated in Bulsey, or for any other reason.

Subgroup members: use of force in the arrests As to the use of force at the other houses, the evidence I have set out at [348]-[362] above establishes that the same level of force, and armed presence, as occurred at Mr Wotton's house occurred at each other house. It was equally disproportionate and unnecessary at each of the houses, and in each of the other arrests. My findings about the unnecessary and disproportionate use of force are relevant to my findings concerning contraventions of s 9(1) of the RDA in relation to the arrests of Mr Wotton and the other individuals who were arrested, in particular the 'based on race' aspect and the second limb of s 9(1). I turn to consider the allegations that the entries and searches of the first, second and third applicants' houses were unlawful. Once I have set out my conclusion on this second tranche of unlawfulness allegations, I will consider the consequences of the findings I have made for the applicants' allegations of contravention of s 9 of the RDA.

Were the entries and searches of the applicants' houses unlawful? The applicants here make four sets of allegations in their written submissions. First, that the entry and search by SERT officers of the home of the first and third applicants at approximately 5 am on 27 November 2004 was unlawful, and was not conducted in accordance with the action plan prepared by Inspector Underwood, Inspector Kachel and DI Webber because it involved 'unnecessary disturbance' to the occupants of the house. Second, that the entry and search by SERT officers of the home of the second applicant at approximately 6.15 pm on 27 November 2004 was unlawful, and was not conducted in accordance with the action plan because it involved 'unnecessary disturbance' to the occupants of the house. Third and fourth, the use of unnecessary force and the unnecessary disturbance of occupants in the entry and search of the houses of the first, second and third applicants. However, there is ***no*** freestanding allegation in the pleadings of the use of excessive force in relation to the entries and searches of the applicants' houses. The applicants' submissions refer to [303] and [309(e)] of the third further amended statement

of claim, but these pleadings do not make such an allegation other than as part of an allegation about the content of the action plan: see [279] of the third further amended statement of claim. In other words, it must be inferred that Inspector Underwood, Inspector Kachel and DI Webber inserted these qualifications in the action plan (about minimum force and ***no*** unnecessary disturbance) for a specific reason. It must be inferred they well understood (without identifying any legal source) that whichever police officers were sent to effect the arrests of the suspects in their homes would be required to use the minimum force necessary and to create the least possible disturbance to innocent people who might be at the addresses where suspects were to be arrested. None of this is addressed by the applicants or respondents in their submissions, but it seems to me that is how the argument must run. I deal with the question whether the pleadings impugn the lawfulness of the entries and searches of the houses of the subgroup members, as well as the applicants, at [1365] below. As to the first two issues about entry and search, the applicants identify two possible sources of authority for this conduct: s 8 of the PSP Act ([304] of the third further amended statement of claim) and s 19 of the PPR Act ([305] of the third further amended statement of claim). The respondents do not submit there was any other source. The applicants submit neither source authorised what was done. I agree with that submission. In my opinion, s 8 of the PSP Act did not authorise the entries and searches conducted by the SERT officers on 27 and 28 November 2004; more particularly, it did not authorise the entries and searches of the applicants' homes on 27 November 2004. Section 8 is purposive. The powers it confers are conferred only for the purpose of doing what is "necessary to effectively deal with" the emergency situation which has been declared, and remains in force, under the Act. Thus, even if there is an emergency situation within the meaning of s 4 of the PSP Act, the powers in s 8 will not be exercisable unless their exercise is "necessary to effectively deal with" the emergency. Here, as I have found, the "emergency" for the purposes of s 5 of the PSP Act was the fires (and accompanying explosions) and the likelihood of further fires (and accompanying explosions). That is what I have found capable of satisfying the precondition to the making of the emergency declaration, and I have found that the residual discretion in s 5 was lawfully exercised by DI Webber in making the declaration in the circumstances he did. I have found that although, after the fact, DI Webber entered onto the certificate para (f) of the definition of "emergency" rather than para (a), the evidence shows the principal matters he was aware about at the time he made the declaration at Townsville airport were the fires and, if the declaration was within another part of the definition of "emergency situation", his mistaken reliance on para (f) would not invalidate the exercise of power: Brown v West at 203; Eastman v Director of ***Public*** Prosecutions (ACT) at [124]; Australian Education Union v Department of Education and Children's Services at [34]; Attorney-General (SA) v Corporation of the City of Adelaide at [175]. Thus, there was ***no*** necessity, effectively to deal with the fires and explosions which had been the emergency situation the day before, for individuals' properties to be entered and searched in the way they were. The same is true on the respondents' extended construction of "any other accident" as including riots: these had ceased an hour after they started, the day before. An example of a lawful exercise of power under s 8 would be, for example, where in a situation of a fire, private property must be entered in order to put a fire out, or remove accelerants which are in the path of the fire. As the applicants submitted, the locations of all the houses entered and searched during the SERT operation were well away from the areas affected by any of the rock-throwing, looting or other anti-social behaviour with which the police were concerned. There was ***no*** connection on the evidence with the fires and explosions in the sense intended by s 8 of the PSP Act. The entry and search of Mrs Agnes Wotton's house occurred in the early evening of 27 November 2004, when there were ***no*** signs of disturbance anywhere. I turn now to s 19 of the PPR Act. It provided:General power to enter to arrest or detain someone or enforce warrant

(1) A police officer may enter a place and stay for a reasonable time on the place—(a) to arrest a person without warrant; or

(b) to arrest a person named in a warrant; or

(c) to detain a person named in a forensic procedure order or a registered corresponding forensic procedure order; or

(d) to detain a person who may be detained under an order made under section 298, 311, 312, 316, 318D or 318ZF; or

(e) to detain a person under another Act.(2) If the place contains a dwelling, a police officer may enter the dwelling without the consent of the occupier to arrest or detain a person only if the police officer reasonably suspects the person to be arrested or detained is at the dwelling.

(3) If the place is a vehicle, a police officer may stop and detain the vehicle and enter it to arrest or detain the person.

(4) A police officer who enters a place under this section may search the place for the person.

(5) In this section—arrest, a person named in a warrant, includes apprehend, take into custody, detain, and remove to another place for examination or treatment.

(Footnotes omitted.) In my opinion, s 19 did not authorise the entries and searches by the SERT teams either. Section 19(1) is facultative: it is not itself the source of any power to arrest without a warrant. Rather, it authorises what would otherwise be a trespass, so that an otherwise lawful arrest can be undertaken. As I have found, there were ***no*** lawful arrests undertaken at the applicants' properties on 27 November 2004 and s 19(1) could not support the entry onto private property of the SERT officers. Section 19(2) is also facultative, and authorises entry into a dwelling on private property for the same purpose. The same reasoning applies and that provision cannot support what occurred at the applicants' properties on 27 November 2004. In my opinion, the entries by SERT officers onto the applicants' properties and into their houses, and the searches of their houses, were unlawful. The unlawfulness stems from the lack of statutory authorisation to enter and search houses without a warrant. Unlawfulness of this kind does not inform the questions to be answered by s 9 of the RDA and I do not consider it any further. As to the applicants' third and fourth allegations (the use of unnecessary force and the unnecessary disturbance of occupants in the entry and search of the homes of the first, second and third applicants), those matters in my opinion are appropriately considered below, because they are properly characterised as the distinctions and restrictions involved in acts rather than acts themselves. In submissions, the applicants concentrated on the allegation that the entries and searches of the house of Mr Wotton and Ms Cecilia Wotton, and the house of Mrs Agnes Wotton, were unlawful. Little if any time was spent on the lawfulness of the entries and searches of the houses of the subgroup. Nevertheless, the pleadings extend to the subgroup on this issue: see [287], [303], [309(e)], [313] and [323] of the third further amended statement of claim. In my opinion, the entries and searches of the houses of the subgroup members were unlawful for the same reasons I have given in relation to the three applicants.

Were the arrests, entries and searches acts involving distinctions or restrictions based on race? In their written summary of argument document, the applicants identify, in this part of their case, four distinctions they say were involved in the conduct of the SERT officers. They are said to be: "(a) breaches of laws and procedures; (b) failures to meet the cultural needs of the community; (c) the unique circumstances; [and] (d) the SERT methodology was peculiar to the operation." As far as I can tell, these four sets of distinctions were said on the facts to be established by: (a) the attributes of the arrests and entries relied on to establish they were unlawful; (b) not considering or addressing Palm Island community needs and expectations following the death of an Aboriginal man in custody (which has been rehearsed earlier in several categories of allegations made by the applicants); (c) the remoteness of Palm Island and its particular history, including lack of media access and scrutiny; and (d) that the SERT teams departed from their usual methodology by entering and searching houses where there were women and children, arresting a 13-year-old boy, and operating on stereotypical information given to them about the transient nature of local residents, the fact they would sleep with weapons, and the like. I do not consider that any of the matters identified by the applicants in this part of their claim constitute distinctions, exclusions, restrictions or preferences involved in the conduct of the SERT officers for the purposes of s 9. As I have set out earlier in these reasons, I do not consider the status of conduct as unlawful necessarily involves a distinction. That said, the continuation of the emergency declaration beyond what I have found was authorised by s 5 of the PSP Act forms part of the evidence on which I base my findings below that the methods of the SERT teams evident during the arrests, entries and searches did involve distinctions and restrictions based on race. That is, the circumstances which give rise to the unlawfulness of the emergency declaration contributes to my conclusion that the way the arrests, entries and searches were conducted was referable to Palm Island being an Aboriginal community and the 'targets' of the

arrests, entries and searches being Aboriginal people. There is ***no*** such connection between the circumstances giving rise to the unlawfulness of the arrests (need for the arresting officer to hold the reasonable suspicion) and the question whether the arrests were acts involving distinctions or restrictions based on race. The second and third distinctions identified by the applicants do not arise from the conduct of the arrests, entries and searches and therefore are not consequences "involved" in the act of discrimination. Relevantly, the act of discrimination is the arrest of Mr Wotton or, to take another example, the entry into and search of his house. Failing to meet the cultural needs of the Palm Island community is not "involved" in either of those acts, even if failing to meet cultural needs could be described as differential treatment and therefore a distinction, exclusion, restriction or preference. They are circumstances. It is possible such circumstances may give rise to an inference that the conduct involving a distinction, exclusion, restriction, or preference (if one gets that far) was based on race. But they do not constitute, in and of themselves, the distinctions, exclusions, restrictions, or preferences involved in the acts of arrest, entry and search. The fourth category of distinctions relied on by the applicants – the methods adopted in the arrests, searches and entries – should in my opinion be viewed differently. To take the examples I have used above, the act of arresting Mr Wotton, and the act of entering and searching his house by using the methods of SERT officers did involve both distinctions and restrictions for the purposes of s 9. That is, the consequence of the methods adopted by the QPS (using SERT officers) was differential treatment of those individuals who were the subjects of the arrests, the searches and the entries into private homes. Mr Wotton was arrested differently – with more force (including being tasered) – than otherwise would have been the case. Ms Cecilia Wotton and the Wotton children were subjected to higher levels of aggression and force in the way police officers searched for suspects than otherwise would have been the case. Ms Wotton and the Wotton children were also subject to restrictions on their privacy, their sense of safety and wellbeing in and around their own homes, on their freedom of movement and (in relation to those arrested) on their liberty. The same proposition holds good for all the occupants of all the houses which were entered and searched by SERT officers. There were also restrictions on people's sense of safety and wellbeing in their own neighbourhoods as well as in their own houses. As the SERT officers moved about the island searching and apprehending suspects, they created an intimidatory atmosphere. The following evidence demonstrates what it was like for members of the community other than the applicants. I was persuaded by Ms Sailor's descriptions of what she saw from her house in Butler Bay. Butler Bay is a small settlement on largely unpaved roads, with forested hills behind one side of it and the sea to the other side. It is near the airport, but the sea dominates. It is beautiful, lush, and quiet. The houses are like any other collection of houses reflecting the ordinary lives of their inhabitants: there are childrens' bikes and toys outside, dogs ambling around or sitting in the dirt or the shade, unfinished building projects apparent at some houses, cars parked, boats on trailers, gardens in various states of care and wilderness. With that picture in mind, this was Ms Sailor's evidence:the only interaction I had at home was sitting – my German – yes, I owned a German Shepherd, and – well, my mum did, and he was old and disabled and he was barking, barking, barking, and that, sort of, gave us the indication that there's somebody in the yard, or something's happening. So I walked down to the front of our driveway. Our house is clearly overgrown with trees, and I walked down, and as I – he was standing at the end of the driveway, barking, barking, and when I looked there was probably 60 – 60, four across, police officers in full gear, marching, and my dog had been barking at their dog, and I sort of laughed, because I think those dogs would have easily killed my dog, and I just stood there and just watched as they walked up the road. I just was wondering what was happening out at Butler Bay for a team of police to be there. After they kept marching up the road I then went upstairs and sat in my kitchen, and I've got a clear view out the back of my neighbour's house, and we didn't have a fence at the time of the yard, and when I looked the officers were in the next door neighbour's yard, marching up towards the bush, because behind our place is just all overgrown bush, and I thought, "I'm not sure where they're going," at the time. But, as it turned out, I found out that they were actually looking for William Blackman. Yes. Later, in answer to some questions from me, she gave a further description of the police she had seen:can you just describe in a bit more detail for me what gear you mean by [the full gear]?--- The full gear. The entire dress was black – helmet, shield, a shield as well in front, black boots, black pants. Yes. So you – I couldn't see anybody's face. They just marched straight ahead. I just stood on the side.

But what could you hear? Were there any noises?---***No***. Only my dog barking and the – the thumping of the feet. Ms Sailor was challenged in cross-examination whether the police were really marching, in step. She confirmed that they were and, despite the denials of Inspector McKay and Superintendent Kruger, I accept her evidence. Ms

Collette Wotton, who is the sister of Mr Lex Wotton, gave evidence about the effects she saw of the police presence on the children she was working with at St Michael's School:... we didn't have much kids then when the police was here. We only got – I think the highest we ended up with – it was 165 kids at the time. So during the first week we was looking at 50 kids max, but from the Friday [26 November 2004] to the Wednesday I think we had about 25 or 30 kids in the school. Well, of course, you can't blame them. You know, their house got raided, seeing full gear of police walking around, you know. They were disengaged. We tried to talk to parents if they can encourage them to come school, but, you know, they didn't want to. The ones at the school were – you know, we took notice when we had them out of the playground where all the buses were going past. They was using our bus. They knew our bus, the kids. They said – you know, they used to say, "When they going to give us our bus back? I'm sick of walking to school. I'm sick of, you know, walking home from school. It's too hot, the ground." You know, our kids used to complain, and during lunchtime, big lunch, when they see ..... Some kids were back. They used to hide round the building, and, you know, some of us indigenous staff said, "Why are you hiding?" "Because they know I'm ..... Them. They came into my place. They came to my nanny place", you know. It was really hard, you know. They came to my house. Ms Collette Wotton also gave evidence about what she witnessed and experienced during the arrests, entries and searches. She lived at Butler Bay, near Mr William Blackman. She described how she was sitting on her back verandah at about 7 am in the morning and saw the SERT teams:they went to John – John Bull's place, because he's the other side opposite of me, and then – you know ..... Everybody out of their houses. They can see it and –same thing. You could hear, like ...They're running in the full gear with – with the shield and everything. They were all covered, and they were there for 30, 40 minutes, and they had the cars there. And then they came out and they went – went back in the mission ... The "Mission" is what some local residents call the central area of Palm Island, where the ***public*** buildings and shops are located. It is indeed where the mission buildings used to be. Ms Collette Wotton then described what happened when the SERT officers could not locate William Blackman at his house. After taking a call from her niece Krysten Harvey, who was crying and upset after her experience at Agnes Wotton's house, Ms Collette Wotton then found herself faced with SERT officers at her own house:Police officers were around the house and running out. So I went back inside of the house. I told the kids, "Quickly go under with your nana ....." This is my partner's mother. She was a dialysis patient too. She was in the – in the room, because I've got a four-bedroom. So she was in this room. They're coming through the back door. I said, "Run in there with your nanny." So they all ran, and they were all screaming and crying, and I walked back to the front door, with my cup of tea, and – yes. They were around my house. One was standing right at the door. One was right there. I stand there, holding my cup of tea. And he was fully covered. The thing I remember about him: he has blue eyes. He had a gun aimed at me, and he said to me, "Have you got a William Blackman here? Does he stay here?" I said, "***No***." "Are you sure?" I said, "He doesn't live here. He lives at the back." "Can we search under the bed and look in the cupboards?" and I said, "If you want to search my house, can you leave the gun outside? Can't you hear all the kids screaming in the other room there?" Because we were standing with the door, I could see the – the kids where they cry. There was another officer – officer there, with a gun, by the window, telling the grandmother – because all the kids was screaming – tell them to shut all their mouths. So I would have had – the age – the kids were between 10 and four, in my house, because they all went straight into one room, and I – and I was really confused, because I couldn't attend to them and, like, my – they was crying. They were singing out to me, saying, "Mum, Mum, come here. Dad, come here," because my partner was in the kitchen, and he didn't want to move from the kitchen because he had – he just froze himself, and at that time, you know, like, you've got a riot – a gun pointing at you and you've got the kids screaming. You know, like, you know, is he going to shoot me or not, and my kids going to go ..... You know, there was a lot of things rushing through my mind. I said – this should not happen. Ms Wotton adhered to her evidence in cross-examination and there is ***no*** reason not to accept it: she was clearly reliving what had occurred as she described it. The SERT officers did not enter Ms Collette Wotton's house: instead, they ran off looking for Mr Blackman, through into the neighbouring property. I have set out a general description of what occurred at [348]-[362] above, but it is necessary, given my findings, to here set out in more detail what I find occurred, especially at the houses of the applicants. I also propose to set out some of the evidence I heard from the other children who had been subjected to the effects of the arrests, entries and searches, because their evidence illustrates the disproportion involved in the conduct of SERT officers, and the distinctions and restrictions involved in the arrests, entries and searches. I turn first to what happened at the house of Mr Wotton and Ms Cecilia Wotton, then to what happened at the house of Mrs Agnes Wotton, and lastly to the evidence of the other lay witnesses, including those who were children at the time. Inspector McKay described what occurred outside Mr and Ms Wotton's house. Subject to making some additional findings based on Mr and Ms

Wotton's evidence, I accept this account:Detective Sergeant Robinson approached the house with another – with – primarily with another SERT operative, SERT Operative 3 [A/S Kruger], who was right beside him. I saw a male person who – who I now know to be Mr Wotton come out of the address, dressed in shorts, stood on the verandah or the patio of the address, and a – and – and he was told by SERT Operative 3 to – to get down on the ground. He didn't get down on the ground. He looked around and, when I say "looked around", at the time – we're trained to identify threat cues, and one of the things that – my initial thought was when – when you ask someone to do something and they fail to comply with that in the first instance, that is a concern, because (1) we've already – we've used two use of force options. One is presence, and particularly the fact that we've got police officers dressed like this. That's an – that's an escalated use of presence. So people that will be compliant when they see police in that configuration generally comply straightaway. Now, I noticed Mr Wotton didn't comply straightaway, and for me that – that is a threat cue and the potential that the person is not going to be compliant. In addition to that, he looked around. So he had his hands out to the side, from memory, but he looked around to the perimeter of where the SERT officers – SERT officers and PSRT was. And again, from experience, another threat cue that – potentially looking for an escape route, potentially looking to get away from that location. And – and – and after I saw that occur, I've then looked out to where the cordon positions were to make sure that it was well-contained and that we didn't have any gaps in the containment, and I heard further instructions – and I think there were a total of four – before I heard the popping sound of the taser, and Mr Wotton was tasered. I looked back to see Mr Wotton slowly get down onto the ground, and he was then handcuffed by the SERT operatives. Ms Cecilia Wotton described this event from her perspective inside the house, which I accept.And what happened the next morning?---Well, Lex came and woke me up.

Okay. Just take your time?---And he said, "They're going to take me", and I jumped up out of bed and looked through the window, seen all the cars coming down to the dirt road to the house where we were staying, about 10 cars.

And did you see anyone get out of the cars?---Yes.

What did you see?---Police with helmets, guns, shields, dogs.

And do you remember how they were dressed?---Yes. In black clothing, helmets.

And did you watch where they went?---Yes. They was on the veranda, but I didn't see the – they was all on the veranda with Lex.

And could you see Lex from where you were looking?---***No***. That's when I walked out

So just tell her Honour what happened then. So you walked out of the bedroom?---My brother came out from the front room, and he was screaming, said they shot Lex, and as I ran down the hallway Detective Robinson shined a torch in my face. The kids were behind me, and he told me to get the fucking hell inside and lay down, and I lie down on the bed with my daughter who couldn't hear anything. My brother got down on the floor. Schanara [the Wottons' eldest daughter] was with the door.

So you lay on the bed with Nazine, and that's why you say she couldn't hear anything?---She couldn't.

She didn't know what was happening?---***No***.

And could you – while you were lying on the bed, what could you see?---The policeman had his gun to my daughter's [Schanara's] head.

Did any of the policemen say anything to you when you were in the bedroom?---***No***. There was one on that side with that window on that side standing there with the gun, just the side my daughter was laying, Nazine.

So that was outside the window?---***No***. The bed inside. There's a window on that side and a window this side on the veranda. About six or seven of them run in the house. They tipped everything upside down and Schanara ..... What they was looking for. And Detective Robinson asked me to grab a pair of ..... And a ..... For Lex, and I got up.

And you knew it was Detective Robinson?---Yes, I know him. That was him.

How did you know him? You had met him before this day?---Yes.

And then what happened? You were asked to get shoes and a shirt for Lex?---I got up and I grabbed a pair of blue singlets and joggers, and gave it to - - -

You gave it to the police officer or to Lex?---To the police officer.

And did you go outside and see Lex?---***No***. I was too scared. I was shaking, crying.

And how many of your family were in the room at that time?---In my room? Me and Nazine on the bed, and my brother on the floor and Schanara was with the door.

And could you speak to the other boys?---***No***. They were in the front room. Two police had them in the front room.

And did you call out to the kids in the front room?---When they left.

When – and how long were the police inside the house?---For about 10 to 20 minutes.

And did they tell you they were leaving?---***No***.

So they just left?---They just left. Ms Wotton then described how she saw the SERT officers go across the road from her house to another house, where they "pulled up and smashed the door down of the other house, and yelling to some people there to get down". Reproducing Ms Wotton's evidence simply as text does not do justice to it. It was clear to me that, as she gave her evidence, Ms Wotton was reliving those events and remained terrified and profoundly disturbed by them. I am satisfied that when her brother called out, "they shot Lex" she thought Mr Wotton had indeed been shot, and possibly killed. I am satisfied that she thought there was a real possibility the guns the SERT officers pointed at her and her children might be fired. She was in fear of her life, and the lives of her husband and children. That fear was palpable as she gave her evidence 10 years later. In its text, her evidence may appear unemotional, but that was not the case. Although in my opinion what also came through in her oral evidence was a sense of disbelief, even after all these years, about what had occurred in their very modest family home, in her children's bedrooms, in her living area, and on her porch. The family continues to live in that house and I am confident, and prepared to find, that the memories of the entry and search, and the arrest of Mr Wotton, will never be far from their minds. In cross-examination, Ms Wotton emphasised what it was about the events that day which most shocked and disturbed her:***No***. And, Mrs Wotton, are you able, in your own mind – I know this is probably very difficult, but are you able, in your own mind, to sort of think about these things and tell me whether those deaths affected you more than what happened when the police came to your house and your husband was arrested and went on trial or- - -?---When they came to my house, this affected me more.

You think that has affected you more - - -?---Yes.

- - - than - - -?---Yes.

- - - these deaths. Okay. And is that because it's more personal? What happened to you at the house and your husband, that's more personal to you. You're more directly involved in it. Is that why you think it has affected you more?---***No***. It's how they held a gun up to my daughter and swore, shouted at us, told us to get down. You see that on TV, on movies, but this happened in real life.

Right. So is that really the big thing that you think has affected you, the - - -?---Yes.

- - pointing of the gun at your daughter's head?---Yes.

That's the thing that sticks in your mind that - - -?---Yes.

Yes. Okay?---They could have killed her.

Sorry?---They could have shot her, killed her. Ms Wotton also gave evidence about subsequent attempts by DS Robinson, apparently, to extract information from her children about Mr Wotton's offending. This evidence was uncontradicted and unchallenged and I accept it. It does not reflect well on the QPS that this occurred. It is further evidence, in my opinion, of the different policing behaviours used on Palm Island, where trying to get children to incriminate their father after having had armed SERT officers enter and search their house that morning seems to have been considered appropriate. Again, in my opinion, the boundaries of behaviour for the QPS seemed to have been drawn differently, and adversely to local residents, because this was an Aboriginal community. This was Ms Wotton's evidence:Okay? Do you recall later in the morning, when you were back home?---That Saturday afternoon when I – me and the kids were on our verandah. Detective Darren Robinson came down. He came on the verandah and he said to the kids, "Come here and sit down. I need to talk to you about your father. What did your father do? Do you know what he did?" And I said to Detective Robinson, "I don't think you should be asking these kids that question. They're only kids." Told them to go back inside, and he asked me, and I said, "I'm not going to answer you till I get legal advice." So he went, but he came there that afternoon and parked in front of the house, and he went like that to me. That must have been about 4.30 that afternoon, and when I went out he said, "You have to come to the school," and I said,

"What for?" and he said, "They're doing some counselling there." I said, "***No***, thanks. I'm right." He went, and he came back a second time, but I didn't go out.

And after he left the first time, what did you do?---I was just sitting there on the verandah. I didn't move.

And what were the kids doing?---They was inside, watching TV.

How were they?---They was very upset.

Who was there at the time? Do you remember?---All the children.

And what were they saying to you?---They was keep asking where their father was.

And did they say anything about Mr Robinson?---***No*** Something was made by the respondents, faintly, about the failure of people such as Ms Wotton to avail themselves of the counselling offered by DS Robinson. The evidence suggests in any event the offer was made as something of a throwaway line. The location of the counselling was at the local school, which was the QPS command centre. At the same time, local residents were being apprehended and questioned there. The school was swarming with police officers, including SERT and PSRT officers. Ms Wotton's husband had just been arrested in violent circumstances (for that is what tasering is), while she and her family were held inside by armed SERT officers. She had ***no*** idea what had happened to him, where he had been taken or for how long. In those circumstances, DS Robinson's offer of counselling could hardly be taken seriously, and it is difficult to understand how he could have considered it an appropriate offer to make. Ms Wotton gave cogent evidence about her reasoning on that day:Well, one of my friends walked past my place, and she came to sit on the veranda with me to talk about – we was talking about what happened, and she said that they was taking people into the school to question them and charge them. Detective Robinson came down after when she left that afternoon.

All right. So what did you think might happen if you went to the school?---Well, I was scared, if I would have went there, what would have happened. They probably would have – I was thinking they might have locked me up or charge me for anything. Mr and Ms Wotton's daughter, Ms Schanara Bulsey, also gave evidence about this entry and search:I remember being woken up early hours of the morning. It was still dark. Mum knocked on the door. As I woke up I can see lights at my windows, people just shining a torch. So we all got up. Mum woke us all up, and said, "They're here." Dad was already outside. He has been sleeping outside all that morning, in the lounge, for them – you know, waiting on them so they don't have to come in the house. We woke up. We all tried to rush outside to see what was going on and if Dad was all right. Then the men in black balaclavas came in the house as we all tried to walk out. So we all rushed back into the house, to the hallway, into Mum and Dad's room. My uncle, brother, my mum, myself, all went into Mum and Dad's room. I was – Mum was on the bed. Uncle Sonny was on the floor. I was sitting near the doorway against a wall. So there was still men coming in by that time. Sitting down all we can [hear] is, "They're here. We got them. We're here. They're here. We got them." After that I kind of was scared at that time, sitting down, couldn't move, crying at the same time, and Mum was telling me to, "Shut up, shut up." I couldn't.

...

And so you get to the front door and what do you see out the front door?---Men standing around Dad. Dad was on his knees with his arm up to his head then they rushed in. So we had to walk back into the hallway and run into the bedroom.

...

And so when you're walking back into your mum's room did you hear any noises?---A big bang.

A big bang and what did you think that was?---Not sure.

Well, what did you think happened when you heard the big bang?---That they was hitting him with something.

Hitting him – who? Your dad or - - -?---Yes. Dad.

And so you get back on the floor. You're sitting on the floor. How were you sitting?---With my knees up against my chest, my arms around my legs and my head in between my knees.

And did anything happen while you were sitting on the floor?---Sitting on the floor all I can hear – the yelling, screaming, me crying. All that time I was hitting on the floor, crying ..... Myself.

And so you said you heard yelling and screaming. Who was yelling and screaming?---Mum was yelling and screaming telling me to shut up ..... Crying and I couldn't stop.

And were there any of the men in the room or ..... At that stage?---Yes. There was.

And where were the men? Were there – was there – how many men were there?---One standing up in the doorway and then you had the rest in the hallway.

So one standing up in the doorway?---Yes.

So how far would he have been away from you then?---Two rulers.

...

And what – was there anything else that you noticed about him – the way he was standing?---He was standing there holding the gun.

And what was he doing with the gun – just holding it?---Holding it.

And how was he holding it, do you remember?---Holding it where my head - - -

Holding it where your head is?---Yes.

[Ms Bulsey then was given a short break in her evidence to settle herself.]

Can you describe how he was pointing that and where it was pointed to?---Holding it up just placing it where my head was.

[She was then asked some leading questions which did not assist me in understanding what she could next recall and I omit her answers to those questions.]

It [the gun] was facing my head because mum kept on yelling at me to get me to stop crying. I told her, "I can't stop crying. He's got the gun with my head."

And so do you remember when you were sitting there – do you remember anything –what happened next after that when you were sitting there?---After everything was done they had dad locked up. One of the officers came in the room and asked for clothes for dad. Mum got those clothes handed up to them.

...

They all left out of the room, so we waited into the room until they all left, went outside to the ledge and see if we could still see dad. We couldn't because they already left. We all sat in the lounge and started crying. Mum was trying to calm us down ... Ms Bulsey's evidence was acutely credible. She had a quiet demeanour, but her terror, like her mother's, was still palpable 10 years later. I accept that what most terrified her, and the thing she cannot forget, was the gun pointed at her head. This is what she said about her memory:And when you think about what happened in these events do you think about those?---I think about the gun always to my head. The respondents

did not call the officers who entered Mr and Ms Wotton's house. Superintendent Kruger gave evidence he thought it was unlikely that officers had pointed their guns in the way Ms Bulsey described, however he did not enter the house. Ms Bulsey was challenged in cross-examination on the basis she may have been mistaken, but she adhered to her evidence with a conviction which I found persuasive. This was her evidence, relevantly, in cross-examination:Is that possible, that he was pointing it forward, but he wasn't pointing it at you, that it only felt like he was pointing it at you. Is that possible?---***No***. As I put my head up I can see from the corner of my eye that he did have it at my head.

Okay. And I think you told Mr Creamer that the gun was two ruler-lengths away from you?---Yes.

Is that right? Is it possible that you've got that slightly wrong as well, and that what actually happened was he was a bit further away from you than that, at least a metre and a half or something like that?---***No***. Ms Bulsey was 15 years old at the time of these events. Other children present were Billo (who was approximately 14), Nazine (who was approximately 8), and Robert (who was approximately 12). Mr and Ms Wotton were rearing some children who were not their biological children. Schanara Bulsey was one of these. She is the granddaughter of David Bulsey. Also present at the Wottons' house during the arrests, entries and searches was Mr and Ms Wotton's son Albert. He was approximately 12 years old at the time. Again, there were some leading questions asked of Mr Albert Wotton, and I have not placed much weight on his answers to such questions. What follows are those aspects of his evidence I found reliable:So the police come in. How – what did you see? Did you see a number of cars or - - -?---I saw cars, about eight to 10 cars.

Eight to 10 cars. And what did those cars do?---Beg your pardon?

...

And what happens once the police cars stop?---When the police cars stops, about 15 to 20 men jumped out. Half went to one side of the house and the other went to the other side.

So when those men jumped out, did they have anything – how would you describe those men? What were they - - -?---They had guns, rifles with a strap around them. They had masks, all dressed in black.

So was there anything else that you remember about them?---They also had red lights on the guns.

...

And you say they go all round the house. What do you mean by that?---Well, half went – about 10 men went to one side, and maybe another eight went to the other side.

So 10 one side, and eight the other. And this is all – is this while you're standing in the lounge still?---Lounge. By the time I went from the lounge to the kitchen, they were already out the back, standing.

Okay. So you saw them. Did you then go into the kitchen, did you?---Yes.

And so when you went into the kitchen, what did you see when you were in the kitchen?---I saw red lights on the wall, coming through the windows and stuff.

You saw red lights coming through the windows?---Yes.

And once you saw those red lights, what was the next thing that happened after that?---I walked back out of the kitchen. That's when I saw about six men coming through the house, through the front door.

...

They were coming – they – as they were coming in, I was already down the hallway into the room. So they already came in, came down and two – two to three went to the second bedroom, and there were two in the front bedroom, standing by the door.

So the front bedroom: is that the room you were in?---Yes.

And so who was in the room with you when you were in there?---There was my cousin Michael.

Your cousin Michael. Was there anyone else there?---Also my uncle.

Your uncle. And what's his name?---Sonny.

Sonny. And was there anyone else in there with you?---***No***.

So you were in there with your uncle and your cousin, and were there – you said that two police officers came into your room?---Yes.

And what did they do once they came into your room?---They told us to get down –get on the ground.

...

It was in a very – tone of voice that they used - - -

Sorry?--- - - - scary - - -

It was a scary voice?---Yes.

And were you scared then? You say - - -?---I was. At the time I was. Albert then described moving to the window in the bedroom he was in, and looking out onto the verandah where his father and the police officers were:And what – when you get to the window, what's the first thing that you remember seeing?---I saw my dad outside.

You saw your dad outside?---Kneeling down.

He was kneeling down?---Yes.

And so he's kneeling down, and what happens then?---Then I saw about maybe six officers around him, telling him to get down: "Get down. Get down."

So he's kneeling down?---He's kneeling down with his - - -

They're yelling, "Get down. Get down"?--- - - - hands behind his head.

His hands are behind his head?---Yes.

They're saying, "Get down. Get down"?---"Get down."

What's the next thing you see then?---I then saw – when I looked back out the door, I saw the police officers still standing there. When I turned back around, I saw the stun gun.

You - - -?---I saw them touch him with the stun gun.

They touched him with the stun gun. And how do you know it was a stun gun?---I saw electricity come across it.

Electricity?---Yes.

And what happened once they stunned him?---He went down to the ground shaking like he was taking a fit, but it was from that.

And what did you think when you saw him on the ground?---I thought that he was going to die, and a lot of things were just rushing through my mind.

A lot of things? What sort of things?---I was – what had happened to Mulrunji was going to happen to my dad and stuff, you know, once they took him and that.

What do you mean by what happened to Mulrunji was going to happen to your dad?--- ..... Can you repeat that again? Sorry.

You said you thought what was going to happen to Mulrunji was going to happen to your dad. That was running through your head?---Yes.

What did you mean by that?---I don't know. I just thought something was going to happen as they took him away, after the stun gun and stuff.

So they stun him, and then do they take him - - -?---And they picked him up and took him to the vehicle.

They pick him up, took him to the vehicle, and what do you do then after that?---And then I shut the window and walked back to the bed and sat down, and they were – I also heard a lot of screaming from the other room, because the police were in there as well.

You heard screaming from the other room?---Pardon?

So that's the room next to your – where you were?---Yes. That's .....

And do you know who was in there?---It was my mum, my brother, sister –Schanara, Maisie, Billo, Robert. Also my Uncle Sonny ended up in that room as well.

He ended up in there?---Yes.

So you stayed in your room with Michael?---Yes.

So you hear screaming in the other room?---Yes.

What happened? What's the next thing after you recall the screaming?---The cops just turned around and walked back down the hallway and back out.

So when you heard that screaming, what were you thinking? What do you think is happening?---I thought something were going on, like, the gun – they were going to fire the guns and stuff.

You thought they were going to fire the guns?---Mmm.

And so you say when the officers – did they say anything to you before they left?---Not that I can recall. In cross-examination, it was suggested to Albert that he, like other witnesses who gave the same evidence, was mistaken in recalling that there were red dots on the guns carried by the SERT teams. He denied he was mistaken. Both Superintendent Kruger and Inspector McKay gave evidence that there were ***no*** such red laser target mechanisms on the guns they were carrying. Inspector McKay gave evidence that there were red dot sighting systems on the SERT assault rifles, in a cylinder or a sight with prisms at either end, so that to the officer holding the rifle a red dot was projected into the middle of the sight. His evidence was that this red dot would not be visible to the person at whom the gun was pointed, and would not be visible forward of the weapon. I do not feel able to make a positive finding one way or the other about the presence or absence of red dots. Such a finding is not material to the matters I need to determine in any event. The terror I find these children experienced was not dependent on their recollection about red lights or dots. It was also submitted in final submissions that Mr Albert Wotton may have been mistaken that his father was on his knees when tasered. It is correct that Mr Wotton himself did not give this evidence. I accept the timing of what Albert said he saw may not be precise. I do accept however that he saw his father on his knees at some stage, and I accept that he saw him being tasered. Importantly, I also accept that the reaction he saw his father have to being tasered looked to Albert like his father was having a fit, and that Albert thought his father might be going to die. That was a sight ***no*** 12-year-old should have to witness, and thoughts ***no*** 12-year-old should have to have. As for Mr Wotton's own evidence of the sequence of events, I find his evidence does not add significantly to the findings I have made above. As I set out elsewhere, although subjectively he may have had ***no*** intention of fleeing, SERT officers trained to react to what they describe as "cues" may well have had different perceptions and this explains why he was tasered. I do accept the officers were acting somewhat pre-emptively, and, in my opinion, this is part of what was likely to happen once a highly trained squad like SERT was given the task of apprehending offenders. There would be ***no*** second chances, ***no*** delays, ***no*** opportunities: they would execute their orders clinically and quickly, which is what they did. As to what Mr Wotton himself apprehended might happen to his family during the entry and search, I accept the following evidence he gave:An officer said, "Get down on your knees. Get down on your knees." And so in all of that I heard – I could hear my children crying, singing out loud. And I said, "Stay inside. Don't worry. Stay inside." And at the same time there was this police officer still singing out, "Get down on your knees. Get down on your knees. Place your hands behind your back of your head." But I was concerned for my children and my wife because my thoughts were if they walked or came out, someone would panic out of the police officers and shoot them. I turned towards them and I said, "Stay in there. Don't worry. Stay in there." And as I turned back, I could see something like – it was so quick, like lightning, and I just remember being hit with something, and my thoughts were I was shot, and I thought, "Maybe it's rubber bullet," because – because I was still standing, and then I could feel this current running through me, and then I knew it wasn't a bullet, so – because I could hear these orders to get down, and then I got down on my knees, and the current started to – it was getting stronger and stronger. So when I got on my knees I actually fell forward, and while I was down there they said to put my hands behind my back, and I couldn't do it because of my shoulders. I had the four reconstructions on my shoulder, and just a police officer – two grabbed me, one on each leg, at the back. Another had me round the neck, and I had my head turned to the side, and I had a barrel pointed in my head, and I felt another one in my back.

Another one? You mean another gun?---Another gun, and I could actually see it, and a police officer leaned on top of me. He had his knee into my back, and they had me pinned down, and then when he did – when they had me pinned down he got off. He pulled his knee off of my back, and then they grabbed me by the hands and forced my hands behind my back, and handcuffed me, and I was there for possibly a couple of minutes, and I could hear my family going off and I could hear – as I got up – they lifted me up. I was in a bit of pain, because of the shoulders and stuff, or they asked me to get up and I couldn't because of my balance, because of the shoulder. So they lifted me up, and one of the officers sang out, "What about in the house?" and Robinson said, "Yeah, go in," and – but at the same time I could hear – before the orders was given, I could hear that they were already in the house. They – because I left the back door open. They must have went in through there. I could hear them, and I could hear they were throwing things around in the house, and – and I could hear the kids screaming. I could hear them told to, "Get on the ground. Lie down." I – when Robinson gave that order I said, "You got all you want. There's ***no*** need to go into the house. You got who you come to grab," and then they had torches shining on me, in my face. At the same time I could see the red laser light before I was hit with the taser. They're shining in my face and – and I was trying to – trying to look – look around at the same time. I could see all of this stuff, and just trying to, I suppose, look away from the light, but at the same time you're trying to see who's who, and stuff. But I – I – there was a couple of officers walked forward, and then one of them pulled out the prods – it looked like little darts, little round things – from my chest. There was a lead attached to it, and they put them in a Mount Franklin water bottle, and after that I said, "Could I have some – could I have a shoe, please, and a – and a shirt?" and Robinson said – I heard him. He walked in – he ran into the house and he said, "Get him a bloody shirt. Get him a shoe. Quick. Hurry up. Get it," and I could hear all the crying and thing, and Cecilia trying to do what she could do thing, and so they marched me over towards the vehicle that was parked at our gate, and they opened up the back. He was not challenged in cross-examination on this evidence, and I accept it. I turn now to the evidence about what happened at Mrs Agnes Wotton's house. The evidence on this issue came from Mrs Wotton herself, Krysten Harvey, who was in the kitchen when the SERT officers entered, and Chevez Morton, who was at that time a young boy playing outside in the yard of Mrs Wotton's house. I have elsewhere explained why Mrs Agnes Wotton's evidence needs to be treated with some care, through ***no*** fault of her own. Mrs Wotton was approximately 60 years old at the time of the events in November 2004. Although she gave evidence on other matters, she did not give evidence about the events at her house, because she was not there. Ms Harvey's evidence was the main evidence about what happened at Mrs Wotton's house. It will be recalled that the SERT teams went to this house looking for Richard Poynter, whom they apprehended there while he was having a shower. Ms Harvey was 16 years old at the time of the arrests, entries and searches. Mrs Agnes Wotton is her grandmother. Richard Poynter was at that time her step-father. Tracy Twaddle, Mulrunji's partner, is Ms Harvey's godmother. I mention that fact as but one of the many illustrations in the evidence in this trial about the multi-layered connections between people who live on Palm Island and the way that Mulrunji's death reverberated through that community. Ms Harvey described how she saw two car loads of police officers pull up outside her grandmother's house, and saw officers run up both sets of steps (front and back) to the upper level of the house, where the living accommodation is situated. She described how she ran to the back door as she saw the police officers coming up the stairs, because she was scared. At this point in her evidence, she broke down. Like the other witnesses who were recalling these events, in my opinion she remained genuinely and significantly scarred from them. Ms Harvey then described what happened:As I ran to the back door before I got to the door a police officer ..... Came in with guns and were fully dressed with heavy shoes and every material, clothing. They told me to get down on the ground, and so I did, and at the time they were still running from the back side to the – from the front entrance. As I was lying there I was scared, and I thought that when I ran to the back – I thought they was going to shoot me because they might have thought that I was Richard, and I was scared, and as I lay down – when they told me to lay down I lay down on my stomach in front of the stove, and my face facing towards the fridge. She described how the guns they were carrying "looked big" and how the officers shouted "Get down, get down". I interpolate here that, during his oral evidence, I asked Sergeant Folpp to mimic for the Court the tone of voice and loudness he routinely used as a SERT officer when on a task such as this and when ordering people in houses that were being searched to get down. It is fair to say that the volume and tone were relatively intimidating even in a court setting, where it was ***no*** more than a reconstruction and those listening knew in advance what was about to happen. For a young girl such as Ms Harvey, there is ***no*** doubt those commands would have been terrifying. Ms Harvey described where the officers were and what they did once she was lying down:And so you're in the kitchen. Are there any police officers that come into the kitchen with you then?---There were – there – there were two of them. One standing in front of me, and one standing at the back of me.

So in front of you. Whereabouts in front of you? What do you mean by that?---Near my head, and one standing at the foot – foot end of me.

And what were they doing when they were standing there next to you?---They were facing their guns at me.

Facing their guns at you?---Yes.

And how do you know that?---Because when I – when I looked to turn, I seen – I could see on the side of my eye that they were facing their guns at me, towards me.

And were they pointing their guns at you? Whereabouts on your body?---Probably on my back, or my head somewhere.

Your back or your head do you mean?---Yes.

And how close to you was the police officer that was standing near your head?---He was just a step away.

Just a step - - -?---He wasn't so far away from me.

Just a step away?---Yes.

And what about the police officer – did you say there was another one near your feet?---Yes.

And how close to you was he?---Well, he was near – somewhere near my feet, I remember. He wasn't – because my nan got a small kitchen. He was leaning against the kitchen bench, or standing near the kitchen bench, near the sink way.

And so as you're laying on the ground with the two police officers near you, what happens then? What's the next thing that you remember after that?---Can you repeat that, please?

So you're laying on the ground with two police officers standing near you. What else do you remember about that happening at that time?---As I was laying there, there were more police officers running in, when those two – when those coppers were standing one in front of me and one at the back, where there were coppers all running up the stairs at that time. I can't recall how much of them, but there were more than five. It is the case that Mrs Wotton's kitchen is small. Once two fully kitted-up SERT officers were in that space, together with Ms Harvey, there would not have been much room left. Ms Harvey then described how the officers searched the house, found the door to the bathroom locked and were "singing out" to Mr Poynter. She could not recall much about how Mr Poynter was actually apprehended. In cross-examination, it was suggested (based on the evidence Sergeant Folpp would later give) that the officer who pointed his gun at her and ordered her to get down, who was (then) Constable Folpp, might have stopped pointing his gun at her once she was down on her stomach. Ms Harvey very properly conceded that she may have thought Constable Folpp continued to point his gun at her, but she may not have been able to see if he actually was. Sergeant Folpp's evidence was that he lowered his gun after Ms Harvey had complied and laid on the floor. His evidence was that Ms Harvey sat down, whereas Ms Harvey's evidence was that she was told to lie on her stomach and that is what she did. I accept Ms Harvey's version of this, as I consider she still has a clear recollection of these events, whereas for Mr Folpp this was one of many operations he performed. Ms Harvey also stated she could not recall whether the officer (Constable Folpp) took his balaclava off. It was Sergeant Folpp's evidence that he did. Again, if she was on the floor on her stomach, Ms Harvey may not have seen this action. I am

prepared to accept that Constable Folpp may well have lowered his gun at some stage, and not kept it trained on Ms Harvey. I am also prepared to accept that he may have taken his balaclava off. In my opinion, neither of those actions would have had any real effect in lessening or ameliorating the terror already induced in Ms Harvey and which has obviously damaged her on a long-term basis. The damage was done by this time. Whether or not Constable Folpp had decided she was ***no*** longer a 'threat' (as he described), Ms Harvey did not know this. All she knew was that she had rifles pointed at her by two heavily armed and masked officers who had stormed into the house and she had been yelled at to get down on her stomach while several more officers entered and searched the house, and were yelling out for Mr Poynter and apprehending him. She was entitled to assume, as it seems to me she did, that all the officers were armed, and that was indeed correct. She was entitled to be fearful for her safety, as indeed she was. She was entitled to be fearful that if she made the wrong move, she might be shot: that was not a fanciful possibility in the circumstances. In my opinion it was the reality that, if things had gone wrong, shots could well have been fired and Ms Harvey could have been caught in the crossfire. And indeed, if she had tried to flee, I am far from persuaded that shots would not have been fired in her direction. That may have been unlikely, but given the evidence I have heard, it was not impossible. Although the individual officers who gave evidence before me seemed impervious to this, the risk that local Aboriginal people may have been shot and injured (or worse) during these arrests, entries and searches was a much more real risk than the risk that any police officer was going to suffer material personal injury during the protests and fires on Friday, 26 November 2004. Indeed, the contemporaneous executive briefing notes stated that ***no*** police injuries were reported as a result of the protests and fires. The Aboriginal people who were in those houses when the SERT teams conducted these operations had real grounds to be fearful for their lives. They had assault rifles pointed at them. One did not see mention of this in any of the media reports at the time, nor in any of the police statements made at the time, nor in the briefing notes to government. Mrs Agnes Wotton's house was, as I have noted, where Mr Poynter was arrested. He was in the shower, and was forced to come out of the shower in the presence of the SERT officers and then directed to put some clothes on. Ms Collette Wotton also gave evidence there was a two-year-old boy present in the house when the SERT officers came in. Ms Harvey placed the age of the child at one year old. Two further witnesses gave evidence about what had happened to them, having been children at the time. One was Mr Morton, who was at Mrs Agnes Wotton's house when the SERT teams arrived, although he was outside. Mr Morton was nine years old at the time of these operations. Mrs Agnes Wotton is his grandmother. This is how he described what he and some of his cousins were doing when the SERT teams arrived:Do you remember what time of day it was?---It was afternoon.

In the afternoon?---Yes.

What were you doing at the time that the police first arrived?---Me and all the brothers, we were all playing hide-and-seek in the backyard.

All the brothers? Who are they?---They're all – all my cousins.

And do you remember who was there with you?---Yes. Excuse me. Hold on. Can you ask that question again?

Are you okay? Do you need to have a break? Do you need a little break?---***No***, I'm fine.

You said you were playing hide-and-seek in the yard?---Yes.

With your cousins?---Yes.

Do you remember who was there, who your cousins were there at the time?---Yes. There was my cousin, Chandon, Wayne, William and – and Michael.

And so how old were you then?---I was nine years old.

How old was Chandon? Do you remember?---He was eight.

And Wade [sic]?---Same with Wayne, he was eight

William?---William, he was nine.

And Michael?---And Michael was 11.

And so you're playing hide-and-go-seek you said?---Yes.

Where were you in the yard when you first saw the police?---I was at the back.

At the back?---On the back path beside the steps, yes. He then described the arrival of the SERT officers:And what's the first thing you remember when you saw the police?---The bus pulled up, and they all jumped out with the balaclavas and all the gear on, with the assault rifles.

You said "the bus". What bus were you talking about?---It was a school bus.

School bus?---A 14-seater, and there was two of them that pulled up out in front of Agnes' house.

Two vehicles?---Two vehicles, yes.

And there was a bus, and what other type of vehicle?---There was two – two buses.

Two buses?---Yes.

And so they pulled out, and you said they had masks on?---Yes.

What else did they have? Sorry?---They had assault rifles, and all their gear on, and they had riot shields, and they had dogs as well.

...

They came running into the yard, telling everyone to get on the ground. At that – when they came into the yard all the brothers, they ran away quickly, but I was too slow to run, and they told me to get on the ground when they came running in the yard.

And did you get on the ground?---Yes.

And where were you on the ground in the yard? Whereabouts were you?---I was beside the step, not far from the – from the fenceline.

And when you got down, how were you positioned on the ground?---I was on my belly, like that, face down with my hands beside me, and he told me to put my face in the dirt, to put my face on the ground, and for that moment I didn't want to do it, because there was – there was mud in my face, on the ground.

And could you see the mud there, could you?---Yes.

So what did the officer say to you?---He told me to put my head on the ground.

And did you do that then?---And I looked up at him and I saw the gun pointed at me. So then I put – I had to my head in the ground because I was scared.

So what do you mean you saw the gun pointed at you?---I looked up and the barrel was pointed straight at me, like – it was pointed at me, like that.

And how far was the officer away that had the gun?---He was maybe a metre away, maybe half a metre away from me.

And so you're laying on your belly?---Yes.

With the gun. Were there any officers around you?---There were two other posted just up from the one that was in front of me.

And while you were on the ground, what's the next thing you remember after that?---I was on the ground and I heard everybody in the – in the house, all the officers in the house screaming and that, and then – excuse me.

Okay?---Sorry. Can you ask me that question again?

Whilst you were on the ground, what's the next thing you remember after that?---Yes. I – I remember all the – there was officers in the house. They were calling out to people in the house to get on the ground, and – hold on. Yes. Mr Morton then asked for a short break. He was visibly distressed. Indeed, he was one of the most visibly distressed of the applicants' witnesses. He described how he remained scared as he watched Richard Poynter being brought out of the house and into custody. He was too terrified (his own word) to tell his mother what had happened, and did not tell her for about a week. In cross-examination, it was suggested to Mr Morton that he was mistaken in virtually his entire account. This is despite ***no*** SERT officer being called who could directly contradict what he said. Constable Folpp went into Mrs Wotton's house through the front stairs and could not have seen very much, if anything, of what went on outside. SS McKay was not, on his own evidence, in the yard at all. Mr Morton rejected the suggestion put to him that, because he was on his belly, he could not have seen whether a gun was pointed at him. He said "it was easy for me to look up like that", and insisted he had a clear recollection of this sequence of events. It was somewhat hopefully suggested to him that he may have laid down of his own accord because he was frightened. He denied this. I accept Mr Morton's evidence. Other evidence before me (including the police logs) demonstrates that it had been raining on Palm Island during the preceding days. His account of how he was forced to lie face down in the mud was compelling and, in my opinion, he was most obviously recollecting something that had happened to him. It was clear to me he had been highly disturbed by the event at the time and, just as importantly, that it remained a damaging event in his life to the point he gave evidence in this proceeding. His mistrust of police was clearly deep and sustained. This was his evidence about his fear of police:Do you think that this incident has had any effect on you?---Yes. I can't really talk to the police, and I get scared. I walk the other way when I see them, sort of, coming towards me or if they're in the car and they're coming towards me, I just turn off into a yard, and I wait there until they've passed.

Even today?---Even today.

And has it had any other effect on you?---My sister works at the police station, and I try to go there to the police station and see my sister, but when I step into the police station I get real scared. It feels like I'm going to be locked

up in the back. This evidence is not without its significance on a broader level, accepting it is clear evidence of the damage done to Mr Morton. It demonstrates how the disproportionate and violent policing reaction during these events has had a lasting and negative impact on the relationship between Aboriginal people on Palm Island and those members of the QPS who are required to serve them, and to help ensure they feel safe. Clearly, for people like Mr Morton, that will never be achieved. The other witness who was a child at the time of the arrests, entries and searches was William Blackman Junior, who was then 12 years old, and was at home in Butler Bay at the time the SERT officers came looking for his father, William Blackman Senior. He recalled that he was in the lounge room of the house with his father when the police arrived. He described how his father got up and ran. He stood up and looked out the window. He then gave this evidence:What did you see when you looked through the window?---I see a bunch of SWATs come running through the front gate, yes.

SWATs? What do you mean by SWATs?---I'm not sure if you call it SWATs, but it was – was people all in black, had guns and that. Yes.

All in black?---Yes.

And what sort of guns did they have?---Big guns.

Big guns?---Yes.

And do you remember anything else about the men, what they were wearing?---They were just fully black with mask over their face and that.

Fully black, mask over their face. And what did you think when you saw them?---Scared for my life.

You got scared for your life?---Yes.

Why would you get scared?---Well, they come running in the house, pointing a gun at us, telling us to get on the ground.

So they came running in the house, did they?---Yes.

So which door did they come running through?---The front door.

They came through the front door?---Yes.

And how many do you remember coming in the front door?---Really can't remember. About – between three and five, I think. Yes.

Between three and five?---Yes.

And did you stay in the lounge?---Yes.

And so what happened when they came through the front door?---Told me – told everyone to get on the ground, yes. Yelling at us, telling us to get on the ground, pointing the gun at us.

Pointing the gun. Whereabouts did they point the gun at you on your body?---Straight at us, yes.

Straight at you. And what did you do when they were yelling at you to get on the ground? What did you do next?---Got on the ground.

You got on the ground?---Yes.

And is this the ground in the lounge room?---Yes.

So how were you laying when you were on the ground?---I really can't remember.

Just remember laying down. Yes. Mr Blackman Junior was, as I have said, 12 years old. There was ***no*** suggestion any SERT officer removed his balaclava for Mr Blackman Junior. He described how the officers stayed for about five to 10 minutes, then went off looking for his father. He then gave this evidence:Five or 10 minutes. And so how were you the whole time they were there?---Scared for my life. I thought I was going to die.

And why did you think you were going to die?---Well, they're carrying big guns around there. Carrying big guns pointed at me.

And then after they leave, what happens as soon as they leave the house?---Got up, and I think I hugged my mum. Yes. He then described how he went outside looking for his father, whom he thought must have been shot by the police officers, but could not find him. Under cross-examination, it was suggested to Mr Blackman Junior that he was mistaken, and the SERT officers were not pointing guns at him, but rather at his grandfather who was in the room with him. Mr Blackman Junior denied this, saying he thought they were pointing guns at "everyone". I accept his evidence, although I am not sure how it is said to reflect any better on the QPS if SERT officers are admittedly bursting into a house and pointing an assault rifle at an older man, with a child present. However, ***no*** evidence was given by any SERT officer about what happened inside the Blackman house and I have ***no*** reason to doubt Mr Blackman Junior's evidence, since I found him to be a credible witness. I find it is likely the SERT officers indeed were treating each and every person they came across as a potential suspect, and potentially dangerous, including 12-year-olds. After all, one of the suspects they were instructed to arrest (and did arrest), was 13 years old. Ms Oui's evidence about this entry and search was also persuasive. As I have said above, she is the mother of Mr Blackman Junior and the de facto partner of Mr Blackman Senior. She gave evidence that the police came in two cars with balaclavas, masks and rifles. Four or five officers came in through the front door and said "don't move". One officer pointed a gun at her in the kitchen, then DS Robinson told her to go and sit in the lounge. DS Robinson then kneeled down and asked her questions for what she said was 10 to 20 minutes. The other officers went outside during this period. The entry and search left her and her three children (including William Blackman Junior) upset, shaken and crying. I also note the evidence of William Blackman Senior about the SERT operation at his home. At some stages during evidence and submissions, it appeared to be suggested, at least implicitly, that Mr Blackman Senior fled entirely to avoid arrest. There are two reasons that is not an accurate reflection of the evidence. The first is what Mr Blackman Senior said about what happened when the SERT officers arrived at his house. The second is the matter I discuss at [1427] below, about him going to the police command centre at the school, on the same day. As to the first reason, this was Mr Blackman Senior's evidence about what happened when the SERT teams arrived at his house at Butler Bay:And what happened?---I was sitting on my recliner, watching TV with my son, William Junior, and ..... Was in the kitchen cooking – cooking supper, and I looked at the window and I seen a – two utes pull up with all men on the back floor, all suited up.

What do you mean by "all suited up"?---Riot squad, and I - - -

And how were they dressed? Sorry?---Pardon?

How were they dressed?---Black helmets, black long sleeves, black jeans, vests, and rifles.

And what did they do?---Well, as they were jumping off the ute – yes, they all jumped off the ute.

What did you do?---I jumped off my chair and I said to my partner, I said, "I'm going to lead them away from the house." I went straight for the back.

Why did you want to lead them away from the house?---Because this is the riot squad, you know, and I have kids, and I – even my neighbour's kids were all in the yard, you know, and – and I don't – I don't want to see our kids – you know, like, terrorists, you know, terrorising our kids. Don't know what it does, and they haven't seen those things before in their life, you know. Haven't even watched those things on TV.

And how many officers do you think you saw?---About five or six on the back of each ute, on – on a tray.

So about 10 or 12 in total?---Yes. Could've been – could've been more inside there. They were – they were a troop ute. They were four door.

Right?---Dual cabs.

So you're out the back?---Yes.

(Emphasis added.) He then described how he ran through some neighbouring properties and up into the hills. It being late afternoon (the SERT officers on his evidence arrived at his house at approximately 4.30 pm), it then became dark and he stayed away from his house for some time. His evidence then was:And what did you do then?---My mother was practically crying and begging me to – she was going to bring me into the school.

And why the school?---Because that's where they set up their – that's where the police set up their quarters, I think, or the little .....

That's this school?---Pardon?

That's this school?---Yes.

But not in this hall because it wasn't built then?---***No***, ***no***.

And did you understand why your mother was crying?---Yes.

Why?---She thought they would shoot me.

And were you worried about that?---Yes.

And so what did your mother ask you to do?---Well, she said, "I'll go with you."

She was going to bring me in.

And did that happen?---Yes.

Was that that night or the next day?---Yes, that night.

That night. So you came here to the school?---Yes.

With your mother?---Yes.

(Emphasis added.) So it was that Mr Blackman Senior went down to the police command centre at the local school, with his mother. There were ***no*** SERT officers on guard to greet him. He simply walked into the school with his mother. He was asked to give a statement, and agreed to, but instead was arrested, charged and handcuffed. It is necessary to say something about the way the police then treated Mr Blackman Senior, which had ***no*** justification whatsoever in the evidence before me. In my opinion, this treatment was squarely based on race. When asked what happened after he had gone down to the school with his mother, and been arrested, Mr Blackman Senior's evidence was:And did they take you into custody, that is, did they not let you go home?---Yes. They put handcuffs on me and arrested me, yes.

And then where did they take you?---They put me in the back of the paddy wagon and took me round the airport.

And how long were you at the airport? I'm sorry. I stopped you there. Do you have any idea what sort of time they took you to the airport?---Could have been round 9 or 10 pm .....

And what happened then?---He left me in the back of the paddy wagon all bloody night with handcuffs on.

So you stayed in the paddy wagon with handcuffs on?---Yes.

Did anyone give you any water?---Yes, they gave me a bit of water, and they let me go use the toilet.

And then what happened?---And then they flew me out the next morning. There was ***no*** evidence whether the doors of the paddy wagon were open or shut, allowing in any fresh air. Palm Island has a very warm, tropical climate and November is a steamy and humid time of year; so much is apparent from much of the video evidence, as well as my own observations on the view which took place in September, at the start of the build-up to more humid weather. The space in the back of a paddy wagon is on any view extremely confined, and for Mr Blackman Senior to be forced to sit or lie in that space, handcuffed, for a period of approximately six hours according to the police logs, is disgraceful. The respondents advanced ***no*** submissions or positive evidence justifying this treatment of Mr Blackman Senior. Mr Campbell was cross-examined about Mr Blackman Senior's treatment, and sought to justify it by saying there were not secure premises available because the police station had been burned down. He was reminded that the QPS had taken sole and entire control of the local school, but he steadfastly maintained there was ***no*** other option. He did concede that, if it had been his decision, he might not have handcuffed Mr Blackman Senior all night, however he professed to have ***no*** knowledge of what happened. I found Mr Campbell's evidence unconvincing. The evidence demonstrates that there were large numbers of local people being questioned at the school and that, indeed, the QPS had taken over the school in a wholesale form. There is ***no*** evidence at all that Mr Blackman Senior posed any particular risk and, since he handed himself in, I am at a loss to see why it would reasonably have been thought that he would run away again. He could have been kept under watch at the school perfectly easily. Instead, what occurred was part of the punishment and subjugation of members of this Aboriginal community for rising up against the police that in my opinion was clearly evident during these days on Palm Island. The applicants described Mr Blackman Senior's treatment as "callous" in their written submissions. In my opinion, it was more than that. It was inhumane and degrading. It may also have been positively dangerous to leave a man locked up and handcuffed in conditions like this, bearing, as it does, some resemblance to the atrocious treatment of the Aboriginal elder Mr Ward, who in 2008 died of heatstroke in the back of a prison van (which had ***no*** air conditioning) in the middle of summer, while being transported from Laverton to Kalgoorlie, Western Australia, to face a drink-driving charge: see Inquest into the death of Ian Ward, State Coroner Alastair Neil Hope, Coroner's Court of Western Australia at Warburton, WA, 12 June 2009. I have ***no*** doubt at all that a non-Aboriginal person would not have been treated in that way. The QPS officers behaved as if they were entitled

to treat a black man on Palm Island in that way. It seems from the description given by Mr Blackman Senior that ***no*** police officer gave this a second thought. Mr Campbell's lack of concern in his evidence before me about Mr Blackman Senior's treatment confirms my views of this incident. Finally, there was the evidence of Ms Jacinta Barry. Mulrunji was a cousin of Ms Barry: again, I refer to that fact simply to illustrate how many people on Palm Island, who were also directly affected by QPS actions, had connections to Mulrunji. While QPS officers may have seen the arrests, entries and searches as entirely separate from Mulrunji's death and its aftermath, none of the local Palm Island residents did. Ms Barry was asleep when, early on the Saturday morning, SERT officers entered her home. It is an agreed fact this occurred at approximately 6.35 am. Also in her home at this time were her daughter Gail (who was about 20), her grandson Ricky (who was about seven) and Gail's boyfriend Solomon Nona (who was about 19). This was her evidence about what happened:Front door. And so what's the first thing you recall about that morning?---I just heard a bang from the laundry door, and then I laid there for a while, wait for some noises, got up out of bed and just went to open the door. I heard a bang on my door.

And you heard a bang on your door, and what did you do after that?---I opened it. That's when a fella with a balaclava come with a gun, pushed me in the chest and said, "Sit the hell down."

So I will just stop you there. So a fella in a balaclava?---Yes.

And what else do you recall about him?---He just sat down and held a gun, and – and there was another fella came in.

Sorry. Just take you back – so you said a gun pushed you in the chest?---Yes. I sat down on the bed.

Okay. You see a fella in a balaclava with a gun and he pushed you in the chest. What was the next thing that happened then?---I was sitting down there. Then the next – the other fella came in with a balaclava with a gun too, searching my cupboard and on the side of the bed. The cupboards were all open.

And was there anything that you remember about what type of gun it was that you got pushed with?---It was like a long one. It had a little infrared on it, because the light – the other one came in with a light on it, which shined on my forehead

Okay?---Yes. It had a magazine in it. It was like them M16 ..... thing, like in the movies. But it was in real life.

Like from the movies?---Yes.

And so once he pushed you in the chest with the gun, what did he – what did you do then?---I just sat there and I asked him if I could go to the toilet, because I was –wanted to have a piss. But he said, "***No***. You can't."

And so at this time, you were in the room. The other – the officer with 10 the gun: is he in the room?---He came looking into the cupboards and on the side of the bed, and he went back out.

And whilst one was looking through the cupboards, where was the other one standing?---He was standing just in front of me, like close up here, because my bed was here. He was just standing ..... door was open.

And what was he doing whilst he was standing there?---Holding a gun to me.

And where was the gun pointed?---At my forehead.

And did you see it pointed at your forehead?---Yes. I was sitting down looking at him like that.

...

And whilst you're sitting there you said to the officer you needed to go to the toilet?---Yes.

And what did he say?---He said, "You can't."

And did you say anything after that?---I said, "Look, I'm going to piss myself here soon."

And did he respond at all?---***No***, he didn't. Ms Barry described how she could then hear Mr Nona "singing out" like he was in pain. She then decided to get up and try to go to the toilet. She saw about six officers in her hallway, all with rifles and balaclavas. She then gave this evidence:And so after you went out to the hallway, what happened then?---I – I thought he was going to turn around and shoot me, because I rushed behind when he just walked to the door. He walked away from my bedroom door, because I wanted to go to the toilet, but I couldn't. I just peed myself in front of the toilet door, and they was all in the hallway, just walking out, talking away. I don't know what they were talking about. Mr Nona was arrested. He was not, however, on the list of suspects. Inspector McKay gave evidence that he was arrested on an outstanding warrant which, as far as he was aware, had nothing to do with the events on 26 November 2004. Ms Barry's laundry door was damaged. This recitation of the evidence establishes comfortably to my mind that the arrests of suspects, and the entries and searches of houses, were acts involving distinctions and restrictions: namely, the methodology of having SERT officers perform the arrests and the entries and searches of the houses of the applicants and the subgroup members. The arrest of Mr Blackman Senior involved additional restrictions and distinctions based on race. His confinement, overnight, handcuffed in the back of a paddy wagon at the airport in the circumstances I have described at [1428]-[1431] above, was in my opinion both a distinction (in the sense of differential treatment) and a restriction (in the sense of the manner in which his liberty was affected), and these were distinctions and restrictions based on race. He was treated like that because the QPS officers involved saw nothing wrong with locking an Aboriginal man in the back of a paddy wagon in that way. The entries and searches of the houses of subgroup members also involved additional distinctions and restrictions. The distinctions were constituted by the way the houses were surrounded by large numbers of armed SERT officers, with police dogs, the way the houses were violently broken into if a door was not immediately opened (and on some occasion without waiting for a door to be opened), and the way the houses were searched – the SERT officers with their assault rifles raised, yelling instructions at the people they found in the houses, and pointing rifles at them until the search was concluded. This was differential treatment to the way innocent bystanders and house occupants would be treated when an unarmed individual is arrested in a family home for what were, in the main, ***public*** order and property offences. I do not consider that, in other circumstances where it was known children would be in the homes of suspects, SERT officers would be authorised to effect an arrest in this way of a person suspected of comparable ***public*** order and property offences. The restrictions were constituted by risks to the occupants' safety, impositions on their personal dignity (Ms Barry's experience is an example), and temporary restrictions of their freedom of movement and liberty. All of the arrests, entries and searches involved distinctions and restrictions that were based on race. As I have noted at several points in these reasons, the evidence I have heard, and read, satisfies me on the balance of probabilities that this particular policing reaction occurred because this was an Aboriginal community. At work were the following attitudes:(1) impunity (that the police could take whatever action they deemed appropriate and there was ***no*** ability or entitlement in the local Aboriginal community to protest or dispute that action);

(2) disregard (that the police did not feel accountable to the local community because they were 'only' Aboriginal people, who could either be treated with less regard than other sections of the community, or who could be ignored);

(3) lack of care (that it did not matter if Aboriginal women and children were terrified, or felt their lives and safety were threatened – that Aboriginal women and children were less sensitive to treatment of this kind, or less deserving of ***protection***); and

(4) a wish to retaliate (against an Aboriginal community which had risen up against, and questioned, police operations on Palm Island). To take one of the starkest examples: I am comfortably satisfied that two teams of armed SERT officers with dogs would not be instructed to force their way into family homes known to be occupied by significant numbers of young children, in order to arrest unarmed individuals suspected of committing offences comprising ***public*** order and property damage offences. Four other matters in the evidence which in my opinion confirm that the methodology adopted in using SERT teams involved distinctions and restrictions based on race are the following. First, there was evidence the method of arrest was unnecessary. Mr William Blackman Senior gave evidence that earlier on the same day the SERT teams came to his house (27 November 2004), he had been at a meeting at the Council chambers with SS Dini, where SS Dini was talking to some of the local people mostly about the rifle that was missing from the police barracks, rather than about Mulrunji's death, a focus which Mr Blackman Senior made clear in his evidence had frustrated him. The point to be made here, however, is that the supposedly dangerous suspect that it was necessary to send SERT teams to arrest a few hours later had attended a ***public*** meeting with members of the QPS in the local Council chambers. He could have been arrested there and then, if necessary. Or he could have been asked by SS Dini to accompany him to the police command centre. Any number of options were available, other than sending teams of armed and masked officers to storm his house and terrorise his family later in the afternoon. It will be recalled Mr Blackman Senior was the person who eventually walked into the local school with his mother and gave himself up –apparently without needing to be surrounded by SERT officers when he did so. Second, it was common ground that one of the targets of the SERT operations was a 13-year-old boy. The police logs record that he was wanted for "throwing rocks, in possession of Molotov type device and running toward police station". The third house that the SERT teams attended on 27 November 2004 was where they had been informed they could find the 13-year-old. They did not find him there, but they found Mr Garrison Sibley and arrested him, having smashed the door open with a sledgehammer. Mr Campbell's evidence was that the 13-year-old was subsequently apprehended – I infer, without the assistance of any SERT officers. Inspector McKay could not recall SERT teams ever having been sent out to arrest a 13-year-old before. He had a career with SERT spanning some 24 years. As with the treatment of Mr Blackman Senior, a plethora of other options spring to mind about how a 13-year-old boy might be brought in for questioning, on a small island with a small and close-knit population, bearing in mind the emergency declaration was still in place and there were ***no*** flights or ferries available to leave. ***No*** evidence or explanation was given on behalf of the respondents about why it was proposed to treat a child in that way. Third, the information provided to the SERT officers, which fed into their understanding of the circumstances they would face, included stereotypical assumptions about Aboriginal people, their lifestyles and their tendencies. In cross-examination, Inspector McKay agreed that DS Robinson had briefed the SERT officers about "the itinerant nature of some of the people that live on Palm Island" and had said this meant a house should be searched even if a person who was expected to be at the house was apprehended outside the house because "it was more than possible there were other people there that were also needed to be apprehended". He also agreed that DS Robinson suggested "people" could be sleeping with "edged weapons" under their pillows. There was ***no*** evidence that suggested this was in fact the case. There was also the matter of the rifle which was said to be missing from the police barracks. As I have related above, on 26 November 2004, when QPS officers moved from the police station to the police barracks during the protests, Constable Robertson took a Ruger 'Mini-14' .223 calibre rifle with him, although he quickly realised he did not have any ammunition or magazines for the Mini-14. When QPS officers moved from the police barracks to the Palm Island Hospital at about 1 pm, Constable Robertson did not take the Mini-14 with him. On the evening of 26 November 2004, SS Whyte reported to DSS Kitching, who recorded in the police running log the following entry at 8.54 pm:Station issue 223 rifle in black case is missing. Rifle was removed from the Station during the seige situation and was hidden in the barracks. Confirms that barracks have been entered by community persons since that time and a search is now unable to locate the rifle. ***No*** ammunition or magazine was with the rifle. Thus, as the applicants emphasised, QPS officers knew on the evening of 26 November 2004 that the rifle, even if missing, was not capable of being used. Despite this, Inspector Dini's evidence in cross-examination was:See, I suggest to you the gun was never missing?---Yes, it was.

And it was at all times missing because a police officer had left it where he had put it?---Well, yes. He had locked it somewhere else and when they went through and did the sweep they noticed a gun case there with the gun not in it. And Craig [Robertson] and the officers that were there during the riot had been taken off the island, and so when we saw the empty case it was assumed that the firearm had been taken. I didn't find it, somebody else did, and they told me that, "We – we think we're missing a 223["].

But Constable Robinson, by 27 November at around 11 o'clock, had said exactly what had happened. When they handed out the ammunition there were ***no*** bullets and ***no*** magazine for the gun, so it was therefore not able to work, you would agree, if it didn't have bullets?---That – that information didn't filter through to us.

And that information was available within the police service from that time. And the suggestion that there was a gun missing and in the community was a false suggestion, wasn't it?---***No***. All I was told was that we were missing a gun, "See if you can get the council to help you find where the gun is."

And I'm suggesting to you that at all times it was not missing; would you agree?---***No***. It was missing. We – well, we believed it was missing.

Yes?---We were operating under the assumption that the gun was missing.

...

And you would agree that a weapon without ammunition is not dangerous?---Well, you can get ammunition anywhere.

...

You alleged the gun had been stolen by a resident?---I don't know if I made that allegation, but the assumption we were working under was the gun wasn't where it was supposed to be and because we knew that the residents had been through that area, the assumption was that one of them had taken the weapon. The Mini-14 was subsequently found in the police barracks on or about 8 December 2004, where Constable Robertson had left it. It is difficult to understand the focus of QPS officers on the rifle. There were references in the evidence to local people hunting and it seems likely there were other firearms on the island. Despite this, there was not a single piece of evidence that any local person ever threatened anyone with a firearm. There is not a single piece of evidence that any local person was seen with a firearm. The protests were never even suggested to be attended with threats of this kind. What the QPS response to the missing rifle reveals is how suspicious QPS officers were of local (Aboriginal) residents. It shows the tendency of police officers to hold inflammatory and exaggerated views of what local (Aboriginal) people were likely to do, and what their motives were. It is clear on the evidence, and the respondents did not dispute, that these kinds of matters (DS Robinson's information about the 'transient nature' of Palm Islanders, people sleeping with edged weapons, and the missing rifle) contributed to the thinking of SS McKay and the other SERT officers about how they should carry out their tasks. Inspector McKay explained this in re-examination:All right. Two final matters, please, inspector. You're asked some questions by Ms Ronalds yesterday about forcing entry through doors after allowing a period of time which – the period discussed was 10 seconds or so. And for your Honour's reference, this is at page P59 of the – of yesterday's transcript. And you in answer to a question from Ms Ronalds spoke about understanding the rational – rationale behind the decision to undertake that as a tactic, that is, forcing entry. Can you just explain what that rationale is?---Yes. So I mentioned yesterday about the appreciation process, and one of the things we try to – we aim to always do is identify the courses of action that are open to the person that is to be apprehended. Now, in this particular situation we had advice, 1, that there was

a fire-arm at large in the community and, 2, that there was a potential for people in the community to arm themselves with edged weapons. In addition to that a key factor was that there was an extreme degree of what I would call anger within the community, demonstrated by the actions the day before. So cognisant of all that information we then have to respond to take that person into custody in a manner that's safe to them and to the police and to the ***public*** in general. So if we were to at every address knock on the door and call the person out of the residence or call the people out of the residence to come and talk to us, whilst on the face value that might sound like a very effective way to achieve our aim, what it can also do, particularly based on the amount of emotion in the community at that point in time – what it can also do is provide an opportunity for that person to take another course of action, like arm themself, like refuse to come out of the premises, like try to flee from the premises and potentially, if they're armed with a weapon, use that weapon against the police. So it can be a very fine balance between allowing the person sufficient time to be able to come to the door and open the door versus scenario where you fear that situation could occur, where someone could arm themselves or put themselves in a position which is in greater danger to them. So a rapid entry into the premises to the location of the person to be able to challenge them and prevent them from undertaking another course of action is a valid course of action under certain circumstances, and those circumstances were present on Palm Island in the operation that we executed. It is also clear that the information was not accurate. It is true to say, therefore, that many Palm Island residents may have been unfairly tarnished with DS Robinson's brush. Fourth, and of considerable significance in my opinion, DS Robinson, who was a key participant in the arrests, entries and searches, was dressed in plain clothes and wore ***no*** protective clothing at any time during the operations. His role was to identify the suspects at the premises, and to provide any other local information or advice to the SERT officers. I infer he also helped them navigate their way around the island. The evidence demonstrates that at each house it was DS Robinson who went to the door with one of the two lead SERT officers in each team, as they rotated through the task of either surrounding the house or being the apprehending team. However, in most cases, it was DS Robinson who went to the door and spoke to the occupants of the house. He was, as I have noted, the officer with the most local knowledge, having lived and worked on Palm Island for two years. The inference is plainly open that DS Robinson well knew there was ***no*** real danger from any of the locals at the houses the SERT officers were scheduled to attend. He knew these people, and they him. He knew the houses had children, elderly people, and family members in them. ***No*** explanation was offered on behalf of the respondents, or their witnesses, for why DS Robinson was dressed in plain clothes with ***no*** protective gear. It was entirely incongruous with every other aspect of these operations. That is because, in my opinion, in truth there was ***no*** real danger and this was a deliberate, but unnecessary, show of force by the QPS, and an inappropriate exercise in subjugation. A show of force of that kind occurred because there was an 'us and them' mentality at work amongst the QPS officers on Palm Island at this time – evident from contemporaneous descriptions in the police logs and in other evidence of this as a siege. Stereotyping played a role; officers were prepared to believe without a second thought that local residents were capable of levels of violence for which there was ***no*** objective evidence. Property damage of the kind that occurred does not provide an objective basis. If it was not stereotyping, then the other explanation in my opinion, which was also at work, was a simple exercise in subjugation of an Aboriginal community that had risen up. Police should be able to, and generally do, separate assumption and rumour from objective risk, but on Palm Island in November 2004 there was ***no*** such separation. The QPS officers were not interested in finding solutions that did not involve subjugation because they did not know how to go about that with Aboriginal people – their liaison processes failed, they had not established, or tried to establish, good working relationships with local elders and the Council and they had not been inclusive and proactive. They preferred a show of force against local people they were prepared to stereotype as incapable of partnership, riddled with alcohol and prone to unpredictable violence, and whose family lives and connections they did not understand, and were not interested in understanding. They were not interested in finding out the depths to which Mulrunji's death might have affected a wide range of people, in discovering how many people were friends with him, related to him, close to him, and in understanding the anger that was shown from that perspective. They were not prepared to allow for the depth of feelings of injustice arising from a local man dying in police custody, on an island with a history of oppression by the police. The QPS had refused to adopt an approach to their investigation which located SS Hurley as a suspect, which on any view he should have been, right from the start. And when there was a powerful reaction from the local community against that, the option sought was coercive, armed subjugation. I am comfortably satisfied that the kind of wholly violent and disproportionate police action which was the arrests, entries and searches on 27 and 28 November 2004 would not have occurred elsewhere in Australia, nor in Queensland, outside an Aboriginal community. I find that is especially the case if one thinks of what

would have happened in a small community of ***no*** more than 2,000 people. In other circumstances and in other communities, or suburbs, a SERT team would not have been sent to the house of an unarmed 13-year-old to apprehend him for throwing rocks and being in possession of a "molotov device". The houses of innocent local residents would not have been entered and searched by 18 SERT officers armed with assault rifles and dressed in bulletproof gear and balaclavas, with PSRT officers and police dogs outside, for the purpose of arresting individuals suspected of ***public*** order and property offences, even if arson was one of those offences. Children would not have had assault rifles pointed at them and would not have been ordered by officers to get down on their stomachs. These things would not have happened in the homes of a non-Aboriginal community, in particular an overwhelmingly white (European) community, whether in regional or urban Australia and whether in better or similar socioeconomic circumstances. The dividing line for this treatment was race. It will be apparent from the findings I have already made that I accept the applicants' alternative arguments (see [303] of the third further amended statement of claim) that there was unnecessary force used against and unnecessary disturbance of occupants in the entries and searches of the homes of the first, second and third applicants. Those descriptions in the third further amended statement of claim are another way of expressing the findings I have already made: namely that the arrests, entries and searches involved distinctions and restrictions (unnecessary force and unnecessary disturbance because SERT officers were employed to effect the arrests, entries and searches), and those distinctions and restrictions were based on race.

Conclusions on the arrests, searches and entries To summarise, I find that the arrests of suspects, and the entries and searches of the houses identified at [351] above, were acts for the purposes of s 9 of the RDA. They were acts involving a distinction, being the use of SERT officers rather than ordinary QPS officers to enter and search houses and to undertake the arrests. The use of SERT officers meant the suspects, and those local residents who happened to be and around the houses which were searched and entered were subjected to a higher level of violence, confrontation and aggression than would have been the case if ordinary uniformed QPS officers had been used, or people had been arrested other than in a coordinated, military-style operation. Those people were subjected to treatment such as having assault rifles pointed at them and causing them to fear being shot. That is treatment quite different to what would have occurred if the suspects had been arrested by ordinary uniformed QPS officers, and other than in a coordinated operation. The acts involved a particular distinction in relation to Mr Wotton, in that he was tasered when, I find, he otherwise would not have been because at that time ordinary uniformed QPS officers did not carry tasers. I am satisfied that if QPS officers were conducting an ordinary arrest on Palm Island in 2004, they would not have been armed at all, and certainly would not have had a taser on them. The acts also involved a particular restriction in relation to Mr Blackman, being locked in a police wagon overnight. Further, the acts involved restrictions on the freedom of movement of people who were in and around the houses when SERT officers arrived, and a restriction of their sense of privacy, safety and wellbeing in and around their own homes. Those people were not able to move: they were held against their will, often on the ground, until the SERT officers decided the operation at a particular house was at an end. They were subjected to circumstances which would have caused any ordinary person to fear for their safety and the safety of their families around them. For the reasons I have set out at [1366]-[1457] above, all of those acts involved distinctions and restrictions based on race.

The second limb of s 9(1): nullification or impairment of human rights or fundamental freedoms I propose in this section to deal only with the conduct of the QPS which I have found to be acts involving distinctions, restrictions and preferences based on race. Where I have rejected the applicants' allegations on what I have called the first limb of s 9(1), I do not propose to consider all those allegations again on the basis I may be wrong in my findings on the first limb. The conduct of the QPS which I have found to constitute acts involving distinctions, restrictions or preferences based on race is:(1) the inappropriate and partial treatment of SS Hurley;

(2) the treatment of Aboriginal witnesses;

(3) the conduct of DSS Kitching in relation to the autopsy report;

(4) the failure to suspend SS Hurley;

(5) the failure to communicate with Palm Islanders and defuse tensions in the intervening week between Mulrunji's death and the protests and fires;

(6) the making and continuation of the emergency declaration;

(7) the arrests, entries and searches of the houses of the applicants and the subgroup members.

The conduct of QPS officers during the investigation and the intervening week As to the first five of the findings listed at [1464] above, in my opinion each of those acts impaired the rights of the class members to access services within the meaning of Art 5(f): namely the service provided by police officers in the impartial investigation of both a death in custody and the possible commission of criminal offences. The functions of the prevention of crime, the detection of offenders and bringing them to justice, the upholding of the law generally and the administration of the law in a "responsible, fair and efficient manner" (see s 2.3(c)-(f) of the PSA Act) are services which are intended for use by the general ***public***, within the meaning of Art 5(f) of the ICERD. The impartial, independent and effective investigation of a death in police custody is a function which falls within the terms of s 2.3(c)-(f) of the PSA Act. For the reasons I have given at [624] above, it is properly characterised as a service intended for use by the general ***public***. It is a service which every member of the community has a right to access, where she or he is affected by a death in police custody. In a confined (physically, culturally and socially) community such as Palm Island, where families' lives are intertwined with each other, I am satisfied it is a proper characterisation of the content and operation of Art 5(f) to find that all group members as defined in this proceeding had a right of access to the service of an impartial, independent and effective investigation into the death in custody of a member of their community. I am satisfied that by s 2.3(c)-(f) of the PSA Act there was a legislative intention that members of the ***public***, including members of a community such as the Palm Island community, have access to that service. There is sufficient evidence to infer that all group members were, in some way (although to varying degrees), interested in and affected by the death of Mulrunji and the outcome of the police investigation. As I have found at [826] above, the purpose of that investigation was not, or should not have been, only to provide information to the coroner. Its purpose was, or should have been, also to determine whether there was a reasonable suspicion that any criminal offences may have been committed (including assault, for example). Further, and separately, I am satisfied that the function of the provision of services within the terms of s 2.3(g) of the PSA Act are properly characterised as services which are intended for use by the general ***public***, within the meaning of Art 5(f) of the ICERD. On the bases I have outlined above, the conduct of an impartial, independent and effective investigation into a death in police custody was a "service" required of QPS officers under the PSA Act, the Coroners Actand the general and statutory criminal law of Queensland (recalling the twin purposes of the investigation). It was also a service required of QPS officers on the basis of the reasonable expectations of the Palm Island community, within the terms of s 2.3(g) of the PSA Act. People ordinarily resident on Palm Island in November 2004 were entitled to expect there would be an investigation of that kind into Mulrunji's death. Whether or not they were related to him, friends with him or grew up with him, in this close-knit community of approximately 2,000 people, his death was a loss felt by all members of the community, for various reasons and in various ways. This was the death of an Aboriginal man in police custody – the very occurrence with which the RCIADIC had been concerned. It also occurred in an Aboriginal community with a history of oppression by white authorities and police, and a history of mistrust of police officers. Impartiality, transparency and thoroughness were especially important to a police investigation in those circumstances. Palm Islanders (that is, the group members, including the applicants) were entitled to expect, and were entitled to, an investigation that gave ***no*** special treatment to individuals who might reasonably be suspected of involvement in Mulrunji's death because they were police officers, and because they were non-Aboriginal. They were entitled to an investigation that did not discount potential evidence because it came from Aboriginal people, an investigation which kept the whole of this close-knit and specially constituted community informed in a timely, respectful and accountable way, about the progress of the investigation, and the outcome of the autopsy. An impartial and transparent investigation would have been one whose officers appreciated the sensitivities of a person in SS Hurley's position remaining on duty, apparently immune to criticism or suspicion, and able to continue to arrest local people as if nothing had happened. Officers conducting such an investigation would have approached the concept of holding a reasonable suspicion in relation to the commission of offences in an even-handed way as between Aboriginal and non-Aboriginal people, which was not the case in relation to the failure to suspend SS

Hurley, whether or not this suspension was accompanied by a charge. The features I have set out in [1472] and [1473] above disclose that the Palm Island community did not have access to the service of a police investigation 'on an equal footing' with other communities. Putting the conduct of the investigating and commanding officers to one side, SS Hurley himself was obliged to appreciate these matters, recognise the importance of impartiality and independence in the investigation, and remove himself from the island. The Palm Island community was entitled to expect he would do so. He was the most senior police officer stationed on Palm Island, yet he ignored (with an apparent sense of impunity) these fundamental precepts of any police investigation. By engaging in inappropriate contact with the investigating officers, continuing on duty and failing to leave the island until 22 November 2004, SS Hurley contributed in a material way to the investigation into Mulrunji's death having ***no*** appearance of impartiality or independence. The acts of DI Webber, DSS Kitching, Inspector Williams, Inspector Richardson and SS Whyte, as the QPS officers in positions of command, control and responsibility at relevant times in:(1) the inappropriate and partial treatment of SS Hurley;

(2) the treatment of Aboriginal witnesses;

(3) the conduct of DSS Kitching in relation to the autopsy report;

(4) the failure to suspend SS Hurley; and

(5) the failure to communicate with Palm Islanders and defuse tensions in the intervening week between Mulrunji's death and the protests and fires,

involved distinctions based on race that had the effect of impairing the enjoyment, on an equal footing, of the rights of the applicants and group members under Art 5(f) of the ICERD. Those rights comprised the right to access an impartial, independent and effective investigation of Mulrunji's death.

The making and continuation of the emergency declaration I have found at [1101]-[1200] above that the making of the emergency declaration under s 5 of the PSP Act by DI Webber, and its continuation until 28 November 2004, was an act involving a distinction, exclusion, restriction, or preference based on race. Separately, I have found that the making of the emergency declaration was lawful, but its continuation past 26 November 2004 was not. The only relevance of this latter finding is its effect on the content of the human rights to be considered under the second limb of s 9(1) (bearing in mind some of the content of some of the rights depends on lawfulness). The making and continuation of the emergency declaration is put as an act of discrimination that affected the applicants and the group members in the same way. Just as with the claims about the investigation into Mulrunji's death and the events in the intervening week, ***no*** different or particular claims are made on behalf of the applicants in relation to the making and continuation of the emergency declaration. On the basis of the findings I have made, can it be said – for the purposes of the second limb of s 9(1) – that the act of making and continuing the emergency declaration involved distinctions, restrictions or preferences based on race that had the effect of impairing or nullifying the enjoyment, on an equal footing, of any human rights or freedoms of the group members in the "political, economic, social, cultural or any other field of ***public*** life"? The rights enjoyed by the group members (including the applicants) which were identified as impaired or nullified by the making and continuation of the emergency declaration were the rights contained in Art 26 of the ICCPR and Arts 5(a) and 5(f) of the ICERD. I have found Art 5(a) inapplicable to the claims in this proceeding: see [577]-[581] above. As to Art 5(f), the making and continuation of the emergency declaration is not appropriately characterised as a service performed by the QPS intended to be used by the applicants and group members. Although it can be seen as having a protective function, the terms of the PSP Act, the function to be performed by the incident coordinator under it and the coercive powers which flow from the making of a declaration and its continuation in force indicate that the making of an emergency declaration is not intended to be beneficial, or helpful, to a community or to particular individuals. Although any community is entitled to expect, consistently with s 2.3 of the PSA Act, that there will be a fair, prompt, effective and appropriate policing response to any emergency situation, a response by way of making an emergency declaration under s 5(1) of the PSP Act is a targeted response confined by the PSP Act to specific circumstances. It is intended to facilitate and empower the relevant government authorities to deal, in the manner they see fit, with what arises from an emergency situation, as that term is defined in the PSP Act. It may carry with it protective objectives (of people,

resources and infrastructure) but its intention is to authorise a series of coercive actions that may sometimes be significantly restrictive of individual freedoms. In contrast to the conduct of an impartial, independent and effective investigation into the death of Mulrunji, it was not intended that the Palm Island community affected by the emergency declaration would receive anything by way of a service from the making of the emergency declaration. There is ***no*** evidence members of the Palm Island community sought, or asked, for the declaration to be made. There is evidence (in the contemporaneous video evidence and in some of the witness evidence) that it was opposed, and some people felt the island was under martial law. In contrast, the legislature did intend that, by the performance of the constellation of functions under s 2.3 of the PSA Act which were involved in the conduct of the investigation into a death in custody, a community would use or secure the help it was entitled to expect in finding out how and why the person died, and how to prevent such a death happening again. It was intended a police investigation would secure accountability under the criminal law for any persons who caused or contributed to a death in custody, or committed any other criminal offences in relation to the person who died. In the circumstances of November 2004, the police investigation was supposed to be a function of benefit to the Palm Island community, and helpful to that community. The investigation into Mulrunji's death was also a function the Palm Island community sought to be performed, and relied on being performed. The emergency declaration was different. It was a restrictive and coercive measure imposed upon Palm Islanders, which (as I have found) involved a series of distinctions and restrictions for all members of that community. It was not helpful; it was not a benefit to that community: it was a burden and an imposition. It was not a function which fell within the terms of Art 5(f) of the ICERD. That leaves Art 26 of the ICCPR as the only other human right relied on by the applicants for the purposes of s 9(1) of the RDA. Article 26 expresses two guarantees. First, all persons are equal "before the law". Second, all persons are entitled without any discrimination to the "equal ***protection*** of the law". The guarantees are directed at different subject matter. The first guarantee, consistently with the common law concept of equal justice, concerns the administration and application of the law "even-handedly, free from bias and without irrational distinction": see J Jowell; "Is Equality a Constitutional Principle?" (1994) 47 CLP 1 at 4. It is an aspect of the rule of law. In Railway Express Agency v New York, [1949] USSC 13; 336 US 106 (1949) at 112-13 Justice Jackson described the importance of the principle. The case concerned whether New York City traffic rules regulating the use of vehicles for advertising purposes violated the due process clause in the 14th Amendment to the United States Constitution:I regard it as a salutary doctrine that cities, states and the Federal Government must exercise their powers so as not to discriminate between their inhabitants except upon some reasonable differentiation fairly related to the object of regulation. This equality is not merely abstract justice. The framers of the Constitution knew, and we should not forget today, that there is ***no*** more effective practical guaranty against arbitrary and unreasonable government than to require that the principles of law which officials would impose upon a minority must be imposed generally. Conversely, nothing opens the door to arbitrary action so effectively as to allow those officials to pick and choose only a few to whom they will apply legislation and thus escape the political retribution that might be visited upon them if larger numbers were affected. Courts can take ***no*** better measure to assure that laws will be just than to require that laws be equal in operation. In Mabo v Queensland (***No*** 2) [1992] HCA 23; 175 CLR 1, Brennan J emphasised that the concept of equal justice is one of the foundational values of the common law of Australia (at 57-58):The preferable rule, supported by the authorities cited, is that a mere change in sovereignty does not extinguish native title to land. (The term "native title" conveniently describes the interests and rights of indigenous inhabitants in land, whether communal, group or individual, possessed under the traditional laws acknowledged by and the traditional customs observed by the indigenous inhabitants.) The preferable rule equates the indigenous inhabitants of a settled colony with the inhabitants of a conquered colony in respect of their rights and interests in land and recognizes in the indigenous inhabitants of a settled colony the rights and interests recognized by the Privy Council in In re Southern Rhodesia as surviving to the benefit of the residents of a conquered colony.

... the common law of Australia rejects the notion that, when the Crown acquired sovereignty over territory which is now part of Australia it thereby acquired the absolute beneficial ownership of the land therein, and accepts that the antecedent rights and interests in land possessed by the indigenous inhabitants of the territory survived the change in sovereignty. Those antecedent rights and interests thus constitute a burden on the radical title of the Crown.

It must be acknowledged that, to state the common law in this way involves the overruling of cases which have held the contrary. To maintain the authority of those cases would destroy the equality of all Australian citizens

before the law. The common law of this country would perpetuate injustice if it were to continue to embrace the enlarged notion of terra nullius and to persist in characterizing the indigenous inhabitants of the Australian colonies as people too low in the scale of social organization to be acknowledged as possessing rights and interests in land.

(Emphasis added, footnotes omitted.) A final example of the meaning to be given to the concept of equality "before" the law is this statement from Green v The Queen [2011] HCA 49; 244 CLR 462, a sentencing case, in which French CJ, Crennan and Kiefel JJ said at [28]:"Equal justice" embodies the norm expressed in the term "equality before the law". It is an aspect of the rule of law. It was characterised by Kelsen as "the principle of legality, of lawfulness, which is immanent in every legal order". It has been called "the starting point of all other liberties". It applies to the interpretation of statutes and thereby to the exercise of statutory powers. It requires, so far as the law permits, that like cases be treated alike. Equal justice according to law also requires, where the law permits, differential treatment of persons according to differences between them relevant to the scope, purpose and subject matter of the law. As Gaudron, Gummow and Hayne JJ said in Wong v The Queen:"Equal justice requires identity of outcome in cases that are relevantlyidentical. It requires different outcomes in cases that are different in some relevant respect."(Emphasis in original.)

Consistency in the punishment of offences against the criminal law is "a reflection of the notion of equal justice" and "is a fundamental element in any rational and fair system of criminal justice". It finds expression in the "parity principle" which requires that like offenders should be treated in a like manner. As with the norm of "equal justice", which is its foundation, the parity principle allows for different sentences to be imposed upon like offenders to reflect different degrees of culpability and/or different circumstances.

(Emphasis added, footnotes omitted.) The content of the first guarantee in Art 26 thus ***protects*** a person, or a group of people, or a minority, from (amongst other things) the exercise of statutory powers in a way that does not treat like circumstances alike. The guarantee in s 15 of the Canadian Constitution of equality before the law has received a similar construction by the Supreme Court of Canada: see Andrews v Law Society (British Columbia) 1989 CanLII 2 (SCC); [1989] 1 SCR 143 at 174-75 (McIntyre J, writing for the majority on this issue). Andrews was a case involving alleged discrimination on the grounds of citizenship. The second guarantee, of equal ***protection***, looks not to administration of the law so much as to what the law itself does, substantively, to "***protect***" individuals. Nowak records (at pp 606-07 of CCPR Commentary) that this second guarantee was only inserted into Art 26 on the basis of a motion by the Indian delegate at the Third Committee of the General Assembly. Nowak describes the content of the second guarantee as having to do with "an obligation on States parties to ensure substantive equality by way of legislation" (at p 608, emphasis in original). By reference to the (now) historical curiosity that was the Australian Bill of Rights Bill 1985 (Cth) Wojciech Sadurski puts the distinction in a helpful way ('Equality Before the Law: A Conceptual Analysis (1986) 60 ALJ 131 at 131):Equality as applied to law may have two distinct meanings: equality before the law (or, in other words, equality in the enforcement of legal rules) and equality in law (that is, equality in the content of legal rules). The principle of legal equality may therefore mean either that valid legal rules should be applied to all in the same way (equality before the law); or that legal rules themselves should not contain any discriminating and privileging provisions (equality in the law). These two meanings correspond, respectively, to what the Australian Bill of Rights Bill 1985 calls "entitlement to rights and freedoms without distinction" (cl. 1 which uses the terminology of "equality before the law") on one hand, and "the right without any discrimination to the equal ***protection*** of the law" (cl. 4, par. 1) on the other. This dichotomy represents the view that, while "equality before the law" stricto sensu simply means the principle of impartial application of law to everyone, "equal ***protection*** of the law" deals with the content of the law and proclaims that the substance of the law should not be discriminatory ...

(Emphasis in original.) While the two concepts are distinct, in some instances both concepts will have application. For example, the passage of Brennan J's reasons in Mabo v Queensland (***No*** 2) extracted at [1489] above involves aspects of both equality before the law (in whether the Court should overrule previous authorities) and equal ***protection*** of the law (in the content of the common law and the manner in which it gives effect to the principle of equal justice). The general operation and purpose of both ss 9 and 10 of the RDA (read with s 8) can be seen as concerned with the subject matter of the second guarantee of equal ***protection***. However, the second guarantee in Art 26 is not relevant to the application of s 9 in this proceeding. In the context of the present discussion, it is not relevant to the making and continuation of the emergency declaration by DI Webber. It is the first guarantee in Art 26 which has relevance, as I have explained in the section of these reasons beginning at [635] above. What is

meant by the use of the word “discrimination” in Art 26 has been addressed by the HRC in General Comment 18 (at [7]):While these conventions deal only with cases of discrimination on specific grounds, the Committee believes that the term “discrimination” as used in the Covenant should be understood to imply any distinction, exclusion, restriction or preference which is based on any ground such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status, and which has the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise by all persons, on an equal footing, of all rights and freedoms. The similarities to the definition of racial discrimination in Art 1(1) of the ICERD are apparent. The circularity of which some judges have spoken in relation to Art 26 is also apparent. However, what can be said (for the reasons I have given earlier) is that the focus on “distinction, exclusion, restriction or preference” demonstrates that the gravamen of the freedom conferred by Art 26 is, relevantly, a freedom against differential treatment in the application of the law, where that differential treatment is based on an irrelevant attribute. Unlike Australian state and federal anti-discrimination legislation, Art 26 is not limited to particular spheres of activity or particular subject matter. In contrast, Art 2 of the ICCPR (which concerns the assumption by states parties of obligations to implement measures to give effect to the Covenant) is limited by reference to subject matter and provides: Each State Party to the present Covenant undertakes to respect and to ensure to all individuals within its territory and subject to its jurisdiction the rights recognized in the present Covenant, without distinction of any kind, such as race, colour, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. Where not already provided for by existing legislative or other measures, each State Party to the present Covenant undertakes to take the necessary steps, in accordance with its constitutional processes and with the provisions of the present Covenant, to adopt such laws or other measures as may be necessary to give effect to the rights recognized in the present Covenant. Each State Party to the present Covenant undertakes: (a) To ensure that any person whose rights or freedoms as herein recognized are violated shall have an effective remedy, notwithstanding that the violation has been committed by persons acting in an official capacity;

(b) To ensure that any person claiming such a remedy shall have his right thereto determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided for by the legal system of the State, and to develop the possibilities of judicial remedy;

(c) To ensure that the competent authorities shall enforce such remedies when granted. The contrast between the two Articles was the subject of part of General Comment 18 by the HRC:While article 2 limits the scope of the rights to be ***protected*** against discrimination to those provided for in the Covenant, article 26 does not specify such limitations. That is to say, article 26 provides that all persons are equal before the law and are entitled to equal ***protection*** of the law without discrimination, and that the law shall guarantee to all persons equal and effective ***protection*** against discrimination on any of the enumerated grounds. In the view of the Committee, article 26 does not merely duplicate the guarantee already provided for in article 2 but provides in itself an autonomous right. It prohibits discrimination in law or in fact in any field regulated and ***protected*** by ***public*** authorities. Article 26 is therefore concerned with the obligations imposed on States parties in regard to their legislation and the application thereof.Thus, when legislation is adopted by a State party, it must comply with the requirement of article 26 that its content should not be discriminatory. In other words, the application of the principle of non-discrimination contained in article 26 is not limited to those rights which are provided for in the Covenant.

(Emphasis added.) The breadth of coverage of Art 26 is illustrated by some of the cases to which I have earlier referred at [656]-[667] above, and by this summary by Tufyal Choudhury and Gay Moon in ‘Complying with Its International Human Rights Obligations: The United Kingdom and Article 26 of the ICCPR’ [2003] 3 EHRLR 283 at 293-94 where the authors state:Since the Broeks decision, Art.26 has been applied to other areas outside the rights in the Covenant, most frequently in areas involving social security and other forms of social ***protection*** payments including disability pensions, unemployment benefit, veterans’ pensions, severance pay, children’s benefits, survivor’s pensions and retirement pensions. They have also covered educational subsidies, employment, the right of conscientious objection, and schemes for restitution of confiscated property.

(Footnotes omitted.) It is not difficult to see how, with this breadth of coverage, there are many circumstances in which the first guarantee in Art 26 may have independent work to do well outside the field of race discrimination. As

I have noted earlier, it is not possible to say that the effect of s 10 of the RDA is coextensive with the effect of Art 26. Further, Art 26, where it is the human right relied upon for the purposes of s 9(1), has a specific rather than a general role to play in the scheme. In s 9(1), the question whether a person's Art 26 right has been nullified or impaired will not arise unless the Court finds there is an act involving a distinction based on race. Therefore, while the reasons supporting such a finding may also support a finding that the Art 26 right has been impaired, there is ***no*** logical circularity in that sequence of findings. Not every act involving a distinction based on race will have the effect of impairing the Art 26 right – for example, it would be unlikely to do so where the actor was a private person or entity rather than a ***public*** official. Conversely, not every impairment of the Art 26 right will necessitate a finding that there was an act involving a distinction based on race because the scope of Art 26 extends beyond race to other grounds of discrimination including sex, language, religion and political opinion. Moreover, as this case illustrates, in the context of s 9(1) the component of Art 26 that is most likely to have application is equality before the law, and in particular, equality in the application of the law by ***public*** officials. That is because s 9(1) operates principally in respect of conduct. Section 10(1) operates principally in respect of laws, not conduct, and in that context the guarantee of equal ***protection*** of the law in Art 26 may produce the circularity to which Gageler J referred inMaloney (although it is unnecessary to express a concluded view on that question in this case). That difficulty does not arise in respect of s 9(1) because of the different subject matter to which the provision is directed. In the making and continuation of the emergency declaration, DI Webber was applying the law (and the legal authority conferred on him, under the PSP Act) to the people of, and on, Palm Island. All those living and working on Palm Island would be affected by the making of the declaration. All those who sought, or needed, to travel to Palm Island would be affected. The declaration, by its nature, had a global effect in relation to the area it covered. The PSP Act intends that a declaration, once made, will operate across the area it purports to cover and thus affect all persons and property within that area. The applicants and other group members had a right (or a freedom, depending on how one expresses it) under Art 26 of the ICCPR to have the law applied – in the making and continuation of the emergency declaration under the PSP Act – in a way which did not involve, or result in, any differential treatment of them because of an irrelevant attribute. It is, on the terms of s 9(1) of the RDA, unnecessary to conclude that the person exercising the power intended that differential treatment occur, because the second limb of s 9(1) can be made out either by purpose or effect. Or, in the description given by the Canadian Supreme Court, by way of "design or impact": see CN v Canada (Canadian Human Rights Commission) [1987] 1 SCR 1114 at 1138-39, Dickson CJ (quoting a description of discrimination in a Royal Commission report on equality in employment). The emergency declaration involved a number of consequences: the NOTAM and the suspension of commercial flights, the suspension of the ferry service and the evacuation of non-Aboriginal people. I have found that all those consequences were distinctions, restrictions or preferences involved in the act of making and continuing the emergency declaration, and were based on race. The declaration was also designed to facilitate and support the use of the SERT officers generally on the island. In particular, the emergency declaration was intended by DI Webber, mistakenly as it turned out, to provide a lawful basis for the entries and searches of houses without warrant and the arrests of suspects without warrant (see [1301] above). The applicants' right (in common with the other group members) to have the discretion in s 5 of the PSP Act exercised in respect of them, and their community on Palm Island, in the same way it would be exercised in respect of any other community in Queensland in similar circumstances, is a right guaranteed by Art 26 of the ICCPR. The applicants (in common with other group members) had a right that they, and the members of their community, would be equal before the law of Queensland when the law was applied by a ***public*** officer so as to impose a series of coercive, intrusive and restrictive consequences on that community. The making and continuation of the emergency declaration involved distinctions and restrictions based on race that had the effect of impairing that right to equality before the law of Queensland. That is because the declaration was made and continued in circumstances where it would not have been made and continued if a different, non-Aboriginal community were affected by protests and fires, and it had a series of consequences which had an adverse impact only on the Aboriginal people of Palm Island, including the applicants. The enjoyment by the group members (including the applicants) of their right to the application of the law in the PSP Act to their community, on an equal footing with the way it would be applied to any other community in Queensland, was impaired by the making and continuation of the emergency declaration in the way I have described. In relation to the emergency declaration, there was ***no*** reliance by the applicants on rights such as freedom of movement (see, eg, Art 12 of the ICCPR), although the effects of the NOTAM and the suspension of ferry services may have impaired the enjoyment of such rights. Accordingly, I do not consider the application of s 9(1) in the context of those rights.

The arrests, entries and searches In relation to the arrests, entries and searches, I am satisfied that the arrests of the suspected individuals and the entries and searches of houses by SERT officers impaired the recognition, enjoyment and exercise, on an equal footing, of the rights to privacy (Art 17 of the ICCPR) of the applicants and the subgroup members. Since I have found the arrests, entries and searches were unlawful, that is sufficient for an impairment (and probably a nullification) of the rights of the applicants and the subgroup members under Art 17 of the ICCPR. Even if the conduct were not unlawful, I am satisfied in any event that the use of SERT officers to conduct the arrests, entries and searches impaired the recognition, enjoyment and exercise, on an equal footing, of the rights of the applicants and the subgroup members to be free of any arbitrary interference with their privacy, family and homes. In making this finding I adopt, as I have explained at [1280]-[1282], a construction of arbitrariness which includes lack of proportionality to the ends sought, and lack of justification. At the time of the arrests, entries and searches, there were ***no*** present, or even recent, threats to ***public*** order and safety. There was ***no*** reasonable or objective basis to believe any of the suspects would be armed, and the only information available was speculative, stereotyped and generalised suspicions conveyed by DS Robinson. A 13-year-old boy was amongst the suspects to be arrested in this orchestrated, military-style operation. It was known there were likely to be innocent women and children in most of the houses. There were other less drastic and obviously available methods of arrest available in relation to all the suspects, given ***no*** one could leave the island and this was a very small community. The means chosen were violent and invasive. They resulted in a reasonable apprehension by the occupants of the houses that their lives and safety were imperilled in circumstances where the alleged offending was historic and not contemporaneous. All these features also apply to the persons who were arrested and to the tasering of Mr Wotton. The use of the SERT to conduct the entries, searches and arrests was disproportionate and lacked justification, and was carried out to serve other, inappropriate, punitive and race-based, objectives. I am satisfied that the conduct of the QPS in using SERT officers in this way substantially damaged the sense of safety and wellbeing the applicants and the subgroup members were entitled to enjoy in their own homes, and in their private lives. It was an arbitrary interference with their privacy, family or home. I do not consider that the arrests can be characterised as a "service" to the persons being arrested for the purposes of Art 5(f) of the ICERD. As Sully J held in the passage of Russell [2001] NSWSC 745 extracted at [603] above, an arrest might be characterised as a service provided to the community as a whole. Nevertheless, as Yates J held in Robinson at [168]-[169], it cannot be characterised as a service provided to the person being arrested, nor to persons in the vicinity who are affected by the police operation. For those reasons, I find that the right in Art 5(f) has ***no*** application in respect of the arrests, entries and searches. I am satisfied that the arrest of Mr Wotton by A/S Kruger, and his tasering as part of that arrest, impaired the recognition, enjoyment and exercise, on an equal footing, of his right to liberty and security of the person. He was not only tasered, but he was handcuffed and shackled. The content of Art 9(1) of the ICCPR and that of Art 5(b) of the ICERD ***protect*** against interference with bodily integrity, against deprivation of liberty, and against a range of unwarranted and intrusive treatments while a person is detained. In my opinion, the way Mr Wotton was treated was disproportionate and deliberately harsh. I have ***no*** doubt he was being punished by QPS officers for being the perceived ringleader in what they saw as an uprising of Aboriginal people against police. Article 9(1) is engaged if arrest or detention is unlawful, and if arrest or detention is arbitrary. Both aspects are satisfied in relation to Mr Wotton's arrest. Article 5(b) ***protects*** "security of person" and bodily integrity. As I have found at [703] above, it is engaged if arrest or detention is racially discriminatory. I have found the first limb of s 9(1) to be satisfied in relation to Mr Wotton's arrest. Therefore, his right to security of person and bodily integrity under Art 5(b) was also impaired. The decision to use SERT to effect the arrests (and entries and searches) was made, on the evidence, before SERT was deployed to the island, although SS McKay was only told about the nature of his teams' tasks once he and his teams arrived on the island. DI Webber's evidence made it clear he knew, and understood, that when he made the emergency declaration it could and would trigger the deployment of SERT (see [1212] above). His written memorandum to A/C McDonnell expressly states (see [1222] above) SERT would undertake the task of assisting investigators to locate and detain wanted persons by "tactical methods" which I find is a reference to the kind of methods in fact used by SERT. This use of SERT was, on the evidence before the Court, decided upon by DI Webber, Inspector Underwood and Inspector Kachel as the three officers DI Webber identified in his evidence (see [1228] above) as "in charge" and working on the action plan for SERT. On the evidence it was approved by DC Conder as the person who subsequently signed the authorisation form (see [337] above). Punishment, subjugation, a show of force – these were all intended objectives of the use of SERT. The methods used to arrest Mr Wotton and the other suspects were without justification, disproportionate and, as I have

found, adopted for inappropriate objectives. The arrests had the character of arbitrariness described by the Full Court in Al Masri: see [701] above.

Other rights As to the other rights pleaded in [316]-[320] of the third further amended statement of claim, being the right to enjoy culture under Art 27 of the ICCPR and the rights to social services and participation in cultural activities under Arts 5(e)(iv) and 5(e)(vi) of the ICERD, I do not consider any of those human rights were applicable to the circumstances where I have found the first limb of s 9(1) to be made out. The content of those rights is simply too far removed from the effects of the police conduct I have found proven by the applicants. In relation to some rights (for example, the right to enjoy culture), the applicants failed to prove how that right was exercised on Palm Island at or about the time of the events in question and how it was impaired or nullified.

Summary of conclusions

Conclusions on the applicants' claims of contraventions of s 9(1) I have found that the applicants have not made out their claims under s 9(1) of the RDA with respect to their allegations dealing with the following matters:(1) the involvement of DS Robinson in the investigation into Mulrunji's death (see [898] above);

(2) failures by the QPS to consider the "cultural needs" of the Palm Island community in the aftermath of Mulrunji's death (see [1010], [1016] and [1018] above);

(3) delay in notifying Mulrunji's family of his death (see [1024]-[1027] above);

(4) the handling of the autopsy report (see [1095] above);

(5) delay in completing the emergency declaration certificate (see [1093] above) and the level of detail in the particulars in the certificate (see [1095] above);

(6) 'disrespectful behaviour' or a 'militaristic presence' of QPS officers on Palm Island in the week following Mulrunji's death (see [1255] and [1268] above);

(7) the formation of the action plan to arrest suspects following the protests and fires on 26 November 2004, the preparation of a list of suspects, and the failure to obtain warrants for the arrests (see [1274] above); and

(8) arbitrary conduct of SERT officers during the entries and searches of homes and the arrests of subgroup members (see [1277] above). The claims I have found proven are summarised at [1540] below.

Findings on common questions: group members The questions common to the claims of the group members are set out in the further amended originating application. I summarise my findings here, with appropriate cross references back to my reasons. Whether the investigation by members of the Queensland Police Service into the death of Mulrunji lacked independence, did not comply with the Queensland Police Service's Code of Conduct or the Queensland Police Service Operational Procedures Manual and/or was otherwise flawed. Answer: The investigation did lack independence, and impartiality, in the ways I have found at [1028]-[1032] above. I have not found the compliance or non-compliance with either the Code of Conduct or the OPM, in and of themselves, to be relevant to whether there was a contravention of s 9(1) of the RDA. Whether the review by members of the Queensland Police Service's Investigation Review Team of the investigation into the death of Mulrunji failed to comply with the Queensland Police Service's Code of Conduct or the Queensland Police Service Human Resources Management Manual and/or was otherwise flawed. Answer: This matter was not the subject of final submissions by the applicant. I do not find any allegations about insufficiencies of the IRT Review to have been established. Whether the declaration of the existence of an emergency situation on Palm Island was made unreasonably and/or unlawfully. Answer: The emergency declaration had a lawful basis at the time it was made until (as an outer limit) the early morning of 27 November 2004. Its continuation until the morning of Sunday, 28 November 2004 had ***no*** lawful basis, as there was nothing which could be characterised as an "emergency situation" after, at the latest, early in the morning of 27 November 2004. The emergency situation was continued to

facilitate the use of SERT officers to apprehend suspects and to enter and search houses without warrant. This was not a lawful reason for the continuation of the emergency declaration under the PSP Act. Whether members of the Queensland Police Service subjected the Applicants and group members to arbitrary and unlawful interference with their security, liberty, privacy, family and home, between 26 and 28 November 2004. Answer: Yes, as to the arrest of the first applicant, and the entry and search of the house of the second applicant, and the entry and search of the house in which the third applicant was present and living with the first applicant. The first applicant's arrest was unlawful for the same reasons as those set out by the Court of Appeal in Bulsey. Therefore, the entries and searches had ***no*** lawful basis. The use of SERT officers was arbitrary in the sense that it was unjustified and disproportionate. This question is not applicable to group members in general. Whether members of the Queensland Police Service responded unreasonably and/or unlawfully to the riots on Palm Island in November 2004. Answer: I have found the use of SERT officers to effect the arrests of the first applicant and subgroup members, and to enter and search the houses of the applicants and subgroup members, was disproportionate and unnecessary. Whether any or all of the acts omissions or practices described in the claims in paragraphs 1, 2 and 3 above: (a) involved a distinction, exclusion, restriction or preference based on race, colour, descent or ethnic origin;

(b) had the purpose or effect of nullifying or impairing the recognition, enjoyment or exercise, by the Applicants and group members, on an equal footing of any human right or fundamental freedom in the political, economic, social, cultural or any other field of ***public*** life; and/or

(c) constituted unlawful discrimination for the purposes of the AHRCA. Answer: the conduct of QPS officers that I have set out in [1028]-[1032], [1096]-[1100], [1196]-[1200] and [1458]-[1462] above contravened s 9(1) of the RDA and constituted unlawful discrimination for the purposes of the AHRC Act. The first respondent is liable pursuant to s 18A of the RDA for their conduct. Whether the Applicants and group members are entitled to any and, if so, what relief under s 46PO of the AHRCA. Answer: the applicants and group members are entitled to the declaratory relief I have set out at [1545] below. The applicants are entitled to damages in the sums I have set out at [1683]-[1685], [1695] and [1724]-[1725] below. The conduct pleaded to aggravate the damage should not result in any orders for aggravated damages or damages to the applicants. The Court has ***no*** power to award exemplary damages under s 46PO. Whether any orders should be made in relation to an ***apology*** will be determined after the receipt of further submissions as indicated at [1597] below.

Findings on common questions: subgroup members The questions common to the claims of the subgroup members are set out in the further amended originating application. The questions, and my answers to them, are as follows. Whether the arrests of the First Applicant and some of the sub-group members in the course of the Raids without warrant were unlawful. Answer: The arrests of the first applicant, and those subgroup members who were arrested, were unlawful on the basis set out by the Court of Appeal in Bulsey, except for the arrests of William Blackman Senior and Solomon Nona. Whether the entry into the dwellings of the Applicants and the sub-group members in the course of the Raids were unlawful. Answer: Given there was ***no*** lawful basis for the arrests of the first applicant and the subgroup members who were arrested, and ***no*** independent source of lawful authority was otherwise identified, the entry and searches of the houses of the subgroup members was also unlawful. Whether the Applicants and sub-group members are entitled to any and, if so, what relief under s 46PO of the AHRCA and/or at common law. Answer: I have found QPS officers contravened s 9(1) of the RDA in the way I have set out at [1028]-[1032], [1096]-[1100], [1196]-[1200] and [1458]-[1462] above, in relation to the applicants, the subgroup members and the group members. The first respondent is liable under s 18A of the RDA for their conduct. The applicants and subgroup members are entitled to the declaratory relief I have set out at [1545] below. Subject to any submissions received on the potential common questions identified in the section below, the subgroup members (those who were arrested, and those who were present in or around the houses that were entered and searched) may be entitled to damages under s 46PO, to be assessed in accordance with these reasons. The conduct pleaded to aggravate the damage should not result in any orders for aggravated damages in relation to the applicants. The Court has ***no*** power to award exemplary damages under s 46PO. Whether any

orders should be made in relation to an ***apology*** will be determined after the receipt of further submissions as indicated at [1597] below.

Potential further common questions Aside from Mr William Blackman Senior, whom I deal with below, there is little evidence before the Court about the individual circumstances of the arrest of the members of the subgroup, namely Garrison Sibley, Russell Parker Senior, David Bulsey, John Clumpoint, Solomon Nona, Lance Poynter, Shane Robertson, Richard Poynter, Russell Parker Junior and Robert Nugent. The applicants submit:The Applicants do not allege that breaches of the rights of the Sub-Group can be established based on the pleaded facts and the evidence adduced at trial. However, as the SERT raids were conducted systematically and with a consistent methodology, the Court's findings of law in relation to the particular circumstances of the Applicants will be common to the claims of the Sub-Group. The individual facts of each Sub-Group member's case will then need to be considered and determined. The respondents' submissions in respect of the rights of subgroup members proceed on that basis. In my opinion, the applicants' submission directs attention to other common questions that are not identified in the further amended originating application, but which clearly arise from the applicants' pleadings and submissions, from the evidence led at trial and what was contested by the respondents, and from the findings I have made in these reasons. I consider that the following further common questions, and answers based on my findings, arise:(a) Question: What methods and appearance did SERT officers adopt at houses other than the applicants? Answer: The evidence demonstrates that SERT officers had the same appearance and adopted the same methods and the same tactical response at each of the houses of subgroup members they attended, as set out at [351] above, as they used at the houses of the applicants.

(b) Question: Were the arrests of the subgroup members lawful? Answer:***No***. Aside from the arrests of William Blackman Senior and Solomon Nona, all of the arrests were unlawful.

(c) Question: Were the entries and searches of houses other than the applicants' houses unlawful? Answer: Yes. All of the entries and searches of the houses were unlawful.

(d) Question: Did the use of SERT officers impair or nullify the recognition, enjoyment or exercise, on an equal footing, of subgroup members' human rights under Art 17 of the ICCPR? Answer: Yes. Given the appearance, methods and tactics of SERT officers were the same at each house they attended, the use of SERT to effect arrests of the members of the subgroup and the entries and searches of the houses identified was an arbitrary interference with the rights of the subgroup members to family, privacy and home under Art 17 of the ICCPR, as I have determined the concept of arbitrariness should be construed. It was also an unlawful interference for the purposes of Art 17. I do not consider the findings in (a), (c) and (d) above can extend to the arrests of Russell Parker Junior and Robert Nugent at Wallaby Point on 29 November 2004. While I consider these are further common questions, and that they can on the basis of my findings be answered in the way I have set out, I propose to give the parties an opportunity to make submissions regarding whether findings in those terms address questions that are in fact common to the subgroup: see, generally, Merck Sharp & Dohme (Australia) Pty Ltd v Peterson [2009] FCAFC 26. A direction will be made accordingly. I have not made comprehensive findings about whether the arrests of the suspects other than Mr Wotton impaired the recognition, enjoyment or exercise, on an equal footing, of their human rights under Art 9 of the ICCPR and Art 5(b) of the ICERD. Those may well give rise to further common questions. I do wish to mention the treatment of Mr Blackman Senior after he was arrested. While it is not a common question, if it were necessary to make findings on his treatment I would be inclined to find the treatement did impair several of his human rights: namely his rights to liberty, security of person, and not to be subjected to inhumane and degrading treatment (Arts 7 and 9 of the ICCPR and Art 5(b) of the ICERD) by reason of the way he was locked and handcuffed in the back of the paddy wagon for several hours. The parties will also be given an opportunity to address in submissions whether further common questions (that is, beyond those I have identified) arise and can be answered on the basis of the Court's findings.

RELIEF

Conduct founding relief I have found the following conduct of QPS officers contravened s 9(1) of the RDA:(1) the inappropriate and partial treatment of SS Hurley;

(2) the treatment of Aboriginal witnesses;

(3) the conduct of DSS Kitching in relation to the autopsy report;

(4) the failure to suspend SS Hurley;

(5) the failure to communicate with Palm Islanders and defuse tensions in the intervening week between Mulrunji's death and the protests and fires;

(6) the making and continuation of the emergency declaration after the evening of 26 November 2004; and

(7) the arrests, entries and searches of the houses of the applicants and the subgroup members. Section 46PO(4) of the AHRC Act authorises the making of the following kinds of orders:If the court concerned is satisfied that there has been unlawful discrimination by any respondent, the court may make such orders (including a declaration of right) as it thinks fit, including any of the following orders or any order to a similar effect:

(a) an order declaring that the respondent has committed unlawful discrimination and directing the respondent not to repeat or continue such unlawful discrimination;

(b) an order requiring a respondent to perform any reasonable act or course of conduct to redress any loss or damage suffered by an applicant;

(c) an order requiring a respondent to employ or reemploy an applicant;

(d) an order requiring a respondent to pay to an applicant damages by way of compensation for any loss or damage suffered because of the conduct of the respondent;

(e) an order requiring a respondent to vary the termination of a contract or agreement to redress any loss or damage suffered by an applicant;

(f) an order declaring that it would be inappropriate for any further action to be taken in the matter. In addition, the Court has available to it the powers under ss 21 and 23 of the Federal Court Act, read with s 22 of that Act. The parties' submissions on damages, as to principle, authority and quantum, were somewhat cursory, and of limited assistance in that many of the propositions in them were not developed in a way which was conducive to detailed examination of the parties' competing positions.

Declaratory relief The respondents did not dispute that if the Court found any contraventions of s 9 to have been proven, declaratory relief would be appropriate. Correctly, they submitted that the form of the declarations proposed by the applicants – that "the respondents" had engaged in certain contraventions of s 9 – was not appropriate. Accordingly the declaratory relief will be in the form of declarations of specific contraventions by identified QPS officers. I have decided it is appropriate to grant a declaration concerning the State's vicarious liability pursuant to s 18A of the RDA, but that is the only declaratory relief appropriate to be made as against the State. In some instances there are allegations made against the second respondent interchangeably with individual QPS officers: see, eg, [245(e)], [246], [248], [295], [312]. The applicants did not develop submissions as to how the second respondent's liability arose, apart from general allegations that the Commissioner has the command and control of the QPS. If any separate or additional liability was intended, it has not been proven. The only substantive allegation remaining against the second respondent appears to be that in [343] of the third further amended statement of claim:Neither the First Respondent nor the Second Respondent [took] any steps to prevent its employees from performing any acts outlined above. There is a typographical error in the pleadings which I have corrected to

remove a double negative. This allegation was not developed in the evidence or final submissions of the applicants. It was not in any event made out on the evidence.

Apology The applicants seek a specific kind of ***apology***. They submit such an ***apology*** is necessary because "the Applicants' damage has been prolonged and exacerbated" by the absence of such an ***apology***. In this form, the proposition is attended with some doubt. Albeit in a different context, in Carson v John Fairfax & Sons Ltd [1993] HCA 31; 178 CLR 44 at 66, Mason CJ, Deane, Dawson and Gaudron JJ said:we have difficulty in understanding how the mere absence of an ***apology*** can aggravate damages. Whereas publication of an ***apology*** may mitigate damage, thereby reducing the harm suffered by a plaintiff in a defamation case, and so reduce the damages awarded, the failure to publish an ***apology*** does not increase the plaintiff's hurt or widen the area of publication. ***No*** doubt want of ***apology*** may be a relevant factor in establishing that a defendant is motivated by a desire to injure the plaintiff but that does not mean that want of ***apology*** itself aggravates the plaintiff's injury. Furthermore, it is of the utmost importance that juries should be instructed that any award of aggravated damages must be confined to what is truly compensation for the relevant harm and must not include any element of punitive damages. Separately, the applicants submit an ***apology*** would acknowledge the community's grievances and allow the community to move on. They make the following submissions as to the nature and form of the ***apology*** sought:The terms of the ***apology*** should include a formal recognition of the findings of this Court in these proceedings, that the Applicants and the Group Members were required to pursue this litigation because of wilful blindness of the Respondents for over 11 years and that the residents of Palm Island were entitled to appropriate levels of ***protection*** as other citizens living in Queensland and subject to the actions of the QPS.

The ***apology*** should be made in a formal, ***public*** ceremony on Palm Island by an appropriate senior politician or politicians, ideally the Premier and the Minister for Police, accompanied by the Commissioner of Police. These reflect the status and standing of the three people who went to Palm Island on Sunday 28 November 2004, after the fire.

Further, it should be published in a full page advertisement in at least The Australian, The Courier-Mail and The Townsville Bulletin on a Saturday and in the first eight pages of each paper. The respondents correctly accept that the nature of the power conferred on this Court by s 46PO(4)(b) (to make an order requiring a respondent to "perform any reasonable act to redress any loss or damage suffered by an applicant") extends to ordering a respondent to apologise to an applicant. The powers in s 23 of the Federal Court of Australia Act would also support such an order. Nevertheless, while the power to order an ***apology*** is not in doubt, courts have generally been reluctant to exercise that power under either s 46PO(4) or cognate provisions in other statutes. The applicants refer to ***no*** authorities in support of their submission that an ***apology*** order should be made. The respondents refer to the observations of Hely J in Jones v Scully [2002] FCA 1080; 120 FCR 243 at [245] that "the idea of ordering someone to make an ***apology*** is a contradiction in terms". That observation has some force and it has been followed in a number of other decisions of this Court to which the parties did not refer. In Jones v Toben [2002] FCA 1150; 71 ALD 629, Branson J said (at [106]) that "I do not consider it appropriate to seek to compel the respondent to articulate a sentiment that he plainly enough does not feel". In Jones v The Bible Believers' Church [2007] FCA 55, Conti J similarly said (at [65]) that such an order would be "inappropriate". All three of those cases dealt with claims of offensive behaviour based on race arising under s 18C of the RDA, but the approach taken by Hely J in Jones v Scully has also been followed in cases dealing with other types of discrimination. In Forest v Queensland Health [2007] FCA 1236, which dealt with disability discrimination, Collier J expressed the view (at [13]) that "a court-ordered ***apology*** serves little purpose". The Full Court allowed an appeal from her Honour's decision in Queensland v Forest [2008] FCAFC 96; 168 FCR 532 without reference to her Honour's comments regarding an ***apology***. In Poniatowska v Hickinbotham [2009] FCA 680, a sex discrimination case, Mansfield J expanded on the view that an ordered ***apology*** might be inappropriate, focusing on whether such an order would go further than was necessary to "recognise" wrongdoing and whether it would result in an ***apology*** that lacked sincerity (at [324]-[325]):I do not propose to direct that any ***apology*** should be ordered against any respondent in the particular circumstances. Ms Poniatowska has already received an ***apology*** from Ms Sharrad in respect of the June 2005 allegations, and from Mr Lotito in respect of the Lotito allegations. Although I have made adverse findings against

the respondents other than Mr A Hickinbotham and Homes, in my discretion under s 46PO(4) of the HREOC Act, I do not propose to order that any further ***apology*** be given.

There are a number of reasons for that. In the first place, in my view, the adverse findings made against the respondents in respect of the conduct concerning them individually is sufficient recognition for Ms Poniatowska of the inappropriateness of that conduct. The imposition upon those respondents, who variously denied the conduct specifically attributed to them or in some respects denied its significance, would put them in the position of requiring them to apologise for conduct which they did not accept that they had severally engaged in: see for instance the observations of Branson J in Jones v Toben [2002] FCA 1150; (2002) 71 ALD 629 at [106]; Jones v The Bible Believers' Church [2007] FCA 55 at [65]. An appeal in Poniatowska was dismissed without reference to the ***apology*** point: Employment Services Australia Pty Ltd v Poniatowska [2010] FCAFC 92. ***Apology*** orders were also considered in a handful of cases that preceded, or did not refer to, Jones v Scully. In Grulke v KC Canvas Pty Ltd [2000] FCA 1415, Ryan J held in short reasons that, while sex discrimination was made out against the employer respondent, it would not be appropriate to make an ***apology*** order under s 46PO(2)(b) because (at [4]):In my view, having regard to the fact that the respondent here is not a natural legal person but is a corporation, and the fact that I have endeavoured to compensate for loss or damage suffered by the applicant by making a pecuniary award of damages, it is inappropriate to exercise the discretion reposed in the Court by additionally ordering the making of an ***apology***. His Honour did not develop his reasoning on why it might be relevant that the respondent was not a natural legal person and his approach to that issue has not been followed in other cases. In Creek v Cairns Post Pty Ltd [2001] FCA 1007; 112 FCR 352, the applicant, an Aboriginal woman, sued a newspaper publisher in relation to a report about a decision of the Queensland Department of Family Services, Youth and Community Care to take a two-year-old Aboriginal girl out of foster care with a white family and place her into the care of the applicant, who had care of the child's two brothers and was a relative of the deceased mother of the children (at [1]). The report included a photograph of the white family in a comfortable living room and a photograph of the applicant in a bush camp with a shed or lean-to in which young children could be seen (at [4]). Kiefel J held that the applicant's complaint under s 18C of the RDA was not made out because there was ***no*** evidence to suggest race had "actuated" the respondent's decision to publish the photographs (at [28]-[29]). Her Honour nevertheless went on to consider the orders she would have made had the complaint been successful (at [33]). One of the orders sought by the applicant was an ***apology***. Kiefel J said (at [34]):It does not seem to me, after a lapse of almost four years, that an extensive ***apology*** would be particularly worthwhile with respect to the wider readership. It may however have helped to vindicate the applicant in the eyes of her own community and for that reason I would have been minded to order a short ***apology***. Her Honour also said (at [35]):A finding of contravention would have meant that the respondent had acted for racist reasons. Its failure or inability to acknowledge this and the withholding of an ***apology*** are matters to be taken into account in assessing the extent of the injury felt by the plaintiff and the compensation to be awarded to redress that. It is not in my view necessary to consider separate and additional awards of aggravated damages. I would have awarded $8,000 damages. While these comments were made in obiter, her Honour's reasoning supports the view that there may be cases in which it is appropriate for a court to order an ***apology*** for race discrimination. It also supports the view that a respondent withholding an ***apology*** may aggravate damages payable for race discrimination. There is ***no*** suggestion in her Honour's reasoning that an ***apology***, ordered together with a monetary award, could somehow constitute double compensation, although that is not to deny the force of observations such as those made by Mansfield J in Poniatowska that an ***apology*** should not be ordered where other findings and orders provide sufficient recognition of wrongdoing and sufficient redress to the complainant. In Forbes v Australian Federal Police (Commonwealth of Australia) [2004] FCAFC 95, a Federal Magistrate had made a declaration that "the Australian Federal Police" had engaged in disability discrimination against the complainant employee and ordered "the Australian Federal Police" to provide a written ***apology***: at [3]. The Full Court of this Court held that the Magistrate had erred by failing to ask whether the applicant's disability (a depressive illness) was the reason for the impugned conduct: at [70] (Black CJ, Tamberlin and Sackville JJ). At the start of their reasons, their Honours noted that "the Australian Federal Police" is not a legal person and that the Commissioner of Police is empowered by legislation to engage employees on behalf of the Commonwealth: at [4]. Their Honours therefore said at [7]:The Magistrate did not identify the source of power to direct 'The Australian Federal Police' to make an ***apology*** and the issue was not raised on the appeal. In view of the outcome of the appeal, however, it is not necessary to consider this issue further. In an article titled 'You Can't

Order Sorriness, So Is There Any Value in an Ordered ***Apology***? An Analysis of Ordered ***Apologies*** in Anti-Discrimination Cases' [2010] UNSWLawJl 16; (2010) 33 UNSW Law Journal 360, Robyn Carroll cites Grulke and Forbes as cases in which "doubts [were] expressed about the power to make an [***apology***] order ... against an entity that is not a natural person, including government authorities": at 378. That is true of Grulke, but I do not consider Forbes should be read in that way. The Full Court's comments were addressed to the fact that "the Australian Federal Police" was not a legal person. The Court made ***no*** comment on the appropriateness of ***apology*** orders generally, whether against government authorities or otherwise. It did not, for example, say that an ***apology*** order cannot be made against the Commonwealth. In Eatock v Bolt [2011] FCA 1103; 197 FCR 261, the Court found that a journalist and a newspaper publisher had contravened s 18C of the RDA by writing and publishing two newspaper articles which conveyed imputations that fair-skinned people with some Aboriginal descent who identified as Aboriginal were not genuinely Aboriginal and were pretending to be Aboriginal in order to access perceived benefits or for political reasons: see [452]-[453] (Bromberg J). The applicant sought, inter alia, an order requiring the publisher to publish an ***apology***. At [465]-[468], Bromberg J said:There is force in the contention of HWT [the publisher] that an ***apology*** should not be compelled by an order of the Court because that compels a person to articulate a sentiment that is not genuinely held. An ***apology*** is one means of achieving the ***public*** vindication of those that have been injured by a contravention of s 18C. The power granted to the Court to require a respondent to redress any loss or damage is a wide power. There are other means by which ***public*** vindication may be achieved.

Public vindication is important. It will go some way to redressing the hurt felt by those injured. It will serve to restore the esteem and social standing which has been lost as a consequence of the contravention. It will serve to inform those influenced by the contravening conduct of the wrongdoing involved. It may help to negate the dissemination of racial prejudice.

Whilst I will not order HWT to apologise, in the absence of an appropriate ***apology***, I am minded to make an order which fulfils the purposes which I have identified.

My preliminary view is that a corrective order should be made which would require HWT to publish a notice in the Herald Sun in print and online. The terms of the notice would include an introduction which referred to this proceeding and the order requiring its publication and set out the declaration made by the Court. In order to give the publication of the corrective notice a prominence and frequency commensurate with the publication of the Newspaper Articles and to facilitate it being communicated to those likely to have read the Newspaper Articles, I have in mind that the corrective order would require the publication of the notice in the Herald Sun newspaper and online, on two separate occasions in a prominent place immediately adjacent to Mr Bolt's regular column. After further submissions from the parties on the form of orders that should be made, Bromberg J said in Eatock v Bolt (***No*** 2) [2011] FCA 1180; 284 ALR 114 (at [14]):In her claim for relief, Ms Eatock sought an ***apology*** from HWT. As I said in my earlier reasons for judgment at [465], I am not persuaded that I should compel HWT to articulate a sentiment that is not genuinely held. I noted, however, that an ***apology*** is but one means of addressing the ***public*** vindication sought by those who have been injured by the contravention of s 18C. His Honour therefore ordered that a corrective notice be published instead of requiring an ***apology***: Eatock v Bolt (***No*** 2) at [17]. As with the earlier decisions to which I have referred above, the salient point to draw from his Honour's reasons is that an ordered ***apology*** may be an appropriate way of redressing loss and damage caused by racial discrimination, including by achieving "***public*** vindication" of those injured by it, but may not be appropriate where such an order would compel the articulation of a sentiment that is not genuinely held. To compel an ***apology*** of that kind is unlikely to be the most appropriate method of redressing loss and damage and achieving vindication. Apart from Jones v Scully, the parties did not refer the Court to any of these cases. Nor did they refer to De Simone v Bevacqua (unreported, Sup Ct, Vic, McDonald J, 15 September 1994), which appears to be the only Australian case in which a superior court ordered an ***apology***. In the context of a sex discrimination complaint made under the Equal Opportunity Act 1984 (Vic), McDonald J said at p 45:Having regard to the provisions of s.46(2)(c) of the Act I am of the opinion that the Board is empowered under it to order a respondent to make an ***apology*** with a view to

redressing any loss, damage or injury suffered by the complainant as a result of the act of discrimination, the subject of the complaint and found to have been established. His Honour ordered an amended form of the ***apology*** that had been ordered by the Equal Opportunity Board, removing a reference to the employer company, which was vicariously liable for the contravening conduct, not having a program to counter sexual harassment on the basis that this was not part of its liability under the Act: p 50. As I have noted, De Simone v Bevacqua has not been followed in decisions of this Court: see, esp, Forest at [13] (Collier J). However, ***apologies*** have been ordered in a number of anti-discrimination decisions at tribunal level: see R Carroll, 'You Can't Order Sorriness', which usefully summarises a number of decisions of that kind; and see R Carroll, '***Apologies*** as a Legal Remedy' (2013) 23 Sydney Law Review 317. Some state anti-discrimination statutes specifically provide power to order ***apologies***: see, eg, s 108(2)(d) of the Anti-Discrimination Act 1977 (NSW); s 209(1)(d) and (e) of the Anti-Discrimination Act 1991 (Qld). ***Apology*** orders were made pursuant to the New South Wales statute in Margan v Manias [2013] NSWADT 177, a homosexual vilification case in which the respondent was ordered to publish an ***apology*** at his expense in a quarter-page advertisement in the Sydney Star Observer; and in Russell v Commissioner of Police, New South Wales Police Service [2001] NSWADT 32, which I discuss at [600]-[604] above. A ***public apology*** was ordered pursuant to the Queensland statute in Fischer v Byrnes [2006] QADT 33, a sexual harassment case. Even in jurisdictions where relevant anti-discrimination statutes do not include a specific power to order an ***apology***, tribunals have occasionally made such an order. For example, in Falun Dafa v Melbourne [2004] VCAT 625, in which the Victorian Civil and Administrative Tribunal, acting pursuant to s 136(a) Equal Opportunity Act 1995 (Vic), ordered the Melbourne City Council to publish in three Chinese-language newspapers an ***apology*** for excluding the Falun Dafa Association of Victoria from the 2003 Moomba Parade on the basis of its political affiliations. ***Apologies*** have also been ordered by the Federal Magistrates Court of Australia in a small number of cases: see, eg, Zheng v Beamish [2004] FMCA 61, a sexual harassment claim brought under s 28B of the Sex Discrimination Act 1984 (Cth); and Oberoi v Human Rights and Equal Opportunity Commission [2001] FMCA 34, a disability discrimination case in which Raphael FM ordered the first respondent to apologise but left the wording of the ***apology*** to the President of the first respondent (the Human Rights and Equal Opportunity Commission). While the utility of ordering an ***apology*** has been questioned in a number of the decisions to which I have referred, it does not appear that a respondent's freedom of speech has been viewed as a limiting factor. In Attorney General v 2UE Sydney Pty Ltd [2006] NSWCA 349; 97 ALD 426, the tribunal had ordered two radio presenters to broadcast an ***apology*** for comments they made vilifying homosexuals. The issue before the Court of Appeal of New South Wales was whether the tribunal had jurisdiction to determine whether s 49ZT of the New South Wales Anti-Discrimination Act, which prohibited homosexual vilification, should be read down to comply with the implied freedom of political communication identified in Lange [1997] HCA 25; 189 CLR 520. In circumstances where s 114 of the Act provided that "upon filing in the Supreme Court [the Tribunal's ***apology*** order] operates as a judgment of the court" (at [64] (Spigelman CJ)), the Court of Appeal held that the High Court's reasoning in Brandy v Human Rights and Equal Opportunity Commission [1995] HCA 10; 183 CLR 245 applied to state tribunals. The Court therefore made a declaration that the tribunal had ***no*** jurisdiction to determine whether s 49ZT should be read down because to do so would be an impermissible exercise of federal judicial power by the tribunal: see [76]-[80] (Spigelman CJ), [114] (Hodgson JA), [118] (Ipp JA, agreeing with Spigelman CJ and Hodgson JA). However, the Court made ***no*** comments about the ***apology*** order itself. There is ***no*** suggestion in their Honours' reasons that an ***apology*** order, made by a tribunal or a court, might be inconsistent with the implied freedom. There is at least one case in which it was held that specific performance of an agreement to apologise should not be ordered because it would interfere with freedom of expression: Summertime Holdings Pty Ltd v Environmental Defender's Office Ltd (1998) 45 NSWLR 291, which also involved a radio station. There, Young J said at 297:Even though there is ***no*** Australian law which governs freedom of speech in the same way as the Constitution of the United States of America, I consider that it needs to be an exceptional case before the courts should exercise their discretion to grant an order like specific performance to compel a person to give an ***apology***. I appreciate that in the instant case the form of the ***apology*** had, with slight exception, been settled, and that the first three defendants were contractually obliged to give it, but it still seems to me that I should not, in the absence of some special reason, compel the defendants to utter the words. In this case, the respondents made ***no*** contention that any principle of freedom of speech should limit the Court's power, or guide its discretion, to order an ***apology*** under s 46PO(4). As the matter does not arise for decision, I say ***no*** more about it, other than to observe that in Canada it has been recognised that an ordered ***apology*** will not necessarily infringe a defendant's right to freedom of expression under s 2(b) of the Canadian Charter of Rights and Freedoms. In Moore v Canadian Newspapers Co Ltd, 1989 CarswellOnt 423; 60 DLR (4th)

113, Rosenberg J acknowledged that an ordered ***apology***, which his Honour did not make in that case, would interfere with that right but that (at 117):Notwithstanding this interference, the court could make such an order as being a reasonable limit prescribed by law under s. 1 of the Charter since it can be demonstrably justified in a free and democratic society that the court should have the right to determine when such an ***apology*** is required. The court would be in effect considering the same issues in determining whether to make the order as another court would be considering in determining whether or not the right to make such an order is demonstrably justified in a free and democratic society: Slaight Communications Incorporated v. Davidson, decision of the Supreme Court of Canada, heard October 8, 1987, judgment rendered May 4, 1989 (unreported) [since reported 59 D.L.R. (4th) 416, 89 C.L.L.C. 14,031, 93 N.R. 183]. Slaight Communications Incorporated v Davidson (1989) 59 DLR (4th) 416 dealt with an order for a corrective notice rather than an ***apology***. The Supreme Court of Canada upheld an order that the defendant employer give the complainant employee a letter of recommendation with correct descriptions of his sales targets and results and a statement that an adjudicator had found the defendant had unjustly dismissed the employee. ***No apology*** was required, however. In Perera v Canada [1998] 3 FC 381; 158 DLR (4th) 341 at[27], the Federal Court of Appeal refused to strike out a claim for an ***apology*** order, citing Slaight but not Moore, but with reasoning substantially identical to that in Moore. However, there does not appear to be any reported case in which a Canadian superior court actually ordered an ***apology*** and academic commentary indicates there is resistance to doing so in the criminal jurisdiction: see JC Kleefeld, 'Thinking Like a Human: British Columbia's ***Apology*** Act' (2007) 40 University of British Columbia Law Review 769 at 793-74. Other foreign courts have also shown reluctance to order ***apologies***, including in anti-discrimination cases. In Ma Bik Yung v Ko Chuen [2001] HKCFA 56; [2002] 2 HKLRD 1, a disability discrimination case, the Hong Kong Court of Final Appeal considered whether an ***apology*** order should be made against an unwilling defendant. Section 72(4)(b) of the Disability Discrimination Ordinance, Cap 487 (HK) was in terms almost identical to s 46PO(4)(b) of the AHRC Act:Without limiting the generality of the power conferred by subsection (3), the District Court may –

...

(b) order that the respondent shall perform any reasonable act or course of conduct to redress any loss or damage suffered by the claimant; Li CJ, with whom the other members of the Court agreed, did not doubt that s 72(4)(b) gave the Court power to order an ***apology***, stating at [30]:The circumstances of the cases brought under the Ordinance would be of an infinite variety. With the wide range of available remedies, it is for the court to fashion the remedies that are appropriate for the case in question. However, his Honour went on to say that such an order should be made against an "unwilling defendant" only in rare circumstances (at [52]):Before an order for an ***apology*** could be made against an unwilling defendant, s.72(4)(b) requires the court to be satisfied that an ***apology*** is a reasonable act for the defendant to perform in the circumstances of the case in question. The requirement of "reasonable" in the provision may not necessarily lead to the conclusion that an order for an ***apology*** can never be made against an unwilling defendant. With an unwilling defendant, it may well be that an ***apology***, which will be an insincere one, would usually not be a reasonable act for him to perform. In this context, it must be borne in mind that there are many other remedies at the court's disposal which could be considered. But there may be rare cases where the court could be satisfied that an ***apology***, albeit insincere, would be a reasonable act for the defendant to perform. Further, in these rare cases, enforcement could not be said to be futile or disproportionate and contrary to the interests of the administration of justice. The circumstances in these rare cases, including the degree of gravity of the defendant's unlawful conduct as well as the nature and extent of the plaintiff's loss and damage, would have to be exceptional. Under s.72(4)(b) the court does have the power to order an unwilling defendant to make an ***apology***. It is in these rare cases that the court could consider exercising this power against an unwilling defendant.

(Emphasis in original.) Li CJ also discussed De Simone v Bevacqua in the course of his reasons, noting that the question whether an ***apology*** order should be made against an unwilling defendant was not specifically considered in that case (at [55]). In my opinion, the principles articulated by Li CJ in Ma Bik Yung are consistent with those articulated by Bromberg J in Eatock v Bolt and the other decisions of this Court to which I have referred. The principal reason tending against ordering an ***apology*** in relation to an unwilling respondent is that the court has other remedies at its disposal that could better achieve the objectives of such an order. Nevertheless, in some

cases it may well be appropriate to order an ***apology***. With respect, I agree with Li CJ that the gravity of the contravening conduct is an important factor to consider when determining whether such an order should be made in a particular case. That factor is likely to affect an assessment of both the extent to which the order will be appropriate to achieve redress and vindication in light of other remedies granted and whether the order is justified. In some jurisdictions with civil law traditions, ***apology*** orders appear to be more readily available than in common law jurisdictions. Such orders are made with varying degrees of frequency in countries including Japan, China, and the Netherlands: see A Zwart-Hink et al, 'Compelled ***Apologies*** as a Legal Remedy: Some Thoughts from a Civil Law Jurisdiction' [2014] UWALawRw 17; (2014) 38 University of Western Australia Law Review 100. In Le Roux v Dey [2011] ZACC 4; [2011] 3 SA 274, the Constitutional Court of South Africa ordered an ***apology*** in a defamation case involving an offensive image of a deputy principal created by the defendant schoolchildren. After noting (at [195]) that "[t]he present position in our Roman Dutch common law" was that an ***apology*** could not be ordered in such a case, Froneman J and Cameron J (with whom the other members of the Court agreed) expressed the justification for reversing that position as follows (at [200]):Respect for the dignity of others lies at the heart of the Constitution and the society we aspire to. That respect breeds tolerance for one another in the diverse society we live in. Without that respect for each other's dignity our aim to create a better society may come to naught. It is the foundation of our young democracy. And reconciliation between people who opposed each other in the past is something which was, and remains, central and crucial to our constitutional endeavour. Part of reconciliation, at all different levels, consists of recantation of past wrongs and ***apology*** for them. That experience has become part of the fabric of our society. The law cannot enforce reconciliation but it should create the best conditions for making it possible. We can see ***no*** reason why the creation of those conditions should not extend to personal relationships where the actionable dignity of one has been impaired by another. The Constitutional Court's emphasis on reconciliation is one which may be a relevant factor in the context of the current proceeding (as a recantation of past wrongs and an ***apology*** for them). While there are many important differences between the experiences of Aboriginal people in Australia and those of black people in South Africa, what is today required of police and other ***public*** officials in South Africa to combat the legacy of apartheid, and the judicial language used to describe the wrongs of the past, is not inapposite for the history of Palm Island. The findings I have made are that lack of respect and understanding, a desire to control and subjugate, and a difficulty treating Aboriginal people equally were all features of the conduct of QPS officers on Palm Island between 19 and 28 November 2004. It is worthwhile referring to the judicial language of the Constitutional Court of South Africa in several decisions. In The Citizen 1978 (Pty) Ltd v McBride [2011] ZACC 11; 2011 (4) SA 191, Ngcobo CJ said (at [144]-[145]):We have recently emerged from a legal order that was founded on racism and characterised by gross discrimination against black people, in particular, black Africans. It sought to dehumanise its victims and strip them of their human dignity by relegating them to an inferior status.

... what was obnoxious with discrimination was not merely the physical separation it promulgated, but its basic premise. It was premised on the inferiority of black people. They had ***no*** dignity worth ***protecting***. Thus, it was defamatory to call a white man black. Our Constitution rejected this. Under our new constitutional order, the recognition and ***protection*** of human dignity is a foundational value.

(Footnotes omitted.) In Bertie Van Zyl (Pty) Ltd v Minister for Safety and Security [2009] ZACC 11; 2010 (2) SA 181, Mogkoro J said of police harassment that formed part of the background to the case (at [77]):This sort of conduct is reminiscent of the abuse of power and police harassment of people and communities which were rife in our past. In a constitutional democracy, based on the values of equality, human dignity and freedom, the harassment to which the applicants were subjected was most regrettable. In ***public*** service where policing must have regard to the values of ubuntu, the conduct of the police was indeed disappointing, and, frankly sanctionable.

(Footnote omitted.) Langa J in S v Makwanyane [1995] ZACC 3; 1995 (3) SA 391 at [224] explained that the concept of ubuntu, which is referred to but not defined in the South African Constitution, relates to the recognition of "a person's status as a human being, entitled to unconditional respect, dignity, value and acceptance from the members of the community such person happens to be part of". Acknowledging the dignity and equal value of Aboriginal people living on Palm Island, acknowledging their continuing sense of injustice about the events in November 2004, and recognising the failures in the QPS response, including its racial basis, is capable of being, as

the South African Constitutional Court put it, a "recantation of past wrongs" and of real benefit in circumstances such as the present one. Drawing these authorities together, I consider that in the current proceeding the critical question is whether a court-ordered ***apology*** is an act which the Court is satisfied would redress damage suffered by the applicants. Whether more appropriate methods of achieving that redress are available is also relevant. The first, second and third applicants rely on evidence from Mr Ralph to the effect that an ***apology*** was capable of having "beneficial psychological effects" for each of the applicants, although in his written report he had only mentioned an ***apology*** as beneficial for Mrs Agnes Wotton. Mr Ralph described an ***apology*** as a "step towards healing". That description is resonant of the 'reconciliation' in the Constitutional Court's decision of Le Roux. Although in cross-examination Mr Ralph began to make a concession that any ***apology*** should not cover QPS conduct connected with Mr Wotton's criminal convictions, when he was asked specifically about Mr Wotton's arrest, this was his answer:The parties and the community have a sense that an injustice has been done in terms of the investigation into the death in custody and the events that followed on from that, as well, have been cause – further cause for considerable grievance in terms of the response of the Queensland Police Service and the events that have followed on from there. Some acknowledgment that – that what happened was –should not have happened and some expression of regret or remorse, combined into an ***apology***, as I said, would be a process that would allow the community and – or the parties and community members to feel that their grievances have, to some extent, at least been acknowledged as being correct and allow them to move on from that point. When pressed to explain how an ***apology*** would sit against the kind of specific findings of contraventions of s 9 which the applicants sought to have the Court make, Mr Ralph said:Certainly an – if it is found that the parties and the community have been – have experienced racial discrimination, then I think that is certainly something that there needs to be an ***apology*** for. The sense of injustice that the parties and the communities have go way back to the police investigation and findings that had been made in other tribunals that have not been acted upon. And there is this sense that they have that that – their concerns, their grievances have simply been ignored and ignored on the basis of racial grounds. The evidence in this proceeding supports the opinion expressed by Mr Ralph and, with one qualification, I accept it. The qualification is that I am satisfied on the evidence that individuals who gave evidence in this proceeding still have the sense of grievance and injustice they had in November 2004. They still feel the QPS and its officers have not been held accountable for the way Mulrunji's death was dealt with, nor for the disproportionate reaction to the protests and fires. I am satisfied on the evidence that a sense of grievance and injustice was much more widely felt across the Palm Island community in November 2004. Does it continue across the Palm Island community, or have those less directly affected by the events of November 2004 "put the matter behind them", to resort to a platitude? If I were satisfied that the community ***no*** longer felt a sense of grievance, I would be unlikely to order any relief centred on accountability and ***public*** statements. The view I take of the function of an ***apology*** by the Commissioner is a broader ***public*** function directed to the Aboriginal community on Palm Island, of which the applicants are members. In many of the cases about ***apologies***, the court has been dealing with an individual applicant and an individual or corporate respondent. ***No*** exercises of ***public*** power were involved in those cases. I accept that, in those circumstances, the unwillingness of the contravener, and therefore the prospect of an insincere statement, is a material consideration. That is not this case. None of the cases deal with circumstances such as those in this proceeding. The issue is, like many others in this proceeding, a novel one. It is difficult to ascertain whether there remains a community-wide sense of grievance and injustice about the events in 2004. The applicants did not seek to establish any such proposition through calling a large number of witnesses to that effect. As I have noted, there were many individuals who were relevant witnesses for the applicants who were absent. The events occurred approximately 12 years ago. That said, there are plausible explanations for why the claims in this proceeding have taken so long to be expressed and determined, not the least of which is the long process experienced by many subgroup members, and the Wotton family in particular, of finalising criminal charges against them arising out of the protests and fires. Further, the group members are identified in the pleadings as "Indigenous people resident on Palm Island on 19 November 2004 who remained ordinarily resident on Palm Island until 25 March 2010", the latter date being the date on which the applicants lodged a written complaint with the Commission. Therefore the group members whose sense of injustice and grievance is to be redressed by the Court's orders are those who come within the class defined in the pleadings. On balance, I am sufficiently persuaded persons within that class continue to be affected by the events of November 2004. It is clear Mulrunji was widely known and liked on the island. It is clear that connections – of family or friendship or both – to the 18 families whose houses were entered and searched exist widely across the majority of class members. There were also others involved in those events – members of the local Council, and concerned community members who

attended meetings – who are likely still to be on the island, and whose families are likely also to fall within the class as pleaded. The need for an ***apology***, and the nature of any ***apology***, as Mr Ralph implies, is context dependent. In any context, an ***apology*** is a way of recognising wrongdoing (large or small, moral, personal, social, ***public*** or legal) and acknowledging hurt and grievance caused or felt in others because of that wrongdoing. An ***apology*** is intended, as Mr Ralph said, to be a step towards healing. Or, as the Constitutional Court put it in Le Roux, a step towards reconciliation. It may well be the case that the observations made in cases such as Jones v Scully and Eatock v Bolt are apposite for controversies which arise between private parties. If an ***apology*** is seen as some kind of admission of personal responsibility or wrongdoing, or a statement of personal regret, then in a dispute between private individuals (or entities) it may well be inappropriate to force an individual to say something she or he does not really mean. Between private individuals, sincerity has a different and more immediate quality, in the sense of an individual taking personal responsibility for wrongdoing and acknowledging hurt or grievance caused to or felt by others. Where ***public*** entities or office holders are concerned, and especially where government is concerned, the situation is quite different. Responsibility is not, in those circumstances personal: it is institutional. The individuals who occupy office in government, or the apex of a ***public*** entity, do so in a representative capacity, and for ***public*** not private purposes. They exercise ***public*** power, and an ***apology*** by them is an exercise of ***public*** power. The ***apology*** is given as an exercise in responsible and representative government. It is not a statement of personal regret, and personal sincerity is not such a key ingredient, although ***no*** doubt it is desirable. An ***apology*** given on behalf of a ***public*** entity or by an office holder may be given by an individual who had nothing at all to do with the contravening conduct. Nevertheless, there remains the question about the appropriateness of ordering a ***public*** office holder to give an ***apology***. The premise underlying an order is that the ***public*** office holder will not, of her or his own accord, apologise. There is something of an analogy with the difference between an undertaking and an injunction, although the analogy is imperfect because an injunction is a remedy to enforce legal rights. Once the findings of the Court have been made, and published, one possible course is for the Court to require, by a court order, that a choice be made whether or not to apologise. In this proceeding, if there were to be an ***apology***, in my opinion it should come from the second respondent, although vicarious liability lies with the first respondent. As the respondents have admitted in their defence, the occupant of the office of Commissioner of Police is the individual with responsibility for the efficient and proper administration, management and functioning of the Queensland Police Service. Part of that function is to ensure compliance with the requirements of all Acts and laws binding members of the QPS, and with directions of the Commissioner. The Court has found that the conduct of those QPS officers in charge of the investigation into Mulrunji's death, and those having some command responsibility for policing functions on Palm Island between 19 and 29 November 2004, contravened s 9 of the RDA, a law which binds each and every QPS officer in the performance of her or his functions as a police officer. On the evidence, one of the attributes found wanting in the QPS by the Palm Island witnesses, and those who spoke or were interviewed in the contemporaneous video footage, was accountability. It is appropriate, in order to redress the damage done by the way QPS officers conducted themselves on Palm Island, for the group members to see the QPS having to be accountable for what the Court has found occurred. Accordingly what I propose to do is to direct the second respondent to consider whether, on the basis of the findings of the Court, it is appropriate to apologise on behalf of the QPS to the community on Palm Island. If the second respondent considers it is appropriate, the second respondent would then issue a ***public apology***. The terms of that ***apology*** are a matter for the second respondent. I would be inclined to order it be published on Palm Island, in The Australian, The Courier-Mail and The Townsville Bulletin on a Saturday and in the first eight pages of each newspaper, and on the QPS website. If the second respondent, having considered the Court's reasons, decides it is not appropriate to apologise, then the second respondent will be directed to publish reasons for that decision and those reasons are to be published in the same places as the ***apology*** would have been published. In that way, the Commissioner must take responsibility for deciding whether an ***apology*** is appropriate, and what that ***apology*** should say in light of the Court's findings. The Commissioner will be accountable publicly for that decision. As I have said, the Court will not however impose an ***apology*** on the Commissioner. The Commissioner must sincerely and genuinely decide to offer one; or explain why he will not. The terms of the ***apology*** sought by the applicants would not be appropriate under any circumstances. This Court has made ***no*** findings about the "wilful blindness" of the State of Queensland and the Commissioner of Police, nor did the applicants' pleadings require any such findings to be made. Further, the references in the applicants' proposed wording to Palm Islanders being entitled to "appropriate levels of ***protection***" from the QPS do not sit comfortably with the majority of the applicants' allegations concerning contraventions of s 9, which are not about the ***protection*** of residents on Palm Island. Another option I am prepared to consider is that an order be

made for the Commissioner to make a ***public*** statement about the Court's findings in this case in lieu of an ***apology***, but to be published in the same way as the ***apology*** would have been published. The statement could be in similar form to that ordered inEatock v Bolt (***No*** 2), adapted to the circumstances of this case. Since the parties made very short submissions on the matter of an ***apology***, and I have considered it at length, it is appropriate the parties have an opportunity to make further submissions on the matters I have raised. There will be directions accordingly.

Compensation The parameters of this proceeding as a class action mean the only orders for compensation which the Court is considering at this time are orders in favour of the first, second and third applicants. It is apparent from the evidence and the findings I have made that other individuals, especially those within the subgroup, may have independent claims for compensation. There was ***no*** real dispute between the parties about the applicable principles to an order for compensation under s 46PO(4) and both parties relied on the Full Court's decision in Richardson v Oracle Corporation Australia Pty Ltd [2014] FCAFC 82; 223 FCR 334, and the cases there referred to. The power to order compensation for loss and damage suffered "because of" the conduct of a respondent is a statutory power. It is conferred in the context of a legislative scheme dealing with unlawful discrimination in relation to attributes identified in the four pieces of federal legislation picked up the AHRC Act. As the other subsections in s 46PO make clear, unlawful discrimination is proscribed in several different fields of activity which give rise to the need for different kinds of remedies. Unlawful discrimination may occur in a setting which aligns its consequences closely with the consequences of common law causes of action such as breach of contract (for example, discrimination by termination of employment). Or it may occur in a setting which aligns its consequences with common law causes of action such as intentional torts (for example, physical sexual harassment). In other circumstances, the statutory cause of action for unlawful discrimination has ***no*** close relative in the common law. That is why it is important to recall that it is the words of the statute which provide the criterion for such an order, not common law principles: see Qantas Airways v Gama [2008] FCAFC 69; 167 FCR 537 at [94] (French and Jacobson JJ). In Richardson at [26], Kenny J relied upon the observations of Gleeson CJ in I & L Securities Pty Ltd v HTW Valuers (Brisbane) Pty Ltd [2002] HCA 41; 210 CLR 109 at [26] where his Honour considered the nature of orders for damages under s 82 of the Trade Practices Act 1974 (Cth). At the time, s 82(1) provided:A person who suffers loss or damage by conduct of another person that was done in contravention of a provision of Part IV or V may recover the amount of the loss or damage by action against that other person or against any person involved in the contravention. Gleeson CJ said at [25]-[26]:the possible existence, in different circumstances, of those and other complications directs attention to the kinds of problem inherent in the word "by" in s 82. Where the kind of contravention of s 52 of the Act that is involved is a misrepresentation, including the expression of an erroneous opinion, which induces a person to enter into a transaction which results in financial loss then, depending upon the way in which a claim for loss or damage under s 82 is formulated, it will be common for the amount of the loss or damage as claimed to be affected by factors in addition to the particular factor that was the subject of the misrepresentation. The misrepresentation will rarely be the sole cause of the loss. In statements of principle concerning the common law of contract or tort, additional factors which affect loss or damage are often discussed under the rubrics of remoteness, mitigation, or contributory negligence. Here we are concerned, not with common law principles, but with statutory rights and liabilities. However, the same problems arise, and must be dealt with in conformity with the statute.

The relationship between conduct of a person that is in contravention of the statute, and loss or damage suffered, expressed in the word "by", is one of legal responsibility. Such responsibility is vindicated by an award of damages. When a court assesses an amount of loss or damage for the purpose of making an order under s 82, it is not merely engaged in the factual, or historical, exercise of explaining, and calculating the financial consequences of, a sequence of events, of which the contravention forms part. It is attributing legal responsibility; blame. This is not done in a conceptual vacuum. It is done in order to give effect to a statute with a discernible purpose; and that purpose provides a guide as to the requirements of justice and equity in the case. Those requirements are not determined by a visceral response on the part of the judge assessing damages, but by the judge's concept of principle and of the statutory purpose. In Murphy v Overton Investments Pty Ltd [2004] HCA 3; 216 CLR 388 at [44] the High Court reiterated the inappropriateness of assuming a general law, rather than statutory, framework for the consideration of compensation orders of the kind in s 46PO(4), while allowing for the possibility that analogies may

be helpful. General law analogies, as the decision in Murphy illustrates, can also lead to error. Unlike the Trade Practices Act, contravention and enforcement are split in the legislative structure of the AHRC Act between that Act and the four federal anti-discrimination statutes. Thus, when one comes to apply concepts of "principle and statutory purpose", to use Gleeson CJ's phrase, the statutory purpose must be not only that of the AHRC Act, but also that of the federal anti-discrimination statute which has been invoked by an applicant. Indeed, in my opinion the principal statutory purpose which will operate on orders under s 46PO(4) will be the purpose in the applicable anti-discrimination statute. As a matter of text, that is because what s 46PO identifies as the basis for attributing legal responsibility is the "conduct" of a respondent, and that conduct is the conduct constituting the contravention of the applicable anti-discrimination statute. The purpose of the RDA was described by Stephen J in Koowarta at 210. His Honour's description was for the purpose of determining whether the RDA was supported by s 51(xxvi) of the Constitution, but in my opinion that does not detract from its force:[The RDA] legislates about race and proscribes discrimination upon the basis of race. But it is a perfectly general law, addressed to all persons regardless of their race and requiring that the members of all races shall be free from discrimination on account of race. It ***protects*** ***no*** particular race or races. As its recitals attest, its purpose is to give effect to the International Convention, a copy of which is scheduled to the Act. That Convention, in its opening recitals, stresses the promotion of universal respect for human rights and fundamental freedoms for all without distinction; universality of application lies very much at its heart. The Act takes from the Convention this quality, thereby denying to it the character of a special law to which par. (xxvi) refers. In Mabo v Queensland [1988] HCA 69; 166 CLR 186 (Mabo (***No*** 1)), Brennan, Toohey and Gaudron JJ described the role of the reference in both s 9 and s 10 of the RDA to Art 5 of the ICERD, and had this to say about what ss 9 and 10 are intended to ***protect*** (at 216-17):The rights referred to in Art.5 are human rights for which, as the Preamble to the Convention testifies, "universal respect ... and observance" are encouraged. Human rights are calculated to preserve and advance "the dignity and equality inherent in all human beings". The Preamble states that the Convention was agreed to in furtherance of the purpose of the United Nations "to promote and encourage universal respect for and observance of human rights and fundamental freedoms for all, without distinction as to race, sex, language or religion". As cases such as Koowarta, Mabo (***No*** 1), Gerhardy, and more recently Maloney make clear, the incorporation of internationally recognised human rights into the text of ss 9 and 10 of the RDA (as well as the special measures provisions in s 8) is intended to enable Australian domestic law to advance and ***protect*** the enjoyment of those rights by all members of the Australian community, in a real and enforceable sense. Although attended with challenges in determining their content and sphere of operation, Parliament has by the text and context of ss 8, 9 and 10 signalled its intention that reliance on the existence of those rights is to be more than aspirational. As I have noted, failure to observe standards of substantive equality has a spectrum of effects depending on the sphere of activity concerned and the nature of the conduct constituting the contravention. Compensation awarded for loss or damage "because of" contravening conduct must take into account the particular human rights nullified or impaired. It should also reflect the measure of causal connection between the contravening conduct and the loss or damage suffered. In Richardson, Besanko and Perram JJ pointed out at [153] that in cases where a respondent is vicariously liable for the conduct of another, the requisite causal connection is not between the conduct of the vicariously liable party and the loss and damage, but between the actor (for whom the State is vicariously liable) and the loss or damage; see also Kenny J at [33]. Here, the individual QPS officers (the 'actors') have not been named as respondents. However, the State's vicarious liability must be determined on the basis of the requisite causal connection between the conduct of the individual QPS officers and the loss or damage said to have been suffered by the applicant. In some cases, tortious principles may be helpful to inform the fixing of compensation, but those principles are not the governing criteria: see Richardson at [30] and [95] per Kenny J; and at [131] per Besanko and Perram JJ. For example, in Richardson, Besanko and Perram JJ looked at the causation issue from both statutory and common law perspectives (see [154]-[155]) and did not take a "but for" approach to the terms of s 46PO. Their Honours also confirmed that they would have reached the same conclusion on the "common sense and experience" approach applicable to common law causation following March v E & MH Stramare Pty Ltd[1991] HCA 12; 171 CLR 506. In this case, there is ***no*** economic loss claimed, or apparent on the evidence, aside from the property damage to some of the houses in the arrests, entries and searches. I deal separately with that at [1726] below. It will be apparent from what I have said that I do not accept the position of the applicants in their written submissions (at [666]) that torts principles are the "starting point" for an assessment of damages. Therefore, I do not accept (contrary to the applicants' submissions at [667]) that the aim of an order for compensation under s 46PO(4) is to place the applicant in the position the applicant would have been in if the unlawful discrimination had not taken place. The authorities on which the

applicants rely for this proposition in their written submissions do not support the proposition. Qantas Airways v Gama at [94] (which I quote at [1754] below) contains ***no*** such proposition. Richardson at [27]-[28] also contains ***no*** such proposition and indeed Kenny J is careful to emphasise that tortious principles may be a guide, but even that proposition, as her Honour emphasises, is context dependent. In Hall v A & A Sheiban Pty Ltd [1989] FCA 72; 20 FCR 217 at 239 (Hall v Sheiban), it is true that Lockhart J does refer to the general approach taken in tort, having noted that tort provides "the closest analogy that I can find", although also noting (at 239) it would be "unwise to prescribe an inflexible measure of damage in cases of this kind and, in particular, to do so exclusively by reference to the common law tests in branches of the law that are not the same, though analogous to varying degrees, with anti-discrimination law". Those observations were made, as his Honour expressly stated, in the context of anti-discrimination legislation and case law being "at an early stage of development in Australia", in circumstances where the entitlement to compensation for injury to feelings or humiliation was still contestable. That is ***no*** longer the case. To take the approach suggested by the applicants would be to fail to give primacy to compensation in this context having a statutory basis, and purpose. The facts of this case provide a good illustration of how the somewhat linear approach of restoring a common law plaintiff to the position she or he would have been in if the tortious conduct had not occurred cannot be applied in any meaningful way. The question for the Court is what loss or damage has been suffered by the first, second and third applicants because of the conduct of QPS officers that I have identified in [1540] above. The respondents did not take issue with this aspect of the applicants' submissions, and therefore I consider the respondents' position to be equally erroneous. In their reply submissions, the applicants contend that the respondents have approached the claim to damages as if it is a claim for personal injury arising from negligence, and they contend that is an erroneous approach. They contend if there is an analogy it is with the intentional torts of battery and false imprisonment. They also contend that, beyond medical injury (whether physical or physiological), orders for compensation should reflect "the seriousness and impact of the wrong", referring to Bulsey at [108] (Fraser JA) and New South Wales v Ibbett [2006] HCA 57; 229 CLR 638 at [31]. Whether or not it is correct to characterise the respondents' approach as one based on negligence, the applicants' resort to intentional torts also tends to frame the question by reference to the common law. The applicants' submissions are, in my opinion, more appropriate when they emphasise that orders under s 46PO(4) are directed at loss arising from unlawful discrimination and, I accept, the impact of unlawful discrimination in terms of hurt and humiliation is damage of the kind for which compensation orders under s 46PO(4) can be made. Where a component of the compensation is to reflect physical harm, such as the tasering of Mr Wotton, it should be recalled that the purpose of the compensation remains connected to unlawful discrimination.

Conduct for which orders under s 46PO(4) are available I turn now to consider each of the categories of unlawful discrimination I have found proven and whether each of the applicants have suffered loss or damage because of the conduct comprising all or any of those acts of unlawful discrimination. There is ***no*** evidence before me that any of the first, second or third applicants suffered loss or damage of any kind because of any or all of the first six categories of conduct I have found contravened s 9 of the RDA. The applicants' submissions on damages did not focus on conduct of this kind, but rather on the arrest of Mr Wotton and the entries and searches of the applicants' houses. It is true that Mr Wotton, as a key participant in many of the community meetings, and in the protests, was angry and outraged by conduct such as the failure to suspend SS Hurley, and by what he (correctly, I have found) perceived to be a partial investigation. His anger and outrage was visible and vocal: however, that does not mean he was any more or less angry and outraged than other Palm Islanders who did or did not attend, or speak at, the meetings and protests. It is clear from both her evidence in this proceeding and the contemporaneous video footage that Mrs Agnes Wotton was also angry, outraged and affected by a real sense of injustice. I have ***no*** doubt Ms Cecilia Wotton experienced the same feelings. It is true, as the applicants submit (and the respondents do not dispute) that compensation can be awarded for what May LJ in Alexander v Home Office called "injured feelings": [1988] 1 WLR 968 at 975. However, this phrase is generally used interchangeably with descriptions such as "distress', "humiliation", "insult", "anxiety" and "stress". The dominant theme is a feeling, or emotional reaction, with discernible negative effects. In other words, they are all characterisations of feelings which carry a sense of injury, and therefore sufficient connection with the statutory concept of "loss" and "damage". Without questioning their sincerity, feelings such as anger, outrage and a sense of injustice, without more, are not susceptible to a characterisations as an injury, or as damage. They may or may not be negative in character: in some cases they are emotions with considerable positive force. In my opinion, reactions and feelings of that kind should not occasion an order for compensation in the circumstances of this proceeding, where protest and outrage was a key

component of the circumstances giving rise to some of the acts of unlawful discrimination. Therefore, I do not propose to make any order for compensation under s 46PO(4) in relation to any of the three applicants because of the contravening conduct of QPS officers falling within the first six categories of conduct set out at [1540] above. Further, in my opinion the evidence demonstrates that Palm Islanders, including the three applicants, were angry and outraged that Mulrunji died at all, probably to a greater extent than they were angry or outraged at the police response to his death. That is, in my opinion the stronger causal connection is between Mulrunji's death and the anger and outrage evident in the general community, rather than any contravening conduct which began with the investigation into his death. The applicants did not seek orders other than the kind usually sought under s 46PO: that is, compensation for actual loss and damage proven to have been suffered by an individual. In that sense, the applicants' case treated proof of non-economic or economic loss or damage as an integral element in securing an order for compensation under s 46PO(4). In my opinion, it was possible for orders to be sought under s 46PO on a different basis. In his recent text on Damages and Human Rights (Hart Publishing, 2016), Jason Varuhas draws a distinction (see p 25) between what he calls the "vindicatory torts" (trespass to land or goods, battery, assault, false imprisonment, defamation) and the "compensatory torts" (negligence being the principal example he gives). In the former category, Varuhas contends, correctly in my respectful opinion, that what is being vindicated by an award of damages is the infringement of a right itself, rather than compensation for actual loss or damage. He refers (at p 54) to false imprisonment cases where compensation is expressed as given for loss of liberty itself: see, eg, R v Governor of Brockhill Prison; Ex parte Evans (***No***. 2) [1998] EWCA Civ 1042; [1999] QB 1043 at 1060 (Lord Woolf MR). So too (although less frequently, he concedes) for assault, where the infringement of personal bodily integrity can lead to compensation: see, eg, Forde v Skinner [1830] EngR 472; (1830) 4 Car & P 239; 172 ER 687 (in which parish officers cut off a woman's hair by force and without her consent); Loudon v Ryder [1953] 2 QB 202 (in which the defendant broke into the plaintiff's flat and assaulted her); and Ms B v An NHS Hospital Trust [2002] EWHC 429 (in which the claimant was given invasive artificial ventilation without her consent, leading to declarations and a nominal award of damages). Trespass to land is, Varuhas contends, in the same category: damages are given for the interference with exclusive possession, whether or not damage is caused to the land: Plenty v Dillon [1991] HCA 5; 171 CLR 635 at 647. In Plenty at 654-55, Gaudron and McHugh JJ said:True it is that the entry itself caused ***no*** damage to the appellant's land. But the purpose of an action for trespass to land is not merely to compensate the plaintiff for damage to the land. That action also serves the purpose of vindicating the plaintiff's right to the exclusive use and occupation of his or her land. ... The appellant is entitled to have his right of property vindicated by a substantial award of damages.

(Emphasis added.) Eschewing any bright lines between human rights law as "***public*** law" and torts as "private law", Varuhas criticises developments in United Kingdom law which diminish the role and importance of damages in human rights cases. He criticises cases such as Anufrijeva v Southwark LBC [2003] EWCA Civ 1406; [2004] QB 1124 and R (Faulkner) v Secretary of State for Justice [2013] UKSC 47; [2013] 2 AC 254 which characterise damages as a remedy of last resort in human rights cases because "***public*** law" remedies – bringing the breach of rights to an end for example – are the remedies which it is said should be given prominence. Varuhas instead contends that a "vindicatory" approach should be taken, by analogy with those torts which recognise the need to vindicate the importance of basic and fundamental rights by an award of damages for the infringement of the right itself. It should be said at once that Varuhas' text is concerned principally with human rights law in jurisdictions with bills of rights, whether statutory or constitutionally entrenched. It should also be said that, as the authorities to which I refer at [1613] demonstrate (Richardson in particular), it is not the case that damages for breaches of statutory equality rights (as a subset of human rights) are approached by Australian courts from any secondary perspective, as if monetary compensation is less important than other remedies. Quite the opposite. In that sense, Varuhas' concerns may not be apparent in Australian cases. Further, Varuhas criticises courts in the United Kingdom for tying the "quantum of awards for non-pecuniary loss to Strasbourg levels of awards, which are far lower than domestic scales for equivalent losses" (at p 95). The case law of the European Court of Human Rights, to which Varuhas refers, is far less of an influence on Australia law. However, his emphasis on the origins of many torts in the vindication of a fundamental right is not without significance for the grant of relief under statutory provisions such as s 46PO, especially read with prohibitions such as those in s 9. If s 9 is, as the authorities emphatically state, concerned with the ***protection*** of equality before the law, and concerned to prohibit the nullification or impairment of the enjoyment of human rights on an equal footing, then why would it not be the case that compensation could be ordered to vindicate such a right, without proof of actual damage? I do ***no*** more than ask

the question, because in this case, the applicants have not sought to develop such an argument. Had they done so, interesting questions might have arisen about what compensation could be ordered for the first five contraventions of s 9 that I have found proven – including whether such orders could be made in a class action of this kind, equally in favour of each class member, where the right infringed was a community's right to have policing services following a death in custody provided to that community in an independent and impartial way.

The arrests, entries and searches: authorities concerning police conduct This leads me to consideration of the final category of contravening conduct – the arrests, entries and searches involving SERT officers. In relation to this category, I am satisfied there is a basis for a compensation order under s 46PO(4) in respect of each applicant on the basis that each of them has suffered loss and damage because of the conduct of QPS officers. After setting out my approach to Mr Ralph's report, I deal with each applicant in turn. There are, so far as I have been able to ascertain, ***no*** reported superior court decisions in Australia involving race discrimination by police officers in which damages have been awarded. Certainly, the parties did not refer to any. At tribunal level, there is at least one: Russell v Commissioner of Police, New South Wales Police Service [2001] NSWADT 32. Bearing in mind the warnings to which I have earlier referred about analogies with tort, it is instructive to consider Bulsey, because of its factual overlap with this proceeding. In the absence of any other anti-discrimination cases, I then consider some other tort decisions involving police or custodial authorities. The facts of Bulsey arise out of the same events with which this proceeding deals, although the evidence was different. As I have said, Mr Bulsey is a class member, and some interesting questions arise about the extent to which the State (at least) is bound by the Court of Appeal's factual findings in Bulsey, and how that might affect the submissions it is able to put in this case. The Court of Appeal's findings of fact do not bind this Court, but these same considerations means caution should be exercised before making a material finding of fact in relation to the same events and the same parties which is inconsistent with a finding in Bulsey. As it has turned out, I do not consider any of the findings I make on damages are inconsistent withBulsey. The fact that I do not propose to order compensation in commensurable amounts reflects the different evidence before me and, perhaps, the causal connection required for a compensation order under s 46PO(4). The evidence in Mr Bulsey's case was that he suffered from a chronic adjustment disorder with depressed and anxious mood, as a consequence of the events of 27 November 2004 and their immediate aftermath when Mr Bulsey was held in prison on the mainland. It will be recalled that the causes of action pursued by Mr Bulsey were trespass to the person by way of assault, battery and false imprisonment. Ms Lenoy's causes of action were assault and false imprisonment. All causes of action were unsuccessful at trial, although the trial judge did assess damages in the alternative. On appeal not only was liability found to exist, but the Court of Appeal substantially increased the amounts to be awarded by way of damages. The Court of Appeal decision records (at [1]) that when Mr Bulsey was arrested and taken to Townsville, he was initially charged with unlawful assembly and remanded in custody on 29 November 2004. That charge was withdrawn by the QPS and he was then charged with rioting with destruction of a building contrary to s 65 of the Criminal Code. At committal, the prosecution conceded it did not have a case against him and he was discharged. This, together with the evidence of what had occurred on 27 November 2004, and medical evidence to which I have referred at [1634], was the factual substratum for the Court of Appeal's consideration of Mr Bulsey's causes of action in tort, and of the damages which should be awarded. I note the Court of Appeal's record of the charges against Mr Bulsey does not fully accord with the agreed facts before this Court about the charges against Mr Bulsey (which only mention the unlawful assembly charge), but I do not consider the discrepancy to have a material effect on any findings I am required to make. In terms of the account before the Court of Appeal of what had occurred on 27 November 2004, the following initial description of what happened is given (at [1]):Early in the morning of 27 November 2004 police officers, including approximately six armed members of the "Special Emergency Response Team" ("SERT") wearing black helmets and masks, forcibly entered the appellants' house, shouted commands at the second appellant, entered the first appellant's bedroom, took him from his bed, placed him on the floor, handcuffed him, and dragged him out to the street. Police transported the first appellant to Townsville. Later in the reasons (at [105]), Fraser JA sets out a summary of Mr Bulsey's evidence as given by the trial judge:[12] His evidence was that on the evening after the riot he was at home and that he went to bed at a normal time of 8 o'clock.

[13] In the morning he heard a big bang which woke him up, the next thing he knew he was on the floor with a boot at his head, the men had guns and helmets, he was handcuffed behind his back, he had ***no*** pants on, only a shirt.

He recognised that Darren Robinson was there, he said he was scared. He gave evidence he was not expecting to be arrested, that if he had been asked he would have gone down to the police station voluntarily to answer any questions as he had nothing to hide.

[14] He recalled guns being held by the SERT operatives pointing at his head and back. He could not recall any words being uttered about him being under arrest after which he was taken out to the police vehicle.

[15] He said that when he was taken outside he had a towel around his body, the police had placed it there. He gave evidence that he could hear his wife calling out, “Leave him alone. He never done nothing wrong.” He said that his children were present at the house but he could not see whether they witnessed these events. In addition his sister-in-law had been sleeping in a bedroom. When he was out in the street a pair of his trousers were produced and they were put on him by the police. He said he felt very embarrassed about being exposed in the street and having trousers put on him in front of people. He was very scared.

[16] Thereafter he was taken to the airport. While he was waiting at the airport he heard that his wife was going to be taken to the Townsville Hospital. He was worried about her pregnancy. She was seven months pregnant. After arriving in Townsville he was taken to the Mundingburra Police Station where he was locked in a cell and after a time questioned. He said he answered the questions and cooperated with the questioning. He was held in the watchhouse after his interview from Saturday 27th November until Monday 29th when he first appeared before a magistrate and was remanded in custody after bail was refused ...

[17] ... He said that as a result of his experiences at the incidents and after he would never trust the police again and he said that it was very hard on him if he visited the mall at Palm Island. He ***no*** longer lives with ... the second [appellant] but lives by himself ...

[20] Concerning his arrest he said that he was asleep when the police entered, he did not hear them say anything, that he was thrown on the floor and that he had ***no*** clothes on the lower part of his body and that he was very scared. When it was suggested that ***no***-one pointed a firearm at the back of his head he said:“Well, I felt boots on me. A big boot on my head and on my back. I felt that. Weight was on me and I guess they do that and they hold guns on you, that’s what they do. They wouldn’t take guns in the house otherwise. They were looking for me and there was ***no*** need for that. If they would’ve knocked in a good way and said, ‘[the first appellant] can you come down to the police station’; I would’ve happily walked out and jumped in the police car ... I would’ve walked out myself”[21] In re-examination he maintained that he saw that the police who entered the bedroom included SERT officers and Darren Robinson and that some wore helmets and had guns. He did not see Darren Robinson holding a gun and said that Robinson treated him “alright”. He was “pretty good”. The second account of what occurred recorded in the Court of Appeal’s reasons is the account of Ms Lenoy. That is in part because there was a challenge to the trial judge’s fact finding about her account, because the trial judge had rejected parts of her account as unreliable (although honest). On appeal the Court of Appeal found the trial judge was in error to reject Ms Lenoy’s account as unreliable. The principal basis for the Court of Appeal’s opinion was that Ms Lenoy’s evidence bore a “striking consistency” with the uncontroversial and accepted evidence before the trial judge, and the trial judge had not considered this point. There remained one factual issue outstanding even on the Court of Appeal’s finding: whether the SERT officers pointed guns directly at Ms Lenoy. She did not give direct evidence this occurred, but even without that evidence the Court of Appeal had ***no*** difficulty in finding what had happened constituted an assault on Ms Lenoy. Fraser JA also noted that it was not possible to make a positive finding that police officers had not pointed their guns at her: at [76]. This is how the Court of Appeal recorded Ms Lenoy’s principal evidence (including the contested aspect about whether she gave direct evidence SERT officers pointed their guns at her):[49] The second appellant gave evidence that in November 2004 she lived with the first appellant and their six children (aged between three and seven years) in a house on Palm Island. A relative and her two children were staying in the house at the time. The second appellant was then 29 years old and seven months pregnant. Shortly before 6.00 am on 27 November 2004 she heard a noise from outside. The second appellant was

the only person awake in the house. She saw people on the verandah in black wearing black helmets and with a mask or goggles covering their eyes. They were carrying rifles. The second appellant was frightened. Some men went around the house and some men came up onto the verandah. The second appellant also saw two police officers who were not dressed in black. Someone shouted to her, “Get away from the door”. She replied, “Wait a minute, I’ll open the door for youse”. Someone told her to move away from the door. As she put her hand on the door knob to open it, the door flew open. She heard a big cracking noise and a lot of shouting. About five armed men dressed in black and two police officers in plain clothes, one of whom she recognised as Darren Robinson, entered the house. The second appellant was upset and screaming. She asked the men what they were doing. The men told her to shut up and asked, “Where’s the suspect?”. Two men ran into the kitchen pointing their guns around.

[50] The following exchange occurred in the second appellant’s evidence in chief:“I think you said earlier - I think you used a phrase something like, “They were waving their guns around?”-- Yes, they was.

Yes. And can you be - I know it happened quickly but can you be more precise about where the guns were being pointed as they were being waved around?-- As they were walking and they're coming in the house really quick.

Yes?-- And like when they were looking around like pointing it around the place.”[51] The second appellant looked towards other windows and saw a person at the window with a gun. Someone shouted at her to, “Shut up, shut up, shut up”. The second appellant said that, “[e]verybody was ... screaming and ... shouting at me ... [t]elling me to shut up. Somebody shouted at her, “Shut up. If you don’t shut up, we’re going to arrest you.” The second appellant gave the following evidence:“[T]hey wanted to know which room David was in, who was sleeping in which room, how many was in there. ... I only got to the top of – just before the laundry where the top of the hallway. ... And they got me to point out who was in which room.”The laundry adjoined bedrooms at the back of the house. The second appellant’s evidence therefore conveyed that she had moved from the front of the house to a position near the back of the house from which the various bedroom doors were all visible.[52] The second appellant gave evidence that police officers, “told me to go and sit down on the couch. Everybody was screaming. They was all shouting.” One of the police officers told her “to get down on the floor and lay down”. She was also told to put her hands behind her head. The second appellant protested that she was seven months pregnant and could not lie on her stomach. She appealed to Detective Robinson. He told other police officers that she was alright and to leave her alone. The second appellant was then told to sit on the floor. She replied that she could not. The second appellant was then told to “sit on the couch and shut up”. She complied. The second appellant gave evidence that one of the men dressed in black and holding a gun was standing on the side of the couch “ ... there where they made me sit down, I couldn’t move ... they told me to stay one place ... one was standing beside ... like, they were all over everywhere and a heap of them run down the hallway.” She was frightened, in shock, crying, and shaking. Her children were crying and screaming. The way in which Ms Lenoy’s will was overborne (for the purposes of making out her false imprisonment claim) is described by Fraser JA at [74]:The respondent made submissions which supported the trial judge’s reasoning and conclusion. I accept the appellants’ argument that evidence given by the second appellant (which was supported in material respects by the respondent’s admissions and evidence adduced by it) did prove that the second appellant submitted to the directions of the police and went to different parts of the house against her will. What happened after police entered the house must be understood in the context of the circumstances of that entry. The reaction to the second appellant’s offer to open the door was that armed police shouted at her to get away from the door, broke the door open, and a group of police dressed in black entered the appellants’ house waving and pointing their firearms and repeatedly shouting commands at the second appellant. This conduct was calculated to have the shocking and frightening effect upon the second appellant of which she gave evidence. As the second appellant said, and as is entirely unsurprising in the circumstances described in the evidence, the second appellant was frightened, in shock, crying, and shaking whilst her children, doubtless awoken by the noise, were crying and screaming. The effect of the respondent’s own admissions is that the police officers did not ask for the second appellant’s cooperation. They shouted “commands” at the second appellant to lie on the floor and they “required” her to go to different parts of the house. Consistently with those admissions, the second appellant’s evidence was that, in the chaotic situation in which armed men were shouting at her, telling her to shut up, and

threatening to arrest her if she did not do so, the police "got me" to identify the occupants of the rooms. Similarly, the second appellant gave evidence that the police "made me sit down" and that she "couldn't move". That occurred in the context of the manifestly threatening conduct of the police which had occurred and where the threat was reinforced by a man standing at the side of the couch holding a firearm. The inference is readily drawn that the second appellant's will was entirely overborne and she felt compelled to obey the police commands and requirements. That this was precisely what police intended is suggested both by their conduct and by the evidence of SERT Operative 2 that this was the standard procedure adopted that morning to "shock and awe" and its adoption was likely to ensure that those in the house were in fact "shocked, frightened". Fraser JA then concluded that in his opinion the "better view" is that there was an assault on Ms Lenoy, and his Honour proceeded to explain why (at [76]):The second appellant's evidence of a group of armed men, dressed in black, breaking the front door and rushing into her home close to where she was standing and waving and pointing their guns around whilst shouting commands at her, and thereby shocking and frightening her as that conduct was intended to do, satisfies the definition of an assault. That the police officers pointed their guns "at her" was only one aspect of the particulars of the assault alleged in paragraph 3 of the statement of claim. Although I would not be prepared to find that police officers pointed their firearms at the second appellant in the absence of direct evidence to that effect from the second appellant, in light of the evidence that it was standard procedure for SERT members to point a firearm at any occupant found in the house there is ***no*** basis for a positive finding that it did not occur. In all other respects the second appellant's evidence fell within the particulars and there was ***no*** objection to any of the second appellant's evidence on the ground that it went beyond the particulars. The second appellant's evidence established the assault. His Honour added at [77]:I would add that whether or not an assault was established would appear to have ***no*** bearing upon the quantum of damages recoverable by the second appellant. The second appellant cannot be compensated for having a firearm pointed directly at her because she did not prove that particular of her claim, but even if she did not prove an assault she should be compensated for the threatening conduct of the police holding and waving firearms around in her presence. That is so because that conduct, and every other aspect of the conduct of the police in entering the house and detaining and removing the first appellant in the second appellant's presence, bore upon the nature, seriousness and impact upon the second appellant of her false imprisonment. In that part of his reasons dealing with quantum of damages, Fraser JA said that the "very great seriousness of the wrong" was apparent from the evidence of police as well as lay witnesses. His Honour further described the police conduct as involving "violence and ... particularly distressing and humiliating circumstances". What happened to Mr Bulsey and Ms Lenoy was also described at various points in the reasons as involving (in relation to Mr Bulsey) a "high degree of force" and "great intimidation" and (in relation to Ms Lenoy) "an extraordinarily traumatic atmosphere" and the "very real indignity" of Ms Lenoy watching Mr Bulsey dragged away handcuffed and partially dressed. Atkinson J found that the treatment of both appellants "breached their most fundamental right ... to personal liberty", and found they were not treated "as one might expect in a civilised society governed by the rule of law". McMeekin J described how the appellants were treated as a "startling feature" of the case and later used the word "egregious" in applying relevant authorities. His Honour also set out a description of his view of the circumstances (at [127]):This was not a case of human fallibility. A deliberate decision was made to make a dawn raid on a citizen's home by armed, masked men and to treat those found within as one would dangerous criminals with ***no*** regard whatever for their dignity or rights. The imprisonment continued for days. The hurt was great. The reason I have spent some time setting out the evidence and findings on what occurred during the entry and search of Mr Bulsey's and Ms Lenoy's house is not to adopt those findings in this proceeding, but rather to indicate the nature of the evidence relied on by the Court of Appeal to fix the level of damages that it did. The Court of Appeal increased the damages payable to Mr Bulsey from $80,000 to $165,000. That sum included $5,000 for Mr Bulsey's psychological injury, assessed under the Civil Liability Regulation 2003(Qld), in respect of a 5 per cent impairment. Exemplary damages were precluded by s 10.5(2) of the PSA Act. Aside from $5,000 for impairment, the sum of $165,000 comprised $60,000 for assault, battery and false imprisonment during the wrongful arrest and $100,000 (including aggravated damages) for false imprisonment after the wrongful arrest (that is, for the period 27 to 29 November 2004). The State was ordered to pay interest on that sum. The damages payable to Ms Lenoy were increased from $30,000 to $70,000, also with interest. The factors in the increase were Ms Lenoy's offer to open the door being rebuffed in a violent way, her being rendered helpless to assist her partner and having to witness the humiliating way in which he was arrested, how frightened she was, and the fact that she was heavily pregnant. The descriptions given by the Justices of the Court of Appeal of what happened to Mr Bulsey and Ms Lenoy accord with my own opinions of the character of the arrests, entries and searches and their effects on the men, women and

children in the houses who gave evidence before me. In particular, for the purposes of making orders for compensation under s 46PO(4), I find that the way the Court of Appeal described the experience of Ms Lenoy closely mirrors my conclusions about what this experience was like for Ms Cecilia Wotton. I return to that below. I turn now to Ibbett. In the early hours of one morning, Mrs Ibbett's son was pursued by two plain-clothed police officers to her home, where her son was staying. Her son attempted to shut the officers out by lowering the roller door of the garage, but one officer managed to get underneath it. That officer attempted to arrest Mrs Ibbett's son, with a gun drawn. Shouting between the men woke Mrs Ibbett, and she came into the garage, whereupon the officer with the gun turned his gun on her. Mrs Ibbett had never seen a gun before and the trial judge described her as "petrified". Mrs Ibbett sued the two police officers and the State of New South Wales for assault and trespass. She was awarded $25,000 for the assault (comprising $15,000 in general damages and $10,000 in exemplary damages) and $50,000 for the trespass to land (comprising $10,000 in general damages, $20,000 in aggravated damages and $20,000 in exemplary damages). The State appealed and Mrs Ibbett cross-appealed to the Court of Appeal of the Supreme Court of New South Wales on questions of damages. The Court of Appeal (Spigelman CJ and Basten JA, Ipp JA dissenting) dismissed the State's appeal and allowed Mrs Ibbett's cross-appeal in part, increasing her damages for the assault to $10,000 for aggravated damages and $25,000 for exemplary damages. The High Court dismissed the State's appeal from the Court of Appeal decision. I return to Ibbett below, because the case is relevant to aggravated and exemplary damages, especially the latter, in circumstances where (as here) vicarious liability is made out. In Beckett v New South Wales [2015] NSWSC 1017 from [672]-[696], Harrison J conducted, if I might say so with respect, a comprehensive and illuminating survey of previous decisions concerning malicious prosecution and false imprisonment, and the awards that were given in those decisions. I have had regard to that survey in determining the appropriate amounts of compensation in this proceeding. Although Bulsey, Ibbett, Beckett, and the cases discussed in Beckett deal with tortious claims, there are two features of all these decisions which I consider can inform the identification of an appropriate level of compensation under s 46PO(4) in the present circumstances. First, they are cases dealing with the conduct of police officers or prosecutorial authorities, or both. Second, they deal with compensation for interference with personal liberty and bodily integrity, which has some resonance with the contravening conduct in this case. The cases to which Harrison J referred (and Beckett itself) also consider aggravated and exemplary damages, and are useful from that perspective. In Victoria v Horvath [2002] VSCA 177; 6 VR 326, the Victorian Court of Appeal said (at [15])[The trial judge] recognised, rightly, we think, that the violation of a person's house and privacy by forced entry is a significant infringement of rights which, other than in very unusual circumstances, constitutes a serious breach of the law. If such an act is carried out by the police, his Honour considered, it should be done only where the seriousness of the situation demands it and only after the most careful and reasoned consideration of all the circumstances. I respectfully agree with those observations and consider they must be kept in mind when approaching the awards to be made in this case.

The extent of the causal connection between Mr Wotton's arrest, his imprisonment and subsequent harm he suffered Mr Wotton's arrest was, I have found, unlawful. Thus, his tasering was also unlawful: there was ***no*** lawful justification for the use of force on him. However in this proceeding he has ***no*** accrued cause of action for battery, assault, nor indeed for false imprisonment, on which (given the Bulsey decision) he is likely to have succeeded. I have also found his arrest and tasering by SERT officers contravened s 9 of the RDA. As I have set out earlier in these reasons, the lawfulness or unlawfulness of conduct is not determinative of a contravention of s 9. In Mr Wotton's case, if his arrest had been lawful under s 198(2) of the PPR Act then this would not have prevented it being a contravention of s 9 of the RDA. Its unlawfulness does engage the human rights in Arts 9 and 17 of the ICCPR, and is relevant to s 9 in that respect. That said, if the arrest had been lawful, the approach to compensation under s 46PO(4) might have been different. In my opinion, the answer to the causal question posed by subs (d) would depend on whether the Court was satisfied Mr Wotton would have been arrested in any event, were it not for the racial discrimination. An arrest on reasonable suspicion leaves room for choice by an officer and there may be any number of reasons why an officer may choose not to arrest a person she or he could lawfully arrest. If an officer chooses to arrest a person based on race, then a contravention of s 9 may occur, even if the arrest is lawful. The compensation which may be payable under s 46PO(4)(d) may, on proof the officer would not otherwise have arrested the person, include compensation for the consequences of the arrest, including deprivation of liberty. That is not this case and I say ***no*** more about it. Mr Wotton's arrest was unlawful, and therefore so was his tasering (just as the handcuffing and other treatment of Mr Bulsey was found by the Court of Appeal to be unlawful in Bulsey). In

the present case, the relevance of the unlawfulness is the engagement of the rights in Arts 9 and 17 of the ICCPR. The applicants did not submit that compensation should be paid to Mr Wotton for any events beyond his arrest and transportation to Townsville. Accordingly, I propose to address the question of compensation for Mr Wotton in relation to the circumstances of his arrest and tasering, and his handcuffing and shackling as he left the island. The compensation is not ordered in relation to the fact of his arrest, but rather its circumstances. It is in these circumstances that there was a contravention of s 9 of the RDA, by the use of SERT.

Mr Ralph's report Mr Ralph produced a single psychological report for Mr Wotton, Mrs Agnes Wotton and Ms Cecilia Wotton. He also interviewed Ms Schanara Bulsey. Mr Ralph's methodology was subject to criticism from Dr Reddan (see [467] above]). Her criticism related to Mr Ralph producing what she described as a "unitary" report in relation to all three applicants, to him interviewing Ms Bulsey, to the length of the three interviews, to Mr Ralph's diagnosis of Ms Cecilia Wotton, and to the history he took from Ms Cecilia Wotton. Despite calling Dr Reddan and relying on the criticisms she identified for the purposes of cross-examining Mr Ralph, in final submissions the respondents made ***no*** criticism of Mr Ralph's report, or his evidence, based on the matters identified by Dr Reddan. I am satisfied that there is ***no*** substance in any of the criticisms made by Dr Reddan, and as I have found at [468] above I am not inclined to give much weight to her evidence, for reasons I there set out. Mr Ralph visited the Palm Island community on 29 May 2015, and during this visit he conducted interviews with Mr Wotton, Mrs Agnes Wotton and Ms Cecilia Wotton at the home of Mr Wotton. He also interviewed Ms Schanara Bulsey. In his second affidavit, he explained the reason for interviewing Ms Bulsey (whose surname was still "Wotton" at the time):I considered that she has had significant and direct personal experience of the events of 2004 and what followed, including the experience of being cared for within her family prior to and after the arrest of Mr Wotton. The interview with Ms Schanara Wotton was therefore able to add to my understanding of the effect of these events upon her family. In my opinion, based on my knowledge, training, and experience, Ms Schanara Wotton's comments add considerable weight to the comments provided by others in interview and her comments promote a better understanding of the issues involved. I accept this explanation. It is persuasive in part because Ms Cecilia Wotton's evidence made it clear that her capacity to look after her family was affected by the impact the events of 27 November 2004 had on her. I have referred to some shortcomings in Mr Ralph's report at [462] above. My view of those shortcomings has meant that I do not accept all of his opinions about the impact of the events of 27 November 2004 on the three applicants. Nevertheless, I have afforded his opinion some weight and where I agree with his conclusions I refer to the below. In general terms I accept the history he took from each applicant, and aside from one issue concerning Ms Cecilia Wotton, the applicants were not cross-examined to suggest that they had given inaccurate, incomplete or skewed histories to Mr Ralph.

Mr Lex Wotton Based on the findings I have made, I am satisfied Mr Wotton suffered temporary physical harm from being tasered by A/S Kruger. I am satisfied he suffered significant fear and anxiety during the process of his arrest in front of his family, and had concerns for the wellbeing and safety of his family in a volatile situation when he and his family were surrounded by a large number of heavily armed men. I am also satisfied that being arrested, especially in the way he was, in front of his partner and children, was a humiliating experience for him, and that it was humiliating for him to be handcuffed, shackled and removed from the island. I have found none of that treatment was justified and I have set out the ways in which it contravened s 9 of the RDA. I am satisfied those matters constitute loss and damage within the meaning of that phrase in s 46PO(4)(d) of the AHRC Act, and I am satisfied that the loss and damage had the requisite causal connection with the contravening conduct of QPS officers (namely those who organised, oversaw and instructed SERT officers to undertake the arrests, entries and searches). Mr Ralph set out the history given to him by Mr Wotton, which reflected a life lived almost entirely on Palm Island, but not without its low points and challenges. I do not propose to set out the contents of Mr Ralph's report in detail, but it is fair to say that the history given by Mr Wotton and accepted by Mr Ralph (and not challenged in this Court) shows Mr Wotton as a young man with serious alcohol and violence issues, which he worked hard to remedy. Contrary to some of the stereotypes about the Palm Islanders involved in the events of 19 to 29 November 2004, Mr Wotton reported to Mr Ralph, and gave evidence in this proceeding, that he had not consumed alcohol for more than 20 years. Other significant changes related to his renewal, on a different footing, of his relationship with Ms Cecilia Wotton, and his commitment to qualifying, and then forging a consistent employment history, as a plumber. These matters of background are material to my assessment of compensation in the sense that there is nothing in Mr Wotton's history to the point of the contravening conduct which needs to be

taken into account in assessing the impact on him of that conduct. In contrast, what happened to him after that date, as a result of his arrest, imprisonment, conviction and bail conditions clearly have all contributed to the material adverse effects on his psychological and emotional wellbeing on which Mr Ralph reported. Those events are without causal connection to the contravening conduct. The manner of Mr Wotton's arrest was the subject matter of a contravention of s 9, but it is highly probable that he would have been arrested in any event, with a warrant and in more proportionate circumstances. The charges he faced, the prosecution's attitude to bail, the bail conditions, the long process of trial and sentence, the dislocation of his family in Townsville and their separation from him – none of these matters could be said to arise out of the contravening conduct. They arose as a result of his own conduct on 26 November 2004, and the prosecutorial (and eventually judicial) view taken of that conduct. I accept the respondents' submissions that although Mr Wotton reported to Mr Ralph he experienced high levels of psychological distress following his arrest, and had periods of depression, anxiety and chronic sleep problems up until his release from prison in 2010, Mr Ralph was could not reliably conclude that Mr Wotton suffers any form of psychopathology to the extent that he could be diagnosed as suffering from any condition as described in the Diagnostic and Statistical Manual of the American Psychiatric Association (DSM-V). Mr Ralph's opinion was that Mr Wotton had responded with some significant stoicism to what happened to him and there were limited residual psychological effects apparent. For example, Mr Ralph stated:Hence, through his personal resilience, insight and strength, his religious beliefs, the support provided by family and community, and his active commitment to community development, Mr Wotton has weathered the physical and emotional hardship and adversity arising from his arrest in 2004 in a manner that has allowed him to remain a functional part of his community and to provide at least adequately for his family. He subsequently concluded:Although he has experienced very high levels of psychological distress his capacity to remain strong, resilient and adaptable, in the face of situations that would otherwise be debilitating, has allowed him to respond to the adversity and hardship that he has faced with limited residual psychological effects. Mr Ralph's opinion is that Mr Wotton's risk of further emotional or psychological harm in the future is small. In those opinions, Mr Ralph is referring to the entirety of the consequences for Mr Wotton after his arrest, not simply the direct consequences of the contravening conduct. Mr Ralph's opinion as to the likely cause of the disturbances he confirmed in Mr Wotton recognises that Mr Wotton's arrest was the beginning, but only the beginning, of events which contributed to his psychological harm:Mr Wotton continues to experience a degree of psychological distress in the form of anxiety that in my opinion is directly attributable to his arrest in 2004 and the events that subsequently followed. The manner of his arrest, that caused extreme distress to him and his family, as well the events that followed, including the requirement that he not return to Palm Island as a condition of his bail, have contributed significantly to the psychological distress he has suffered. In the period from his arrest until his conviction in 2008 he has also witnessed firsthand the police and government response to the death in custody, and has been deeply frustrated and distressed by the perceived injustice of the events that followed. The criticism of the police investigation into the death in custody by the State Coroner, the fact that ***no*** one has been held accountable for the death, and that ***no*** disciplinary action has been taken against the police officers involved in the investigation, are all matters that have added to his level of psychological distress and his perception that that the process has been discriminatory and unjust.

(Footnote omitted.) Mr Ralph's opinion is consistent with my own in relation to the humiliation and anxiety caused by the manner in which Mr Wotton was arrested in front of his family. Mr Wotton may have good capacity to mitigate the effects of traumatic experiences, but that does not mean those effects have not been real. However, I recognise, as Mr Ralph also has, that there were a number of more serious events which occurred after the arrest contributing to Mr Wotton's impairments. When the duration and severity of the contravening conduct is compared with what subsequently happened to Mr Wotton, it is clear that what subsequently happened to Mr Wotton was of much greater magnitude, and lasted over a period of many years. Mr Ralph did not suggest any particular rehabilitation or treatment was required, given how Mr Wotton presented in 2015, although as Mr Ralph noted this was in part because Mr Wotton was able to cope with the effects he was experiencing. Mr Ralph expected the effects on Mr Wotton would continue to diminish as time passed. Mr Ralph did not identify any real impairment to Mr Wotton's daily life arising from his experiences, aside from ongoing sleeping and anxiety issues which, as I have found, are more likely to be due to what happened to Mr Wotton after 27 November 2004 than what happened to him on that day. Mr Wotton knew police officers would come to arrest him on the morning of 27 November 2004. His evidence was he told his family that was going to happen. He was resigned to being arrested. That said, there is ***no*** basis in the evidence to believe Mr Wotton knew more than 20 armed SERT and PSRT officers, and police

dogs, would be coming to his house to arrest him. I find he did experience a degree of shock about the armed police that arrived at his house to arrest him. I find he was afraid for his family, and for their safety if anything went wrong and firearms were discharged. He was afraid and worried for how his children would react to his arrest. He was humiliated in front of his partner and children when he was tasered like a highly dangerous criminal and taken away. This was Albert Wotton's evidence about what he saw:There were about four of them, two on each side. They had to sort of lift him and carry him, because of the taser that had happened. And they put him in – I can't recall if it was in the backseat or the – I'm not too sure if you call it the cage or whatever it's called on the back of the car. This was Mr Wotton's evidence about what happened when he was tasered. I accept this evidence, including that he feared an officer would shoot one of his children. In the circumstances that was a natural and obvious fear for a father to have. And, in my opinion, there was a real risk that could have occurred .An officer said, "Get down on your knees. Get down on your knees." And so in all of that I heard – I could hear my children crying, singing out loud. And I said, "Stay inside. Don't worry. Stay inside." And at the same time there was this police officer still singing out, "Get down on your knees. Get down on your knees. Place your hands behind your back of your head." But I was concerned for my children and my wife because my thoughts were if they walked or came out, someone would panic out of the police officers and shoot them. I turned towards them and I said, "Stay in there. Don't worry. Stay in there." And as I turned back, I could see something like – it was so quick, like lightning, and I just remember being hit with something, and my thoughts were I was shot, and I thought, "Maybe it's rubber bullet," because – because I was still standing, and then I could feel this current running through me, and then I knew it wasn't a bullet, so – because I could hear these orders to get down, and then I got down on my knees, and the current started to – it was getting stronger and stronger. So when I got on my knees I actually fell forward, and while I was down there they said to put my hands behind my back, and I couldn't do it because of my shoulders. I had the four reconstructions on my shoulder, and just a police officer – two grabbed me, one on each leg, at the back. Another had me round the neck, and I had my head turned to the side, and I had a barrel pointed in my head, and I felt another one in my back.

Another one? You mean another gun?---Another gun, and I could actually see it, and a police officer leaned on top of me. He had his knee into my back, and they had me pinned down, and then when he did – when they had me pinned down he got off. He pulled his knee off of my back, and then they grabbed me by the hands and forced my hands behind my back, and handcuffed me, and I was there for possibly a couple of minutes, and I could hear my family going off and I could hear – as I got up – they lifted me up. I was in a bit of pain, because of the shoulders and stuff, or they asked me to get up and I couldn't because of my balance, because of the shoulder. So they lifted me up, and one of the officers sang out, "What about in the house?" and Robinson said, "Yeah, go in," and – but at the same time I could hear – before the orders was given, I could hear that they were already in the house. They – because I left the back door open. They must have went in through there. I could hear them, and I could hear they were throwing things around in the house, and – and I could hear the kids screaming. I could hear them told to, "Get on the ground. Lie down." I – when Robinson gave that order I said, "You got all you want. There's ***no*** need to go into the house. You got who you come to grab," and then they had torches shining on me, in my face. At the same time I could see the red laser light before I was hit with the taser. They're shining in my face and – and I was trying to – trying to look – look around at the same time. I could see all of this stuff, and just trying to, I suppose, look away from the light, but at the same time you're trying to see who's who, and stuff. But I – I – there was a couple of officers walked forward, and then one of them pulled out the prods – it looked like little darts, little round things – from my chest. There was a lead attached to it, and they put them in a Mount Franklin water bottle, and after that I said, "Could I have some – could I have a shoe, please, and a – and a shirt?" and Robinson said – I heard him. He walked in – he ran into the house and he said, "Get him a bloody shirt. Get him a shoe. Quick. Hurry up. Get it," and I could hear all the crying and thing, and Cecilia trying to do what she could do thing, and so they marched me over towards the vehicle that was parked at our gate, and they opened up the back. It was a four wheel drive – I'm not sure. I think it was – it looked like one of the ones I used to drive when I used to do our men's group thing, where I have a vehicle. It was a Toyota wagon. Mr Wotton went on to describe how, once he was placed in the helicopter with some of the QPS officers, his legs were shackled. He also described how painful the handcuffs were, as they cut into his wrist. He asked for them to be loosened, and an officer told him "I'm sorry, mate. I can't do anything about that. You just have to, you know, stay like that". Which he did, all the way to the watchhouse in Townsville, where the handcuffs were removed. Inspector McKay described how a taser in probe mode (as used on Mr

Wotton) worked, and what it did:So it can be used in – in – in two – and that's why I said there's two manners in which it can be used. One is in a probe – or two modes. One is in a probe mode, where the probes are fired from the device from –from compressed nitrogen. The darts fly out from the – the cartridge, and if two darts strike the person, then the electrical current is complete and the person suffers involuntary muscular contractions and, depending on the spread of the taser, it may call – cause the person to fall down. Where the spread is really quite small, it causes pain in that area but doesn't cause the involuntary contraction where you might see someone completely fall over as a result of the device being used. Tasering is painful, as Mr Wotton, Inspector McKay and Superintendent Kruger each testified. A person's body has small electric shocks sent through it. It is disturbing and disorienting, as well as painful. Tasering compels submission, as it is intended to do. By temporarily disabling a person, it puts the person at the mercy of the individuals who inflicted the taser on her or him. In Mr Wotton's case this included DS Robinson, one of the very men Mr Wotton was holding accountable for what had happened to Mulrunji and for the inadequate investigation into his death. Being forced into submissions and compliance by police officers, who were the very people he had been protesting about, was additionally humiliating. That was, I find, part of the aim of the QPS in using the SERT teams – to teach the residents, and it would seem in particular Mr Wotton, a 'lesson', to engage in a show of force and a subjugation of the Aboriginal population. Inspector McKay and Superintendent Kruger both gave evidence about how SERT officer training involves officers themselves being tasered. It was unclear what the purpose of this evidence was. If it was to diminish the seriousness of tasering a person, I reject any such suggestion. In any event there was ***no*** evidence before me, one way or the other, about the risks associated with being tasered, or the complications which might arise. I also have ***no*** evidence about the circumstances in which any of the officers who gave evidence were tasered and how closely they resembled the circumstances in which Mr Wotton was tasered. It is an obvious inference, for example, that if it was conducted during training any tasering of police officers would have been done with their informed consent, after explanations to them about the effects and sensation of tasering, with appropriate medical care available if necessary, and that the officers knew such care would have been available. Inspector McKay's evidence tended to confirm that this was the case, in that he said the purpose of SERT officers being tasered in training was to ensure they understood "the effects of that device" and its "limitations". Therefore, an officer would first, have been fully prepared to be tasered, having had the effects and sensation explained to her or him, would be assured of medical care if required and would not be expected to be handcuffed, taken away under armed guard and removed from her or his community to face custody and criminal charges. The bare fact of officers having experienced tasering as part of their training does not diminish in any way the view I have formed about the shock and harm suffered by Mr Wotton when he was tasered in the circumstances he was. I note here an incongruous piece of evidence given by Mr Wotton during his narrative of how he was arrested and taken to the Palm Island airport. He said:Well, on the way to the airport the police officer was driving pretty fast and I knew – I didn't actually know his name but he was there for about 12 months before. And he had a relationship with another police officer. And he was driving fast and I said to him, "Why don't you just slow down because you might end up killing us all?" And some – as we got pretty close to the airport, the second climb on your way to the airport, I could see Erica Kyle, the mayor at the time, walking her dog. And one of the officers said, "There's number 2 target there." The applicants sought to make something, by way of a conspiracy theory of some kind, of the fact that Mayor Kyle was initially a suspect, indeed a prime suspect with Mr Wotton, in relation to the fires and damage, but was never charged. There is ***no*** basis in the evidence for any findings about why she was not charged, and the evidence of Mr Wotton is not reproduced for that purpose. I refer to it because of the wholesale incongruity of the scene it portrays. There is Mr Wotton, having just been arrested before it was light by 14 heavily armed SERT officers, tasered, and carried off in handcuffs at high speed to the airport. And there, in what I infer might have been something of a regular ritual for Ms Kyle, was the Mayor taking her dog for a walk. There was ***no*** emergency on the island; there was ***no*** danger; ***no*** lives were at risk. The mayor was taking her dog for an early morning walk. The juxtaposition of these two images illustrates in my opinion how grossly disproportionate the actions of the QPS were in using SERT. The applicants submitted the respondents should be ordered to pay Mr Wotton $200,000 by way of compensation. This was the same figure they submitted should be paid to Mrs Agnes Wotton and to Ms Cecilia Wotton, despite quite different evidence, and different contraventions, in respect of each of them. There was ***no*** real development of submissions about how this figure was arrived at, save a belated reference to the Court of Appeal's decision in Bulsey, which the applicants seemed to suggest meant a six figure sum would be appropriate. The respondents submitted that if the Court found, against their submissions, there had been contraventions of s 9, then each of the first and third applicants should receive the sum of $20,000, and the second applicant should not receive an amount of compensation because the relevant

causal connection was absent. Again, ***no*** submissions were developed about why a figure of $20,000 was appropriate and nor were there any submissions about why it was appropriate that each of these two applicants should receive the same amount. I do not accept the submissions of either party on quantum: both appeared arbitrarily selected, at contrasting ends of the spectrum. In my opinion an appropriate sum to compensate Mr Wotton for the loss and damage he suffered as a result of being arrested, tasered and taken away as he was is $65,000. That sum is to compensate him for the physical shock and temporary pain of being tasered, the humiliation he suffered in front of his family and partner, the fear and anxiety he experienced in relation to listening to the terrorised screams of his partner and children, and his justifiable fear about whether his family might be shot during the entry and search. These consequences were real and significant, although temporary in nature. Given the use of the SERT officers resulted in actual physical harm to Mr Wotton, albeit temporary, he should receive a substantial sum of compensation to reflect the law's protective attitude to personal and bodily integrity. Unlike his partner, Mr Wotton has found ways to cope with the aftermath of these events, and his subsequent incarceration and separation from his family, without long term ill effects to clinical levels. That is not to suggest he has suffered ***no*** ill effects – far from it. However, in my opinion the longer term effects he has suffered are more likely due to what happened to him after he was flown out of Palm Island on 27 November 2004, rather than the effects of the conduct constituting a contravention of s 9. Mr Wotton should also receive compensation for the entry and search of his home. Although he was arrested on the verandah out the front of his home, and was not one of the people terrified and disturbed by the entry of search officers into his home, nevertheless it was his home. His privacy was unlawfully invaded. The safety and security that he was entitled to in his own home was violated. He had to endure watching, and knowing, that the safety and security his partner and children also associated with their home had been violated. He was powerless to help them, comfort them, or be with them as they sought to recover from what happened. I propose to order the State pay him $30,000 compensation for the violation of his privacy and home.

Mrs Agnes Wotton Barely any submissions were made about the basis on which the respondents should be ordered to pay compensation to Mrs Agnes Wotton. The extent of the applicants' submissions was:Mrs Agnes Wotton has continued to suffer and "the experience of the emotional upheaval and trauma associated with the riot and its aftermath remained firmly imprinted upon her". This was a quotation from Mr Ralph's report. Mrs Wotton was not at her house when the SERT officers entered and searched the house looking for Richard Poynter. She spent some time in her evidence discussing the events leading up to the protests and fires, and was present when the fires were started. It was clear the entire sequence of events from 26 November 2004 onwards was distressing for her. It is clear she had a sense of outrage that SS Hurley had not been charged with any offence and had stayed on the island. Mrs Wotton was at her house when a number of police officers came by a few days later (her evidence was not clear about exactly when) and told her and her daughter Fleur that they had to go and make a statement. In fact, both were charged with offences. Mrs Wotton identified DS Robinson as one of the officers who came to her house, and after some suggestions in cross-examination, identified another officer. She then described how she and her daughter had to go to Townsville and stay there for a number of weeks, going to court each day. During this time they were not allowed to return to Palm Island for Mulrunji's funeral. I accept Mrs Wotton's evidence that she was distressed at not being able to do so. Neither the manner in which she was charged and dealt with in Townsville, nor her inability to return to Mulrunji's funeral, are the subject of any allegations in the third further amended statement of claim and I need not consider them further. As Mr Ralph's report noted, Mrs Wotton has been an active leader of her community, and has been much involved in local and regional politics and community activities. Mrs Wotton gave evidence about being elected to the Palm Island Council and was also as a member of the Aboriginal and Torres Strait Islander Commission. In the video evidence she is one of the people who is interviewed, expressing her frustration and sense of injustice at SS Hurley remaining on the island and not being charged. She can also be seen at many of the meetings. Mr Ralph describes Mrs Wotton's account to him in the following terms:Ms Wotton described the events surrounding the arrest of Mr Wotton and those that followed as deeply distressing for all involved. She described it as a time of community upheaval with many people distressed and traumatized by the death in police custody of Mulrunji and the events that followed, particularly the response of the police in investigating the death and their response following the riot. Both in Mr Ralph's report and in her oral evidence, Mrs Wotton spoke about the effect Mr Lex Wotton's arrest and incarceration had on her, and what she observed to be the effect on Ms Cecilia Wotton and the Wotton children. She also described, both to Mr Ralph and in her evidence, how stressful it was having to stay in Townsville and to go through the court proceedings. She was also clearly worried about her son. However none of these events are identified as contraventions of s 9 in the

statement of claim. Mrs Wotton was not asked any questions about the impact of having her house entered and searched by SERT officers. It was, as I have found, a breach of her privacy right as expressed in Art 17 of the ICCPR, but there is ***no*** substantive evidence before me about the effect, if any, the entry and search had on Mrs Wotton. I do not consider there is any basis in the evidence to make an order for compensation to Mrs Wotton for any loss or damage suffered by her in terms of injury to her feelings because of the arrests, entries and searches of the houses. As I have found, Krysten Harvey, who was present at Mrs Wotton's house, was terrified and damaged by the entry and search, but in these reasons I am not currently assessing compensation under s 46PO(4)(d) for Ms Harvey. The same is true of Mr Morton, who was the (then) nine-year-old boy playing outside Mrs Wotton's house. However, Mrs Wotton's house was entered and searched in a way which I have found contravened s 9 of the RDA. The privacy and security of her family home was violated. The fact of that violation of her property and her house is in my opinion damage within the terms of s 46PO(4)(d) and she should receive a modest amount of compensation. In my opinion an appropriate amount is $10,000.

Ms Cecilia Wotton Ms Cecilia Wotton gave evidence in this proceeding, but she was a reluctant witness. I say that not to suggest she was anything but truthful and genuine: rather, that the prospect and necessity for her to relive the events of 27 November 2004, their aftermath and effects on her and her family, was obviously the last thing she wanted to do. She is, I find, a private person, who prefers – despite her clear sense of grievance and injustice about what has happened to her, her family and her community – to remain out of the spotlight. In that sense, the way she presented as a witness was consistent with the content of her evidence. There were some aspects of Ms Wotton's life history and experiences which were relevant to the assessment of her psychological condition. Leave was sought that she not be examined about those matters on Palm Island: that is, in her local community. The respondents had ***no*** objection to those aspects of her evidence being given in Townsville, which is what occurred. In Townsville, applications were made for either closed court or non-publication orders concerning parts of her evidence. I refused those applications, giving ex tempore reasons for doing so. In short I held that, having regard to the importance of the principle of open justice, I was not satisfied that Ms Wotton's evidence should be given other than in open court, particularly as this proceeding involves matters of ***public*** interest. As it turned out, her ***public*** evidence was able to be given without direct references to those matters, with both parties dealing sensitively with the relevant issues. For similar reasons, I do not propose to set out those matters in detail in these reasons. The respondents did not contest the reliability or genuineness of her accounts, or of the history given to Mr Ralph. What they did put in issue, properly, was the effect these matters may have on any causal link between the events of 27 November 2004 and Ms Wotton's somewhat fragile psychological state. The following summary is taken from both Mr Ralph's report and Ms Wotton's oral evidence. Cecilia Wotton has lived on Palm Island all her life. Her own ancestors, the Sibleys, are a well-known Palm Island family. Her paternal great uncle was Sonny Sibley, a leading figure in the 1957 strike on Palm Island. She has been in a relationship with Mr Wotton for approximately 20 years, although they had been partners earlier in life for some time. The first relationship began when Ms Wotton was very young and ended, it is fair to say, due to Mr Wotton's violence towards her and his alcoholism – behaviours he set about, and was successful in, remedying. Ms Wotton's brother is David Bulsey. Mr and Ms Wotton had five children living with them on 27 November 2004: Schanara (Bulsey, who was a witness in this proceeding), Billo, Albert (Wotton, who was also a witness), Robert (Bulsey, who I infer may be Ms Wotton's brother) and Nazine. Schanara was 15, Billo was 14, Albert and Robert were both 12, and Nazine was 8. Nazine has a hearing disability, and some consequential learning difficulties. Ms Wotton knew Mulrunji, having lived in the same street as him when they were children, when Ms Wotton was living with her sister. Mulrunji's elder sister, Claudelle, lived with Ms Wotton's family for some time. This evidence is a good example of the level of interconnectedness and extended family responsibilities which exist between families on Palm Island, all of which should have been well understood by QPS officers. These relationships, connecting people not only within extended family groups but between extended family groups, mean that the death of a single person has real effects throughout the entire community. Ms Wotton has had a steady working life in various capacities on Palm Island. At the time of giving her evidence she was working as a cleaner at the Joyce Palmer Health Service on Palm Island, which is otherwise referred to in these reasons as the hospital. She had been there for seven years, and prior to that she had been working at the Katana Women's Centre on the island. Ms Wotton described being at home after the protests and fires on 26 November 2004, watching the news, and watching all the footage of Lex, including the television reports identifying him as a ringleader. She described how Mr Wotton told her he was likely to be arrested:And did he say anything to you then?---He just said, "They probably, you know, come and take me."

And what did you say to him?---I just broke down and cried.

And were some of the children there then?---Yes, they were there. They ended up just going in the room.

So they were part of this conversation?---Yes.

And what were they doing?---Well, they was upset.

And then what happened?---We went to – watched some news and went to sleep, went to bed until that – what happened around 5 that morning. The next morning, at 5 am, Ms Wotton was in bed with her husband. He woke up and said "they're going to take me", and she jumped out of bed and looked out the window to see vehicles arriving at her house. She described seeing "all the cars coming down to the dirt road to the house where we were staying, about 10 cars". She then saw police with helmets, dressed in black clothing, guns, shields and dogs. She saw them out on the verandah with her husband, and she then walked out of her bedroom. She gave the following description of what then happened:My brother came out from the front room, and he was screaming, said they shot Lex, and as I ran down the hallway Detective Robinson shined a torch in my face. The kids were behind me, and he told me to get the fucking hell inside and lay down, and I lie down on the bed with my daughter who couldn't hear anything. My brother got down on the floor. Schanara was with the door.

So you lay on the bed with Nazine, and that's why you say she couldn't hear anything?---She couldn't.

She didn't know what was happening?---***No***.

And could you – while you were lying on the bed, what could you see?---The policeman had his gun to my daughter's head. I infer that Robert Bulsey had seen, or perhaps seen and heard, Mr Wotton being tasered and mistook it for him being shot. Ms Wotton then described what the SERT officers did inside the house (ellipses in original, signifying pauses rather than words removed):Did any of the policemen say anything to you when you were in the bedroom?---***No***. There was one on that side with that window on that side standing there with the gun, just the side my daughter was laying, Nazine.

So that was outside the window?---***No***. The bed inside. There's a window on that side and a window this side on the veranda. About six or seven of them run in the house. They tipped everything upside down and Schanara ..... What they was looking for. And Detective Robinson asked me to grab a pair of ..... And a ..... For Lex, and I got up.

And you knew it was Detective Robinson?---Yes, I know him. That was him.

How did you know him? You had met him before this day?---Yes.

And then what happened? You were asked to get shoes and a shirt for Lex?---I got up and I grabbed a pair of blue singlets and joggers, and gave it to - - -

You gave it to the police officer or to Lex?---To the police officer.

And did you go outside and see Lex?---***No***. I was too scared. I was shaking, crying.

And how many of your family were in the room at that time?---In my room? Me and Nazine on the bed, and my brother on the floor and Schanara was with the door.

And could you speak to the other boys?---***No***. They were in the front room. Two police had them in the front room. I repeat that Nazine was 8 years old. Ms Wotton estimated the SERT officers were in the house for 10 to 20 minutes. In my opinion, it was unlikely the officers were in the house for 20 minutes, but I accept it is likely they were in the house for approximately 10 minutes. Ms Wotton saw the vehicles drive away from her house, with her husband. She then watched the SERT officers go across the main road to another house, where she saw them smash down the front door, and heard them yelling at people. This was the Clay house. Ms Wotton went down to the school, which was the police command centre, about 9 am that morning, looking for her husband. It would have taken some considerable courage in the circumstances for Ms Wotton to go the police command centre, given what she had been through at her home a few hours earlier. She was met by some police, who were not local police. She asked if Lex was there and they told her he was not. They did not tell her he had been taken to Townsville. Ms Wotton called Mayor Kyle for help. Mayor Kyle went down to the command centre but was not allowed in. Eventually, that night, some Indigenous people at the Townsville watchhouse called Ms Wotton and told her Lex was there. Ms Wotton called them the "cell watch mob" and I infer they may have been ATSILS representatives. That afternoon, DS Robinson paid Ms Wotton and her children a visit. Ms Wotton was not challenged on her account of what DS Robinson said, and DS Robinson was not called as a witness. I accept Ms Wotton's account, and it reflects poorly indeed on DS Robinson.Okay? Do you recall later in the morning, when you were back home?---That Saturday afternoon when I – me and the kids were on our verandah. Detective Darren Robinson came down. He came on the verandah and he said to the kids, "Come here and sit down. I need to talk to you about your father. What did your father do? Do you know what he did?" And I said to Detective Robinson, "I don't think you should be asking these kids that question. They're only kids." Told them to go back inside, and he asked me, and I said, "I'm not going to answer you till I get legal advice." So he went, but he came there that afternoon and parked in front of the house, and he went like that to me. That must have been about 4.30 that afternoon, and when I went out he said, "You have to come to the school," and I said, "What for?" and he said, "They're doing some counselling there." I said, "***No***, thanks. I'm right." He went, and he came back a second time, but I didn't go out.

And after he left the first time, what did you do?---I was just sitting there on the verandah. I didn't move.

And what were the kids doing?---They was inside, watching TV.

How were they?---They was very upset.

Who was there at the time? Do you remember?---All the children.

And what were they saying to you?---They was keep asking where their father was.

And did they say anything about Mr Robinson?---***No***. There are various descriptions which could be applied to DS Robinson's conduct. Harassment is one. Improper attempts to have a man's children provide evidence against their father is another. Even if one takes a benign view of what appeared to be an offer of "counselling", it is difficult to accept it was a genuine offer, especially given it was said to be occurring at the police command centre. Ms Wotton would have been entitled to see it as a ruse to lure her to the police command centre for further questioning, or to be arrested. I am inclined to view it as DS Robinson laying the groundwork for what proved to be a successful reconstruction of events to make QPS officers look as if they cared about the needs of the local community when, in my opinion, they plainly did not. While this event is not relied on by the applicants as a contravention of s 9 (and I am not suggesting it should have been, given my earlier comments about the inappropriateness of excessive dissection of police conduct), I am satisfied it is probative of the sense of impunity I have found QPS officers felt during these days on Palm Island. Out of sight in a remote community, dealing with people with ***no*** immediate

access to legal or other advice, in a community that had just experienced an incredible show of force by the authorities, DS Robinson had ***no*** compunction about seeking to extract incriminating evidence from children about their father. There was, after all, ***no***-one to pull him up about that. I am satisfied DS Robinson's conduct in returning to the Wotton house, asking such inappropriate questions, caused additional anxiety, stress and harm to Ms Wotton. Ms Wotton described what she did the next day:Yes, I went that Sunday on the ferry with the kids. Some people paid for accommodations for us, and meals, because I had ***no*** money on me. I just went over like that, me and the kids. As I have noted, there were Lifeline counsellors waiting in Townsville for the non-Aboriginal people coming across on the ferry from Palm Island on the evening of 26 November 2004. There were ***no*** Lifeline counsellors waiting for Ms Wotton and her children when they took the same trip two days later, although what they had been through was in reality something that cried out for such services. The double standard is obvious. Ms Wotton was not allowed to see her husband until the following Tuesday. He was granted bail after a week, but had to stay in Townsville. Therefore, as she described, the whole family had to "pack up" and stay in Townsville. The children all had to go to new schools. The family had to live off Centrelink payments, as Mr Wotton had been the principal earner, and Ms Wotton's work was on Palm Island. The slow progress of Mr Wotton's criminal prosecution meant the family lived like this for years. Ms Wotton described the time as "hard", which was typical of the understated way in which she gave her evidence. Whether the considerable broader human impact on families was considered when bail conditions of this kind were set, I was not told. Ms Wotton described how she eventually moved back to Palm Island with the children because life was too hard in Townsville and she was becoming suicidal. She said it was easier once she was back on Palm Island. Given that is her lifelong community, that is understandable. She started work at the hospital, shift work, but was given weekends off so she and the children could take the ferry to Townsville to visit Mr Wotton. The ferry takes approximately two hours each way. It is not necessary to go into any further detail at this point about the serious difficulties Ms Wotton and her family faced during Mr Wotton's incarceration. Mr Ralph and Dr Reddan disagreed about the correct label to place on the diagnosis of the psychological condition suffered by Ms Wotton. Dr Reddan did not dispute, in substance, that Mr Ralph was correct to diagnose Ms Wotton as suffering from a psychological condition; rather she disagreed with the diagnosis of post-traumatic stress disorder. Further, Mr Ralph's description of the symptoms experienced by Ms Wotton was not challenged:These symptoms include recurrent depressed mood, suicidal ideation, intrusive thoughts, and chronic anxiety as evidenced by a fear of being alone and recurrent nightmares. She presented as suffering from guilt and low self-esteem as a result of her difficulties in caring for her children, in circumstances where she has been burdened by a level of psychological distress that has significantly undermined her capacity to parent her children. Mr Ralph also interviewed Ms Schanara Bulsey, who described her mother as "still stressed, tired and emotional" and as "struggling" at times. In the years following the arrest and during her father's imprisonment, Ms Bulsey had described her mother to Mr Ralph as not coping and as struggling with the basic tasks of providing physically and emotionally for Ms Bulsey and her siblings. These descriptions are consistent with the impressions I have formed about Ms Wotton, although in my opinion she works hard to conceal the extent of her struggles, and she has at all times determined to continue to care for and support her husband and family to the best of her ability. Ms Wotton is a religious woman and in her evidence she described how her Christian faith has supported her through these issues. I accept that evidence. Ms Wotton was cross-examined about a number of other tragedies which may have affected her, such as the suicide of Patrick Bramwell in 2007 (the young man who was in the police van and cell with Mulrunji) and the suicide of Mulrunji's son. She was asked whether these events had a greater effect on her than the events of 27 November 2004. She was adamant the events of 27 November 2004 had a greater effect. I accept her evidence. There is ***no*** doubt that a long and tragic series of events have played out on Palm Island since November 2004, which could be said to have some connections to Mulrunji's death, the protests and fires, and the police response. Ms Wotton was very clear about what she feels has had the most impact on her and since I consider her to be a sincere and genuine witness, I accept that what happened at her house on the morning of 27 November 2004 has had significant and lasting effects for her. That is not to say the tremendous challenges and life changes that followed Mr Wotton's arrest and imprisonment should be disproportionately discounted or ignored. However, what happened on 27 November 2004 remains, in my opinion, a significant cause of Ms Wotton's longer term psychological difficulties. There were also other events in her life, to which ***no public*** reference need be made, that have obviously been highly distressing on a long term basis for her. In other words, it is true that Ms Wotton has suffered throughout her life with several tragedies and they have all taken a long term and serious toll. It is, as the respondents submitted, important but difficult to try to separate out the harm suffered by Ms Wotton which can be said to be "because of" the events of 27 November 2004. Looking at

all the evidence, in my opinion two matters are clear. First, there were short term and particularly acute effects on Ms Wotton from the entry and search and the way her husband was tasered and arrested. I find she was truly terrified during those events. She was told by Robert Bulsey that Lex had been shot and I accept at the time she was likely to have thought that to be the case, at least temporarily. Her children were screaming and petrified about what was happening to them, with armed men in their house yelling at them and pointing guns at them. Ms Wotton watched a gun being pointed at her nine-year-old daughter. In that moment, I have ***no*** doubt there was a real fear that one or more of her children might be shot. That fear might be said not to have an objective foundation when one listens to the evidence of the SERT officers, but that is, for the present exercise, beside the point. Any mother watching several men, dressed as the SERT officers were, barging into her house and yelling and searching the house, would be entitled to fear that if a gun was pointed at her children, it might go off. That is not something any parent should have to experience, especially without real cause, as I have found is the case in relation to this conduct. She saw her husband taken away and then another house entered and searched across the road, with violence. Her husband was at that time with the officers who were committing that property damage and she was rightfully fearful of how he might be treated. She was later turned away from the police command centre at the school and given ***no*** information about his safety or whereabouts. All she could do, as she did, was gather up her family and head to Townsville the next day to try to see her husband. In my opinion, the deep fear, shock, distress and anxiety Ms Wotton suffered over the course of the day on 27 November 2004, and for several days thereafter, were because of the contravening conduct of the officers I have identified in [1516] above as those responsible for the decision to employ SERT to effect the arrests, entries and searches. The second matter is that there has plainly been a longer term effect on Ms Wotton from the SERT operations. I am satisfied that the terror she felt during the operations returns from time to time. She and her family still live in the same house. She has nightmares related to those events. She feels deeply the way her children's lives have been affected by the conduct of the QPS that day. She has been a witness to the terror and lasting impact on Schanara and Albert, which they displayed in their evidence as I have discussed earlier in these reasons. The Court saw those effects for a short period of time on one day, but Ms Wotton has to live with her children having those effects. ***No*** party developed any submissions about how to quarantine this suffering from the effects of other events in Ms Wotton's life and the Court received little assistance from the parties on this issue generally, consistently with other damages issues. Doing the best I can, I find there has been a material long-term effect on Ms Wotton from the SERT operation at her house and its immediate aftermath, but it is not the principal cause of her ongoing psychological and emotional issues. Greater in proportion are some of the challenges and tragedies in her early life, and then the much longer term experiences she had while Mr Wotton was being prosecuted, and then after he was convicted and sentenced. For both the short term and longer term effects of the contravening conduct on 27 November 2004 I consider Ms Wotton should be compensated with an award of $85,000. This figure appropriately reflects my finding that she continues to live with the terror she experienced during those events, and to have to deal with her children's ongoing suffering because of them. It also reflects my judgment that she suffered a more prolonged and serious impact from the SERT operations than her partner. Ms Wotton also suffered the violation of her home and her privacy, in a way which I have found to be unnecessary and disproportionate. It involved assaults and violence. She still lives in the same house and I am satisfied she will never feel completely safe in her home again. For that violation of the privacy, safety and security of her family home she should be compensated in the sum of $30,000.

Compensation for property damage None of the three applicants make any claim for property damage. The evidence discloses some of the other subgroup members had their houses damaged. They are entitled in my opinion to recover compensation for any property damage. Compensation may also be available under s 46 of the PSP Act, although ***no*** party drew the Court's attention to this provision.

An argument not put It is of sufficient importance that I consider I should note that the respondents did not put any argument to the effect that Mr Wotton, or any of the other subgroup members who were arrested, unlawfully and in contravention of s 9 as I have found, would have been arrested in any event in the days after 26 November 2004 and that any compensation or other damages payable to them should be reduced accordingly: see R (Lumba) v Secretary of State for the Home Department [2011] UKSC 12; [2012] 1 AC 245 and R (Kambadzi) v Secretary of State for the Home Department [2011] UKSC 23; [2011] 1 WLR 1299, and the adoption of that approach by a Full Court of this Court in Fernando v Commonwealth [2014] FCAFC 181; 231 FCR 251 at [76], [81]-[89] (Besanko and Robertson JJ) and at [166] (Barker J).

Aggravated damages claim The applicants rely on Lockhart J's reasons in Hall v Sheiban at 239-40 for the proposition that aggravated damages can be awarded under s 46PO(4) because they are compensatory in nature. As I have noted at [1777] below, on present authorities, the power under s 46PO(4) has been construed as authorising awards which are in the nature of compensation, rather than those which are punitive. The respondents did not expressly dispute that aggravated damages were an available form of compensation under s 46PO(4): that is, they did not submit there was ***no*** power to make such an order. Rather, they made two submissions: first, that the applicants' submissions departed from their pleaded case on aggravated damages; and second, that the factors identified by the applicants as aggravating the applicants' damages could not properly be characterised in that way because of the absence of sufficient connection between them. At Part M of the third further amended statement of claim the applicants set out what they claim is the conduct of the QPS that aggravated the loss and damage suffered by the applicants. That conduct is identified as:(a) Inquest In September 2006, Acting State Coroner Christine Clements delivered the results of an inquest into the death of Mulrunji, finding that SS Hurley had caused the death of Mulrunji, and calling SS Hurley's treatment of Mulrunji "callous and deficient" and his arrest "completely unjustified". On 19 December 2006, in response to the Acting State Coroner's comments, the Commissioner of Police formed an Investigation Review Team (IRT) to examine in detail any criticisms of the QPS and its members arising from the Inquest and the Acting State Coroner's findings. The Commissioner also requested the CMC to review the internal investigation. The IRT conducted a disciplinary investigation into the conduct of members of the QPS, pursuant to section 18 of the HRMM [the QPS Human Resource Management Manual]. In November 2008 the IRT delivered the three-volume report of its internal investigation, entitled Palm Island Review, to the CMC.(b) Failure to discipline QPS officers Between 19 November 2004 and the time these proceedings were commenced: ***no*** member of the QPS faced any disciplinary action over the events the subject of this claim; ***no*** member of the QPS was charged with criminal proceedings in relation to Mulrunji's death or the subsequent investigation, except for SS Hurley; and DS Robinson was awarded the top police bravery medal, the Queensland Police Valour Award, for his actions on Palm Island on 26 to 29 2004; and SS Hurley was promoted to Acting Inspector. The First and Second Applicants and eighteen Group Members were charged with various offences almost immediately after 26 November 2004. SS Hurley was not charged with an offence until 5 February 2007. The Second Applicant had had the charges against her abandoned at that time, and all Group Members who faced charges had already either faced trial or had the charges against them abandoned by that time. In about June 2010, the CMC handed down a report entitled "CMC Review of the Queensland Police Service's Palm Island Review", which recommended that the QPS commence disciplinary proceedings for misconduct, in relation to their conduct on Palm Island in November 2004, against each of:a. DI Webber;

b. DSS Kitching;

c. DS Robinson; and

d. Inspector Williams. The QPS did not commence disciplinary proceedings against any of those officers. The QPS has not, at any time, commenced an investigation into, or implemented disciplinary proceedings in respect of, the actions of any of the QPS officers involved in the Further Failures. Rather, DS Robinson was awarded the top police bravery medal, the Queensland Police Valour Award, for his actions during that period, and a number of other QPS officers were recommended for commendation for their actions during that period.Particulars

Document 351. In about August 2011, pursuant to the IRT's recommendations, the QPS issued 'Managerial Guidance' to each of Inspector Williams, DI Webber, and DSS Kitching. The fact of those officers receiving managerial guidance was not made known to the ***public*** or to persons who had complained about the conduct of those officers in the course of the investigation of Mulrunji's death, because Senior Sergeant Michael Bond of the Legal and Policy Unit of the QPS Ethical Standards Command was of the view that such advice may be viewed as "somewhat antagonistic" given the notoriety of the relevant events.Particulars

Documents 370 and 372. Aggravated damages were described by Lord Diplock in Cassell & Co Ltd v Broome [1972] UKHL 3; [1972] AC 1027 at 1124 (citing with approval the description given by Lord Devlin in Rookes v

Barnard [1964] UKHL 1;[1964] AC 1129) as "[a]dditional compensation for the injured feelings of the plaintiff where his sense of injury resulting from the wrongful physical act is justifiably heightened by the manner in which or the motive for which the defendant did it." That formulation was applied with approval by Clarke JA in the New South Wales Court of Appeal in Spautz v Butterworth [1996] NSWSC 614; 41 NSWLR 1 at 15-18, although it should be noted that the High Court has acknowledged criticism of Rookes v Barnard on other issues, notably that case's approach to exemplary damages: see Gray v Motor Accident Commission [1998] HCA 70;196 CLR 1 at [18]- [19] (Gleeson CJ, McHugh, Gummow and Hayne JJ) and the authorities there cited, especially Uren v John Fairfax & Sons Pty Ltd [1966] HCA 40; 117 CLR 118. Another description of the function of aggravated damages was given by Windeyer J in Uren at 149, where his Honour said that aggravated damages "compensate the plaintiff where the harm done to him by a wrongful act was aggravated by the manner in which the act was done". This passage was cited with apparent approval in Gray v Motor Accident Commission at [6] (Gleeson CJ, McHugh, Gummow and Hayne JJ). The plurality opinion in Gray emphasises that exemplary damages are punitive, by finding that once a person has been convicted and sentenced for conduct she or he has been punished and exemplary damages for substantially the same conduct are not available: at [40]. The character of the conduct necessary for an award of aggravated damages was described by the High Court in Triggell v Pheeney [1951] HCA 23; 82 CLR 497 at 514 as lacking bona fides, or being improper or unjustifiable. In some cases, the aggravation comes not from conduct directly associated with or following on from the contravening conduct, but from subsequent conduct that has the same effect. In Elliott v Nanda [2001] FCA 418; 111 FCR 240 at [179]- [185], Moore J set out the kinds of additional circumstances which might justify such an award. All concerned the manner in which a respondent or defendant conducted proceedings brought against her, him or it. An example is Houda v New South Wales [2005] NSWSC 1053, in which aggravated damages of $20,000 were awarded for the way the defendant conducted its defence of the proceedings against the plaintiff. Neither party referred the Court to any anti-discrimination cases (whether under s 46PO(4) of the AHRC Act or otherwise) in which aggravated damages had been awarded for acts of unlawful discrimination, although clearly Elliott v Nanda is such a case. In Hall v Sheiban Lockhart J (at 239-40) and French J (at 282) were prepared to assume, without deciding, that aggravated damages may be available under s 81(1)(b)(iv) of the Sex Discrimination Act. In McIntyre v Tully (1999) 90 IR 9, an age discrimination case, Atkinson J upheld an award of aggravated damages for the way the complainant was cross-examined, saying at [25]-[26]:It has been recognised that in those category of cases where damages are awarded for hurt and humiliation, aggravated damages may be awarded because of the defendant's conduct of the case. Aggravated damages are compensatory in nature being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like (Lamb v Cotogno [1987] HCA 47; (1987) 164 CLR 1 at 8; Mafo v Adams [1970] 1 QB 548at 558). Such injury may be exacerbated by the defendant's conduct of the case. In John v MGN Ltd [1997] QB 586 at 608, Bingham MR held that the fact that the plaintiff had been cross-examined in a wounding and insulting way could be taken into account in the assessment of damages. In false imprisonment cases, damages for an initial false imprisonment may be aggravated by persistence with the assertion of facts alleged to justify the imprisonment up to the moment when damages are assessed which continue the slur on the plaintiff's reputation (Spautz v Butterworth [1996] NSWSC 614; (1996) 41 NSWLR 1 at 14; Myer Stores Ltd v Soo [1991] VicRp 97; [1991] 2 VR 597 at 603, 606; Walter v Alltools (1944) 61 TLR 39 at 40; Warwick v Foulkes [1844] EngR 144; (1844) 12 M&W 507; 152 ER 1298).

There is ***no*** reason in principle why this head of damages should not be awarded in appropriate cases for unlawful discrimination when damages are awarded for distress, loss of dignity and injury to feelings (see O'Neill v Steiler at 40; Whittle v Paulette [1994] EOC 92-621 at 77,306; McNeill v Commonwealth of Australia [1995] HREOCA 9; [1995] EOC 92-714 at 78,369-78,370; W v Abrop Pty Ltd [1996] EOC 92-858 at 79,369). Nor did either party refer to any case law on whether aggravated damages can be awarded under provisions of other statutory schemes that bear some similarity to s 46PO(4). In Collings Construction Co Pty Ltd v Australian Competition and Consumer Commission [1998] NSWSC 32; 43 NSWLR 131, for example, the New South Wales Court of Appeal approved their availability under s 87 of the Trade Practices Act, for reasons similar to those of Atkinson J in McIntyre v Tully: at 155-56 (Cole JA, with whom Stein JA and Sheppard AJA agreed). The weight of authority therefore favours the view that aggravated damages may be awarded under s 46PO(4). Even on general principles, however, there are two principal difficulties with the way the applicants put their aggravated damages claim. The first is that the State's liability is solely vicarious, yet none of the identified aggravating conduct is alleged to have been undertaken by the same police officers responsible for the contravening conduct. Nor is any of the aggravating conduct alleged to

have been undertaken by the State itself: for example, in the way it conducted the proceeding. At least, not on the applicants' pleaded case. There were some general submissions made about the "wilful blindness" of the State's defence of these proceedings. I should make it clear that I consider the State conducted these proceedings responsibly and courteously, and was consistently mindful of its model litigant obligations. Instead of relying on anything to do with the "manner" in which the harm was caused to the individual applicants, the applicants' pleadings and submissions relied on various functions, decisions and conduct of other individuals and bodies, exercising ***public*** powers of various kinds. To take some examples, the inquiry by the Investigation Review Team was not conduct undertaken by those officers I have found contravened s 9. Nor was it undertaken by the State. That team was separately established by the then Commissioner of Police, some two years after the events of November 2004, to perform an inquiry function under s 18 of the QPS Human Resource Management Manual, in order to determine whether individual officers should face disciplinary action. I fail to see how the pursuit of such an inquiry by the Commissioner could be said to have the requisite lack of bona fides for aggravated damages to be considered; nor can I see how the establishment of that review has the close connection with the contravening conduct required to be able to describe it as going to the manner or motive of the respondents for the contravening conduct. The way a defendant or respondent conducts a defence to a proceeding is quite a different issue. There, the very subject matter of the proceeding is the alleged unlawful or contravening conduct and the way in which a defendant or respondent defends that conduct can well be seen as capable of heightening an applicant's or plaintiff's sense of injury. Allegations such as the failure to charge SS Hurley until February 2007 are too remote from the loss or damage suffered because of the contravening conduct and are not connected to the manner in which the loss and damage was inflicted. They have a connection in subject matter, but ***no*** more than that. The decision by the QPS officers I have identified to use SERT officers to perform the arrests, entries and searches is unconnected other than in the most general of senses with the prosecutorial decision whether, and when, to charge SS Hurley. The extraordinarily long time taken to decide whether to charge SS Hurley exacerbated, I accept, the sense of outrage and injustice felt by many members of the Palm Island community, including the applicants. Feelings of outrage and injustice are, as I have noted, separate and distinct from the compensable loss and damage suffered by the applicants for the purposes of s 46PO(4). The second difficulty is an evidentiary one. Allegations of this kind (see also [335] of the matters set out at [1730] above, concerning disciplinary proceedings, and [336], concerning the valour and bravery awards) also suffer from the absence of a proper evidentiary foundation. Why SS Hurley was not charged until February 2007 was not explained in the evidence. Why disciplinary proceedings were not commenced against particular officers was not the subject of any evidence, or cross-examination, or subpoenas to those who might have been responsible for that decision. The basis for the bravery and valour awards was not the subject of any evidence. While DC Rynders' Report and CS Wall's memorandum shed some light on these matters, each of those documents was written for a particular purpose and cannot provide an evidentiary basis for findings that would support an award of aggravated damages for the reasons advanced by the applicants. In my opinion, direct evidence from relevant witnesses was required. The last piece of conduct relied on in the third further amended statement of claim – the failure to make known to the ***public*** or to persons who had complained about the conduct of QPS officers in the course of the investigation of Mulrunji's death that certain officers would be given 'managerial guidance' – is in my opinion unjustifiable, but still not within the applicable principles for aggravated damages. The evidence about this decision was scant, but unflattering to the QPS. It is contained in a confidential memorandum to the Office Manager of the Legal and Policy Unit, dated 12 August 2011. The author is Senior Sergeant Michael Bond of the Ethical Standards Command. The subject is DC Rynders' Report and the "finalisation of Palm Island matters". DC Rynders had, as I have noted elsewhere, declined to impose any disciplinary sanctions on any officer but had recommended "managerial guidance". SS Bond writes:Given the history, publicity and sensitivity of this matter, I recommend the complainants are not notified of the outcome; specifically the fact officers received 'managerial guidance'. Such advice may be viewed as somewhat antagonistic given the widespread publication of Deputy Commissioner Rynders' determination of the matters and subsequent events. The "complainants" to whom SS Bond refers are not identified but I infer this is a reference to the two complainants to the CMC, whose identities appear to have remained confidential. Why SS Bond is referring to them in the context of DC Rynders' review is difficult to understand. In any event, the memorandum records that Inspector TJ Goldsworthy of the Ethical Standards Command concurred with SS Bond's recommendation and that the recommendation was approved. This conscious attempt to conceal the fact that any officer was subjected to any performance management arising out of the events on Palm Island, ***no*** matter how objectively weak that performance management was, does not reflect well on those QPS officers involved. It is however consistent with

the lack of transparency from the QPS right from the start of its investigation into Mulrunji's death. Nevertheless, the fact of this concealment did not aggravate the loss and damage suffered by any of the applicants because of the s 9 contraventions. Since it was concealed, none of the applicants were aware of this decision until this proceeding. In any event, the complex processes of review and further review that have been undertaken were not matters to which the applicants referred in evidence when describing what events had affected them after 27 November 2004. Although, in my opinion, the applicants have not made out their claim of aggravation by reference to them, the internal service awards and recognition given to QPS officers by those in positions of command should be considered in some detail. These matters are covered in a memorandum dated 29 May 2006 from CS Wall and addressed to the Assistant Commissioner, to which I refer at [369] above. In that memorandum, the awards were said to be "recognition for officer and staff members who made significant contribution to the overall police response to the November 2004 Palm Island Riots." The officers listed in the memorandum as nominated for various forms of awards is long indeed, and includes officers in the MIR at Townsville, and other officers who did not set foot on Palm Island. The descriptions in CS Wall's memorandum of what occurred during, and after, the protests and fires are, on the basis of the evidence before me, inaccurate, inflammatory, exaggerated and one-sided. Descriptions of aggressive and violent tactics of the SERT officers and their effects on local families are nowhere to be found in that memorandum. There is ***no*** mention of QPS officers authorising in excess of 20 armed officers to conduct an operation with, amongst other objectives, the aim of arresting a 13-year-old child, who like all the other suspects was unarmed. Instead the memorandum simply states that:In the following weeks an extensive investigation under the operational code name "Charlie Clover" was carried out on Palm Island which resulted in 34 persons being arrested on a total of 81 charges which included riot, arson, serious assault etc. Of course, the number of 34 persons includes people such as Mrs Agnes Wotton, against whom all charges were dropped a few weeks later in Townsville. I note also that on the basis of facts agreed by the respondents in this proceeding, ***no*** person was charged with "serious assault". It is readily understandable that members of the Palm Island community would be outraged that police officers were receiving commendations while ***no*** police officer was held responsible for the circumstances of Mulrunji's death: SS Hurley was not charged by the time these awards were given. ***No*** doubt it fuelled the sense of outrage and injustice on the island that white police officers received bravery awards while a large number of Aboriginal Palm Islanders protesting about Mulrunji's death and the biased investigation of it were arrested in shocking and humiliating circumstances, incarcerated and kept by bail conditions away from their homes for lengthy periods of time, and had their lives and families disrupted only for many of them to have charges dropped or to be acquitted. ***No*** doubt it appeared as if the only wrongdoers in the series of events were the local Aboriginal people, and the only people worth honouring were the white police officers, in circumstances where ***no*** police officer was injured but an Aboriginal man was dead in police custody and the lives of many Aboriginal families on Palm Island had been torn apart. The behaviour of QPS in electing to honour its officers in this way at a time where ***no*** persons had been held to account in any way for Mulrunji's death was insensitive and lacking in insight in the extreme. It took an unjustifiably one-sided view of the entire sequence of events and paid ***no*** attention to the context of the protests and fires, which was a death in custody and tremendous dissatisfaction with the ensuing investigation. It perpetuated the impression of impunity and superiority which in my opinion had been apparent in much of the conduct of QPS officers on Palm Island during these events. Notwithstanding the views I have expressed about both the way the memorandum was written and the way QPS commanding officers chose to elevate and honour the conduct of officers involved in events both on and off Palm Island, I do not consider that this conduct by CS Wall and other commanding officers can be seen, within applicable legal principles, as conduct heightening the injury suffered by the applicants as a result of the contraventions of s 9 of the RDA through the arrests, searches and entries. It is not conduct concerning the manner in which the harm caused by those arrests, entries and searches was inflicted. It is subsequent conduct, neither designed nor intended to have anything to do with the Palm Island community: indeed, it is the disconformity between what is recounted in CS Wall's memorandum and what happened on Palm Island, on my view of the evidence, that is the infirmity in the whole process of conferring awards on the officers concerned. If there had been available claims for damages in respect of the contraventions of s 9 I have found occurred in the conduct of the investigation into Mulrunji's death, then the conduct of QPS commanding officers in elevating and honouring officers I have found were responsible for those contraventions may well have been capable of aggravating the injury suffered. However, ***no*** damages have been claimed, nor have I found they are available, for those contraventions of s 9. If one examines, for example, the findings of Harrison J in Beckett at [810]-[816] about why Ms Beckett was entitled to aggravated damages, one can see in my opinion the proper scope of these principles. Harrison J's focus is on conduct by New South Wales police

officers directly affecting Ms Beckett – such as handcuffing her, parading her in front of the media, opposing her being granted bail, and seeking to revoke her bail. In a case for damages arising from malicious prosecution one can readily see how this conduct is conduct that could be said to have heightened the damage suffered by Ms Beckett as a result of the malicious prosecution. In the present case, it may have been open to the applicants to plead that Mr Wotton's handcuffing and shackling should be the subject of an award of aggravated damages. The dragging of Mr Bulsey semi-naked out of his house might be in the same category. Making Mr Morton, a child, lie face down in the mud might be another. It may be open to characterise the imprisonment of Mr Blackman in the back of a police van overnight as conduct aggravating any damages award he should receive. None of these matters concerning Mr Wotton were pleaded in the context of aggravated damages and I say ***no*** more about them. The matters in relation to other subgroup members are for another day.

Exemplary damages claim Exemplary damages are sought by the applicants based on alleged differences between the findings and recommendations of ***public*** reviews of police conduct in relation to the events on Palm Island in November 2004, and internal police reviews of that conduct. The applicants submit the internal police reviews (the IRT and Rynders reports) never resulted in any disciplinary action being taken against any QPS officers. In contrast, the ***public*** reviews (the CMC report and the second inquest decision) made recommendations to that effect. The respondents deny there is power to make orders for exemplary damages under s 46PO(4), relying on the following statement of French and Jacobson JJ in Qantas Airways v Gama at [94]:The damages which can be awarded under s 46PO(4) of the HREOC Act are damages "by way of compensation for any loss or damage suffered because of the conduct of the respondent". Such damages are entirely compensatory. In many cases, as in damages awarded under s 82 of the Trade Practices Act 1974 (Cth) the appropriate measure will be analogous to the tortious. That may not be every case. Ultimately it is the words of the statute that set the criterion for any award. In any case the discretionary character of the remedy allows an award of an amount "by way of compensation" which does not fully compensate for the loss suffered. The applicants submit that the list of specified orders in section 46PO(4) is not exhaustive. They submit the language of the chapeau – "the court may make such orders (including a declaration of right) as it thinks fit" – suggests the power extends to orders for exemplary damages if, in an appropriate case, the Court sees fit to make orders of that kind. Before I turn to consider these arguments, I note that the respondents did not rely on s 10.5(2) of the PSA Act, which provides:In ***no*** case does the Crown's liability for a tort committed by any officer, staff member, recruit or volunteer extend to a liability to pay damages in the nature of punitive damages. I assume that is because of the reference to torts in the provision, and its operation being seen as confined to that circumstance. That would appear to be correct, and I say ***no*** more about this provision: cf Bulsey at [94]. Exemplary damages at common law have a different character to compensatory and aggravated damages: they are punitive. Brennan J explained their purpose, and the nature of the conduct which must exist for such damages to be awarded, in XL Petroleum (NSW) Pty Ltd v Caltex Oil (Australia) Pty Ltd [1985] HCA 12;155 CLR 448 at 471:As an award of exemplary damages is intended to punish the defendant for conduct showing a conscious and contumelious disregard for the plaintiff's rights and to deter him from committing like conduct again, the considerations that enter into the assessment of exemplary damages are quite different from the considerations that govern the assessment of compensatory damages. There is ***no*** necessary proportionality between the assessment of the two categories. In a passage approved by the High Court on appeal at [34], Spigelman CJ in New South Wales v Ibbett [2005] NSWCA 445; 65 NSWLR 168 at [83] described the differences in perspective between aggravated and exemplary damages:The difference is that in the case of aggravated damages the assessment is made from the point of view of the Plaintiff and in the case of exemplary damages the focus is on the conduct of the Defendant. Nevertheless, it is necessary, as I have noted above, to determine both heads of compensatory damages before deciding whether or not the quantum is such that a further award is necessary to serve the objectives of punishment or deterrence or, if it be a separate purpose, condemnation. The awarding of sums for exemplary damages far in excess of what is awarded for compensatory damages (see, as an example, the award in Nye v New South Wales [2003] NSWSC 1212) reflects their different purpose. The combination of the egregiousness of the conduct and the Court's opinion that there should be condemnation by way of an order for the payment of money, the character of the conduct (for example, whether it is conduct engaged in by a ***public*** official and the capacity of that official), together with the need to deter future conduct of the same kind can all lead to awards of very significant sums. As Priestley JA observed in Adams v Kennedy [2000] NSWCA 152; 49 NSWLR 78 at [35], the only guide to the sum which should be awarded in a given case is "the somewhat opaque rule that the damages must not be out of all proportion in the circumstances". In

New South Wales v Delly [2007] NSWCA 303; 70 NSWLR 125 at [116]- [117], Basten JA, speaking particularly of police officers, emphasised the exceptional nature of exemplary damages:One purpose of an award of exemplary damages is to deter both the wrongdoer and others who may be in his or her position from a repetition of the kind of conduct under scrutiny. In the present case, it is the State of New South Wales, rather than the individual police officers who will suffer the financial burden of an award. Further ... such an award may indirectly have a deterrent effect on the police officers concerned through the response of the Police Service. It is, therefore, important to preserve the deterrent effect of such an award. That effect will tend to be diminished if the preconditions for an award are not tightly controlled. ***No*** doubt it is important that police officers know and observe the limits of their powers: however that desirable end will not make a careless or mistaken exercise of power outrageous or high-handed.

The fact that an award of exemplary damages constitutes an expression of the Court's disapproval of the conduct does not mean that the Court's disapproval is a sufficient reason to make an award. For example, in Adams v Kennedy, in awarding an aggregate sum of $100,000 in exemplary damages for several causes of action (trespass, assault, battery and false imprisonment) Priestley JA said at [36] (Sheller JA and Beazley JA agreeing):The amount should also be such as to bring home to those officials of the State who are responsible for the overseeing of the police force that police officers must be trained and disciplined so that abuses of the kind that occurred in the present case do not happen. In Beckett, Harrison J awarded Ms Beckett the sum of $1,825,200 for false imprisonment following upon what his Honour found to be malicious prosecution in relation to several criminal charges, although Ms Beckett remained convicted of two offences, for which she had, his Honour accepted, lawfully served a sentence of imprisonment. His Honour awarded Ms Beckett $100,000 in aggravated damages for the manner in which she was arrested (including being handcuffed when his Honour found that was unnecessary) and the way she was conveyed through a "media scrum", apparently on the 'tip off' of the police. His Honour also awarded $200,000 in exemplary damages, specifically by reference to the conduct of a particular detective whom his Honour found had long demonstrated a partiality against Ms Beckett and had been determined to "get square" with her, in what Harrison J described (at [817]) in the following terms:Detective Thomas remained in charge of the investigation and prosecution of Ms Beckett long after his partiality had been identified and commented upon by judges and police Internal Affairs investigators. Detective Thomas' own written words demonstrated that he saw Ms Beckett as his nemesis and that it has adversely affected his career. This was, or should have been, apparent from as early as, and certainly by ***no*** later than, Ms Beckett's complaints about him following the delicatessen fire in 1983. The fact that he was permitted to remain connected in any way with the charges preferred against Ms Beckett after that represents an egregious failure in policing and an institutional failure of remarkable proportions. Many of the New South Wales cases discussed by Harrison J in his comprehensive survey in Beckettinvolved deliberate fabrication of evidence by police, or other egregious and deliberate conduct. For example, Harrison J described Detective Thomas in Beckett as a bully and a person who "clearly treated many people with an arrogant contempt that was intimidating and frightening for them": at [839]. There have been other circumstances in other states where awards of common law exemplary damages have been made against police officers. In White v South Australia [2010] SASC 95; 106 SASR 521, a group of about 30 protesters were beaten, sprayed with OC spray, arrested and detained by police for breach of the peace after staging a walk-on protest at the Beverley uranium mine. Once arrested, they were taken to another part of the mine site by police cars and then placed in a disused shipping container. A wire cage was also welded onto the outside of the container. Most were held in the shipping container for about three hours and then outside in the wire cage for another three hours. Later that day, they were taken to a separate location and released after having spent up to seven hours in custody. Eight of the protesters and a Channel Seven cameraman sued for assault and false imprisonment, and an 11-year-old girl who was not participating in the protests sued for assault. Anderson J held that the plaintiffs had not been asked to leave the land so they were not trespassing. Therefore all of the arrests and detentions were unlawful. His Honour awarded damages to each plaintiff and awarded all but one of the plaintiffs $15,000 each in exemplary damages for demeaning remarks about them made in the press by two ministers of the South Australian government: see [461]-[470]. Inclusive of exemplary damages and interest, nine of the protestors were awarded between $53,000 and $95,110 (see [527]), with the 11-year-old girl being awarded $18,000. In Carter v Walker [2010] VSCA 340; 32 VR 1, two police constables forcibly entered a residential unit in response to a call concerning a domestic violence incident. In the course of a physical altercation between a son alleged to be responsible for the domestic violence

incident, his mother (who lived next door), and the police officers, the son and mother were injured, including the mother's shoulder being dislocated. A second son then arrived home and suffered nervous shock at what he saw. At first instance, Smith J upheld the plaintiffs' assault and battery claims, awarding: (a) the first son $300,000 for general damages, $883,413 for past loss of earnings and lost future earning capacity, $200,000 as aggravated compensatory damages, and $400,000 by way of exemplary damages; (b) the second son $200,000 for general damages, $643,610 for past loss of earnings and lost future earning capacity, and $75,000 as aggravated compensatory damages; and (c) the mother's estate $100,000 as general damages and aggravated damages of $100,000. The Court of Appeal (Buchanan, Ashley and Weinberg JJA) criticised some of the primary judge's fact finding and allowed the appeal in relation to the second son on the basis that nervous shock of a third party is not compensable in battery (at [251]). However, their Honours upheld most of the balance of his Honour's judgment, although they reduced the amounts of aggravated and exemplary damages awarded to the first son from $200,000 to $100,000 and from $400,000 to $100,000 respectively. In Sadler v Madigan [1998] VSCA 53, a jury awarded the plaintiff $40,000 in damages and $10,000 in exemplary damages for false imprisonment by an officer in a police station. The plaintiff had been lawfully arrested, but then held for longer than was reasonably necessary, although the period of in which he was unlawfully detained was ***no*** more than 1 190; hours: at [10]. The Court of Appeal set aside the award and substituted an award of $15,000 in damages only, declining to award exemplary damages, on the basis that the police conduct was not "outrageous" so as to justify such an award: see [55] (Winneke P, Charles JA and Batt JA agreeing). In Coleman v Watson [2007] QSC 343 in a trial in the Supreme Court sitting at Townsville, the defendants were two officers and the State of Queensland. Liability, principal and vicarious, was admitted. The plaintiff was attempting to enter the Townsville Entertainment and Convention Centre to attend a ceremonial sitting of the Queensland Legislative Assembly. At [14]-[15], Cullinane J described the plaintiff in the following terms:It can be said that there is a history of clashes between the plaintiff and the police arising out of the plaintiff's activities as an activist. I think that the word agitator would not be a term that the plaintiff would cavil with.

By 3 September 2002 it is obvious that police treated the plaintiff as someone to be kept under observation when he appeared in a ***public*** place or at a ***public*** event. After several exchanges outside the venue, where police officers were preventing the plaintiff from entering (being aware of his intent to protest inside), he was eventually arrested and taken to the cells at the Townsville Magistrates Court, and subsequently granted bail. The damages related to a short period in which he was unnecessarily detained before being granted bail. The action was for false imprisonment, assault and trespass to the person. The plaintiff was charged with two offences of obstructing a police officer in the exercise of his duty, and acquitted of both charges. Noting (at [53]) that damages in such circumstances are "primarily awarded to compensate for a sense of outrage, injury to feeling, humiliation and disgrace, indignity and the like", Cullinane J awarded the plaintiff $20,000 compensatory damages plus interest. At [69]-[72], Cullinane J explained why he declined to order any exemplary damages:So far as exemplary damages is concerned I do not think this is a matter which calls for such an award. Although it is acknowledged that the defendants acted unlawfully and at the commencement of the trial admitted their liability there is nothing to suggest that they were acting in anything other than good faith.

The defendants had been instructed by their superiors to prevent the plaintiff from entering the premises.

It is not a case in which their attention to the plaintiff was in any sense arbitrary. There was evidence of conduct on his part in the past which would to any reasonable person have justified paying some attention to him when he was seen at the convention centre. The defendants were part of a group of police officers having the obligation to provide security at a gathering of parliamentarians. Members of the ***public*** who had a variety of interests including grievances were in attendance and the police undoubtedly were obviously going to be fully occupied.

There is nothing about the manner in which the defendants spoke to or otherwise dealt with the plaintiff which could be regarded as high handed or unreasonable. The audio tape rather suggests they dealt with him with considerable patience and courtesy. It can be seen that in common law actions where allegations are found proven, courts have ***no*** difficulty in awarding exemplary damages against police officers for conduct occurring in the

exercise of their powers, where the conduct was sufficiently egregious, rather than simply mistaken or negligent. It is also important to note that the tort of malicious prosecution requires that a prosecution was commenced or maintained without reasonable and probable cause: A v New South Wales [2007] HCA 10;230 CLR 500 at [1], [58]-[59] (Gleeson CJ, Gummow, Kirby, Hayne, Heydon and Crennan JJ). Unlike s 9 of the RDA (which applies to ***public*** and private actors) it is, of its nature, a tort directed at the use and abuse of ***public*** power. Further, malicious prosecution involves an examination of the intention of those responsible for the prosecution, in a way that an inquiry under s 9 of the RDA does not, or does not necessarily involve. While Lamb establishes that 'malice' is not a necessary prerequisite for an award of exemplary damages, it is consistent with an inquiry into motive or intention forming part of the elements of a tort that, in an appropriate case, the nature of that motive or intention and the conduct that accompanied it might be seen as deserving of punishment, and of requiring orders calculated to deter others from deliberately abusing ***public*** powers in similar ways. There are ***no*** straightforward parallels between cases of the kind I have discussed and successful proceedings under s 9 of the RDA. Nevertheless, it is conceivable that there can be cases of deliberate and conscious racial discrimination under s 9, and in those circumstances, there may be greater parallels with the malicious prosecution cases. There being ample authority in Australian tort cases for awards of exemplary damages against police officers in respect of the exercise of their powers, I turn now to consider the position under s 46PO. Two parts of s 46PO must be considered: the chapeau to subs (4) and subs (4)(d). Current authority suggests that the power under s 46PO(4) is a power to make orders that are compensatory in nature. As I have noted, in Qantas Airways v Gama French and Jacobson JJ said at [94]:The damages which can be awarded under s 46PO(4) of the HREOC Act are damages "by way of compensation for any loss or damage suffered because of the conduct of the respondent". Such damages are entirely compensatory. In many cases, as in damages awarded under s 82 of the Trade Practices Act 1974 (Cth) the appropriate measure will be analogous to the tortious. That may not be every case. Ultimately it is the words of the statute that set the criterion for any award. In any case the discretionary character of the remedy allows an award of an amount "by way of compensation" which does not fully compensate for the loss suffered. In Richardson the Court did not endorse a submission suggesting this passage was authority for the proposition there was a discretion in a trial judge to decide to award less than a sum of compensation which reflected the loss and damages because of the contravening conduct: see Richardson at [137]-[138] (Besanko and Perram JJ). The approach of Besanko and Perram JJ again emphasises the compensatory purpose of s 46PO(4). In Clarke v Nationwide News Pty Limited [2012] FCA 307; 201 FCR 389 at [340], Barker J referred to Qantas Airways v Gama, and to some academic views about whether s 46PO(4) extends to exemplary damages. His Honour did not find it necessary to decide the matter, although at [342] he expressed the opinion that if he had needed to decide the matter, he would not have considered the conduct in the proceeding before him sufficiently outrageous or egregious to warrant such an order. Barker J also referred (at [340]) to a decision of the Federal Magistrates Court in Hughes (formerly De Jager) v Car Buyers Pty Ltd [2004] FMCA 526; 210 ALR 645, a case concerning allegations of sexual harassment. Walters FM expressed a view that ***no*** power to make orders for exemplary damages existed, and expressed his disagreement with an earlier decision of Raphael FM (Font v Paspaley Pearls Pty Ltd [2002] FMCA 142)that s 46PO(4) extended that far: Hughes at [74]. In the context of a primary judge's decision not to make any orders under s 46PO(4) for aggravated or exemplary damages, in Employment Services Australia Pty Ltd v Poniatowska [2010] FCAFC 92 at [133]Stone and Bennett JJ (somewhat equivocally) said:We note that, while s 46PO(4) refers only to orders for damages of a compensatory nature, there is ***no*** exclusion of other orders that may be made. However, we do not need to determine whether or not there is power to make such an award under this section as, in our view, his Honour's approach [declining to award aggravated or exemplary damages] was reasonable in the circumstances. The question of power to award exemplary damages was also left open by Bromberg J in Ewin v Vergara (***No*** 3) [2013] FCA 1311; 307 ALR 576 at [681]- [684], in observations the Full Court on appeal approved: see Vergara v Ewin [2014] FCAFC 100; 223 FCR 151 at [106]- [112] (White J, dissenting in the result, but North and Pagone JJ agreeing with his Honour on this issue at [123]). In particular, on appeal White J approved the proposition that exemplary damages are awarded only when a court is satisfied that the amount of the compensatory damages has insufficient punitive effect. Most recently, a Full Court of this Court has described the "debate" about the availability of exemplary damages under s 46PO as "unresolved" but also declined to decide the matter: see Mulligan v Virgin Australia Airlines Pty Ltd [2015] FCAFC 130; 234 FCR 207 at [166] (Flick, Reeves and Griffiths JJ). The parties did not refer the Court to any of these authorities. In this case, the applicants have pressed for exemplary damages, and for the reasons I give below, if I was of the view there was power to award them, I would consider doing so. That being the case, it is necessary to determine whether they are available. In my

view they are not. Section 46PO(4) establishes a suite of statutory remedies the Parliament has chosen as expressly available where unlawful discrimination has occurred. It is true that the suite is not expressed to be exhaustive, and that is consistent with the context and purpose of s 46PO as prescribing remedies to be available across a range of federal anti-discrimination statutes, which must deal with unlawful discrimination occurring in a wide variety of circumstances. In its inclusive nature, s 46PO(4) recognises the realities of the exercise of federal judicial power and the need to allow courts to do justice between the parties in a way which finally and appropriately settles the controversy between them. That is emphasised by the use of the phrase "as it thinks fit" in the chapeau, which has an established meaning, and also emphasises the discretionary nature of all these remedies. The phrase "as it thinks fit", like phrases such as "as the Court thinks just" (see for example s 22 of theFederal Court Act) or "as the Court thinks appropriate" (s 23 of the Act), is a phrase intended to confer on the Court a wide discretionary power. However, even such widely expressed discretions have functional limits, requiring sufficient connection with the jurisdiction to be exercised, ensuring a court's processes are not frustrated, preserving the subject matter of a proceeding, ensuring effective relief can be granted at the end of a proceeding, preventing abuse of the court's processes and the like: see, generally, Patrick Stevedores Operations ***No*** 2 Pty Ltd v Maritime Union of Australia [1998] HCA 30; 195 CLR 1 at [35] (Brennan CJ, McHugh, Gummow, Kirby and Hayne JJ). However, to see such a power as extending to the conferral of a punitive power is a more ambitious constructional choice. It sits less easily with the objectives of each federal anti-discrimination statute (the achievement of substantive equality in the areas in which each statute operates) and it does not reflect any other aspect of the statutory schemes either in the individual anti-discrimination statutes or in the AHRC Act (in particular, the conciliation function of the Commission). Unlike other statutory regimes where there are similarly worded compensation clauses (such as the Competition and Consumer Act 2010 (Cth) ss 76, 82 and 87 and the Fair Work Act 2007 (Cth) ss 545 and 546), there are ***no*** penalty provisions in the RDA, nor does the AHRC Act provide in terms that a penalty may be imposed for unlawful discrimination. Although that feature could tend in different ways on the construction of s 46PO(4), in my opinion it demonstrates that what Parliament was enacting with s 46PO(4) was a compensatory and remedial regime and not a regime designed to punish, or confer any deterrent or punitive functions on a court by its orders. There is also the specific use of the word "compensation" in s 46PO(4)(d) which in my opinion gives a clear indication of the nature of power conferred by the provision, including the ancillary power conferred in the chapeau. In my opinion the better constructional choice is that Parliament did not intend to confer on this Court the ability to make punitive orders as part of resolving a dispute between parties concerning unlawful discrimination. This approach appears consistent with the approach taken to trade practices and consumer law legislation. As I have noted, there is an increasing trend to construe federal anti-discrimination statutes as embodying their own compensation regimes, without drawing too close an analogy with tort law, and support for this approach is drawn from authorities dealing with trade practices and consumer law. In some circumstances, orders for exemplary damages are expressly prohibited. For example, s 87ZB of the Competition and Consumer Act specifically prohibits aggravated or exemplary damages in a claim for damages or compensation for death or personal injury made under Pt VIB. In Marks v Gio Australia Holdings Ltd [1998] HCA 69; 196 CLR 494 at [9] Gaudron J held that exemplary damages were not available under the provisions of the Trade Practices Act providing for damages (s 82)and other relief (s 87):Before turning to the argument, it is convenient to note two matters which are clear from the terms of ss 82 and 87. The first is that for a person to obtain relief under those sections he or she must have suffered loss or damage or, in the case of s 87, be likely to suffer loss or damage. The second is that there is ***no*** punitive aspect to these provisions, they being concerned solely to provide for recovery of "the amount of the loss or damage [suffered]" (s 82) or to "compensate" for or "prevent or reduce" loss or damage (s 87). Similar observations could be made of s 46PO(4). To obtain relief under subs (b), (d), or (e) of s 46PO(4), a person must have suffered "loss or damage". Nothing in those subsections – nor in subs (a), (c) or (f) – provides support for a conclusion that the reference in the chapeau to orders the court "thinks fit" includes orders that aim to punish a respondent. Earlier Federal Court authority on the availability of exemplary damages under the Trade Practices Act had reached the same conclusion: see Musca v Astle Corporation Pty Ltd [1988] FCA 4; 80 ALR 251 at 262 (French J). A Full Court agreed with that approach: see Munchies Management Pty Ltd v Belperio [1988] FCA 413; 58 FCR 274 at 287-88 (Fisher, Gummow and Lee JJ). In Musca, French J also held that s 22 of the Federal Court Act empowered the Court to order exemplary damages in exercise of its accrued jurisdiction in relation to the tort of deceit. I do not see that example as detracting from the view I have taken. If the applicants had invoked this Court's accrued jurisdiction to claim relief in relation to false imprisonment or assault, the same approach could have been taken. However, that exercise of power, relying on s 22, would originate in the

continuing common law recognition of the role of exemplary damages, not in the Court's statutory task under s 46PO(4). In Nixon v Philip Morris (Australia) Ltd [1999] FCA 1107; 95 FCR 453, Wilcox J agreed with the approach taken by French J. His Honour said (at [99]-[103]):In the present case, counsel for the applicants accept that exemplary damages are not recoverable under s 82 or 87 of the Trade Practices Act. But they argue, in effect, that French J's approach leads logically to the conclusion that exemplary damages are available under s 22 even in relation to a contravention of Pt V of the Trade Practices Act. They say:"Having been granted power under Section 22 (a power which should be given a liberal construction – see French J at 263) to grant such remedies as are necessary to resolve disputes before it, why should that power not extend to granting an award of exemplary damages where appropriate, pursuant not to Section 82, or Section 87, but to that power?"Alternatively, counsel suggest, exemplary damages ought to be regarded as compensatory in character, at least in part. In support of that submission, they refer to comments in various cases about the role of exemplary damages in assuaging victims' feelings.

I reject both these submissions. French J took some trouble to explore and explain the limits on damages awards imposed by the terms of ss 82 and 87 of the Trade Practices Act. Section 22 is an exhortatory provision requiring the Court, in every matter before it, to grant "all remedies to which any of the parties appears to be entitled in respect of a legal or equitable claim properly brought forward by him in the matter", so as to avoid multiplicity of proceedings. It ought to be construed liberally: see the Full Court decision in McLeish v Faure [1979] FCA 38; (1979) 40 FLR 462 at 471-473; [1979] FCA 38;25 ALR 403 at 413-414. However, s 22 does not confer on the Court any additional jurisdiction: see Philip Morris Inc v Adam P Brown Male Fashions Pty Ltd at 489-490 per Gibbs J, at 505-506 per Mason J and at 529 per Aickin J. Section 22 does not give the Court a general charter to make whatever orders it might think to be just, independently of any legal or equitable claim the parties may succeed in establishing. In determining Musca, French J was aware of the existence and limitations of s 22. His approach has been indorsed at Full Court level and is supported by Gaudron J's observation in Marks. Having regard to these circumstances, I would follow his Honour even if I had reservations about the correctness of his view. I do not; I think he was plainly correct.

In relation to the second submission, it is true that some judges have drawn attention to the role of exemplary damages in assuaging the feeling of hurt or outrage which is often experienced by victims of tortious conduct. In a sense, that role might be regarded as compensatory. However, the distinction between compensatory (including aggravated) damages and exemplary damages is deeply entrenched. It is enough to recall the decision of the House of Lords in Rookes v Barnard [1964] UKHL 1; [1964] AC 1129 and the reaction to that decision of the High Court of Australia in Uren v John Fairfax & Sons Pty Ltd [1966] HCA 40; (1966) 117 CLR 118. In considering the matter of aggravated damages, the Court examines the effect of the defendant's conduct on the plaintiff; in considering exemplary damages it focuses on the conduct itself. The distinction was succinctly explained by the High Court in Lamb v Cotogno [1987] HCA 47; (1987) 164 CLR 1 at 8:"Aggravated damages, in contrast to exemplary damages, are compensatory in nature, being awarded for injury to the plaintiff's feelings caused by insult, humiliation and the like. Exemplary damages, on the other hand, go beyond compensation and are awarded 'as a punishment to the guilty, to deter from any such proceeding for the future, and as a proof of the detestation of the jury to the action itself'."I accept it may be possible, in an appropriate case, to recover aggravated damages as "loss or damage", within the meaning of s 82 or 87 of the Trade Practices Act. However, it seems to me clear that exemplary damages cannot fall into that category. I am of the opinion that, in the present case, it is not open to any of the applicants or group members to recover exemplary damages in relation to any contravention of s 52 of theTrade Practices Act they may prove. On appeal, Wilcox J's decision was set aside on other grounds and the Full Court refrained from expressing a view on the availability of exemplary damages: Philip Morris (Australia) Ltd v Nixon [2000] FCA 229; 170 ALR 487 at [185]- [186] (Sackville J, Spender J agreeing at [1] and Hill J agreeing at [13]). In the 16 years since Nixon was decided, it does not appear that the issue of orders for exemplary damages in consumer law cases has arisen again. One possible reason for that is, as I have noted above, the existence under these regimes of a variety of other kinds of punitive orders. If, contrary to my opinion, there is power to make orders for exemplary damages under s 46PO(4) (or, if one recalls the possibility raised and discounted by Wilcox J in Nixon, s 22 of the Federal Court Act), then I would have foreshadowed the making of such orders in relation to some of the subgroup members. I explain briefly what those orders would have been. I say "foreshadowed"

because I am not asked at the current stage of this proceeding to make orders by way of compensation or damages in relation to the subgroup members. However, it is only those members (or rather, some of them) in respect of whom I consider orders for exemplary damages would have been appropriate. First, I would have foreshadowed orders for exemplary damages in relation to the treatment of William Blackman Senior. The way Mr Blackman was locked overnight in a police vehicle should be deprecated in the strongest terms. It is inhumane and under ***no*** circumstances appropriate to lock a human being, handcuffed, in a tropical climate and in the confines of a police van for an extended period of time. There was ***no*** shortage of police officers on the island – indeed there were approximately 100 officers on the island that night. Mr Blackman could have been kept, in safety and with dignity and human decency, in any locked room and guarded if need be by officers on rotating shift. In any event, there is not the slightest evidence that he posed any risk whatsoever to any person, which simply adds to the outrageousness of the way he was treated. I have not the slightest doubt that QPS officers considered they could treat Mr Blackman like this because he was Aboriginal. That only adds to the egregiousness of their conduct. There is ***no*** evidence before me about the identities of the individual officers who undertook this conduct, although the police log reveals that DS Campbell requested a "travel arrangement" for Mr Blackman and that Inspector Kachel was on duty when Mr Blackman was taken to the airport. In cross-examination, Mr Campbell said he could not remember anything about the incident. In any event, the officers who were responsible for Mr Blackman's treatment should be publicly named, and ***no*** doubt that may occur in due course whether or not an award of exemplary damages is made. The second category of subgroup members in whose favour I would have foreshadowed making awards of exemplary damages are the people who were children at the time of the entries and searches of the houses, and who were the innocent victims in the aggressive, confrontational and violent conduct that necessarily accompanies the entry and search of properties by two large teams of SERT and PSRT officers, with police dogs. I would have foreshadowed such orders against those QPS officers who together appear to have decided to use SERT to undertake the arrests, searches and entries (namely: DI Webber, Inspector Underwood and Inspector Kachel) because, on the evidence before me, it was known, or ought reasonably to have been known, to each of those officers, that there would likely be children in and around the houses the SERT officers were sent to. In circumstances, as I have found them to be, where there was ***no*** reasonable basis to suppose the suspects would be armed (or even if there was, it was only with sticks and spears, on the best evidence for the respondents, which I have not accepted in any event) it was unnecessary and disproportionate to send SERT officers at all. Those teams were sent to subjugate, punish and 'send a message' to the Aboriginal population of Palm Island about the consequences of rising up against police. That was an improper purpose. Be that as it may, it transforms an improper purpose into a callous and cruel choice when it was plain that children would be in those houses. The evidence which supports those opinions is as follows. First, it is a notorious fact if one looks at any of the contemporaneous evidence that Palm Island had a high proportion of children in its population. They were also a visible component of the population: that is, they were out and about, playing on the streets and in the neighbourhoods. They were mobile and curious and therefore highly likely to be at and around the houses to be attended by the SERT officers. I find DS Robinson, having been on the island for two years, would have been well aware of this feature of the Palm Island community. Indeed he knew the members of the community well enough to have a good idea of which houses were likely to have children in them when entered and searched. There is ***no*** evidence he attempted to modify in any way what should happen at those houses. Further, the entry and search of Mr Wotton's house was timed expressly and deliberately for a time at which he and his family were likely to be there, and asleep. There was a deliberate choice to target that house knowing the whole family was likely to be there. Second, the particular evidence about knowledge of the presence of children is as follows. DI Webber conceded that he knew there might be children and elderly people in the houses that were to be entered and searched. Mr Campbell agreed he knew there was a "very real possibility" that women, children and elderly people would likely be in the homes to which SERT officers were sent. Inspector McKay accepted that he briefed the SERT officers "around the fact that there were potentially children in the addresses". Inspector McKay's evidence was that this information came from DS Robinson, and Superintendent Kruger confirmed this in his evidence. On the day following the arrests, entries and searches, being Sunday, 28 November 2004, several people raised concerns with Inspector Kachel and DI Webber about police pointing guns at children. The latter I consider a mild and inaccurate description of what happened during the arrests, entries and searches, on the evidence before me. In my opinion, the determination to subjugate and punish the Aboriginal people suspected of being the 'ringleaders' in the uprising against police the day before overwhelmed all sense of proportion and decency which should have pulled each and every one of these officers up, when they knew there would be children present in and around those houses. Fully

understanding what was involved in two teams of SERT officers going to each house to apprehend suspects, and enter and search the houses, they consciously abandoned concerns for the safety and wellbeing of innocent children in favour of pursuing the purposes I have outlined above. That came at an unforgivable cost to those children, as the evidence in this proceeding has demonstrated. As with Mr Blackman, the amount of any exemplary damages for subgroup members who were children (had exemplary damages been available under s 46PO(4), which I have found they are not) would have needed to be considered in the context of awards of compensatory damages to those individuals, now all adults, some of whom gave evidence in this proceeding. As I have said, any awards of compensatory damages for subgroup members is a matter reserved for a future stage of this proceeding.

CONCLUSION The Court's findings result in a number of declarations of contraventions of s 9(1) of the RDA, a declaration concerning the application of s 18A of the RDA, and orders for compensation by way of damages in respect of each of the applicants. A number of issues remain to be determined, both in relation to the applicants and in relation to the group and subgroup members. In the first category fall the questions of an ***apology***, interest on the damages, and appropriate orders for costs of the proceeding. In the second category fall the questions of the potential additional common questions, and the future conduct of the remainder of the proceeding in accordance with Pt IVA of the Federal Court Act. Directions will be made to accommodate submissions on all these matters. Liberty to apply will also be given to the parties for any variations to the final orders which they submit are necessary or appropriate upon consideration of the Court's reasons. It has been said, in relation to the events on Palm Island on 26 November 2004, that:"To riot against the police service is an affront to the rule of law."

(R v Poynter, Norman & Parker; ex parte A-G (Qld) [2006] QCA 517 at [34] (de Jersey CJ)) For those in command and control of particular policing activities, and for those in charge of a police investigation into the death of a person in police custody, to perform their functions differently by reference to the race of the people they are dealing with is also, in my respectful opinion, an affront to the rule of law.

I certify that the preceding one thousand, eight hundred and six (1806) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justice Mortimer.

Associate:

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