

NOTICE OF FILING

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File Title: SHERONA ROE AND DAVIN FERREIRA AS CO-ADMINISTRATORS OF THE ESTATE OF THE LATE MS JULIEKA DHU & ANOR v THE STATE OF WESTERN AUSTRALIA
Registry: WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA



Sia Lagos

Registrar

Important Information

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

The date of the filing of the document is determined pursuant to the Court's Rules.



Second Further Amended Statement of Claim

Filed by leave granted by Colvin J on 21 June 2023 and leave granted by Colvin J on 15 May 2024

No: WAD5/2022

Federal Court of Australia

District Registry: Western Australia

Division: General

SHERONA ROE AND DAVIN FERREIRA AS CO-ADMINISTRATORS OF THE ESTATE OF THE LATE MS JULIEKA DHU and another named in the Schedule

Applicants

STATE OF WESTERN AUSTRALIA

Respondent

A. THE APPLICANTS

1. The first applicants (Ms Sherona Roe and Mr Davin Ferreira):
 - (a) are, and make the claims herein on behalf of, and as the co-administrators of, the estate of the late Julieka Dhu (**Ms Dhu**), an Aboriginal woman, who died in custody on 4 August 2014; and
 - (b) were complainants in the Final Complaint accompanying the Originating Application.
2. The second applicant (**Ms Dickie**) is an Aboriginal woman.

B. THE GROUP MEMBERS

3. The first applicants and Ms Dickie bring this proceeding seeking the relief set out in the Further Amended Originating Application (**Originating Application**):
 - (a) in the case of the first applicants, on behalf of the late Ms Dhu and Ms Dhu's estate and as representative parties pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) for the group members described in paragraph 4 below (or alternatively, for the female group members described in paragraph 5 below); and

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- (b) in the case of Ms Dickie, on her own behalf and as a representative party pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) for the group members described in paragraph 4 below (or alternatively, for the female group members described in paragraph 5 below).
4. The group members who are represented in this proceeding are Aboriginal or Torres Strait Islander persons (**Indigenous persons**):
- (a) who were arrested and detained and/or imprisoned in Western Australia for any period of time between 1 January 2014 and 30 September 2020; and
- (b) whose arrest, detention or imprisonment was pursuant to one or more warrants of commitment purportedly issued by the Registrar of the Western Australian Fines Enforcement Registry (**Registrar**) under s 53 or s 55D(1)(c) and (f) of the *Fines, Penalties and Infringement Notices Enforcement Act 1994* (WA) (**FPINE Act**) during the period 1 January 2014 to 28 September 2020 (the **relevant period**).
- (**group members**).
5. Further or alternatively, the group members who are represented in this proceeding as a sub-group or otherwise are Aboriginal or Torres Strait Islander women (**Indigenous women**):
- (a) who were arrested and detained and/or imprisoned in Western Australia for any period of time between 1 January 2014 and 30 September 2020; and
- (b) whose arrest, detention or imprisonment was pursuant to one or more warrants of commitment purportedly issued by the Registrar under s 53 or s 55D(1)(c) and (f) of the FPINE Act during the relevant period.
- (**female group members**).
6. As at the date of the commencement of this proceeding, seven or more group members in each of the categories set out in paragraphs 4 and 5 above have claims against the first respondent in respect of their arrest, detention or imprisonment, during the relevant period, by members of the Police Force of Western Australia and/or the chief executive officer or persons exercising delegated powers of the chief executive officer as defined in the *Prisons Act 1981* (WA) executing warrants of commitment purportedly issued by the Registrar under s 53 or s 55D(1)(c) and (f) of the FPINE Act.

C. THE FIRST RESPONDENT

7. The first respondent, the State of Western Australia (**State**):

- (a) is sued under the title 'the State of Western Australia' pursuant to s 5(2) of the *Crown Suits Act 1947 (WA)*; and
- (b) by reason of the matters set out in paragraphs 63 to 66, is and was at all material times liable for the conduct of the Registrar in relation to the issuing of warrants of commitment by the Registrar under ss 53 and/or 55D(1)(c) and (f) of the FPINE Act.

D. THE ARREST, DETENTION AND IMPRISONMENT OF MS DHU AND MS DICKIE

Ms Dhu

- 8. Between 2009 and 2012, fines were imposed on Ms Dhu in the Magistrates Court of Western Australia (**Magistrates Court**), in respect of various offences.
- 9. On 13 May 2014, the Registrar issued four warrants of commitment in respect of Ms Dhu (**Dhu Warrants of Commitment**), purportedly pursuant to s 53 of the FPINE Act, in respect of a total of \$3,622.34 of unpaid fines and related costs.

Particulars

Particulars of the Dhu Warrants of Commitment will be provided after discovery.

- 10. The Dhu Warrants of Commitment collectively purported to authorise a total period of imprisonment of four days.
- 11. At about 4:30pm on 2 August 2014, in purported execution of the Dhu Warrants of Commitment, members of the Police Force of Western Australia arrested Ms Dhu and then detained and/or imprisoned her in a "lock-up" in the South Hedland Police Station, Western Australia.
- 12. Ms Dhu was thereafter in the custody of the Police Force of Western Australia until about 1:39pm on 4 August 2014, when Ms Dhu was pronounced dead at the Hedland Health Campus, a nearby public hospital.

Ms Dickie

- 13. Between 2018 and 2019, fines were imposed on Ms Dickie in the Magistrates Court, in respect of various offences.
- 14. On 9 August 2019, the Registrar issued 11 warrants of commitment in respect of Ms Dickie (**Dickie Warrants of Commitment**), purportedly pursuant to s 53 of the FPINE Act, in respect of a total of \$6,174.34 of unpaid fines and related costs.

Particulars

The Dickie Warrants of Commitment are dated 9 August 2019 and bear warrant numbers 32389485, 32389486, 32389487, 32389495, 32389496, 32389497, 32389512, 32389513, 32389514, 32389515 and 32389541.

Copies of the Dickie Warrants of Commitment are in the possession of the Applicants' solicitors and can be provided upon request.

15. The Dickie Warrants of Commitment collectively purported to authorise a total period of imprisonment of 18 days.
16. ~~On 21 September 2019~~ Early in the morning of 22 September 2019, Ms Dickie, when at a McDonald's restaurant on Scarborough Beach Road, Innaloo:
 - (a) ~~voluntarily attended Scarborough Police Station~~;
 - (b) voluntarily reported to police that she had been assaulted and, as a result, had broken ribs and injuries to her head and arms; and
 - (c) thereafter attended hospital to receive medical treatment for her injuries.
17. On 22 September 2019, during daylight hours, following her discharge from hospital, Ms Dickie voluntarily attended Mirrabooka Police Station to complete the reporting of her assault.
18. Upon her attendance at Mirrabooka Police Station on 22 September 2019, Ms Dickie was arrested and detained by members of the Police Force of Western Australia, in purported execution of one or more of the Dickie Warrants of Commitment, and then detained and imprisoned:
 - (a) initially, in a lock-up at the Mirrabooka Police Station; and
 - (b) later, in the Melaleuca Remand and Reintegration Facility,
 for a total of approximately 24 hours before she was released on 23 September 2019.

E. THE COMPLAINTS TO THE AHRC

19. On 8 June 2018, three relatives of Ms Dhu (Ms Della Roe, Ms Carol Roe and Mr Shaun Harris) lodged a complaint (**First Complaint**) with the Australian Human Rights Commission (**AHRC**) in which they alleged, among other things, that the arrest and

detention of Ms Dhu amounted to unlawful discrimination under s 9 of the *Racial Discrimination Act 1975 (Cth)* (**RDA**).

20. On 11 July 2018, the AHRC granted leave for the First Complaint to be amended to add six additional relatives of Ms Dhu as complainants.
21. On 28 August 2019, the complainants lodged a request with the AHRC to amend the First Complaint so as to rely on both ss 9 and 10 of the RDA.
22. The 28 August 2019 amendment request was made by the complainants, both on their own behalf and as representatives of the class of persons who:
 - (a) were detained within the period beginning 1 January 2014 and ending 30 September 2020, in the course of the enforcement of the FPINE Act, and who would not have been detained but for the enforcement of the FPINE Act; and
 - (b) are Indigenous persons or Indigenous women.
23. On 21 May 2021, the complainants lodged a final amended complaint (**Final Complaint**) which included the amendments sought in 2019 and additionally sought to amend the First Complaint to add as a complainant the estate of Ms Dhu (by Ms Sherona Roe and Mr Davin Ferreira in their capacity as the co-administrators of Ms Dhu's estate), both on behalf of the estate and the late Ms Dhu and as a representative of the class of persons who:
 - (a) were detained within the period beginning 1 January 2014 and ending 30 September 2020, in the course of the enforcement of the FPINE Act, and who would not have been detained but for the enforcement of the FPINE Act; and
 - (b) are Indigenous persons or Indigenous women.
24. On 10 November 2021, the AHRC:
 - (a) granted leave for the First Complaint to be amended in the form of the Final Complaint;
 - (b) terminated the Final Complaint under s 46PH(1B)(b) of the *Australian Human Rights Commission Act 1975 (Cth)* (**AHRC Act**); and
 - (c) gave notice to the complainants under s 46PH(2) of the AHRC Act in relation to the termination of the Final Complaint.
25. In the premises of paragraphs 19 to 24 above, each of the first applicants, in their capacity as the co-administrators of the estate of Ms Dhu, are affected persons in relation to the Final Complaint who are entitled under s 46PO of the AHRC Act to make the present application:

- (a) on their own behalf and, in respect of the co-administrators, on behalf of the late Ms Dhu and her estate; and
- (b) on behalf of Ms Dickie and the group members (or alternatively the female group members), being affected persons in relation to the Final Complaint by reason of being members of the class of persons on whose behalf the Final Complaint was brought.

F. FINES ENFORCEMENT DURING THE RELEVANT PERIOD

Structure of fines enforcement system

26. At all times during the relevant period:

- (a) a registry called the Fines Enforcement Registry was established pursuant to s 6 of the FPINE Act and the Registrar was appointed to the Fines Enforcement Registry pursuant to s 7(1) of the FPINE Act;
- (b) pursuant to s 57 of the *Sentencing Act 1995* (WA) (**Sentencing Act**), unless an order was made under ss 57A, 58 or 59 of the Sentencing Act, a fine imposed by a court was to be paid, and could be enforced, under the FPINE Act;
- (c) section 41 of the FPINE Act provided a regime for the registration of fines with the Fines Enforcement Registry for enforcement;
- (d) pursuant to s 42(1) of the FPINE Act, the Registrar had a discretionary power to issue a notice of intention to enforce a registered fine, which notice was required by s 42(3) to contain a statement to the effect that unless the amount owed was paid before a date specified in the notice, the Registrar could take certain steps;
- (e) pursuant to s 45 of the FPINE Act, if 28 days had elapsed since the date of issue of a notice of intention to enforce and the amount owed had not been paid, the Registrar had a discretionary power to issue an enforcement warrant;
- (f) pursuant to s 47 of the FPINE Act, if the Registrar issued an enforcement warrant in respect of an offender who was an individual, the Registrar had a discretionary power to also issue an order to attend for work and development;
- (g) pursuant to s 47A(1) of the FPINE Act, despite ss 42 to 45 and 47 of the FPINE Act, at any time after a fine was registered the Registrar had a discretionary power to issue an order to attend for work and development in respect of the offender, if the Registrar was satisfied of the matters set out in that sub-section;
- (h) pursuant to s 47B of the FPINE Act, the effect of an order to attend for work and development was to require the offender to, within 7 days after service of the order,

pay the amount owed or report to a community corrections centre to be assessed for the purposes of deciding whether a work and development order (**WDO**) should be made in respect of the offender;

- (i) pursuant to s 48 of the FPINE Act, an offender who reported to a community corrections centre with an order to attend for work and development was to be assessed by a community corrections officer and, if suitable, was to be given a WDO;
- (j) pursuant to s 49 of the FPINE Act, a WDO required an offender to comply with s 76 of the *Sentence Administration Act 2003* (WA) and the primary requirements of a WDO set out in s 50 of the FPINE Act;
- (k) pursuant to s 51(1) of the FPINE Act, an offender's liability to pay a fine and associated enforcement fees was discharged:
 - (i) by the offender satisfactorily performing all the requirements of a WDO;
 - (ii) by payment of the amount owed; or
 - (iii) by a combination of the offender satisfactorily performing part of the requirements of a WDO and payment of part of the amount owed;
- (l) pursuant to s 53(1) and (2) of the FPINE Act, if an offender was served with an order to attend for work and development or with an order made under s 57A(3) of the Sentencing Act (enforcement of fine by a court-issued WDO) and:
 - (i) the offender did not report as required by the order; or
 - (ii) a s 48 WDO was not made or could not be served on the offender; or
 - (iii) a s 48 WDO was made but was cancelled under s 52(1),

and the amount owed was not paid, the Registrar had a discretionary power to issue a warrant of commitment, provided at least 7 days had elapsed since the offender was served with the order to attend for work and development;
- (m) the effect of a warrant of commitment was to commit an offender to be imprisoned for a period of days specified in the warrant, that was to be calculated in accordance with s 53(3) of the FPINE Act and that was in any event to be not less than one day;
- (n) pursuant to s 53(5) of the FPINE Act, the period for which an offender was to be imprisoned under a warrant of commitment ended when the offender's liability to pay the amount in respect of which the warrant was issued had been discharged by:

- (i) the offender serving the whole of the period of imprisonment specified in the warrant;
 - (ii) payment of that amount; or
 - (iii) a combination of the offender serving part of that period and payment of part of that amount, to be calculated in accordance with s 53(6) and (7);
- (o) pursuant to s 55D(1)(c) and (f) of the FPINE Act, if the Registrar was satisfied that a warrant of commitment would be more likely than other methods of enforcement to result in the payment or recovery of the amount owed, the Registrar had a discretionary power to issue a warrant of commitment despite s 53(1) and (2);
- (p) pursuant to s 55D(5) of the FPINE Act, if the Registrar issued a warrant of commitment under s 55D(1), s 53(3) to (9) applied in relation to the warrant;
- (q) pursuant to s 7(3) of the FPINE Act, any warrant issued by the Registrar was to be taken to be a warrant issued by the Magistrates Court;
- (r) s 103 of the FPINE Act provided that the rules of natural justice, including any duty of procedural fairness, do not apply to or in relation to the doing or omission of any act, matter or thing under the Act by the Registrar;
- (s) pursuant to s 104(2) of the FPINE Act, a warrant of commitment issued under the FPINE Act was to be directed to all members of the Police Force of Western Australia and to the chief executive officer as defined in the *Prisons Act 1981 (WA)*; and
- (t) pursuant to s 32(2) of the *Magistrates Court Act 2004 (WA)*, members of the Police Force of Western Australia were required to obey any warrant that was duly issued by the Magistrates Court and addressed to members of that Police Force.
27. At all times during the relevant period, when considering whether to exercise either:
- (a) the discretionary power conferred by s 53 of the FPINE Act, to issue a warrant of commitment in relation to an offender; or
 - (b) the discretionary power conferred by s 55D(1)(c) and (f) of the FPINE Act, to issue a warrant of commitment in relation to an offender,
- the Registrar had:
- (c) a duty to consider the individual circumstances of the offender, including but not limited to:
 - (i) the offences for which the unpaid fines had been imposed;

- (ii) the amount owed by the offender (being the total of the unpaid fines and associated enforcement costs);
 - (iii) why the amount owed remained unpaid;
 - (iv) if the offender did not report as required by any order to attend for work development, why the offender did not so report;
 - (v) if a WDO was made and cancelled, why the WDO was cancelled;
 - (vi) if the Registrar was satisfied that a warrant of commitment would be more likely than other methods of enforcement to result in the payment or recovery of the amount owed, why the Registrar was so satisfied;
 - (vii) whether the offender had the capacity to pay the amount owed; and/or
 - (viii) the impact that imprisonment of the offender would be likely to have on the offender and on any dependants of the offender,
- (Duty to Consider Individual Circumstances); and/or**

Particulars

The Duty to Consider Individual Circumstances arises by necessary implication:

- (i) from the terms of ss 53(1) and 55D(1), which each use the term “may” in relation to the exercise of the power conferred; and
 - (ii) from the nature of the powers being exercised, being powers to authorise the deprivation of a person’s liberty.
- (d) a duty to consider whether the power to issue a warrant of commitment should, in all the circumstances, be exercised or not, as a matter of discretion, notwithstanding that the statutory criteria for issuing a warrant of commitment may appear to be satisfied (**Duty to Consider Non-Exercise**); and

Particulars

The Duty to Consider Non-Exercise arises by necessary implication:

- (i) from the terms of ss 53(1) and 55D(1), which each use the term “may” in relation to the exercise of the power conferred; and

- (ii) from the nature of the powers being exercised, being powers to authorise the deprivation of a person's liberty.

Application of fines enforcement system to applicants and group members

28. During the relevant period, the Registrar purportedly issued one or more warrants of commitment in relation to:
- (a) Ms Dhu, on 13 May 2014 (as described at paragraph 9 above);
 - (b) Ms Dickie, on 9 August 2019 (as described at paragraph 14 above); and
 - (c) each of the group members (including each of the female group members), on various dates,
- under s 53 and/or s 55D(1)(c) and (f) of the FPINE Act (**Relevant Warrants of Commitment**).
29. The Relevant Warrants of Commitment were issued:
- (a) on the papers without requesting or receiving any oral or written submissions, or any information relevant to whether the Warrant should or should not be issued, from the relevant offenders or otherwise;
 - (b) without conducting any inquiry into, or receiving any information from the relevant offender about, the capacity of the relevant offenders to pay the amounts in respect of which the warrants were issued or the reason for the non-payment of those amounts; and/or
 - (c) without according to the relevant offenders any opportunity to be heard in relation to whether the warrants should or should not be issued.
30. During the relevant period, in purported execution of one or more of the Relevant Warrants of Commitment, members of the Police Force of Western Australia and/or the chief executive officer or persons exercising delegated powers of the chief executive officer as defined in the *Prisons Act 1981 (WA)* arrested and detained and/or imprisoned:
- (a) Ms Dhu, from 2 August 2014 until her death in custody on 4 August 2014 (as described at paragraphs 11 and 12 above);
 - (b) Ms Dickie, from 22 September 2019 to 23 September 2019 (as described at paragraph 18 above); and
 - (c) each of the group members (including each of the female group members), for various periods of time.

31. At all material times during the relevant period, in purporting to issue warrants of commitment under s 53 or s 55D(1)(c) and (f) of the FPINE Act, it was the Registrar's practice to issue warrants of commitment:
- (a) on the sole basis that the statutory criteria for issuing a warrant of commitment appeared to the Registrar to be satisfied; and/or
 - (b) without considering the individual circumstances of the relevant offenders; and/or
 - (c) without considering whether the power to issue a warrant of commitment should, as a matter of discretion, be exercised or not; and/or
 - (d) without according any opportunity to the relevant offenders to be heard in relation to the matters set out in sub-paragraphs (b) and (c) and also in relation to whether the warrants should or should not be issued; and/or
 - (e) relying on s 103 of the FPINE Act to not accord natural justice or procedural fairness to the relevant offenders.
32. The Relevant Warrants of Commitment were issued in accordance with the practice referred to described at paragraph 31 above.

Disproportionate impact of fines enforcement system on Indigenous persons and on Indigenous women

33. At all material times during the relevant period:
- (a) Indigenous persons (or alternatively Indigenous women) in Western Australia were, if fined, statistically less likely to be able to pay or to pay the fine and any associated enforcement costs than non-Indigenous persons (or persons who were not Indigenous women) in Western Australia; and/or
 - (b) Indigenous persons (or alternatively Indigenous women) in Western Australia were, due to their circumstances, including their economic, geographic and language and literacy circumstances, statistically less likely to be able to understand, respond to or comply with an order to attend for work or development or with a WDO than non-Indigenous persons (or persons who were not Indigenous women) in Western Australia; and/or
 - (c) a disproportionate number of warrants of commitment were issued in relation to Indigenous persons (or alternatively Indigenous women) in Western Australia, given the proportion of Indigenous persons (or Indigenous women) in the general West Australian population; and/or

- (d) a disproportionate number of persons imprisoned in Western Australia for fine default were Indigenous persons (or alternatively Indigenous women), relative to the number of Indigenous persons (or Indigenous women) in the general West Australian population.

Particulars

Particulars of the disproportionate impact of the fines enforcement system on Indigenous persons and Indigenous women are set out in Annexure A.

Further particulars will be provided after discovery.

G. UNLAWFUL DISCRIMINATION

Section 9 of the RDA

34. At all material times, s 9(1) of the RDA relevantly operated to make unlawful the doing of any act involving a distinction, exclusion, restriction or preference based on race, colour, descent or national or ethnic origin which has the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of the following human rights and/or fundamental freedoms:
- (a) the right to equal treatment before all organs administering justice (pursuant to s 9(2) of the RDA and art 5(a) of the *International Convention on the Elimination of All Forms of Racial Discrimination*, opened for signature 21 December 1965 (entered into force 2 January 1969) (**CERD**)) (**right to equal treatment**); and
 - (b) the right to liberty and security of the person (pursuant to art 9 of the *International Covenant on Civil and Political Rights*, opened for signature 16 December 1966 (entered into force 23 March 1976) (**ICCPR**)), which right in the present context is:
 - (i) the right not to be deprived of liberty by being subjected to arbitrary arrest or detention;
 - (ii) the right not to be deprived of liberty except in accordance with such procedures as are established by law; and
 - (iii) the right of any person who has been deprived of liberty in infringement of the rights set out in sub-paragraphs (i) or (ii) to have an enforceable right to compensation.

(the right to liberty)
35. At all material times, the Registrar was required, in exercising powers under the FPINE Act, to act in a manner that was not unlawful under s 9(1) of the RDA.

Act involving a distinction based on race

36. By the operation of ss 53(3) and (5) and 55D of the FPINE Act (as described at paragraph 26(m), (n), (o) and (p) above), in issuing each of the Relevant Warrants of Commitment (as described at paragraph 28 above), the Registrar required the relevant offender to comply with a requirement to pay the full amount in respect of which the warrant was issued or face imminent arrest and imprisonment (**Urgent Payment Requirement**).
37. The Urgent Payment Requirement was not reasonable, having regard to the circumstances in which the Relevant Warrants of Commitment were issued, which included:
- (a) the fact that the Relevant Warrants of Commitment were issued on the papers, without hearing from the relevant offenders or considering their capacity to pay the amounts in respect of which the warrants were issued (as alleged at paragraph 29 above);
 - (b) the fact that the Relevant Warrants of Commitment were issued on the sole basis that the statutory criteria for issuing a warrant of commitment appeared to the Registrar to be satisfied (as alleged at paragraphs 31(a) and 32 above);
 - (c) the fact that the Registrar had not considered the individual circumstances of the relevant offenders (as alleged at paragraphs 31(b) and 32 above);
 - (d) the fact that the Registrar had not considered whether the power to issue a warrant of commitment should, as a matter of discretion, be exercised or not (as alleged at paragraphs 31(c) and 32 above); and/or
 - (e) the fact that the Registrar did not provide the relevant offenders with an opportunity to be heard in relation to whether the warrants of commitment should or should not be issued (as alleged in paragraphs 31(d) and 32 above).
38. In the case of each of the Relevant Warrants of Commitment, the relevant offender did not comply, or did not comply fully, with the Urgent Payment Requirement.
39. The Urgent Payment Requirement had the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, by Indigenous persons (or alternatively, by Indigenous women) of:
- (a) the right to equal treatment; and/or
 - (b) the right to liberty,
- in circumstances (being those alleged in paragraphs 33 and 36 to 38) where:

- (c) they were less likely to be able to pay or to pay the amount in respect of which the warrant was issued than non-Indigenous persons (or persons who were not Indigenous women) (as alleged at paragraph 33(a)) above); and
- (d) they were therefore more likely than non-Indigenous persons (or persons who were not Indigenous women) to be arrested or detained in a manner that was arbitrary in the sense that the arrest or detention was not appropriate, just, reasonable, necessary or proportionate.

40. In the premises pleaded in paragraphs 33 and 36 to 39 above, pursuant to s 9(1A) of the RDA the act of requiring compliance with the Urgent Payment Requirement and by issuing a warrant of commitment is to be treated as an act involving a distinction based on, or acts done by reason of, the relevant offender's race.

Unlawful discrimination

41. In the premises pleaded in paragraph 39 above, the distinction based on race described at paragraph 40 above had the effect of nullifying or impairing the recognition, enjoyment or exercise, on an equal footing, of:

- (a) the right to equal treatment; and/or
- (b) the right to liberty,

by Ms Dhu, Ms Dickie and the group members (or alternatively, the female group members).

Particulars

- (i) Imposing a requirement (namely the Urgent Payment Requirement) with which they were statistically, and in fact, less likely to be able to comply; and
- (ii) Subjecting them to arbitrary arrest and detention when they did not comply, or did not fully comply, with the Urgent Payment Requirement in the sense that their arrest and detention was not appropriate, just, reasonable, necessary, proportionate, by due process or for sufficient cause in the circumstances pleaded at paragraphs 31 to 39 above.

42. In the premises set out in paragraphs 36 to 41 above, the issue of each of the Relevant Warrants of Commitment and the subsequent arrest, detention and/or imprisonment of Ms Dhu, Ms Dickie and the group members (including the female group members) pursuant to the warrants:

- (a) was unlawful within the meaning of s 9(1) of the RDA; and
- (b) thereby amounted to unlawful discrimination for the purposes of the AHRC Act (and, in particular, ss 46P and 46PO of that Act).

H. INVALIDITY OF WARRANTS UNDER THE FPINE ACT

- 43. By reason of the matters pleaded at paragraphs 31(b) and 32 above, in issuing the Relevant Warrants of Commitment, the Registrar failed to comply with and/or acted contrary to the Duty to Consider Individual Circumstances referred to at sub-paragraph 27(c) above.
- 44. By reason of the matters pleaded at paragraphs 31(c) and 32 above, in issuing the Relevant Warrants of Commitment, the Registrar failed to comply with and/or acted contrary to the Duty to Consider Non-Exercise referred to at sub-paragraph 27(d) above.
- 45. By reason of the matters pleaded at paragraphs 43 to 44 above, the discretion of the Registrar to issue the Relevant Warrants of Commitment under ss 53 or 55D(1)(c) and (f) of the FPINE Act miscarried, with the effect that:
 - (a) the Relevant Warrants of Commitment were not validly issued under the FPINE Act; and
 - (b) accordingly, the arrest, detention and imprisonment of Ms Dhu, Ms Dickie and the group members (including the female group members), referred to at paragraph 30 above, was unlawful.
- 46. In the premises pleaded in paragraphs 30 and 46 above, the arrest, detention and imprisonment of Ms Dhu, Ms Dickie and the group members (including the female group members) by members of the Police Force of Western Australia and/or the chief executive officer or persons exercising delegated powers of the chief executive officer as defined in the *Prisons Act 1981* (WA) constituted false imprisonment.

I. SECTION 10 OF THE RDA

Operation and practical effect of the FPINE Act

- 47. At all times during the relevant period:
 - (a) the provisions of the FPINE Act relevantly operated as pleaded at paragraph 26 above; and
 - (b) the Registrar had the Duty to Consider Individual Circumstances and/or the Duty to Consider Non-Exercise as pleaded at paragraphs 27(c) and (d) above.

48. In the premises set out in paragraph 47 above, the FPINE Act during the relevant period did not authorise the Registrar to require the relevant offender to comply with the Urgent Payment Requirement described at paragraph 36 above, by issuing a warrant of commitment under ss 53 or 55D(1)(c) and (f) of the FPINE Act, in circumstances where:

- (a) the Registrar had not considered the individual circumstances of the relevant offender; and/or
- (b) the Registrar had not considered whether the power to issue a warrant of commitment should, as a matter of discretion, be exercised or not;

and, as a consequence, the purported issue of a warrant of commitment in such circumstances had the effect of infringing the relevant offender's right to equal treatment and infringing the relevant offender's right to liberty by:

- (c) subjecting the relevant offender to arbitrary arrest and detention, in the sense mentioned in sub-paragraphs (i) and (ii) of the Particulars to paragraph 41; and/or
- (d) depriving the relevant offender of liberty otherwise than in accordance with the procedures established by law.

Particulars

The applicants refer to and repeat the particulars to paragraph 41.

49. Alternatively to paragraphs 47(b) and 49, if in issuing a warrant of commitment under ss 53 or 55D(1)(c) and (f) of the FPINE Act during the relevant period, the Registrar did not, on the proper construction of the FPINE Act, have the duties pleaded in paragraph 27(c) or (d) above, then the imposition of the Urgent Payment Requirement described at paragraph 36 above (through the issue of a warrant of commitment), in circumstances where:

- (a) the Registrar had not considered the individual circumstances of the relevant offender; and/or
- (b) the Registrar had not considered whether the power to issue a warrant of commitment should, as a matter of discretion, be exercised or not; and/or
- (c) the Registrar had not heard from the relevant offender about those matters and, by reason of s 103 of the FPINE Act, was under no duty to afford the relevant offender with that opportunity.

had the effect of infringing the relevant offender's right to equal treatment and infringing the relevant offender's right to liberty by subjecting the relevant offender to arbitrary

arrest and detention, in the sense mentioned in sub-paragraphs (i) and (ii) of the particulars to paragraph 41.

50. The disproportionate impact of the fines enforcement system on Indigenous persons (alternatively Indigenous women) in Western Australia, referred to at paragraph 33 above, and the consequences of that impact for Ms Dhu, Ms Dickie and the group members (alternatively, the female group members), referred to at paragraphs 33 and 36 to 42 above had the effect that Ms Dhu, Ms Dickie and the group members (alternatively, the female group members) enjoyed:

- (a) the right not to be deprived of liberty by being subjected to arbitrary arrest and detention; and/or
- (b) the right not to be deprived of liberty except in accordance with such procedures as are established by law; and/or
- (c) the right to have an enforceable right to compensation for the deprivation of liberty in infringement of the rights set out in sub-paragraphs (a) and (b) above,

to a more limited extent than non-Indigenous persons in Western Australia (alternatively, persons in Western Australia who are not Indigenous women).

51. The disproportionate impact described in paragraph 50 above arises by reason of the practical operation and effect of ss 53 and 55D(1)(c) and (f) of the FPINE Act as pleaded in paragraphs 28 to 33 above.

Operation of section 10 of the RDA

52. At all material times, s 10(1) of the RDA relevantly had the effect that if, by reason of one or more provisions of the FPINE Act, Indigenous persons (or Indigenous women) enjoyed a right to a more limited extent than non-Indigenous persons (or persons who were not Indigenous women), then notwithstanding anything in the FPINE Act, Indigenous persons (or Indigenous women) were to enjoy that right to the same extent as non-Indigenous persons (or persons who were not Indigenous women).

53. Because of the matters set out in paragraphs 50 and 51 above, s 10(1) of the RDA operated so as to confer on Indigenous persons (or Indigenous women), including Ms Dhu, Ms Dickie and the group members (alternatively, the female group members), equal enjoyment of the right to liberty and the right to equal treatment, despite any provision of the FPINE Act which would otherwise have the practical operation and effect that they would enjoy those rights to a lesser extent than non-Indigenous persons (or people who are not Indigenous women).

54. Section 10(1) of the RDA operated in the manner pleaded at paragraph 53 above by preventing ss 53 or 55D(1)(c) and (f) of the FPINE Act from operating so as to allow the infringement of a person's right to equal treatment or a person's right to liberty, including by preventing a warrant of commitment issued under ss 53 or 55D(1)(c) and (f) of the FPINE Act from lawfully authorising:
- (a) the arbitrary arrest or detention of any person; or
 - (b) the deprivation of a person's liberty otherwise than in accordance with the procedures established by law,
- including in the ways set out in paragraphs 48 and 49 above.
55. In the premises set out in paragraphs 47 to 54 above, the arrest, detention and imprisonment of each of Ms Dhu, Ms Dickie and the group members (including the female group members) pursuant to the Relevant Warrants of Commitment was arbitrary, in the sense mentioned in sub-paragraphs (i) and (ii) of the Particulars to paragraph 41 above, and/or was not in accordance with procedures established by law as pleaded in paragraphs 43 and 44 above, with the consequence that:
- (a) pursuant to s 10(1) of the RDA, notwithstanding anything in the FPINE Act, the Relevant Warrants of Commitment did not lawfully authorise the arrest, detention or imprisonment of Ms Dhu, Ms Dickie and the group members (including the female group members);
 - (b) accordingly, that arrest, detention and imprisonment was unlawful by reason of s 10(1); and
 - (c) that arrest, detention and imprisonment gave rise to an enforceable right to compensation for unlawful detention under, or by reason of, s 10(1) and/or for unlawful discrimination for the purposes of s 46PO(4)(d) of the AHRC Act.
56. In the premises pleaded in paragraph 55 above, the imprisonment of Ms Dhu, Ms Dickie and the group members (including the female group members) by members of the Police Force of Western Australia and/or the chief executive officer or persons exercising delegated powers of the chief executive officer as defined in the *Prisons Act 1981* (WA), purportedly pursuant to the Relevant Warrants of Commitment, also constituted false imprisonment and gave rise to an entitlement to damages at common law.

Inconsistency between s 10(1) of the RDA and relevant operation of the FPINE Act

57. At all material times, s 109 of the Constitution provided to the effect that if a law of the State was inconsistent with a law of the Commonwealth, the law of the Commonwealth

would prevail, and the law of the State would, to the extent of the inconsistency, be invalid.

58. During the relevant period, ss 53 and/or 55D(1)(c) and (f) of the FPINE Act purported to authorise the arrest, detention and imprisonment of Ms Dhu, Ms Dickie and the group members (including the female group members) pursuant to the Relevant Warrants of Commitment, in circumstances which infringed their right to liberty and their right to equal treatment in the ways pleaded at paragraphs 48 and 49 above.
59. Section 16 of the *Limitations Act 2005* (WA) and s 4(2) of the *Law Reform (Miscellaneous Provisions) Act 1941* (WA) purport to impose conditions upon, or otherwise limit the enjoyment of, an enforceable right to compensation for arbitrary arrest or detention or for unlawful detention in Western Australia.
60. To the extent that the statutory provisions referred to in paragraphs 58 and 59 above have the effects pleaded in those paragraphs, they were or are inconsistent with the right to liberty and the right to equal treatment which Ms Dhu, Ms Dickie and the group members (including the female group members) enjoyed under s 10(1), referred to at paragraphs 50, 51, 53, 54 and 55 above, with the effect that:
 - (a) section 10(1) of the RDA prevailed and operated in accordance with its terms; and
 - (b) the provisions referred to in paragraphs 58 and 59 above were invalid pursuant to s 109 of the Constitution, to the extent of the inconsistency.
61. Further:
 - (a) pursuant to s 79(1) of the *Judiciary Act 1903* (Cth), the laws of the State are binding on all Courts exercising federal jurisdiction in the State in all cases to which they are applicable, "except as otherwise provided by the Constitution or the laws of the Commonwealth";
 - (b) section 10(1) of the RDA is a law of the Commonwealth that falls within the exception referred to in s 79(1) of the *Judiciary Act 1903* (Cth), because of the matters pleaded at paragraphs 52 to 55 above; and
 - (c) accordingly, to the extent that the provisions referred to in paragraphs 58 and 59 above impose conditions upon or otherwise limit rights which were (or are to be) enjoyed pursuant to s 10(1) of the RDA, s 79(1) of the *Judiciary Act 1903* (Cth) does not make those provisions binding on Courts exercising federal jurisdiction.
62. In the premises set out in paragraphs 54, 55 and 60 above:
 - (a) the Relevant Warrants of Commitment were not validly issued; and

- (b) accordingly, the arrest, detention and imprisonment of Ms Dhu, Ms Dickie and the group members (including the female group members), referred to at paragraph 30 above, was unlawful and constituted false imprisonment giving rise to an entitlement to damages at common law.

J. VICARIOUS LIABILITY

63. At all times during the relevant period, the Registrar was an employee of the State, having been appointed to the Fines Enforcement Registry under Part 3 of the *Public Sector Management Act 1994* (WA), pursuant to s 7(1) of the FPINE Act.
64. Each of the Relevant Warrants of Commitment was issued:
- (a) by the Registrar in connection with their duties as an employee or agent of the State; or
 - (b) with the delegated authority of the Registrar, by an employee or agent of the State in connection with their duties as an employee or agent of the State.
65. Further or alternatively, each of the Relevant Warrants of Commitment:
- (a) are to be taken to have been issued by the Magistrates Court, by the operation of s 7(3) of the FPINE Act;
 - (b) were issued in the exercise of an administrative function of the Magistrates Court; and
 - (c) were thereby issued by an agent of the State in connection with its duties as an agent of the State.
66. In the premises of paragraphs 63 to 65 above, to the extent that the issue of each of the Relevant Warrants of Commitment would be unlawful under Part II of the RDA if it was an act of the State:
- (a) the RDA applies as if the issue of each of the Relevant Warrants of Commitment was an act of the State, pursuant to s 18A of the RDA; and
 - (b) the State is vicariously liable for the issue of each of the Relevant Warrants of Commitment accordingly.

66A. Alternatively, in the premises of paragraphs 63 to 65 above, the State is vicariously liable for the issue of each of the Relevant Warrants of Commitment at common law.

K. LOSS OR DAMAGE

67. ~~Ms Dhu suffered loss or damage, by reason of:~~

- ~~(a) the unlawful discrimination alleged at paragraphs 42 and 55 above;~~
- ~~(b) the unlawful arrest, detention and imprisonment alleged at paragraphs 42, 45, 55 and 62 above; and~~
- ~~(c) the false imprisonment alleged at paragraphs 46, 56 and 62 above.~~

Particulars of loss or damage

The loss or damage suffered by Ms Dhu comprised:

- ~~(i) injury to her dignity;~~
- ~~(ii) deprivation of her liberty;~~
- ~~(iii) injury to her feelings due to being in distress and experiencing fear and suffering; and~~
- ~~(iv) injury to her physical health being the exacerbation of her illness, giving her great discomfort, pain and suffering resulting in her death.~~

68. Ms Dickie has suffered loss or damage, by reason of:

- (a) the unlawful discrimination alleged at paragraphs 42 and 55 above;
- (b) the unlawful detention and imprisonment alleged at paragraphs 42, 45, 55 and 62 above;
- (c) the false imprisonment alleged at paragraphs 46, 56 and 62 above.

Particulars of loss or damage

The loss or damage suffered by Ms Dickie comprised:

- (i) injury to her dignity;
- (ii) deprivation of her liberty;
- (iii) injury to her feelings due to being in distress and experiencing fear and suffering;
- (iv) injury to her feelings and physical person by the use of force by police officers in arresting and detaining Ms Dickie and the use of force by corrective services officers in detaining Ms Dickie; and
- (v) injury to her physical health being the exacerbation of her illness, giving her great discomfort, pain and suffering.

69. Each of the group members (including each of the female group members, but excluding Ms Dhu) has suffered loss or damage, by reason of:
- (a) the unlawful discrimination alleged at paragraphs 42 and 55 above;
 - (b) the unlawful detention and imprisonment alleged at paragraphs 42, 45, 55 and 62 above; and
 - (c) the false imprisonment alleged at paragraphs 46, 56 and 62 above.

Particulars of loss or damage

The loss or damage suffered by each of the group members (including each of the female group members) comprised:

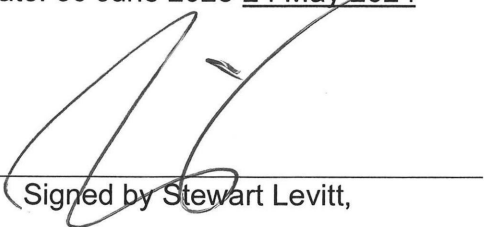
- (i) injury to their dignity;
- (ii) deprivation of their liberty;
- (iii) injury to their feelings due to being in distress and experiencing fear and suffering; and
- (iv) injury to their feelings and physical person by the use of force in their arrest and detention.

Further particulars will be provided following identification of the individual group members.

L. RELIEF

70. The first applicants and Ms Dickie claim on their own behalf, and on behalf of the group members (including the female group members), the relief set out in the Further Amended Originating Application.

Date: ~~30 June 2023~~ 24 May 2024

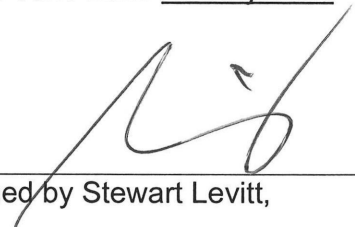

Signed by Stewart Levitt,
Lawyer for the applicants

This pleading was drawn by Ben Slade and Christopher Lum of counsel and settled by Ron Merkel KC.

Certificate of lawyer

I, Stewart Levitt, certify to the Court that, in relation to the further amended statement of claim filed on behalf of the applicants, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: ~~30 June 2023~~ 24 May 2024



Signed by Stewart Levitt,
Lawyer for the applicants.

Schedule

No: WAD5/2022

Federal Court of Australia

District Registry: Western Australia

Division: General

Applicants

First Applicants: Sherona Roe and Davin Ferreira as co-Administrators
of the Estate Of the late Ms Julieka Dhu

Second Applicant: Keennan Courtney Dickie

Respondents

First Respondent: State of Western Australia

Annexure A**Particulars to paragraph 33 of the Further Amended Statement of Claim**

- (a) Between 2010 and 2013:
 - (i) Indigenous persons constituted slightly in excess of 3% of both the West Australian population and the Australian population; and
 - (ii) 5213 people were admitted to prison in Western Australia for fine default alone, of whom 2,213 (or 42.5%) were Aboriginal.
- (b) Between 2006-07 and 2013-14:
 - (i) 38% of male persons admitted to prison in Western Australia for fine default were Aboriginal; and
 - (ii) 64% of female persons admitted to prison in Western Australia for fine default were Aboriginal.
- (c) Between 2006-07 and 2013-14:
 - (i) 52% of unemployed Aboriginal persons admitted to prison in Western Australia for fine default were female; and
 - (ii) 57% of employed non-Aboriginal persons admitted to prison in Western Australia for fine default were male.
- (d) In 2014-15:
 - (i) 603 people were imprisoned in Western Australia for fine default alone;
 - (ii) 40% of those 603 people were Aboriginal;
 - (iii) 151 of the 603 people were women; and
 - (iv) 62% of those 151 women were Aboriginal.

Further particulars will be provided prior to trial.