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With newly available brainspace he writes on current issues in the sector, and this is one such publication.

The NT Stolen Wages Class Action: A glimpse of the future?

This class action was against the Commonwealth, which was responsible for administration of the Northern Territory at the time, on behalf of First Nations people who were unpaid or underpaid for work between 1933 and 1971.

The action was settled by agreement in August 2024, but as all class action settlements need to be approved by the relevant Court, the judgments regarding the settlement approvals are often interesting. This judgment was notable for the numerous criticisms levelled by the judge against the plaintiff lawyers and the litigation funder involved.

The case was heard by Justice Debra Mortimer, Chief Justice of the Federal Court of Australia.

The Chief Justice's sharp critique raises the question of the judgment's broader implications and the possibility of changes in the class action regime. As Chief Justice, her decisions and reasoning (outside of High Court rulings) carry substantial weight and are likely to influence future judicial approaches.

This paper analyses various aspects of the judgment and draws out the topics where the Chief Justice indicates changes are needed.

Much is made of the costs requested by the plaintiff lawyers and litigation funder, which is not the first time a judge has made such comments. Beyond that, there are several potential systemic changes that the Chief Justice opines on, aimed at better protecting group members' interests and ensuring fairer processes:

1. Independent Settlement Administration: For complex or lengthy settlement distributions, the judgment supports appointing a neutral third party as the scheme administrator. In this case, Deloitte was appointed for this role, reportedly at a significantly lower cost than the plaintiff lawyers' estimate for performing the same function.
2. Addressing Lawyer Conflicts on Costs: The judgment critiques the practice of plaintiff lawyers presenting arguments and evidence to justify their own costs *as part of their case for settlement approval*. This inherently places lawyers in a position of conflict against the interests of the group members they represent.
3. Separate Process for Remuneration: Building on the conflict issue, the need for a process to sort out lawyers' and funders' remuneration, in a balanced manner, separate from the settlement approval process and before the court's approval is requested.
4. Focus on 'Value Obtained' for Funding Commission: When deciding on the reasonableness of a litigation funder's commission, the emphasis should not be on the terms of the funding agreement, but should be on assessing the *actual value and benefit* secured for the group members.
5. Enhanced Outreach and Engagement Standards: The judgment explicitly calls for improved practices, particularly when law firms operate outside the communities where group members reside. Best practice should involve:

- Genuine partnership, engagement, and consultation with local community organisations.
- Using cultural advisors and consultants with deep understanding of the group members.
- Logistical and administrative tasks to be managed by individuals with local knowledge, rather than solely city-based lawyers.
- Developing communication materials (like notices and brochures) with input from experts skilled in reaching the specific communities involved.
- Minimising redundant information collection by enabling trusted local organisations (with appropriate consent) to leverage existing data about individuals, rather than requiring law firms to collect it again from each individual.

Beyond these points there is a further potential improvement that could be considered, based on frequent debate in settlement approvals:

- Treating After The Event (ATE) Insurance as a Funder's Cost: Rather than reimbursing ATE insurance premiums from the settlement funds (thus reducing the pool available to group members), this cost could be treated as a standard business expense for the litigation funder.

If you do read on, I would be delighted to hear your thoughts and any suggestions.

Class Actions – Lessons from the NT Stolen Wages Judgment

This article discusses the Northern Territory Stolen Wages class action (*McDonald v Commonwealth of Australia*), focusing on the judge's commentary regarding the costs requested by lawyers and funder, conduct of the litigation and areas highlighted for attention in class action practice. It draws upon the judgment to outline specific issues raised by the Court.

Background to the Case and the Decision

The case was brought against the Commonwealth of Australia on behalf of First Nations people who were alleged to have been unpaid or underpaid for work performed in the Northern Territory between 1933 and 1971, when the Commonwealth was responsible for administration in the Territory.

The action was conducted by Shine Lawyers and funded by LLS Fund Services (part of Litigation Lending Services). Similar "stolen wages" class actions involving similar parties had previously been settled in Western Australia and Queensland.

Commenced in 2021, the NT case reached a settlement agreement in August 2024. Class action settlements require Court approval, which was sought from the Federal Court of Australia. Court procedures for the case were somewhat expedited on the grounds that group members are now quite old and often unwell, with the stated desire of getting settlement proceeds to them as soon as practicable.

The judgment discussed here, dated 17 April 2025, pertains to the Second Settlement Approval hearing and represents the third set of court orders related to the settlement, with further orders anticipated.

Under the settlement, the Commonwealth agreed to pay up to $180 million in damages (calculated at $18,000 per eligible group member, capped at 10,000 members). Additionally, the Commonwealth agreed to pay up to $22 million towards costs being: $15 million for the applicant's legal costs (fees and disbursements), $6 million for settlement administration, and $1 million for costs assessment processes, bringing the potential total Commonwealth payout to $202 million plus its own legal expenses.

The legal costs funded by the Commonwealth were framed on a 'party-party' basis. Further 'solicitor-client' costs and the litigation funder's commission were sought from the settlement sum itself. Initial estimates suggested eligible claimants might receive between $12,000 and $13,500 each, with interim payments of $10,000 commencing immediately.

The Judge

The case was heard by Justice Debra Mortimer, Chief Justice of the Federal Court of Australia, after being reassigned from Justice Murphy due to his upcoming retirement.

Complexity Arising from Costs

A significant portion of the judgment (over 500 of the 600 paragraphs) addresses the costs sought by the applicant's lawyers (Shine) and the litigation funder (LLS) – who gets paid, how much and when. The judge commented directly:

> *"The issues in this proceeding have many layers of complexity. That is in some ways ironic."*
>
> *"The irony, and the matter which needs to change in these kinds of proceedings, is that the complexity arises almost entirely because of the arguments brought to the Court by Shine and the funder about how much money they should receive because of the settlement of this proceeding, and when and how they receive it."*
>
> *"It would not be surprising if potential eligible claimants observing the proceedings gained the impression the proceeding was little more than a money-making exercise for others."*

The judgment frequently commented on the fact that submissions, though formally presented by 'the Applicant', were in practice being advanced by Shine.

The Court oversaw the appointment of Deloitte as the settlement scheme administrator following a tender process. Deloitte's fee estimate was $1.8 million, noted in the judgment as being substantially lower than an estimate provided by Shine for undertaking the administration. (But look at the postscript at the end of the article.)

Litigation Funder's Commission

LLS sought a commission of 20% of the 'gross settlement sum' ($202 million), amounting to $40.4 million, plus reimbursement of a $1.05 million After The Event (ATE) insurance premium, totalling $41.45 million. The Judge estimated that the funder's maximum 'at risk' amount was approximately $15 million (based on a $10.5 million cap on funded legal costs and $5 million in ATE cover for adverse costs).

After dedicating 98 paragraphs to the funding commission, the Court approved a lower amount:

- A commission calculated at 20% of the settlement sum actually paid to eligible group members ($3,600 per member receiving $18,000).
- This commission was capped based on a maximum of 8,750 eligible claimants, limiting the total commission to $31.5 million (20% of $157.5 million).
- Reimbursement of the ATE premium of $1.05 million.

This resulted in a maximum potential recovery for LLS of $32.55 million, compared to the $41.45 million sought.

The final amount will depend on the number of eligible claimants; if only 6,000 claimants are eligible, the commission would be significantly lower at $21.6 million plus the ATE premium). The judgment also recorded that LLS had advanced $9.7 million for legal fees, which Shine is required to repay from its recovered costs.

The judge observed:

> *"It is unclear to me whether a litigation funder has ever submitted that litigation it funded was neither large, nor complex, nor very risky."*

Applicant Lawyers' Costs and Disbursements

The judgment devoted 224 paragraphs to Shine's costs. Shine reported fees and disbursements totalling approximately $15 million up to December 2024.

A court-appointed costs referee assessed reasonable costs on a party-party basis at $10.7 million. The Court adopted this figure, to be paid from the Commonwealth's $15 million costs contribution.

Shine initially sought an additional $8.6 million (later revised to a capped $7.3 million) for estimated costs to complete the 'outreach and registration' process through to the closing date of 31 August 2025.

A significant controversy in the case was Shine's charge-out rates for 'law clerks', billed at $325 per hour (increasing to $341 after two years). The judgment noted arguments that a reasonable rate might be $130 to $200 per hour. Law clerks accounted for 42% of charged hours and 34% of total fees. The judge adjusted approximately a quarter of the law clerk hours charged to a rate of $200 per hour, reducing the recoverable fees by about $0.35 million. Following judicial examination of this issue, Shine committed to applying the $200 rate for remaining law clerk work.

Regarding solicitor-client costs sought from the settlement sum, the Court allowed approximately $1.7 million out of $2.6 million claimed, plus a $0.5 million uplift fee. The uplift was not applied to fees previously advanced by the funder, on the grounds that these amounts were not 'at risk' for Shine.

The judgment noted Shine's initial costs estimate through to trial was around $11 million, compared to a revised estimate of $19.7 million in a costs agreement signed around the time of settlement (June 2024).

The Court also examined Shine's approach to contacting potential group members, noting it was initially undertaken without engaging local organisations. Following the first settlement hearing and suggestion by the

Judge, Shine contacted local Indigenous and other organisations regarding potential assistance. The judge stated:

> *"I find it probable that the local aboriginal organisations could have undertaken this work for well under $1m and possibly closer to $500,000."*

The judgment also recorded an agreement for Shine to pay a 'referral fee' (10% of professional fees received from the funder) to the law firm Bottoms English, which was involved in the earlier Queensland stolen wages case.

Issues Highlighted by the Judgment

The judgment's detailed examination of the costs and conduct of the litigation highlighted several areas pertinent to class action practice. Justice Mortimer explicitly addressed the conflict of interest inherent when applicant lawyers argue for their own remuneration:

> *"In future proceedings, in my respectful opinion, greater care and attention should be paid to the apprehensions created, especially on the part of group members, by this practice."*

Based on the reasoning and orders within this judgment, the following points emerge as potential areas of change for class action proceedings:

1. Independent Scheme Administration: The appointment of a third-party administrator (Deloitte) following a tender process provides a model considered by the Court for potentially long or complex settlement distribution schemes.
2. Managing Conflicts in Cost Justification: The judgment critiqued the practice of applicant lawyers presenting arguments and evidence supporting their own costs as part of the applicant's case for settlement approval, identifying an inherent conflict with group member interests.
3. Separate Remuneration Processes: The Court's approach suggests a need for processes to determine lawyer and funder remuneration distinctly from, and prior to, the main settlement approval application.
4. Funding Commission Focus: The determination of the funding commission should place emphasis on the 'value obtained by group members' and the funder's actual risk, rather than solely the contractual terms agreed between the funder and applicant/lawyers.
5. Outreach and Registration Practices: The judgment addressed the methods for outreach, particularly for firms operating outside the relevant communities, favouring:
    - Partnership and consultation with local organisations.
    - Use of cultural advisors and knowledgeable consultants.
    - Logistics managed by those with local knowledge.
    - Materials developed by communication experts familiar with the communities.
    - Utilising existing information held by local organisations (with consent) to reduce duplication.

A further aspect, identified in many class action settlement approvals, is that the treatment of ATE insurance premiums invites consideration – specifically, whether they should be reimbursed from settlement funds in

addition to a funder's commission, or treated as a funder's operational cost. In this case, the ATE premium reimbursement was approved.

Concluding Remarks from the Judgment

Justice Mortimer concluded with observations on the balance between commercial interests and the objectives of class actions:

> *"There are statements in the authorities, and many more in the oral and written submissions in this proceeding, that convey an apocalyptic impression of the future of legal proceedings such as this if funders such as LLS and lawyers such as Shine (a publicly listed corporation) are not sufficiently 'rewarded' by courts for their participation in class action proceedings."*
>
> *"The pursuit of the business model has, in my respectful opinion, at times overshadowed (any) good intentions."*
>
> *"Courts need to be cautious that their protective role under (the law) is not seen as being little more than an adjunct to considerable commercial profits being made out of litigation, and on the backs of applicants and group members."*
>
> *"This is one of the principal reasons that the "social justice" refrain through the material rang somewhat hollow."*

McDonald v Commonwealth of Australia [2025] FCA 380
Federal Court of Australia
Mortimer CJ
Class actions - applicant brought representative proceedings on behalf of group members concerning the non - or under-payment of wages for Aboriginal and Torres Strait Islander persons who worked on pastoral stations, other private workplaces, Aboriginal institutions and missions, or government-run stations in the Northern Territory over a certain period - Commonwealth had NT governance responsibility during the claim period - parties sought Court's approval for a settlement under which Commonwealth would pay up to $180million calculated by multiplying $18,000 by up to 10,000 eligible claimants - held: Court approved the settlement sum, to which no group member had objected - applicant had faced significant hurdles in respect of liability and proof - Court refused to make proposed differentiation order under which eligible claimants would receive different levels of compensation depending on age, as a proxy for how much of their likely working life during the claim period was likely to have been affected by them receiving little or no wages - too many assumptions in such a method, and differentiation likely to lead to dispute and debate within communities and families, not be conducive to obtaining the registration of as many eligible claimants as possible, nor to acceptance of the settlement as a beneficial outcome - interim payments of $10,000 to living eligible claimants approved, so that as many as possible would receive a substantial portion of their compensation before they passed away - litigation funder's commission of 20% of the net settlement sum should be capped at $31million - after the event insurance premiums of about $1million approved as deductions from the settlement fund - applicant's agreed legal costs were approved at about $12million - no provision in settlement deed for the making of an apology, but senior counsel for the Commonwealth said in open court that the Commonwealth intended to make an apology in Parliament - Court inferred the willingness of the Commonwealth to make a considered public apology arose because of the settlement, and confirmed the Court's opinion that the proposed settlement was fair and reasonable - settlement approved.
McDonald (I B)

A Postscript: The Administrator gets a pay rise

In November 2025 the parties were back in the Federal Court asking the Court to approve an increase in the fees to the fund administrator, Deloitte, from $1.8m to $3.2m. The reason for the request was that Deloitte under-estimated the work required when they submitted their tender for the role.

Justice Mortimer said '*Despite some misgivings, the Court approves the increase in costs sought by the Administrator, but dismisses the suppression application*'. (They had applied for some evidence to be kept confidential because it dealt with commercially sensitive financial information from Deloitte.)

Some of the difficulties arise from the so-called 'protective role' of the court in respect of group members. The Judge in essence has to take responsibility for determining fees, having received submissions from the plaintiff lawyers which undoubtedly put forward a good picture.

In this case the judge seemingly blamed herself, at least in part. *'… in hindsight [the court] should have interrogated the material more'*. In future '*much greater scrutiny is needed at the stage where the court is determining approval of amounts to be paid to administrators, and perhaps a greater need to test the tenders being put forward, and require more active scrutiny from the other parties.'*

The judgment was somewhat sarcastic in describing the content and layout of the Deloitte quote, saying that it appeared to be a very impressive First Nations oriented submission, with none of the assertions borne out in reality.

The judge tried to get a commitment that there would be no more applications for increases in future but the best she got was 'his instructions are that there *should* not be a further application'

In my mind there is no great surprise with any of this. It illustrates why I hold the view that the Court is not in a good position to undertake this supervisory or protective role when it comes to remuneration.