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Details of Filing

Document Lodged:	Statement of Claim - Form 17 - Rule 8.06(1)(a)
File Number:	WAD237/2020
File Title:	MERVYN STREET v STATE OF WESTERN AUSTRALIA
Registry:	WESTERN AUSTRALIA REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Sia Lagos".

Dated: 20/10/2020 8:51:09 AM AWST

Registrar

Important Information

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Form 17
Rule 8.05(1)(a)

STATEMENT OF CLAIM

No. of 2020

Federal Court of Australia
District Registry: Western Australia
Division: General

MERVYN STREET

Applicant

STATE OF WESTERN AUSTRALIA

Respondent

TABLE OF CONTENTS

A.	INTRODUCTION	4
B.	THE APPLICANT	5
C.	LEGISLATIVE FRAMEWORK	5
C.1.	Native Acts	5
C.2.	Regulations	6
C.3.	Objects of Native Acts	7
C.4.	Definitions of Native in Native Acts	7
C.5.	Entities and roles under the Native Acts	8

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D.	REGULATION OF CONTROLLED NATIVES' WORK UNDER THE ACTS	12
D.1.	Regulation of Work on Reserves and Native Institutions	12
D.2.	Supervision of Controlled Natives' Work outside Reserves and Native Institutions	15
D.3.	Supervision of work by wards under guardianship of Commissioner	18
E.	CONTROL OF WAGES PAID OR OWING TO CONTROLLED NATIVES	19
E.1.	General power in respect of Native property	19
E.2.	Specific trust accounts	20
E.3.	Departmental Trust Account	21
F.	THE FIDUCIARY OBLIGATIONS AND TRUSTS	22
F.1.	Work Duties (1936, 1954 and 1963 Acts)	22
F.2.	Lost Wages Trusts (under 1936, 1954 and 1963 Acts)	26
F.3.	Management Duties and Trusts (1936, 1954 and 1963 Acts)	29
F.4.	Ward Duties and Trusts (under 1936 and 1954 Acts)	36
F.5.	Saved Wages Trusts (under 1936 Act)	43
G.	WORK FOR NO OR INADEQUATE WAGES	46
H.	BREACH OF FIDUCIARY DUTIES AND TRUSTS	48
H.1.	Breach of Work Duties (1936, 1954 and 1963 Acts)	48
H.2.	Breach of Ward Duties (1936 and 1954 Acts)	51
H.3.	Breaches of Trusts (1936, 1954 and 1963 Acts)	53
I.	OTHER CLAIMS IN RESPECT OF UNPAID WAGES	55
I.1.	Claims against State in respect of Native Institution Work (1936, 1954 and 1963 Acts)	55
I.2.	Existence of claims against employers in respect of Station & Domestic Work (1936 Act)	60
I.3.	Breach of Statutory Duty	61

J.	CAUSATION, LOSS AND DAMAGE IN RESPECT OF BREACHES OF FIDUCIARY DUTIES, TRUSTS AND OTHER CLAIMS FOR UNPAID WAGES	65
K.	RACIAL DISCRIMINATION ACT CLAIMS	66
K.1.	Reparation scheme	66
K.2.	Unlawful racial discrimination	67
K.3.	Causation loss and damage	70

A. INTRODUCTION

1. The Applicant brings these proceedings on his own behalf and on behalf of represented persons (**Group Members**) pursuant to Part IVA of the *Federal Court of Australia Act 1976* (Cth) (**FCAA**).
2. The Group Members are all persons who:
 - (a) being Aboriginal or Torres Strait Islander persons, lived in Western Australia during all or part of the period from 11 December 1936 to 9 June 1972 (**Claim Period**);
 - (b) during all or part of the Claim Period were a "native" as defined by:
 - (i) s 2 of the *Native Administration Act 1905-1936* (WA) (**1936 Act**) (as amended from time to time in the Claim Period, including by the *Native Welfare Act 1905-1954* (WA) (**1954 Act**)); and/or
 - (ii) s 4 of the *Native Welfare Act 1963* (WA) (as amended) (**1963 Act**),

(**Controlled Native**); and
 - (c) during all or part of the Claim Period worked in Western Australia at a time when they were a Controlled Native,

(all persons meeting sub-paragraphs (a) to (c) being a **Working Controlled Native**), and if a Working Controlled Native has died (**Deceased Working Controlled Native**), then any legal personal representative or beneficiary of the estate of the Deceased Working Controlled Native who has the capacity to claim on behalf of that estate, or any person who has a right (equitable or otherwise) in respect of the administration of, or property forming part of, the estate of the Deceased Working Controlled Native is also a Group Member.
3. As at the date of the commencement of this proceeding, seven or more Group Members have claims against the Respondent (**State of WA**) within the meaning of s 33C of the FCAA.

B. THE APPLICANT

4. The Applicant was:

- (a) born in or about 1948 although his date of birth is recorded as 1 July 1950;
- (b) a “native” within the meaning of s 2 of the 1936 Act, s 2 of the 1954 Act and s 4 of the 1963 Act (and accordingly, at all material times, a Controlled Native); and
- (c) subject to the 1936 Act, the 1954 Act and the 1963 Act and the regulations made thereunder.

C. LEGISLATIVE FRAMEWORK

C.1. Native Acts

5. The *Aborigines Act Amendment Act 1936* (WA):

- (a) received assent on 11 December 1936;
- (b) amended the *Aborigines Act 1905* (WA) (**Aborigines Act 1905**); and
- (c) re-named the *Aborigines Act 1905* (as amended) the *Native Administration Act 1905-1936* (WA),

(that is, the 1936 Act).

6. The 1954 Act:

- (a) received assent on 30 December 1954;
- (b) amended the 1936 Act; and
- (c) re-named the 1936 Act (as amended) the *Native Welfare Act 1905-1954* (WA),

(that is, the 1954 Act).

7. The 1963 Act:

- (a) received assent on 19 December 1963; and
- (b) repealed the 1954 Act.

8. The *Aboriginal Affairs Planning Authority Act 1972* (WA) (**1972 Act**);

(a) received assent on 9 June 1972; and

(b) repealed the 1963 Act.

C.2. Regulations

C.2.1. 1936 Act

9. The 1936 Act provided that the Governor could make regulations under the 1936 Act (s 68).

10. The *Native Administration Regulations 1938* (WA):

(a) were made under the 1936 Act, and were gazetted on 29 April 1938; and

(b) were relevantly amended on 1 November 1938,

and are referred to (as amended from time to time) as the **1936 Act Regulations**.

C.2.2. 1954 Act

11. The 1954 Act provided that the Governor could make regulations under the 1954 Act (s 69).

12. The *Native Welfare Regulations* (WA):

(a) were made under the 1954 Act and were gazetted on 9 May 1956;

(b) amended the 1936 Act Regulations; and

(c) re-named the 1936 Act Regulations (as amended) the *Native Welfare Regulations* (WA),

and are referred to (as amended from time to time) as the **1954 Act Regulations**.

C.2.3. 1963 Act

13. The 1963 Act provided that the Governor could make regulations under the 1963 Act (s 37).

14. The *Native Welfare Act Regulations 1964* (WA):

(a) were made under the 1954 Act and were gazetted on 25 June 1964; and

(b) repealed the 1954 Act Regulations,

and are referred to (as amended from time to time) as the **1963 Act Regulations**.

C.3. Objects of Native Acts

15. The express object of the 1936 Act was to "*make provision for the better protection and care of the Native inhabitants of Western Australia.*"

16. The express object of the 1954 Act was to "*make provision for the welfare of the Native inhabitants of Western Australia.*"

17. The express object of the 1963 Act was to "*to consolidate and amend the law relating to and providing for the Welfare of the Native Inhabitants of Western Australia; and for incidental and other purposes.*"

C.4. Definitions of Native in Native Acts

18. Section 2 of the 1936 Act defined "Native" as meaning:

"(a) *any person of the full blood descended from the original inhabitants of Australia;*

(b) *subject to the exceptions stated in this definition any person of less than full blood who is descended from the original inhabitants of Australia or from their full blood descendants, excepting however any person who is:*

(i) *a quadroon under twenty-one years of age who neither associates with or lives substantially after the manner of the class of persons mentioned in paragraph (a) in this definition unless such quadroon is ordered by a magistrate to be classed as a native under this Act;*

(ii) *a quadroon over twenty-one years of age, unless that person is by order of a magistrate ordered to be classed as a native under*

this Act, or requests that he be classed as a native under this Act; and

(iii) a person of less than quadroon blood who was born prior to the 31st day of December, 1936, unless such person expressly applies to be brought under this Act and the Minister consents".

19. Section 2 of the 1936 Act defined "Quadroon" as meaning "a person who is descended from the full blood original inhabitants of Australia or their full blood descendants but who is only one-fourth of the original full blood."
20. Section 2 of the 1954 Act and s 4 of the 1963 Act defined "Native" in relevantly identical terms as the 1936 Act.

C.5. Entities and roles under the Native Acts

C.5.1. Outline

21. The 1936 Act provided for:
 - (a) the establishment of a Department of Native Affairs (**Department**) (ss 2 and 4);
 - (b) the appointment of a Commissioner of Native Affairs by the Governor (**Commissioner**) (ss 2 and 7);
 - (c) the appointment of Protectors by the Minister (**Protectors**) (ss 2 and 7);
 - (d) the appointment of travelling inspectors by the Governor (**Inspectors**) (ss 2 and 7); and
 - (e) the appointment of superintendents by the Governor (**Superintendents**) (ss 2 and 11).
22. By the 1954 Act, the 1954 Act:
 - (a) amended the title of the Department to the Department of Native Welfare;
 - (b) amended the title of the Commissioner to Commissioner of Native Welfare;
 - (c) removed the office of Inspector; and

- (d) otherwise provided for the existence and continuation of the Department, Commissioner, Protectors and Superintendents (ss 2, 4, 7 and 12).

23. The 1963 Act:

- (a) replaced the office of Protector with "representative" (**Representative**) (ss 4 and 12);
- (b) replaced the office of Superintendent with "manager" (**Manager**) (ss 4 and 19); and
- (c) otherwise provided for the existence and continuation of:
 - (i) the Department (s 5);
 - (ii) the Commissioner (s 11);
 - (iii) Protectors as Representatives (s 12); and
 - (iv) Superintendents as Managers (s 19).

C.5.2. Department

24. The 1936 Act provided that:

- (a) the Department was "*charged with the duty of promoting the welfare of the natives, providing them with food, clothing, medicine and medical attendance, when they would otherwise be destitute, providing for the education of native children, and generally assisting in the preservation and wellbeing of the natives*" (s 4); and
- (b) the duties of the Department included:
 - (i) "*to apportion, distribute, and apply, as may seem most fit, the moneys by this Act placed at its disposal*" (s 6(1));
 - (ii) "*to provide for the custody, maintenance, and education of the children of natives*" (s 6(3));
 - (iii) "*to manage and regulate the use of all reserves set apart for the benefit of natives*" (s 6(5)); and

- (iv) *"to exercise a general supervision and care over all matters affecting the interests and welfare of the natives, and to protect them against injustice, imposition, and fraud"* (s 6(6)).

25. Sections 4 and 6 of the 1954 Act provided relevantly identical objects and powers to the Department as the 1936 Act, save that s 6(f) provided instead of s 6(6) of the 1936 Act that the duties of the Department included *"to exercise such general supervision and care over all matters affecting the interests and welfare of the natives as the Minister in his discretion considers most fit to assist in their economic and social assimilation by the community of the State, and to protect them against injustice, imposition, and fraud"*.
26. Sections 5 and 7 of the 1963 Act provided relevantly identical objects and powers to the Department as the 1936 Act, save that s 5 provided instead of s 4 of the 1954 Act that the Department was *"charged with the duty of promoting the welfare of natives"*.

C.5.3. Commissioner

27. Section 7 of the 1936 Act provided that Commissioner was, under the Minister, responsible for the administration of the Department and the execution of the 1936 Act throughout Western Australia.
28. Section 7(2) of the 1954 Act and s 11(1) of the 1963 Act were in relevantly identical terms as s 7 of the 1936 Act.
29. Section 8 of the 1936 Act provided that the Commissioner shall be the legal guardian of every Controlled Native child notwithstanding that the child has a parent or other relative living, until such child attains the age of twenty-one years.
30. Section 8 of the 1954 Act provided that the Commissioner shall be the legal guardian of every Controlled Native child notwithstanding that the child has a parent or other relative living, until such child attains the age of twenty-one years except while the child is a ward according to the interpretation given to that expression by s 4 of the *Child Welfare Act, 1947* (WA) and the Commissioner may, from time to time direct what person is to have the custody of a Controlled Native child of whom he is the legal guardian, and his direction has effect according to its tenor.

C.5.4. Protectors and Representatives

31. Regulation 130 of the 1936 Act Regulations provided that the duties of a Protector included to:
- (a) make himself thoroughly acquainted with the 1936 Act and 1936 Act Regulations;
 - (b) report to the Commissioner on all matters as required by the 1936 Act and 1936 Act Regulations;
 - (c) report promptly to the Commissioner or any Inspector any matter in which he considers legal or other special action of a like nature desirable or which in his opinion may require reference to the Courts;
 - (d) ensure that all working Controlled Natives or Controlled Natives under contract are employed in accordance with the 1936 Act and 1936 Act Regulations, having special regard to the position of wards;
 - (e) generally to exercise benevolent supervision and interest in and over all matters affecting the interests and welfare of natives and to protect them from injustice, imposition and fraud.
32. Regulation 130(1) of the 1954 Act Regulations was in relevantly identical terms to r 130 of the 1936 Act Regulations, save that references to the 1936 Act and 1936 Act Regulations were to the 1954 Act and 1954 Act Regulations, respectively.
33. The 1963 Act Regulations:
- (a) did not specify the duties of Representatives;
 - (b) provided that the Minister shall specify in the appointment of every Representative the powers and duties of that Representative and shall assign to him a part or parts of Western Australia in which those powers and duties may be exercised by him (r 14(2)).

C.5.5. Inspectors

34. Section 7 of 1936 Act provided that it was the duty of Inspectors in regard to the territories assigned to them to inspect and report to the Commissioner on:
- (a) the condition of Controlled Natives generally; and

- (b) the management and conduct of Native Institutions periodically.

C.5.6. Superintendents and Managers

- 35. Regulation 33 of the 1936 Act Regulations provided that the Superintendent or manager of a Reserve or Native Institution is, subject to any higher authority, responsible for its welfare, administration and control.
- 36. Regulation 33 of the 1954 Act Regulations was in identical terms to r 33 of the 1936 Act Regulations.
- 37. Regulation 22 of the 1963 Act Regulations was in materially identical terms to r 33 of the 1936 Act Regulations and 1954 Act Regulations, save that it only referred to Managers.

C.5.7. Servants or agents of State of WA

- 38. By reason of the matters pleaded at paragraphs 21 to 34 above, at all material times the Commissioner, Protectors, Inspectors, Superintendents, Representatives and Managers:

- (a) were servants or agents of the State of WA; and

- (b) acted for and on behalf of the State of WA,

with the scope of their respective powers and duties under the 1936 Act, 1954 Act and 1963 Act and subordinate legislation, as the case may be.

D. REGULATION OF CONTROLLED NATIVES' WORK UNDER THE ACTS

D.1. Regulation of Work on Reserves and Native Institutions

D.1.1. Reserves and Native Institutions

- 39. Section 10 of the 1936 Act provided that the Governor may proclaim certain Crown lands to be reserves (**Reserves**).
- 40. Section 12 of the 1954 Act and s 18 of the 1963 Act were in materially identical terms to s 10 of the 1936 Act.

41. Section 2 of the 1936 Act defined "*Native institution*" as meaning and including "*any mission, reformatory, orphanage, school, home, station, reserve, or other institution for the benefit, protection, or care of the native inhabitants of the State declared by proclamation to be a native institution for the purposes of this Act*" (**Native Institution**).
42. Section 2 of the 1954 Act and s 4 of the 1963 Act defined "*Native*" and "*Native institution*" in relevantly identical terms as the 1936 Act.
43. Sections 12 and 13 of the 1936 Act provided that the Minister may cause any Controlled Native to be removed to and kept within the boundaries of a Reserve, district, institution, or hospital, or to be removed from one Reserve, district, Native Institution, or hospital to another Reserve, district, Native Institution, or hospital, and kept therein, except any Controlled Native:
- (a) who is lawfully employed by any person;
 - (b) who is the holder of a permit to be absent from a Reserve;
 - (c) who is a female lawfully married to and residing with a husband who is not himself a Native; or
 - (d) for whom, in the opinion of the Minister, satisfactory provision is otherwise made.
44. Sections 12 and 13 of the 1936 Act were repealed on 30 December 1954 and not replaced in the 1954 Act.
45. Regulation 20 of the 1936 Act Regulations provided that managers and Superintendents of Native Institutions or Reserves may admit Controlled Natives thereto and discharge them therefrom upon their own authority, provided that the Controlled Native was not a ward.
46. Regulation 20 of the 1954 Act Regulations was in identical terms to r 20 of the 1936 Act Regulations.
47. Regulation 23(2) of the 1963 Act Regulations was in materially identical terms to r 20 of the 1936 Act Regulations 1954 Act Regulations, save that it only referred to Managers and did not refer to wards.

D.1.2. Native Inmates' duty to obey commands to work

48. Regulation 19 of the 1936 Act Regulations provided that every Controlled Native while within a Native Institution or Reserve shall be deemed an inmate of such Native Institution or Reserve (**Native Inmate**) and shall obey all reasonable instructions and commands of the Superintendent or Manager.
49. Regulation 19 of the 1954 Act Regulations was in identical terms to r 19 of the 1936 Act Regulations.
50. Regulation 22(4) of the 1963 Act Regulations was in identical terms to r 19 of the 1936 Act Regulations and 1954 Act Regulations save that it made no reference to a Superintendent.
51. Regulation 50 of the 1936 Act Regulations provided that Native Inmates of a Native Institution or Reserve according to their ability may be called upon to work during such reasonable hours as the Superintendent or manager may direct, and must perform the duties allotted to them.
52. Regulation 50 of the 1936 Act Regulations was repealed on 9 May 1956 and not replaced in the 1954 Act Regulations.

D.1.3. Duty to supply necessities to Native Inmates

53. Regulation 35 of the 1936 Act Regulations provided that Native Inmates shall be supplied with ample plain wholesome food and water daily to the satisfaction of the Commissioner.
54. Regulation 35 of the 1954 Act Regulations and r 29(a) of the 1963 Act Regulations was in identical terms to r 35 of the 1936 Act Regulations.

D.1.4. Absence of provision for payment to Native Inmates

55. Neither the 1936 Act, 1936 Act Regulations, the 1954 Act nor the 1954 Act Regulations made any provision for payment to be made to Native Inmates in respect of work done by them pursuant to directions issued to them by the Superintendent or Manager under regulation 50 of the 1936 Act Regulations, as pleaded in paragraph 51 above.
56. Neither the 1954 Act, the 1954 Act Regulations, the 1963 Act nor the 1963 Act Regulations made provision for payment to be made to Native Inmates in respect of

any instruction or command issued to them by the Superintendent or Manager pursuant to regulation 19 of the 1936 Act Regulations, regulation 19 of the 1954 Act Regulations or regulation 22(4) of the 1963 Act Regulations, as pleaded in paragraphs 48 to 50 above.

D.2. Supervision of Controlled Natives' Work outside Reserves and Native Institutions

D.2.1. Permits and Agreements under the 1936 Act

57. Section 18 of the 1936 Act provided that:

- (a) a person was prohibited to employ or engage under a contract to perform work or services a Controlled Native except under permit (**Permit**) or Permit and agreement (**Agreement**) (ss 18(1) and (2)), not including male Controlled Natives *"over twenty-one years of age who is of half blood or less than half blood descent from the original full blood inhabitants of Australia or from their full blood descendants, where such person does not live after the manner of the original full blood inhabitants or their full blood descendants"*; and
- (b) every Permit or Permit and Agreement was to be in the prescribed form (s 18(3)).

58. Section 19 of the 1936 Act provided that every Permit:

- (a) was to be granted or refused by a Protector or Inspector (s 19(1));
- (b) may be granted for any period not exceeding twelve months for employment on land, or not exceeding eight months for employment on any ship or boat (s 19(2));
- (c) may from time to time be renewed (s 19(3));
- (d) may contain such conditions as the Protector or Inspector considers fit and proper (s 19(4));
- (e) may, if the protector or inspector thinks fit, be granted as a general permit to employ Controlled Natives (s 19(5)); and
- (f) may be cancelled at any time by a Protector or Inspector (s 19(6)).

59. Section 26 of the 1936 Act provided that any Controlled Native who, without reasonable cause, shall neglect or refuse to enter upon or commence his service, or shall absent

himself from his service, or shall refuse or neglect to work in the capacity in which he has been engaged, or shall desert or quit his work without the consent of his employer, or shall commit any other breach of his agreement, shall be guilty of an offence against the 1936 Act.

60. Regulation 60 and the Schedule to the 1936 Act Regulations provided:

- (a) for the prescribed form of Permit and Permit and Agreement under the 1936 Act;
- (b) that an issuing Protector could direct in respect of a Permit whether the employer was required to provide the Controlled Native or Controlled Natives employed under the Permit:
 - (i) no wages but "*[s]ubstantial, good and sufficient rations, clothing and blankets*";
 - (ii) wages in cash at a particular rate per week and food and lodging; or
 - (iii) wages only at a particular rate per week (Forms 12 and 13),
- (c) that Permits in respect of employment of Natives on ships or boats:
 - (i) did not require the payment of any wages to the employed Native or Natives; and
 - (ii) required the provision of "*substantial, good, and sufficient rations, clothing and blankets*" (Form 14); and
- (d) that Permits in respect of casual employment of Controlled Natives did not require the payment of any wages to the casually employed Controlled Native or Controlled Natives (Form 15).

61. Section 50 of the 1936 Act provided that all blankets, bedding, clothing, and other articles issue or distributed to the Natives by or by the direction of the Department shall remain the property of His Majesty; and it shall not be lawful for a Controlled Native receiving such bedding, clothing, or other articles to sell or otherwise dispose of the same to any person other than a Controlled Native, without the sanction of a Protector.

62. Sections 18 and 19 of the 1936 Act were repealed on 30 December 1954 and not replaced in the 1954 Act.

D.2.2. Native employees under supervision under the Acts

63. The 1936 Act provided that:

- (a) every Native employed by any person shall be under the supervision of a Protector or police officer (s 28);
- (b) every employer shall:
 - (i) produce to an Inspector or a Protector or police officer or officer appointed by the Commissioner on demand, the Permit, or Permit and Agreement as the case may be, under which any Controlled Native is employed (s 29(1)); and
 - (ii) allow an Inspector or a Protector or police officer or officer appointed by the Commissioner to have access to any Controlled Native employed, or to any house, ship, boat, or premises where such Controlled Native may happen to be, at all reasonable times, for such inspection and inquiry as he may deem necessary (s 29(2)); and
- (c) all actions and other proceedings against any person for the recovery of wages due to a Controlled Native who is, or has been, employed by such person, or for any breach of an agreement made with a Native, may be instituted and carried on by, or in the name of, a Protector, or any other person authorised by the Minister (s 53).

64. The 1954 Act provided that:

- (a) every Controlled Native employed as an employee or engaged as an independent contractor by any person shall be under the supervision of the Commissioner (s 29);
- (b) a person who employs as an employee or engages as an independent contractor a Controlled Native, shall allow the Commissioner or a person authorised to do so by the Commissioner, to have access to the Controlled Native, or to any house, ship, boat, or premises where the Controlled Native may happen to be, at all reasonable times, for such inspection and inquiry as he may deem necessary (s 30); and

- (c) all actions and other proceedings against any person for the recovery of wages due to a Controlled Native who is, or has been, employed by such person, or for any breach of an agreement made with a Controlled Native, may be instituted and carried on by, or in the name of, a Protector, or any other person authorised by the Minister (s 53).
65. Section 21 of the 1963 Act provided that a person who employs as an employee or engages as an independent contractor a Controlled Native, shall allow the Commissioner, or a person authorised to do so by the Commissioner, to have access to the Controlled Native and to any house, ship, boat or premises where the Controlled Native may happen to be, at all reasonable times, for such inspection and inquiry as he may deem necessary.
- D.3. Supervision of work by wards under guardianship of Commissioner**
66. Regulation 54 of the 1936 Act Regulations provided that the Superintendent or manager of every Native Institution:
- (a) which is in receipt of a subsidy from the Government or which is wholly or partially supported by the Government must admit any ward when required by the Commissioner; and
 - (b) which is not subsidised by the Government may admit any ward when requested by the Commissioner.
67. Regulation 56 of the 1936 Act Regulations provided that no ward under fourteen years of age shall be allowed or compelled to work or be placed out at employment except with the consent of the Commissioner.
68. Regulation 57 of the 1936 Act Regulations provided that wherever a ward has been placed in employment from an institution an exact account of the terms of such employment shall be supplied to the Commissioner thereafter by the most expeditious means available and thereafter the Commissioner shall take charge of the matter.
69. Regulations 54, 56 and 57 of the 1954 Act Regulations were in materially identical terms to rr 54, 56 and 57 of the 1936 Act Regulations.

70. The 1963 Act Regulations:

- (a) provided in rr 35(1) and 39 materially identical provisions to rr 54 and 56 of the 1936 Act Regulations and 1954 Act Regulations save that it applied to wards under sixteen years of age; and
- (b) provided by r 35(2) instead of r 57 of the 1936 Act Regulations and 1954 Act Regulations that "*Whenever a native child is placed in employment from a native institution, a full and correct account of the terms of that be furnished to the Commissioner forthwith.*"

E. CONTROL OF WAGES PAID OR OWING TO CONTROLLED NATIVES

E.1. General power in respect of Native property

71. Section 34 of the 1936 Act provided that the Commissioner "*may undertake the general care, protection, and management of the property of any native and may*":

- (a) "*take possession of, retain, sell, or dispose of any by such property, whether real or personal*" (s 34(1));
- (b) "*in his own name sue for, recover, or receive any money or other property due or belonging to or held in trust for the benefit of a native, or damages for any conversion of or injury to any such property*" (s 34(2)); and
- (c) "*exercise in the name of a native any power which the native might exercise for his own benefit*" (s 34(3)),

provided that the powers conferred by s 34 must not be exercised, except in the case of minors, without the consent of the Controlled Native except so far as may be necessary to provide for the due preservation of such property.

72. Section 34 of the 1936 Act provided that the Commissioner shall keep proper records and accounts of all moneys and other property, and the proceeds thereof received or dealt with by him under s 34, and shall, for such purpose, be deemed to be a public accountant within the meaning of the *Audit Act 1904* (WA).

73. Section 35 of the 1954 Act and s 23 of the 1963 Act provided powers and duties in identical terms to s 34 of the 1936 Act.

E.2. Specific trust accounts

E.2.1. Saved wages

74. Regulation 85 of the 1936 Act Regulations provided that the Commissioner may direct that the wages or part of the wages of any Controlled Native shall be paid to him in trust for such Controlled Native, in any manner he may think fit, and the wages shall be paid by the employer accordingly.
75. Regulation 94 of the 1936 Act Regulations provided that an employer paying a portion of wages into trust in accordance with r 85 shall produce whenever requested by the Commissioner a pocket money book showing the amount of wages paid direct to the Controlled Native concerned and containing a written acknowledgement by the Controlled Native.
76. Regulation 85 of the 1936 Act Regulations was repealed by the 1954 Act Regulations.

E.2.2. Lost wages

77. Section 64 of the 1936 Act provided that:
- (a) any wages due to or property known to belong to a Controlled Native who absconds from service or who is deceased, and any estate or other moneys to which a Native is entitled either as a beneficiary or otherwise, shall forthwith be paid or delivered by the employer, trustee, debtor, or other person liable to pay or deliver the same to the Commissioner (s 64(1));
 - (b) the Commissioner may recover any such wages or property by action in his name in any court of competent jurisdiction (s 64(2));
 - (c) on receipt of such wages or property the Commissioner shall, in the case of money, place that money to the credit of a special trust account (**Lost Wages Trust Account**), and where the property does not consist of money the Commissioner shall as soon as practicable convert that property into money and place the money to the credit of that account (s 64(3)); and
 - (d) subject to the provisions of the 1936 Act, the moneys placed to the credit of the Lost Wages Trust Account may in the case of a Controlled Native who cannot be found, and in the event of no claim for the money being made by the native within a period of three years, be applied by the Commissioner for the benefit of any

Controlled Native or for the benefit of Controlled Natives generally, and in the case of a native who has died intestate, shall be applied in accordance with the 1936 Act Regulations (s 64(4)).

78. Section 65 of the 1954 Act was in materially identical terms to s 64 of the 1936 Act.
79. Section 33 of the 1963 Act was in materially identical terms to s 64 of the 1936 Act and s 65 of the 1954 Act, save that it only operated with respect to a Controlled Native “who cannot be found”.
80. On their proper construction:
 - (a) s 64(4) of the 1936 Act;
 - (b) s 65(4) of the 1954 Act; and
 - (c) s 33(4) of the 1963 Act,

required the Commissioner to cause all reasonable inquiries to be made to locate the Controlled Native on whose behalf funds were held in the Lost Wages Trust Account before disbursing that amount for the benefit of another Controlled Native or for the benefit of Controlled Natives generally.

E.3. Departmental Trust Account

81. Section 72 of the 1936 Act relevantly provided that:
 - (a) a separate account of the moneys placed at the disposal of the Department shall be opened and kept at the Treasury as a Trust account (**Departmental Trust Account**) (s 72(1));
 - (b) the Commissioner or such other officers as the Minister may appoint shall operate on the Departmental Trust Account (s 72(2));
 - (c) the Minister shall cause accounts to be kept of all moneys received and expended by the Department (s 72(3)); and
 - (d) within sixty days after the close of each financial year the Minister shall cause a statement of receipts and payments for the year to be prepared, and such other statements as he may direct (s 72(4)).

82. Section 73 of the 1954 Act and s 35 of the 1963 Act were in materially identical terms to s 72 of the 1936 Act.

F. THE FIDUCIARY OBLIGATIONS AND TRUSTS

F.1. Work Duties (1936, 1954 and 1963 Acts)

83. By reason of:

- (a) the undertaking of the State of WA to exercise its statutory powers under ss 19, 28, 29 and 53 of the 1936 Act, ss 29, 30 and 53 of the 1954 Act and s 21 of the 1963 Act for or on behalf of or in the interests of Working Controlled Natives by:
 - (i) the express objects of the 1936 Act, 1954 Act and 1963 Act, as pleaded in paragraphs 15 to 17 above;
 - (ii) the duties of the Department provided for by s 4 and 6 of the 1936 Act and 1954 Act, and ss 5 and 6 of the 1963 Act, as pleaded in paragraphs 24 to 26 above;
 - (iii) the duties of the Commissioner under s 7 of the 1936 Act and 1954 Act, and s 11 of the 1963 Act, as pleaded in paragraphs 27 to 28 above; and/or
 - (iv) the duties of Protectors under r 130 of the 1936 Act Regulations and r 130(1) of the 1954 Act Regulations, as pleaded in paragraphs 31 to 32 above;
- (b) the power of the State of WA under the 1936 Act, 1954 Act and 1963 Act to affect (including adversely) the interests of Working Controlled Natives, including by reason of:
 - (i) during the currency of the 1936 Act, the matters pleaded in paragraphs 43, 48, 51, 53 to 54, 55, and 57 to 61 above;
 - (ii) during the currency of the 1954 Act, the matters pleaded in 39 to 42, 45 to 46, 48 to 49, 53 to 54 and 55 to 56 above; and/or
 - (iii) during the currency of the 1963 Act, the matters pleaded in paragraphs 39 to 42, 45 to 47, 48 to 50, 53 to 54 and 55 to 56 above,

and the controls they and their family members thereby lived under;

- (c) the vulnerability on the part of Working Controlled Natives as against the State of WA's exercise of its statutory powers, including by reason of:

- (i) during the currency of:

- (A) the 1936 Act, the matters pleaded in paragraphs 43, 48, 51, 53 to 54, 55 and 57 to 61 above;

- (B) during the currency of the 1954 Act, the matters pleaded in 39 to 42, 45 to 46, 48 to 49, 53 to 54 and 55 to 56 above; and/or

- (C) during the currency of the 1963 Act, the matters pleaded in paragraphs 39 to 42, 45 to 47, 48 to 50, 53 to 54 and 55 to 56 above,

and the controls they and their family members thereby lived under;

- (ii) the fact that they were, or were likely to:

- (A) have either no or low levels of formal education;

- (B) have limited levels of literacy or were illiterate (and have limited levels of numeracy or were innumerate);

- (C) have limited or no ability to read and understand English;

- (D) be impecunious or have limited financial means; and

- (E) possess cultural attributes peculiar to Aboriginal and/or Torres Strait Islanders;

- (d) the reliance by Working Controlled Natives upon the State of WA's exercise of its statutory powers for or on behalf of them or in their interests,

during the currency of each of the 1936 Act, the 1954 Act and the 1963 Act, the State of WA owed fiduciary and/or equitable obligations to Working Controlled Natives.

84. Further or in the alternative, by reason of:

- (a) the undertaking of Protectors and Inspectors to exercise their statutory powers under ss 19, 28, 29 and 53 of the 1936 Act, the Commissioner under ss 29, 30

and 53 of the 1954 Act and the Commissioner under s 21 of the 1963 Act for or on behalf of or in the interests of Working Controlled Natives by (as applicable):

- (i) the express objects of the 1936 Act, 1954 Act and 1963 Act, as pleaded in paragraphs 15 to 17 above;
 - (ii) the duties of the Department provided for by s 4 and 6 of the 1936 Act and 1954 Act, and ss 5 and 6 of the 1963 Act, as pleaded in paragraphs 24 to 26 above;
 - (iii) the duties of the Commissioner under s 7 of the 1936 Act and 1954 Act, and s 11 of the 1963 Act, as pleaded in paragraphs 27 to 28 above;
 - (iv) the duties of Protectors under r 130 of the 1936 Act Regulations and r 130(1) of the 1954 Act Regulations, as pleaded in paragraphs 31 to 32 above;
- (b) the power of the Protectors and Inspectors under the 1936 Act, the Commissioner under the 1954 Act and 1963 Act to affect (including adversely) the interests of Working Controlled Natives, including by reason of:
- (i) during the currency of the 1936 Act, the matters pleaded in paragraphs 43, 45, 48, 51, 53, 55, and 57 to 61 above;
 - (ii) during the currency of the 1954 Act, the matters pleaded in 39 to 42, 45 to 46, 48 to 49, 53 to 54 and 55 to 56 above; and/or
 - (iii) during the currency of the 1963 Act, the matters pleaded in paragraphs 39 to 42, 45 to 47, 48 to 50, 53 to 54 and 55 to 56 above,

and the controls they and their family members thereby lived under;

- (c) the vulnerability on the part of Working Controlled Natives as against the exercise of its statutory powers by Protectors, Inspectors and Commissioners, including by reason of:
- (i) during the currency of:
 - (A) the 1936 Act, the matters pleaded in paragraphs 43, 45, 48, 51, 53, 55 and 57 to 61 above;

(B) during the currency of the 1954 Act, the matters pleaded in 39 to 42, 45 to 46, 48 to 49, 53 to 54 and 55 to 56 above; and/or

(C) during the currency of the 1963 Act, the matters pleaded in paragraphs 39 to 42, 45 to 47, 48 to 50, 53 to 54 and 55 to 56 above,

and the controls they and their family members thereby lived under;

(ii) the fact that they were, or were likely to:

(A) have either no or low levels of formal education;

(B) have limited levels of literacy or were illiterate (and have limited levels of numeracy or were innumerate);

(C) have limited or no ability to read and understand English;

(D) be impecunious or have limited financial means; and

(E) possess cultural attributes peculiar to Aboriginal and/or Torres Strait Islanders;

(d) the reliance by Working Controlled Natives upon the exercise of statutory powers for or on behalf of them or in their interests by Protectors, Inspectors and Commissioners,

during the currency of the 1936 Act, the Protectors and Inspectors owed fiduciary and/or equitable obligations to Working Controlled Natives and during the currency of the 1954 Act and the 1963 Act, the Commissioner owed fiduciary and/or equitable obligations to Working Controlled Natives.

85. The fiduciary and/or equitable obligations owed by the State of WA, Protectors, Inspectors and/or Commissioners to Working Controlled Natives included:

(a) exercising due care and skill in protecting the interests of Working Controlled Natives in connection with their work, including by exercising their powers (as applicable) under:

(i) ss 19, 28, 29, 34 and 53 of the 1936 Act;

(ii) ss 29, 30, 35 and 53 of the 1954 Act;

- (iii) ss 21 and 23 of the 1963 Act; and
 - (b) accounting for any benefit received in conflict of interest and the interests of Working Controlled Natives or from or by the use of its fiduciary position,
- (together, **Work Duties**).

F.2. Lost Wages Trusts (under 1936, 1954 and 1963 Acts)

86. From time to time in the Claim Period prior to 9 May 1956, wages due to some Working Controlled Natives (**Lost Wages Native**) were required to be paid and/or were paid into the Lost Wages Trust Account (such wages being (**Lost Wages**)).

Particulars

- A. *The Applicant was not a Lost Wages Native.*
- B. *The identity of those Working Controlled Natives who are Lost Wages Natives is unknown to the Applicant, though he knows they do exist because the Lost Wages Trust Account had a positive balance from time to time as identified in the following Annual Reports of the Commissioner:*
 - i) 1935, p 18;
 - ii) 1936, p 19;
 - iii) 1937, p 23;
 - iv) 1938, p 23;
 - v) 1940, p 37;
 - vi) 1941, pp 15-16;
 - vii) 1942, p 30;
 - viii) 1943, p 19;
 - ix) 1944, pp 12-13;
 - x) 1945, p 15;
 - xi) 1946, pp 23-34; and
 - xii) 1947, pp 25-26.

87. By reason of:

- (a) the use of the term "special trust account" in:
 - (i) s 64(3) of the 1936 Act;
 - (ii) s 65(3) of the 1954 Act;
 - (iii) s 33(3) of the 1963 Act;
- (b) the express objects of the 1936 Act, 1954 Act and 1963, as pleaded in paragraphs 15 to 17 above;
- (c) the duties of the Department provided for by s 4 and 6 of the 1936 Act and 1954 Act, and ss 5 and 7 of the 1963 Act, as pleaded in paragraphs 24 to 26 above;
- (d) the duties of the Commissioner under ss 7 and 64 of the 1936 Act, s 65 of the 1954 Act, and ss 11 and 33 of the 1963 Act, as pleaded in paragraphs 27 to 28 and 77 to 79 above;
- (e) the accounting obligations attached to the Departmental Trust Account by s 72 of the 1936 Act, s 73 of the 1954 Act, and s 35 of the 1963 Act, as pleaded in paragraphs 81 to 82 above;
- (f) the particular circumstances and vulnerability of Lost Wages Natives during the Claim Period, including by reason of:
 - (i) during the currency of:
 - (A) the 1936 Act, the matters pleaded in paragraphs 43, 45, 48, 51, 53, 55 and 57 to 61 above;
 - (B) during the currency of the 1954 Act, the matters pleaded in 39 to 42, 45 to 46, 48 to 49, 53 to 54 and 55 to 56 above; and/or
 - (C) during the currency of the 1963 Act, the matters pleaded in paragraphs 39 to 42, 45 to 47, 48 to 50, 53 to 54 and 55 to 56 above,
 - and the controls they and their family members thereby lived under;
 - (ii) the fact that they were, or were likely to:

- (A) have either no or low levels of formal education;
 - (B) have limited levels of literacy or were illiterate (and have limited levels of numeracy or were innumerate);
 - (C) have limited or no ability to read and understand English;
 - (D) be impecunious or have limited financial means; and
 - (E) possess cultural attributes peculiar to Aboriginal and/or Torres Strait Islanders;
- (g) the manifest statutory intendment that Lost Wages be specifically and exclusively held by the Commissioner on behalf of the Lost Wages Native so entitled; and/or
- (h) the absence of a governmental interest or function involved in the obligation to hold the Lost Wages until distribution to the Lost Wages Native or in accordance with:
- (i) s 64(4) of the 1936 Act;
 - (ii) s 65(4) of the 1954 Act; or
 - (iii) 33(4) of the 1963 Act,

the State of WA held and holds the Lost Wages on trust for each Lost Wages Native, alternatively the Commissioner from time to time (as servant or agent of the State of WA) held and its successor at law holds the Lost Wages on trust for the Lost Wages Native (**Lost Wages Trusts**).

88. It was a term of the Lost Wages Trusts that the trustee would not expend any Lost Wages, or permit any Lost Wages to be expended, otherwise than in accordance with:
- (a) s 64 of the 1936 Act;
 - (b) s 65 of the 1954 Act; or
 - (c) s 33 of the 1963 Act.
89. The trustee of each Lost Wages Trust owed a duty to the beneficiaries of the Lost Wages Trusts to:
- (a) become acquainted with the terms of the Lost Wages Trusts;

- (b) adhere to and carry out the terms of the Lost Wages Trusts;
- (c) exercise due care and skill in respect to the Lost Wages Trusts;
- (d) get in Lost Wages into the Lost Wages Trusts by:
 - (i) ensuring that the employment (within the meaning of s 18 of the 1936 Act) of each Lost Wages Native took place in accordance with a Permit or Permit and Agreement that complied with the 1936 Act;
 - (ii) ensuring that all Lost Wages required to be paid by an employer into the Lost Wages Trusts in respect of a Lost Wages Native was paid in accordance with each Permit or Permit and Agreement;
 - (iii) taking appropriate recovery action against any person failing to pay the Lost Wages into the Lost Wages Trusts as required by exercising any of the powers under ss 34 or 64 of the 1936 Act;
- (e) make all reasonable efforts to locate the Lost Wages Native entitled to his or her Lost Wages before applying the amount under s 64(4);
- (f) not to delegate its duties and powers under the Lost Wages Trusts;
- (g) properly invest the Saved Wages held in the Lost Wages Trusts;
- (h) keep proper accounts and records of the administration of the Lost Wages Trusts;
- (i) render accounts of the Lost Wages Trusts so as to enable a beneficiary to know their interest or when required to do so by a beneficiary; and/or
- (j) not deal with the Lost Wages Trusts so as to benefit from its position as trustee.

F.3. Management Duties and Trusts (1936, 1954 and 1963 Acts)

90. During the Claim Period, the Commissioner was capable of exercising his power under:
- (a) s 34 of the 1936 Act;
 - (b) s 34 of the 1954 Act; and
 - (c) s 23 of the 1963 Act,

to undertake the management of the property of Controlled Natives, including by taking possession of, retaining, selling, or disposing of any such property, with the consent of that Controlled Native (**Managed Property**, and where such power was exercised such Controlled Native was a **Managed Native**).

91. By reason of:

- (a) the existence of a recognised fiduciary relationship as between bailee and bailor or agent and principal between the Commissioner acting as servant or agent of the State of WA and any Managed Natives;
- (b) the undertaking of the State of WA to exercise its statutory powers under s 34 of the 1936 Act and 1954 Act and s 23 of the 1963 Act for or on behalf of or in the interests of Managed Natives by:
 - (i) the express objects of the 1936 Act, 1954 Act and 1963 Act, as pleaded in paragraphs 15 to 17 above;
 - (ii) the duties of the Department provided for by s 4 and 6 of the 1936 Act and 1954 Act, and ss 5 and 6 of the 1963 Act, as pleaded in paragraphs 24 to 26 above;
 - (iii) the duties of the Commissioner under s 7 of the 1936 Act and 1954 Act, and s 11 of the 1963 Act, as pleaded in paragraphs 27 to 28 above; and/or
 - (iv) the duties of Protectors under r 130 of the 1936 Act Regulations and r 130(1) of the 1954 Act Regulations, as pleaded in paragraphs 31 to 32 above;
- (c) the power of the State of WA under the 1936 Act, 1954 Act and 1963 Act to affect (including adversely) the interests of Managed Natives, including by reason of:
 - (i) during the currency of the 1936 Act, the matters pleaded in paragraphs 43, 45, 48, 51, 53, 55, and 57 to 61 above;
 - (ii) during the currency of the 1954 Act, the matters pleaded in 39 to 42, 45 to 46, 48 to 49, 53 to 54 and 55 to 56 above; and/or
 - (iii) during the currency of the 1963 Act, the matters pleaded in paragraphs 39 to 42, 45 to 47, 48 to 50, 53 to 54 and 55 to 56 above,

and the controls they and their family members thereby lived under;

- (d) the vulnerability on the part of Managed Natives as against the State of WA's exercise of its statutory powers, including by reason of:

- (i) during the currency of:

- (A) the 1936 Act, the matters pleaded in paragraphs 43, 45, 48, 51, 53, 55 and 57 to 61 above;

- (B) during the currency of the 1954 Act, the matters pleaded in 39 to 42, 45 to 46, 48 to 49, 53 to 54 and 55 to 56 above; and/or

- (C) during the currency of the 1963 Act, the matters pleaded in paragraphs 39 to 42, 45 to 47, 48 to 50, 53 to 54 and 55 to 56 above,

and the controls they and their family members thereby lived under;

- (ii) the fact that they were, or were likely to:

- (A) have either no or low levels of formal education;

- (B) have limited levels of literacy or were illiterate (and have limited levels of numeracy or were innumerate);

- (C) have limited or no ability to read and understand English;

- (D) be impecunious or have limited financial means; and

- (E) possess cultural attributes peculiar to Aboriginal and/or Torres Strait Islanders;

- (e) the reliance by Managed Natives upon the State of WA's exercise of its statutory powers for or on behalf of them or in their interests,

during the currency of the 1936 Act, the 1954 Act and the 1963 Act, the State of WA owed fiduciary and/or equitable obligations to Managed Natives.

92. Further or in the alternative, by reason of the following:

- (a) the existence of a recognised fiduciary relationship as between bailee and bailor or agent and principal between the Commissioner acting as servant or agent of the State of WA and Managed Natives;
- (b) the undertaking of the Commissioner to exercise his statutory powers under s 34 of the 1936 Act and 1954 Act and s 23 of the 1963 Act for or on behalf of or in the interests of Managed Natives by:
 - (i) the express objects of the 1936 Act, 1954 Act and 1963 Act, as pleaded in paragraphs 15 to 17 above;
 - (ii) the duties of the Department provided for by s 4 and 6 of the 1936 Act and 1954 Act, and ss 5 and 6 of the 1963 Act, as pleaded in paragraphs 24 to 26 above;
 - (iii) the duties of the Commissioner under s 7 of the 1936 Act and 1954 Act, and s 11 of the 1963 Act, as pleaded in paragraphs 27 to 28;
- (c) the power of the Commissioner under the 1936 Act, 1954 Act and 1963 Act to affect (including adversely) the interests of Managed Natives, including by reason of:
 - (i) during the currency of the 1936 Act, the matters pleaded in paragraphs 43, 45, 48, 51, 53, 55 and 57 to 61 above;
 - (ii) during the currency of the 1954 Act, the matters pleaded in 39 to 42, 45 to 46, 48 to 49, 53 to 54 and 55 to 56 above; and/or
 - (iii) during the currency of the 1963 Act, the matters pleaded in paragraphs 39 to 42, 45 to 47, 48 to 50, 53 to 54 and 55 to 56 above,and the controls they and their family members thereby lived under;
- (d) the vulnerability on the part of Managed Natives as against the Commissioner's exercise of his statutory powers, including by reason of:
 - (i) during the currency of:

(A) the 1936 Act, the matters pleaded in paragraphs 43, 45, 48, 51, 53, 55 and 57 to 61 above;

(B) during the currency of the 1954 Act, the matters pleaded in 39 to 42, 45 to 46, 48 to 49, 53 to 54 and 55 to 56 above; and/or

(C) during the currency of the 1963 Act, the matters pleaded in paragraphs 39 to 42, 45 to 47, 48 to 50, 53 to 54 and 55 to 56 above,

and the controls they and their family members thereby lived under;

(ii) the fact that they were, or were likely to:

(A) have either no or low levels of formal education;

(B) have limited levels of literacy or were illiterate (and have limited levels of numeracy or were innumerate);

(C) have limited or no ability to read and understand English;

(D) be impecunious or have limited financial means; and

(E) possess cultural attributes peculiar to Aboriginal and/or Torres Strait Islanders;

(e) the reliance by Managed Natives upon the Commissioner's exercise of his statutory powers for or on behalf of them or in their interests,

during the currency of the 1936 Act, the 1954 Act and the 1963 Act, the Commissioner owed fiduciary and/or equitable obligations to Managed Natives.

93. The fiduciary and/or equitable obligations owed by the State of WA and/or the Commissioner to Managed Natives included:

(a) exercising due care and skill in protecting the interests of Managed Natives in connection with the Managed Property;

(b) exercising due care and skill in connection with the exercise of powers under:

(i) s 34 of the 1936 Act;

(ii) s 34 of the 1954 Act;

- (iii) s 23 of the 1963 Act; and
 - (c) accounting for any benefit received in conflict of interest and the interests of Managed Natives or from or by the use of fiduciary position,
- (together, **Management Duties**).

94. By reason of:

- (a) the existence of the fiduciary relation pleaded at paragraph 91 and/or paragraph 92 and the Management Duties;
- (b) the express objects of the 1936 Act, 1954 Act and 1963 Act, as pleaded in paragraphs 15 to 17 above;
- (c) the duties of the Department provided for by s 4 and 6 of the 1936 Act and 1954 Act, and ss 5 and 7 of the 1963 Act, as pleaded in paragraphs 24 to 26 above;
- (d) the duties of the Commissioner under s 7 of the 1936 Act and 1954 Act, and s 11 of the 1963 Act, as pleaded in paragraphs 27 to 28 above;
- (e) the accounting obligations attached to the Departmental Trust Account by s 72 of the 1936 Act, s 73 of the 1954 Act, and s 35 of the 1963 Act, as pleaded in paragraphs 81 to 82 above;
- (f) the particular circumstances and vulnerability of Managed Natives in Western Australia during the Claim Period, including by reason of:
 - (i) during the currency of:
 - (A) the 1936 Act, the matters pleaded in paragraphs 43, 45, 48, 51, 53, 55 and 57 to 61 above;
 - (B) during the currency of the 1954 Act, the matters pleaded in 39 to 42, 45 to 46, 48 to 49, 53 to 54 and 55 to 56 above; and/or
 - (C) during the currency of the 1963 Act, the matters pleaded in paragraphs 39 to 42, 45 to 47, 48 to 50, 53 to 54 and 55 to 56 above,

and the controls they and their family members thereby lived under;

- (ii) the fact that they were, or were likely to:
 - (A) have either no or low levels of formal education;
 - (B) have limited levels of literacy or were illiterate (and have limited levels of numeracy or were innumerate);
 - (C) have limited or no ability to read and understand English;
 - (D) be impecunious or have limited financial means; and
 - (E) possess cultural attributes peculiar to Aboriginal and/or Torres Strait Islanders;
- (g) the manifest statutory intendment that Managed Property be specifically and exclusively held by the Commissioner on behalf of Managed Native;
- (h) the specific provision for the transfer of Managed Property from the Management Trust to a public trust on certain conditions being met; and/or
- (i) the absence of a governmental interest or function involved in the obligation to hold the Managed Property until distribution to the Managed Native,

the State of WA held and holds any property received by it or its servants or agents on behalf of a Managed Native on trust for that Managed Native, alternatively the Commissioner from time to time (as servant or agent of the State of WA) held and its successor at law holds any property received by it on behalf of a Managed Native on trust for that Managed Native (**Management Trusts**).

95. It was a term of the Management Trusts that the trustee of each trust:
 - (a) would not expend any Managed Property in relation to an expense for which the Managed Native was not properly liable; and
 - (b) would pay and transfer all or part of the trust property and its income to a Managed Native upon request or upon termination.
96. The trustee of each of the Management Trusts owed a duty to Managed Natives to:
 - (a) become acquainted with the terms of the Management Trusts;

- (b) adhere to and carry out the terms of the Management Trusts;
- (c) exercise due care and skill in respect to the Management Trusts;
- (d) not to delegate its duties and powers under the Management Trusts;
- (e) properly invest the monies held in the Management Trusts;
- (f) keep proper accounts and records of the administration of the Management Trusts;
- (g) render accounts of the Management Trusts so as to enable a beneficiary to know their interest or when required to do so by a beneficiary; and/or
- (h) not deal with the Management Trusts so as to benefit from its position as trustee.

F.4. Ward Duties and Trusts (under 1936 and 1954 Acts)

97. By reason of the matters pleaded in paragraphs 29 to 30 above, during the currency of the 1936 Act and 1954 Act, the Commissioner was the legal guardian of all Controlled Natives under the age of 21 (**Native Wards**), unless they were specifically excluded from those provisions.
98. By reason of:
 - (a) the existence of a recognised fiduciary relationship as between guardian and ward between the Commissioner acting as servant or agent of the State of WA and Native Wards;
 - (b) the undertaking of the State of WA to exercise its statutory powers under s 8 of the 1936 Act and 1954 Act for or on behalf of or in the interests of Native Wards by:
 - (i) the express objects of the 1936 Act and 1954 Act, as pleaded in paragraphs 15 to 16 above;
 - (ii) the duties of the Department provided for by s 4 and 6 of the 1936 Act and 1954 Act, as pleaded in paragraphs 24 to 25 above;
 - (iii) the duties of the Commissioner under s 7 of the 1936 Act and 1954 Act, as pleaded in paragraphs 27 to 28 above;

- (iv) the duties of Protectors under r 130 of the 1936 Act Regulations and r 130(1) of the 1954 Act Regulations, as pleaded in paragraphs 31 to 32 above;
- (v) rr 54, 56 and 57 of the 1936 Act Regulations and 1954 Act Regulations, as pleaded in paragraphs 66 to 69 above;
- (c) the power of the State of WA under the 1936 Act and 1954 Act to affect (including adversely) the interests, livelihood, employment, living arrangements and familial arrangements of Native Wards, including by reason of:
 - (i) during the currency of the 1936 Act, the matters pleaded in paragraphs 43, 45, 48, 51, 53, 55 and 57 to 61 above; and/or
 - (ii) during the currency of the 1954 Act, the matters pleaded in 39 to 42, 45 to 46, 48 to 49, 53 to 54 and 55 to 56 above; and/or

and the controls they and their family members thereby lived under;

- (d) the vulnerability on the part of Native Wards as against the State of WA's exercise of its statutory powers, including by reason of:
 - (i) during the currency of:
 - (A) the 1936 Act, the matters pleaded in paragraphs 43, 45, 48, 51, 53, 55 and 57 to 61 above; and/or
 - (B) during the currency of the 1954 Act, the matters pleaded in 39 to 42, 45 to 46, 48 to 49, 53 to 54 and 55 to 56 above; and/or

and the controls they and their family members thereby lived under;

- (ii) the fact that they were, or were likely to:
 - (A) have either no or low levels of formal education;
 - (B) have limited levels of literacy or were illiterate (and have limited levels of numeracy or were innumerate);
 - (C) have limited or no ability to read and understand English;
 - (D) be impecunious or have limited financial means; and

(E) possess cultural attributes peculiar to Aboriginal and/or Torres Strait Islanders; and/or

(F) be minors or juveniles; and/or

(e) the reliance by Native Wards upon the State of WA's exercise of its statutory powers for or on behalf of them or in their interests,

during the currency of the 1936 Act and the 1954 Act, the State of WA owed fiduciary and/or equitable obligations to Native Wards.

99. Further or in the alternative, by reason of:

- (a) the existence of a recognised fiduciary relationship as between guardian and ward between the and Native Wards;
- (b) the undertaking of the Commissioner to exercise his statutory powers under s 8 of the 1936 Act and 1954 Act for or on behalf of or in the interests of Native Wards by:
 - (i) the express objects of the 1936 Act and 1954 Act, as pleaded in paragraphs 15 to 16 above;
 - (ii) the duties of the Department provided for by ss 4 and 6 of the 1936 Act and 1954 Act, as pleaded in paragraphs 24 to 25 above;
 - (iii) the duties of the Commissioner under s 7 of the 1936 Act and 1954 Act, as pleaded in paragraphs 27 to 28 and 29 to 30 above;
 - (iv) rr 54, 56 and 57 of the 1936 Act Regulations and 1954 Act Regulations, as pleaded in paragraphs 66 to 69 above;
- (c) the power of the Commissioner under the 1936 Act and 1954 Act to affect (including adversely) the interests, livelihood, employment, living arrangements and familial arrangements of Native Wards, including by reason of:
 - (i) during the currency of the 1936 Act, the matters pleaded in paragraphs 43, 45, 48, 51, 53, 55 and 57 to 61 above; and/or
 - (ii) during the currency of the 1954 Act, the matters pleaded in 39 to 42, 45 to 46, 48 to 49, 53 to 54 and 55 to 56 above; and/or

and the controls they and their family members thereby lived under;

- (d) the vulnerability on the part of Native Wards as against the Commissioner's exercise of his statutory powers, including by reason of:

- (i) during the currency of:

- (A) the 1936 Act, the matters pleaded in paragraphs 43, 45, 48, 51, 53, 55 and 57 to 61 above; and/or

- (B) during the currency of the 1954 Act, the matters pleaded in 39 to 42, 45 to 46, 48 to 49, 53 to 54 and 55 to 56 above; and/or

and the controls they and their family members thereby lived under;

- (ii) the fact that they were, or were likely to:

- (A) have either no or low levels of formal education;

- (B) have limited levels of literacy or were illiterate (and have limited levels of numeracy or were innumerate);

- (C) have limited or no ability to read and understand English;

- (D) be impecunious or have limited financial means; and

- (E) possess cultural attributes peculiar to Aboriginal and/or Torres Strait Islanders; and/or

- (F) be minors or juveniles; and/or

- (e) the reliance by Native Wards upon the Commissioner's exercise of his statutory powers for or on behalf of them or in their interests,

during the currency of the 1936 Act and the 1954 Act, the Commissioner owed fiduciary and/or equitable obligations to Native Wards during the period of their wardship.

- 100. The fiduciary and/or equitable obligations owed by the State of WA and/or the Commissioner to Native Wards included one or more of the following:

- (a) adequately provide for, maintain and educate the Native Ward;

- (b) exercising due care and skill in protecting the interests of Native Wards generally, including by exercising the powers under:
 - (i) s 34 of the 1936 Act;
 - (ii) s 34 of the 1954 Act;
 - (c) exercising due care and skill in connection with the exercise of the powers under rr 54, 56 and 57 of the 1936 Act Regulations and 1954 Act Regulations, as pleaded in paragraphs 66 to 69 above; and/or
 - (d) accounting for any benefit received in conflict of interest and the interests of Native Wards or from or by the use of fiduciary position,
- (together, **Ward Duties**).

101. By reason of the matters pleaded in paragraphs 97 to 100, the State of WA owed the Ward Duties to all Working Controlled Natives who were Native Wards.

Particulars

- A. *The Applicant was not a Native Ward.*
- B. *Particulars of the claims of Working Controlled Natives who were Native Wards will be provided at the time of the advancement of their individual claims.*

102. From time to time in the Claim Period, the Commissioner received wages or part of the wages, or other property of Working Controlled Natives who were Native Wards.

Particulars

The particulars to paragraph 101 are repeated.

103. By reason of:
- (a) the existence of the fiduciary relationship pleaded at paragraph 98 and the Ward Duties;
 - (b) the express objects of the 1936 Act and 1954 Act, as pleaded in paragraphs 15 to 16 above;

- (c) the duties of the Department provided for by ss 4 and 6 of the 1936 Act and 1954 Act, as pleaded in paragraphs 24 to 25 above;
- (d) the duties of the Commissioner under s 7 of the 1936 Act and 1954 Act, as pleaded in paragraphs 27 to 28 and 29 to 30 above;
- (e) the accounting obligations attached to the Departmental Trust Account by s 72 of the 1936 Act and s 73 of the 1954 Act (and its continuation under s 35 of the 1963 Act), as pleaded in paragraphs 81 to 82 above;
- (f) the particular circumstances and vulnerability of Native Wards in Western Australia during the Claim Period, including by reason of:

- (i) during the currency of:

- (A) the 1936 Act, the matters pleaded in paragraphs 43, 45, 48, 51, 53, 55 and 57 to 61 above;

- (B) during the currency of the 1954 Act, the matters pleaded in 39 to 42, 45 to 46, 48 to 49, 53 to 54 and 55 to 56 above; and/or

- (C) during the currency of the 1963 Act, the matters pleaded in paragraphs 39 to 42, 45 to 47, 48 to 50, 53 to 54 and 55 to 56 above,

and the controls they and their family members thereby lived under;

- (ii) the fact that they were, or were likely to:

- (A) have either no or low levels of formal education;

- (B) have limited levels of literacy or were illiterate (and have limited levels of numeracy or were innumerate);

- (C) have limited or no ability to read and understand English;

- (D) be impecunious or have limited financial means;

- (E) possess cultural attributes peculiar to Aboriginal and/or Torres Strait Islanders; and/or

- (F) be minors or juveniles;

- (g) the manifest statutory intendment that the property of Native Wards be specifically and exclusively held by the Commissioner on behalf of the Native Ward so entitled; and/or
- (h) the absence of a governmental interest or function involved in the obligation to hold the property of Native Wards until distribution to the Native Ward,

the State of WA held and holds any property received by it and/or the Commissioner (as servant or agent of the State of WA) on behalf of each Working Controlled Native who was a Native Ward on trust for the Native Ward, alternatively the Commissioner from time to time (as servant or agent of the State of WA) held and its successor at law holds such property on trust for each Native Ward (each and together being, **Ward Trusts**).

104. It was a term of the Ward Trusts that the trustee of each trust:

- (a) would not expend any portion of a Ward Trust in relation to an expense for which the Native Ward was not properly liable; and
- (b) would pay and transfer the trust property and its income held in a Ward Trust to a Native Ward upon majority.

105. The trustee of each of the Ward Trusts owed a duty to the beneficiaries of the Ward Trusts to:

- (a) become acquainted with the terms of the Ward Trusts;
- (b) adhere to and carry out the terms of the Ward Trusts;
- (c) exercise due care and skill in respect to the Ward Trusts;
- (d) not to delegate its duties and powers under the Ward Trusts;
- (e) properly invest the monies held in the Ward Trusts;
- (f) keep proper accounts and records of the administration of the Ward Trusts;
- (g) render accounts of the Ward Trusts so as to enable a beneficiary to know their interest or when required to do so by a beneficiary; and/or
- (h) not deal with the Ward Trusts so as to benefit from its position as trustee.

F.5. Saved Wages Trusts (under 1936 Act)

106. From time to time in the Claim Period prior to 9 May 1956, the Commissioner directed that the wages or part of the wages of some Controlled Natives (**Saved Wages Native**) be paid to him pursuant to r 85 of the 1936 Act Regulations, and the wages of those Saved Wages Natives were paid by their employers accordingly (**Saved Wages**).

Particulars

- A. *The Applicant was not a Saved Wages Native.*
- B. *The identity of those Working Controlled Natives who are Saved Wages Natives is unknown to the Applicant with his present state of knowledge, though he knows they do exist because the Saved Wages Trust Account had a positive balance from time to time as identified in the following Annual Reports of the Commissioner:*
- i) 1935, p 18;
 - ii) 1936, p 19;
 - iii) 1937, p 23;
 - iv) 1938, p 23;
 - v) 1940, p 37;
 - vi) 1941, pp 15-16;
 - vii) 1942, p 30;
 - viii) 1943, p 19;
 - ix) 1944, pp 12-13;
 - x) 1945, p 15;
 - xi) 1946, pp 23-34;
 - xii) 1947, pp 25-26.
 - xiii) 1948, pp 32-33;

- xiv) 1949, p 20;
- xv) 1950, p 36;
- xvi) 1951, pp 34-35;
- xvii) 1952, pp 37;
- xviii) 1953, p 27; and
- xix) 1954, p 55.

107. By reason of:

- (a) r 85 of the 1936 Act Regulations, as pleaded in paragraphs 74 to 76 above;
- (b) the express objects of the 1936 Act, as pleaded in paragraph 15 above;
- (c) the duties of the Commissioner under s 7 of the 1936 Act, as pleaded in paragraph 27 above;
- (d) the accounting obligations attached to the Departmental Trust Account by s 72 of the 1936 Act, (and its continuation under s 73 of the 1954 Act, and s 35 of the 1963 Act), as pleaded in paragraphs 81 to 82 above;
- (e) the particular circumstances and vulnerability of Saved Wages Natives during the currency of the 1936 Act, including by reason of:
 - (i) the matters pleaded in paragraphs 43, 48, 51, 55 and 57 to 61 above and the controls they thereby lived under; and
 - (ii) the fact that they were, or were likely to:
 - (A) have either no or low levels of formal education;
 - (B) have limited levels of literacy or were illiterate (and have limited levels of numeracy or were innumerate);
 - (C) have limited or no ability to read and understand English;
 - (D) be impecunious or have limited financial means; and
 - (E) possess cultural attributes peculiar to Aboriginal and/or Torres Strait Islanders;

- (f) the manifest statutory intendment that wages or part of wages earned by Saved Wages Native be required to be paid by employers on behalf of each respective Saved Wages Native to the Commissioner be specifically and exclusively held by the Commissioner on behalf of the Saved Wages Native so entitled; and/or
- (g) the absence of a governmental interest or function involved in the obligation to hold the Saved Wages until distribution to the Saved Wages Native,

the State of WA held and holds the Saved Wages for each Saved Wages Native, alternatively the Commissioner from time to time (as servant or agent of the State of WA) held and its successor at law holds the Saved Wages on trust for each Saved Wages Native (each and together being, **Saved Wages Trusts**).

108. It was a term of the Saved Wages Trusts that the trustee:

- (a) would not expend any Saved Wages, or permit any Saved Wages to be expended, in relation to an expense for which the Saved Wages Native concerned was not properly liable; and
- (b) would pay and transfer, or cause to be paid or transferred, all or part of the trust property and its income to a Saved Wages Native upon request or upon termination.

109. The trustee of each Saved Wages Trust owed a duty to the beneficiaries of the Saved Wages Trusts to:

- (a) become acquainted with the terms of the Saved Wages Trusts;
- (b) adhere to and carry out the terms of the Saved Wages Trusts;
- (c) exercise due care and skill in respect to the Saved Wages Trusts;
- (d) get in Saved Wages into the Saved Wages Trusts by:
 - (i) ensuring that the employment (within the meaning of s 18 of the 1936 Act) of each Saved Wages Native took place in accordance with a Permit or Permit and Agreement that complied with the 1936 Act;
 - (ii) ensuring that all Saved Wages required to be paid by an employer into the Saved Wages Trusts in respect of a Saved Wages Native was paid in accordance with each Permit or Permit and Agreement;

- (iii) taking appropriate recovery action against any person failing to pay the Saved Wages into the Saved Wages Trusts as required by exercising any of the powers under ss 34 or 64 of the 1936 Act;
- (e) with respect to Saved Wages received or recovered in accordance with s 64 of the 1936 Act, make all reasonable efforts to locate the Saved Wages Native entitled to those Saved Wages before applying the amount under s 64(4);
- (f) not to delegate its duties and powers under the Saved Wages Trusts;
- (g) properly invest the Saved Wages held in the Saved Wages Trusts;
- (h) keep proper accounts and records of the administration of the Saved Wages Trusts;
- (i) render accounts of the Saved Wages Trusts so as to enable a beneficiary to know their interest or when required to do so by a beneficiary; and/or
- (j) not deal with the Saved Wages Trusts so as to benefit from its position as trustee.

G. WORK FOR NO OR INADEQUATE WAGES

110. The Applicant and all other Controlled Natives worked in Western Australia, and were Working Controlled Natives for some or all of the Claim Period.

Particulars

- A. *The Applicant worked at the following stations between about 1958 and about 1968: Louisa Downs Station; Margaret River Station; Carnegie Station; Wongawol Station; Mount Clere Station; Fossil Downs Station; Windega Station; Nonaclean Station; Penoil Station; Egartarla Station; Newry Station. The Applicant is presently unable to provide better particulars of his employment history, and the wages received by him, as he is both illiterate and innumerate. Further particulars of the Applicant's employment history may be provided following discovery.*
- B. *Particulars of the work history of those Controlled Natives who assert they worked in Western Australia for no or inadequate wages during the Claim Period will be provided prior to the trial of their individual claim, following the trial of common issues.*

111. During the Claim Period, some Working Controlled Natives (being Native Wards and Native Inmates domiciled at Native Institutions) performed work:
- (a) at Native Institutions;
 - (b) in compliance with directions or requirements by the Superintendent or Manager at the Native Institution at which they were domiciled, given:
 - (i) during the currency of the 1936 Act, under regulation 50 of the 1936 Act Regulations;
 - (ii) during the currency of the 1936 Act, 1954 Act and 1963 Act, under regulation 19 of the 1936 Act Regulations, regulation 19 of the 1954 Act Regulations and/or regulation 22(4) of the 1963 Act Regulations; and
 - (c) for no or inadequate wages.

Particulars

- A. *Western Australia Stolen Wages Taskforce "Reconciling the Past: Governmental Control of Aboriginal Monies in Western Australia 1905-1972" (2008) (WA Stolen Wages Report), pp 26 – 32, Appendix 3.*
- B. *Annual Reports of the Commissioner.*
- C. *Report on Survey of Native Affairs by F.E.A. Bateman, 1948.*
- D. *The Applicant was not a Native Ward or Native Inmate. The Applicant does not know the identity of individual Working Controlled Natives who were Native Wards and Native Inmates, repeats the particulars to paragraph 110, and says that particulars will be provided prior to the trial of their individual claim, following the trial of common issues.*

112. During the Claim Period, the Applicant and some Controlled Natives performed work:
- (a) at stations or other private workplaces at the request of the owner or operator or his or her employees or agents (**Station & Domestic Natives**);
 - (b) for no or inadequate wages, either because:
 - (i) to the extent they worked under a contract of employment, the contract of employment did not provide for them to be paid wages at all, or only in minimal or nominal amounts (which were less than the fair value of

work done by them) and they were not paid wages at all, or only in minimal or nominal amounts (which were less than the fair value of work done by them);

- (ii) to the extent they worked without a contract of employment, they were not paid wages at all, or only in minimal or nominal amounts which were less than the fair value of work done by them).

Particulars

- A. *Annual Reports of the Commissioner.*
- B. *Report on Survey of Native Affairs by F.E.A. Bateman, 1948.*
- C. *In respect of the individual claims of the Applicant, the Applicant repeats the particulars to paragraph 110, and is unavailable to provide further particulars of the extent to which he was paid inadequate wages.*
- D. *The Applicant does not know the identity of individual Controlled Natives who were Station & Domestic Natives, repeats the particulars to paragraph 110, and says that particulars will be provided prior to the trial of their individual claim, following the trial of common issues.*

H. BREACH OF FIDUCIARY DUTIES AND TRUSTS

H.1. Breach of Work Duties (1936, 1954 and 1963 Acts)

113. In breach of the Work Duties, the State of WA failed to exercise due care and skill in protecting the interests of the Applicant and Working Controlled Natives (that is all Working Controlled Natives) in connection with their work during the Claim Period by failing to:

- (a) exercise its statutory powers to, in the name of the Commissioner or in the name the Working Controlled Native, to:
 - (i) require payment to be made to Native Inmates in respect of work done by them on Native Institutions;
 - (ii) ensure that any employment arrangements with Station & Domestic Natives provided for them to be paid a fair amount for their labour, and

ensuring that such employment arrangements were complied with such that those amounts were in fact paid;

- (b) adequately supervise the employment of Working Controlled Natives, by permitting, authorising or facilitating Controlled Natives working for no or inadequate wages;
 - (i) by Native Inmates at Native Institutions, as pleaded at paragraph 111 above (and/or in the circumstances pleaded in paragraphs 1.1.1 to 136 below); and/or
 - (ii) by Station & Domestic Natives, as pleaded at paragraph 112 above (and/or in the circumstances pleaded in paragraphs 137 to 140 below);
- (c) exercise its statutory powers to, in the name of the Commissioner or in the name the Working Controlled Native, pursue any claim arising from work for no or inadequate wages:
 - (i) by Native Inmates at Native Institutions, as pleaded at paragraphs 111 above and/or 1.1.1 to 136 below; and/or
 - (ii) by Station & Domestic Natives, as pleaded at paragraphs 112 above and/or 137 to 140 below,

promptly after the work was done by the Working Controlled Native, or at all;

- (d) avoid any conflict between its interests and the interests of Working Controlled Natives in relation to employment, by controlling Working Controlled Natives' access to higher wages by denying Native Inmates permission to work outside Native Institutions; and
- (e) account for any benefit received in conflict of its interests and the interests of Working Controlled Native or from or by the use of its fiduciary position,

(together and individually, **Breaches of Work Duties**).

Particulars

A. As to sub-paragraphs (a) to (d), the Applicant relies on:

- (i) WA Stolen Wages Report, pp 26-32, 39, 53-59

(ii) *Annual Reports of the Commissioner,*

and may provide further particulars following discovery and inspection.

- B. *As to sub-paragraph (e), the Applicant says that to the extent the State engaged in any of the breaches alleged at paragraphs 113(a) to 113(e) and retained or entered into its revenue or avoided expenditure of its revenue by reason of its fiduciary position, it received a benefit in conflict of its interests and the interests of Working Controlled Native or from or by the use of its fiduciary position.*
- C. *In respect of the individual claims of the Applicant and Working Controlled Natives other than the Applicant:*
- (i) *the Applicant relies upon the breaches pleaded in sub-paragraph (a) and (c)(ii), and repeats paragraph 110 and 140, and the particulars thereto are repeated.*
- (ii) *Particulars of the individual claims of Working Controlled Natives other than the Applicant will be provided prior to the trial of their individual claim, following the trial of common issues.*

114. Further or in the alternative, each person holding the office of Protector, Manager and/or the Commissioner at the time such Breaches of Work Duties occurred committed the Breaches of Work Duties.

Particulars

The particulars to paragraph 113 are repeated.

115. The Breaches of Work Duties by Protectors, Inspectors and/or the Commissioner as pleaded in paragraph 114 were committed by each such person as a servant and/or agent of the State of WA in the course of their service and/or agency, as pleaded in paragraph 38 above.
116. In the premises pleaded in paragraphs 114 to 115, the State of WA is liable to the Applicant and Working Controlled Natives who were Working Controlled Natives for the Breaches of Work Duties.

H.2. Breach of Ward Duties (1936 and 1954 Acts)

117. In breach of the Ward Duties, the State of WA failed to exercise due care and skill in providing for, maintaining and protecting the interests of Working Controlled Natives who were Native Wards during the currency of the 1936 Act and 1954 Act, by failing to:

- (a) exercise its statutory powers, in the name of the Commissioner or in the name the Working Controlled Native who was a Native Ward, to:
 - (i) require payment to be made to Native Inmates who were Native Wards in respect of work done by them on Native Institutions;
 - (ii) ensure that any employment arrangements with Station & Domestic Natives who were Native Wards provided for them to be paid a fair amount for their labour, and ensuring that such employment arrangements were complied with such that those amounts were in fact paid;
- (b) adequately supervise the employment of Working Controlled Natives who were Native Wards, by permitting, authorising or facilitating Controlled Natives who were Native Wards working for no or inadequate wages;
 - (i) by Native Inmates who were Native Wards at Native Institutions, as pleaded at paragraph 111 above (and/or in the circumstances pleaded in paragraphs I.1.1 to 136 below); and/or
 - (ii) by Station & Domestic Natives who were Native Wards, as pleaded at paragraph 112 above (and/or in the circumstances pleaded in paragraphs 137 to 140 below);
- (c) exercise its statutory powers to, in the name of the Commissioner or in the name the Working Controlled Native who was a Native Ward, pursue any claim arising from work for no or inadequate wages:
 - (i) by Native Inmates who were Native Wards at Native Institutions, as pleaded at paragraphs 111 above and/or I.1.1 to 136 below; and/or
 - (ii) by Station & Domestic Natives who were Native Wards, as pleaded at paragraphs 112 above and/or 137 to 140 below,

promptly after the work was done by the Working Controlled Native who was a Native Ward, or at all;

- (d) account for any benefit received in conflict of its interests and the interests of Working Controlled Natives who were Native Wards or from or by the use of its fiduciary position,

(together and individually, **Breaches of Ward Duties**).

Particulars

- A. *As to sub-paragraphs (a) to (c), the Applicant relies on WA Stolen Wages Report, pp 26-32, and may provide further particulars following discovery and inspection.*
- B. *As to sub-paragraph (d), the Applicant says that to the extent the State of WA engaged in any of the breaches alleged at paragraphs 113(a) to 113(e) and retained or entered into its revenue or avoided expenditure of its revenue by reason of its fiduciary position, it received a benefit in conflict of its interests and the interests of Native Wards or from or by the use of its fiduciary position.*
- C. *The Applicant was not a Native Ward, and in respect of the individual claims of Working Controlled Natives other than the Applicant, particulars will be provided prior to the trial of their individual claim, following the trial of common issues.*

- 118. Further or in the alternative, each person holding the office of Commissioner at the time such Breaches of Ward Duties occurred committed the Breaches of Ward Duties.

Particulars

The particulars to paragraph 117 are repeated.

- 119. The Breaches of Ward Duties by the Commissioner as pleaded in paragraph 118 were committed by each such person as an employee and/or agent of the State of WA in the course of their employment and/or agency.
- 120. In the premises pleaded in paragraphs 118 to 119, the State of WA is liable to the Working Controlled Natives for the Breaches of Ward Duties.

H.3. Breaches of Trusts (1936, 1954 and 1963 Acts)

121. The State of WA breached its duties to Working Controlled Natives who were beneficiaries of the Management Trusts, Ward Trusts, Saved Wages Trusts and/or Lost Wages Trust (together, **State Trusts**) as trustee of each of those respective State Trusts by failing to:

- (a) exercise due care and skill in respect to the State Trusts;
- (b) adhere to and carry out the terms of the State Trusts by causing the expenditure of trust property in relation to expenses for which beneficiaries were not liable;
- (c) adhere to and carry out the terms of the State Trusts by failing to pay and transfer all or part of the trust property and its income to a beneficiary upon request or upon termination;
- (d) get in the Lost Wages into the State Lost Wages Trusts or Saved Wages into the Stated Saved Wages Trusts by taking appropriate recovery action against any person failing to pay those amounts;
- (e) keep proper accounts and records of the administration of the State Trusts;
- (f) render accounts of the State Trusts so as to enable a beneficiary to know their interest or when required to do so by a beneficiary; and
- (g) deal with the State Trusts so as to not benefit from its position as trustee,

(together and individually, **State Breaches of Trust**).

Particulars

- A. *As to sub-paragraph (a), the Applicant relies on WA Stolen Wages Report, pp 35 – 40;*
- B. *As to sub-paragraph (b), the Applicant relies on WA Stolen Wages Report, p 36;*
- C. *As to sub-paragraph (c), the Applicant relies on WA Stolen Wages Report, pp 36 – 37, 60, 65-66;*
- D. *As to sub-paragraph (d), the Applicant relies on WA Stolen Wages Report, pp 36 – 37;*

- E. *As to sub-paragraph (e), on the Applicant relies on WA Stolen Wages Report, pp 61-66*
- F. *As to sub-paragraph (f), the Applicant relies on WA Stolen Wages Report, pp 36 – 37, 66;*
- G. *As to sub-paragraph (g), the Applicant says that to the extent the State of WA engaged in any of the breaches alleged at paragraphs 121(a) to 121(f) and retained or entered into its revenue property of the Trusts as a result, or avoid expenditure of its revenue by improper use of Trusts funds, it obtained a benefit from its position as trustee.*
- H. *In respect of the individual claims of Working Controlled Natives other than the Applicant, particulars will be provided prior to the trial of their individual claim, following the trial of common issues.*

122. Further or alternatively, to the extent the Commissioner was trustee of the Management Trusts, Saved Wages Trusts, Ward Trusts and/or Lost Wages Trusts (and the State of WA was not trustee), the Commissioner breached his duties to Working Controlled Natives who were beneficiaries of those trusts (together, **Commissioner Trusts**) by failing to:

- (a) exercise due care and skill in respect to the Commissioner Trusts;
- (b) adhere to and carry out the terms of the Commissioner Trusts by causing the expenditure of trust property in relation to expenses for which beneficiaries were not liable;
- (c) adhere to and carry out the terms of the Commissioner Trusts by failing to pay and transfer all or part of the trust property and its income to a beneficiary upon request or upon termination;
- (d) get in the Lost Wages into the Lost Wages Trusts or Saved Wages into the Saved Wages Trusts by taking appropriate recovery action against any person failing to pay those amounts;
- (e) keep proper accounts and records of the administration of the trusts; and
- (f) render accounts of the trusts so as to enable a beneficiary to know their interest or when required to do so by a beneficiary,

(together and individually, **Commissioner Breaches of Trust**).

Particulars

The particulars to paragraph 121 are repeated.

123. The Commissioner Breaches of Trust were committed by:
- (a) each person holding the office of Commissioner at the time such Commissioner Breaches of Trust occurred as an employee and/or agent of the State of WA in the course of his employment and/or agency; and/or
 - (b) to the extent those breaches continued, by successive Commissioners and/or by:
 - (i) the successor in law of the Commissioner from such time as legal title to the funds the subject of the Commissioner Trusts passed from the control of the Commissioner following the enactment of the 1972 Act and/or *Machinery of Government (Miscellaneous Amendments) Act 2006 (WA)* (which resulted in the person previously holding the title of Commissioner ceasing to hold that title) to the State of WA, being now the CEO of the Department of Planning, Lands and Heritage (being a servant or agent of the State of WA); and/or
 - (ii) by the State of WA as trustee de son tort of the State Trusts, by reason of its failure to appoint an alternative person to act as trustee of, and carry out the terms of, the Commissioner Trusts.
124. In the premises pleaded in paragraphs 122 to 123, the State of WA is liable for the Commissioner Breaches of Trust.

I. OTHER CLAIMS IN RESPECT OF UNPAID WAGES

I.1. Claims against State in respect of Native Institution Work (1936, 1954 and 1963 Acts)

I.1.1. Proper construction

125. On its true construction, r 50 of the 1936 Act Regulations was to be exercised reasonably having regard to the protective purposes of the 1936 Act.

126. On their true construction:

- (a) rr 19, 20 and 33 of the 1936 Act Regulations;
- (b) rr 19, 20 and 33 of the 1954 Act Regulations; and
- (c) rr 22(4), 23(2) and 22 of the 1963 Act Regulations,

were powers conferred with the object of serving the interests of those Native Wards or Native Inmates whose care, custody or control was undertaken by the State of WA through its employees or agents, or alternatively powers to be exercised reasonably.

127. To the extent any Native Ward or Native Inmate was required to work by the Superintendent or Manager of a Native Institution for no or inadequate wages as pleaded in paragraph 111, such requirement was adverse to the interests of that Native Ward or Native Inmate and/or unreasonable in the circumstances, and by reason thereof such requirement was beyond the power provided by:

- (a) s 68 of the 1936 Act and/or rr 19, 20, 33 or 50 of the 1936 Act Regulations;
- (b) s 69 of the 1954 Act and/or rr 19, 20 or 33 of the 1954 Act Regulations; and
- (c) s 37 of the 1963 Act and/or rr 22(4), 23(2) or 22 of the 1963 Act Regulations,

and accordingly invalid.

128. To the extent any Working Controlled Native being a Native Ward or Native Inmate performed work in the circumstances alleged in paragraphs 111 and 127 above, that Native had and has a claim against the State of WA for the payment of reasonable wages on a *quantum meruit* basis.

Particulars

- A. *The Applicant was not a Native Ward or Native Inmate. The Applicant does not know the identity of individual Working Controlled Natives who were Native Wards and Native Inmates, repeats the particulars to paragraph 110, and says that particulars will be provided prior to the trial of their individual claim, following the trial of common issues.*

1.1.2. Repugnancy

129. The *Slavery Abolition Act 1833* (Imp) (3 & 4 Will IV c 73) (**Slavery Abolition Act**) was a Colonial Act of paramount force which was expressed to apply, relevantly, “*throughout the British Colonies*” and remained in force in Western Australia during the Claim Period.
130. At all material times, the Slavery Abolition Act provided, inter alia, that:
- (a) whereas divers persons are holden in Slavery within divers of His Majesty’s Colonies, and it is just and expedient that all such Persons should be manumitted and set free ... and it is necessary that the Laws now in force in the said several Colonies should forthwith be adapted to the new State and Relations of Society therein which will follow upon such general Manumission as aforesaid of the said Slaves ... that from and after 1 August 1834 all Persons who in conformity with the Laws now in force in the said colonies respectively shall on or before [that date] have been duly registered as Slaves in any such Colony, and who on [that date] shall be actually within such Colony shall by force and virtue of the Slavery Abolition Act become and be apprenticed Labourers (s 1);
 - (b) subject to the Obligations imposed by the Slavery Abolition Act, or to be imposed by any such Act of General Assembly, Ordinance or Order in Council, upon such apprenticed Labourers, all and every Persons who on 1 August 1834 shall be holden in Slavery within any such British Colony shall become and be to all Intents and Purposes free and discharged of and from all Manner of Slavery, and shall be absolutely and for ever manumitted, and that the Children thereafter to be born to any such Persons, and the Offspring of such Children, shall in like Manner be free from their Birth, and from and after 1 August 1834 Slavery shall be and is hereby utterly and for ever abolished and declared unlawful throughout the British Colonies, Plantations and Possessions Abroad (s 12); and
 - (c) it shall not be lawful for any such Governor, Council, and Assembly, or for any such local Legislature [in the respective Colonies], or for His Majesty in Council, by any such Acts of Assembly, Ordinances, or Orders in Council as aforesaid, to make or establish any Enactment, Regulation, Provision, Rule, or Order which shall be in anywise repugnant or contradictory to this present Act or any Part thereof, but that every such Enactment, Regulation, Provision, Rule, or Order

shall be and is hereby declared to be absolutely null and void and of no effect (s 16).

131. The *Slave Trade Act 1824* (Imp) (5 Geo VI Sess 1 c 113) as amended by the *Slave Trade Act 1843* (Imp) (6 & 7 Vict c 98) (**Slave Trade Act**) was (from 1 November 1843) a Colonial Act of paramount force which was expressed to apply to British subjects wheresoever they resided, and remained in force in Western Australia during the Claim Period.
132. At all material times, the *Slave Trade Act* provided, inter alia, as follows (such provisions being unaffected by the partial repeals effected by the *Slave Trade Act 1873* (Imp) (36 & 37 Vict c 88)):
 - (a) it shall not be lawful for any Persons to deal or trade in, purchase, sell, barter, or transfer, or to contract for the dealing or trading in, Purchase, Sale, Barter or Transfer of Slaves, or Persons intended to be dealt with as Slaves, or to carry away or remove or to contract for the carrying away or removing of Slaves or other Persons, as or in order to their being dealt with as Slaves (s 2); and
 - (b) if any Persons shall deal or trade in, purchase, sell, barter, or transfer, or to contract for the dealing or trading in, Purchase, Sale, Barter or Transfer of Slaves, or Persons intended to be dealt with as Slaves, or shall carry away or remove or to contract for the carrying away or removing of Slaves or other Persons, as or in order to their being dealt with as Slaves, ... then the Person so offending and their Procurers, Counsellors, Aiders and Abettors shall be liable to an Offence and liable to pay £100 for each and every Slave so dealt in traded in, purchased, sold, bartered, or transferred, carried away ...: one moiety thereof to the use of His Majesty, his Heirs and Successors, and the other Moiety to the Use of any Person who shall inform, sue and prosecute for the same (s 3).
133. At all material times prior to and during the Claim Period, by reason of the *Colonial Laws Validity Act 1865* (Imp):
 - (a) by reason of the matters pleaded in paragraphs 129 to 130, the State of WA was unable to validly make laws which were repugnant to the *Slavery Abolition Act*; and/or
 - (b) by reason of the matters pleaded in paragraphs 131 to 132 the State of WA was unable to validly make laws which were repugnant to the *Slave Trade Act*,

and any such law so purportedly made was, to the extent of such repugnancy, absolutely void and inoperative.

134. In the alternative to paragraphs 125 to 128, to the extent any Working Controlled Native being a Native Ward or Native Inmate was required to work by the Superintendent or Manager of a Native Institution for no or inadequate wages:

- (a) under the direction of the Superintendent or Manager (being a servant or agent of the State of WA);
- (b) while the Native Inmate was not at liberty to leave the Native Institution; and
- (c) while the Superintendent or Manager exercised substantial control over the liberty of the Native Inmate,

such circumstances amounted to slavery within the meaning of s 12 of the Slavery Abolition Act.

135. In the premises of paragraph 134, to the extent:

- (a) s 68 of the 1936 Act and rr 19, 20, 33 and 50 of the 1936 Act Regulations;
- (b) s 69 of the 1954 Act and rr 19, 20 and 33 of the 1954 Act Regulations; and
- (c) s 37 of the 1963 Act and rr 22(4), 23(2) and 22 of the 1963 Act Regulations,

authorised a state of forced labour of any Controlled Native (being a Native Ward or Native Inmate) contrary to s 12 of the Slavery Abolition Act, each were repugnant to the Slavery Abolition Act and contrary to s 2 of the *Colonial Laws Validity Act 1865* (Imp), and were absolutely void and inoperative by reason of the matters pleaded in paragraph 133 above.

136. To the extent any Working Controlled Native being a Native Ward or Native Inmate performed work in the circumstances alleged in paragraphs 111 and 135 above, that Native Ward or Native Inmate had and has a claim against the State of WA for the payment of reasonable wages on a *quantum meruit* basis.

Particulars

A. *The particulars to paragraph 128 are repeated*

I.2. Existence of claims against employers in respect of Station & Domestic Work (1936 Act)

137. The non-payment of wages, or adequate wages, to the Applicant and some Working Controlled Natives being Station & Domestic Natives pleaded in paragraph 112 occurred:

- (a) in breach of the contract of employment, or for the provision of contract labour, of those Station & Domestic Natives; or
- (b) otherwise in circumstances where the station owner was obliged to make proper compensation to the Station & Domestic Natives for their labour.

138. To the extent the employment of any Station & Domestic Native for no or inadequate wages occurred under a Permit or Permit and Agreement under the 1936 Act, and occurred while:

- (a) the Station & Domestic Native was under the supervision of the servants or agents of the State of WA;
- (b) the Station & Domestic Native was unable to refuse to perform his or her employment, on pain of an offence against the 1936 Act; and
- (c) while the employer exercised substantial control over the liberty of the Station & Domestic Native,

such circumstances amounted to slavery within the meaning of s 12 of the Slavery Abolition Act.

139. In the premises of paragraph 138, to the extent ss 18, 19, 26, 28 and 68 of the 1936 Act and r 60 and Forms 12, 13 and 14 of the 1936 Act Regulations authorised a state of forced labour of any Native contrary to s 12 of the Slavery Abolition Act, each were repugnant to the Slavery Abolition Act and contrary to s 2 of the *Colonial Laws Validity Act 1865* (Imp), and were absolutely void and inoperative by reason of the matters pleaded in paragraph 133 above.

140. In the premises, to the extent the Applicant and Working Controlled Natives (being Station & Domestic Natives) performed work:

- (a) during the currency of the 1936 Act, in the circumstances alleged in paragraphs 112 and 137 and 138 to 139 above,

- (b) during the currency of the 1954 Act and 1963 Act (which do not include provisions in the nature of ss 18, 19, 26, 28 and 68 of the 1936 Act and r 60 and Forms 12, 13 and 14 of the 1936 Act Regulations), in the circumstances alleged in paragraph 112 and 137 above; and/or

they had a claim against that employer for the payment of reasonable wages in contract or on a *quantum meruit* basis.

Particulars

- A. *In respect of the individual claims of the Applicant, the Applicant repeats the particulars to paragraph 110 and 112, and is unavailable to provide further particulars of the amount of reasonable wages due to the Applicant.*
- B. *The Applicant does not know the identity of individual Working Controlled Natives who were Station & Domestic Natives, repeats the particulars to paragraph 110 and 112, and says that particulars will be provided prior to the trial of their individual claim, following the trial of common issues.*

I.3. Breach of Statutory Duty

I.3.1. The Statutory Duty

141. By reason of the matters pleaded in paragraphs 129 to 132:

- (a) all British subjects in Western Australia (including officers and employees of the State of WA holding the office of Protectors, Superintendents or Managers during the Claim Period):
- (i) would engage in a contravention of the Slave Trade Act if they engaged in conduct which amounted to procuring, counselling, aiding or abetting the carrying away or removing of persons in order to their being dealt with as Slaves contrary to ss 2 and 3 of the Slave Trade Act;
 - (ii) had a statutory obligation not to engage in conduct which amounted to procuring, counselling, aiding or abetting the carrying away or removing of persons in order to their being dealt with as Slaves (**Statutory Duty**).
- (b) the Statutory Duty was owed, inter alia, to Native Inmates and/or Station & Domestic Natives; and

- (c) Native Inmates and/or Station & Domestic Natives had and have a private right of action in respect of any breach of the Statutory Duty.

1.3.2. The Statutory Duty claim in respect of Native Inmates (1936, 1954 and 1963 Acts)

142. Further to paragraph 136, to the extent:

- (a) that any Native Ward or Native Inmate performed work in the circumstances alleged in paragraphs 111 and I.1.2 above; and
- (b) that:
 - (i) s 68 of the 1936 Act and rr 19, 20, 33 and 50 of the 1936 Act Regulations;
 - (ii) s 69 of the 1954 Act and rr 19, 20 and 33 of the 1954 Act Regulations; and
 - (iii) s 37 of the 1963 Act and rr 22(4), 23(2) and 22 of the 1963 Act Regulations,

authorised a state of forced labour of Native Wards and Native Inmates contrary to s 12 of the Slavery Abolition Act as pleaded in paragraph 135 above,

the State of WA (by the Superintendents or Manager of each Native Institution, being British subjects) engaged in conduct which amounted to dealing in persons, or procuring, counselling, aiding or abetting the carrying away or removing of persons in order to their being dealt with, as Slaves contrary to ss 2 and 3 of the Slave Trade Act.

143. By reason of the matters pleaded in paragraph 142, the State of WA (by the Superintendents or Managers of Native Institutions being British subjects) engaged in conduct which was:

- (a) in contravention of ss 2 and 3 of the Slave Trade Act, as pleaded in paragraph 141(a)(i); and/or
- (b) in breach of the statutory obligation, as pleaded in paragraph 141(a)(ii),

(Statutory Duty Breaches).

144. By reason of the Statutory Duty Breaches, the State of WA is liable to Working Controlled Natives who were Native Wards or Native Inmates, who performed work in

the circumstances alleged in paragraph 142 above at any time during the Claim Period, in respect of the loss and damage suffered by them by reason of the Statutory Duty Breaches and their being subjected to the conditions pleaded in paragraphs 111 and 1.1.2 above (including the non-receipt of reasonable remuneration for work performed)

1.3.3. The Statutory Duty claim in respect of Station & Domestic Natives (1936 Act)

145. Further to paragraph 140, to the extent:

- (a) any Station & Domestic Native performed work in the circumstances alleged in paragraphs 112 and 137 above during the currency of the 1936 Act; and
- (b) ss 18, 19, 26, 28 and 68 of the 1936 Act and r 60 and Forms 12, 13 and 14 of the 1936 Act Regulations authorised a state of forced labour of any Native contrary to s 12 of the Slavery Abolition Act (as pleaded in paragraph 139 above),

then by reason of the matters pleaded in sub-paragraphs 137(a)-(c) above, the State of WA (by the Protectors being British subjects) engaged in conduct during the currency of the 1936 Act which amounted to procuring, counselling, aiding or abetting the carrying away or removing of persons in order to their being dealt with as Slaves contrary to ss 2 and 3 of the Slave Trade Act.

Particulars

A. *Annual Reports of the Commissioner:*

- i) 1936, pp 8, 9 and 14;
- ii) 1937, pp 15 and 22;
- iii) 1938, pp 14 and 15;
- iv) 1940, pp 12 and 30;
- v) 1942, pp 8 and 25;
- vi) 1943, p 16;
- vii) 1944, pp 6 and 11;
- viii) 1949, pp 8, 9 and 10;

- ix) 1950, p 31;
- x) 1952, pp 7 and 16;
- xi) 1953, pp 6, 16, 20 and 24;
- xii) 1954, pp 5, 24, 25, 28 and 37;
- xiii) 1955, p 47;
- xix) 1960, p 31;

C. *Report on Survey of Native Affairs by F.E.A. Bateman, 1948.*

D. *In respect of the individual claims Working Controlled Natives who were Station & Domestic Natives, further particulars will be provided prior to the trial of their individual claim, following the trial of common issues.*

146. By reason of the matters pleaded in paragraph 145 the State of WA (by the Protectors being British subjects) engaged in conduct during the currency of the 1936 Act which was:

- (a) in contravention of ss 2 and 3 of the Slave Trade Act, as pleaded in paragraph 141(a)(i); and/or
- (b) in breach of the statutory obligation, as pleaded in paragraph 141(a)(ii),

(also **Statutory Duty Breaches**).

147. By reason of the Statutory Duty Breaches, the State of WA is liable to the Applicant and Working Controlled Natives who were Station & Domestic Natives who performed work in the circumstances alleged in paragraph 145 above during the currency of the 1936 Act, in respect of the loss and damage suffered by them by reason of the Statutory Duty Breaches and their being subjected to the conditions pleaded in paragraphs 112 and 137 above (including the non-receipt of reasonable remuneration for work performed and the practical inability to bring a quantum meruit claim of the kind referred to in paragraph 140 against the employers).

Particulars

A. *In respect of his individual claim, the Applicant repeats Particular A to paragraph 140.*

- B. In respect of Working Controlled Natives, the Applicant repeats the particulars to paragraph 128, and particular B to paragraph 140.*

J. CAUSATION, LOSS AND DAMAGE IN RESPECT OF BREACHES OF FIDUCIARY DUTIES, TRUSTS AND OTHER CLAIMS FOR UNPAID WAGES

148. By reason of the:

- (a) Breaches of Work Duties;
- (b) Breaches of Ward Duties;
- (c) State Breaches of Trust;
- (d) Commissioner Breaches of Trust; and/or
- (e) the Statutory Duty Breaches

the Applicant and Working Controlled Natives have suffered loss and damage.

Particulars

- A. The loss suffered by the Applicant will be calculated by reference to the difference between the amounts paid to the Applicant and the reasonable value of the work performed by the Applicant. Further particulars of the Applicant's loss will be provided after the service of the Applicant's evidence.*
- B. Particulars of the losses of the Working Controlled Natives other than the Applicant will be provided prior to the trial of their individual claim, following the trial of common issues.*

149. Further to paragraph 148, to the extent the State of WA retained the benefit of the use of the proceeds of any Breach of Work Duties, Breach of Ward Duties, or State Breaches of Trust (and/or Commissioner Breaches of Trust) causing loss to the Applicant and Working Controlled Natives (or any of them) as pleaded at paragraph 148:

- (a) the State of WA was unjustly enriched to the extent it had the benefit of trust monies or profits obtained in breach of fiduciary duty for its own purposes; and/or
- (b) the State of WA holds its interest in such benefit subject to a constructive trust in favour of the Applicant or the Working Controlled Native (as applicable).

K. RACIAL DISCRIMINATION ACT CLAIMS

K.1. Reparation scheme

150. On 13 June 2006, the Commonwealth Senate passed a motion for the Standing Committee on Legal and Constitution Affairs to conduct an inquiry and report into "Indigenous workers whose paid labour was controlled by the Government."
151. In December 2006, the Standing Committee on Legal and Constitution Affairs of the Senate of the Commonwealth published its report "Unfinished business: Indigenous stolen wages".
152. In May 2007, the Cabinet of the Western Australian Government established the 'Stolen Wages Taskforce' (**Taskforce**) for the purpose of investigating the 'scope and extent' of stolen wages and the actions of the Government between 1905 and 1972.
153. The Taskforce released its report "Reconciling the Past – Government control of Aboriginal monies in Western Australia, 1905-1972" to Cabinet in 2008 (that is, the WA Stolen Wages Report).
154. The WA Stolen Wages Report was not made public until 6 March 2012.
155. On 12 December 2011, Cabinet approved a scheme providing for an ex-gratia payment amount of \$2,000 per eligible applicant (**Scheme**).
156. The Scheme:
 - (a) initially operated from 6 March 2012 to 6 September 2012; and
 - (b) was extended to 30 November 2012.
157. In order to be eligible under the Scheme, an applicant had to be a living Aboriginal person who:
 - (a) was born before 1958;
 - (b) from 14 years or older was a resident at a Government Native Welfare Settlement (i.e. a Native Institution);

- (c) while a resident at a Government Native Welfare Settlement (i.e. a Native Institution) experienced direct government control over income or parts of income; and
 - (d) was never repaid the outstanding monies by the WA Government.
158. In the 9-month period the Scheme was operational:
- (a) a total of 2,026 applications were received;
 - (b) 1,276 applicants were deemed eligible for the ex-gratia payment; and
 - (c) a total of \$2,552,000 in ex-gratia payments were made to the applicants who were deemed eligible.

K.2. Unlawful racial discrimination

159. By virtue of their race, the Applicant and Working Controlled Natives, generally:
- (a) were subjected to the statutory controls of the 1936 Act, 1954 Act and 1963 Act (including as pleaded in paragraphs 5 to 82 above);
 - (b) had either no or low levels of formal education;
 - (c) had limited levels of literacy or were illiterate (and have limited levels of numeracy or were innumerate);
 - (d) had limited or no ability to read and understand English;
 - (e) were likely to be impecunious or have limited financial means; and
 - (f) possessed cultural attributes peculiar to Aboriginal and/or Torres Strait Islanders, (together and individually, the **Characteristics**).
160. The Scheme failed to have regard to the Characteristics of the Applicant and the Group Members.
161. By virtue of the Characteristics, the State of WA knew it was unlikely the Applicant or Working Controlled Natives (or Group Members) had or could have:
- (a) accessed documents in the possession of the State of WA;

- (b) accessed their own independent legal advice; and/or
 - (c) capacity to institute legal proceedings.
162. The State of WA implemented the Scheme in a way that, having regard to the Characteristics, failed to ensure the Applicant and the Group Members:
- (a) were provided with appropriate advice;
 - (b) understood the effect of the terms of the reparations payment;
 - (c) had appropriate access to independent legal advice;
 - (d) understood their legal rights (including the legal rights of Deceased Working Controlled Natives); and/or
 - (e) were provided with all relevant documents in the possession of the State of WA in relation to their claims (including the claims of Deceased Working Controlled Natives).
163. The Scheme excluded Group Members who:
- (a) were not a resident of a Native Institution, despite those Group Members also being subjected to certain of the controls under 1936 Act, 1954 Act and 1964 Act as Native Inmates; and
 - (b) were deceased at the time the Scheme was implemented, regardless of whether the estate of those Group Members had a legal personal representative or beneficiaries.
164. Having regard to the Characteristics, the State of WA administered the Scheme to impose conditions which increased the likelihood that the Applicant and Group Members:
- (a) would not apply to the Scheme; or
 - (b) in the event they did apply, would be unsuccessful.
165. The State of WA administered the Scheme that:

- (a) did not pay the Applicant or Group Members adequate reparations or compensation in respect of their claims (including the claims of Deceased Working Controlled Group Members); and
 - (b) paid the Applicant or Group Members less in respect of their claims (including the claims of Deceased Working Controlled Group Members) than they would have otherwise been paid but for their race (including the race of Deceased Working Controlled Group Members).
166. The conduct of the State of WA as pleaded in paragraphs 150 to 165 above had the effect of nullifying or impairing the recognition, enjoyment or exercise of the Applicant's and Group Members' human rights and fundamental freedoms on an equal footing, as the conduct:
- (a) was in breach of Article 2(c) of the International Convention on the Elimination of All Forms of Racial Discrimination (**ICERD**);
 - (b) nullified, impaired or restricted the Applicant's and Group Members' right to seek equal treatment before tribunals and all other organs administering justice in breach of Article 5(c) of the ICERD;
 - (c) nullified, impaired or restricted the Applicant's and Group Members' right to a fair, impartial, independent and effective service in breach of Articles 5(c) and 5(f) of the ICERD;
 - (d) nullified, impaired or restricted the Applicant's and Group Members' right to pursue remedies for their pay and remuneration in breach of Article 5(e) of the ICERD;
 - (e) nullified, impaired or restricted the Applicant's and Group Members' right to remedies for the violation of their economic, social and cultural development in breach of Article 1(1) of the International Convention on Civil and Political Rights (**ICCPR**);
 - (f) nullified, impaired or restricted the Applicant's and Group Members' right to seek effective remedies for the violation of their rights in breach of Article 2(3) of the ICCPR;
 - (g) nullified, impaired or restricted the Applicant's and Group Members' civil and political rights in breach of Article 3 of the ICCPR; and

(h) nullified, impaired or restricted the Applicant's and Group Members' rights to equal protection of the law in breach of Article 26 of the ICCPR.

167. By the matters pleaded at paragraphs 159 to 166, the State of WA engaged in conduct which was in breach of s 9 of the *Racial Discrimination Act 1975* (Cth) (**Racial Discrimination**);

K.3. Causation loss and damage

168. Further, by reason of the Racial Discrimination, the Applicant and Group Members have suffered loss or damage and are entitled to:

- (a) damages pursuant to s 46PO(4)(d) of the *Australian Human Rights Commission Act 1986* (Cth);
- (b) aggravated damages;
- (c) exemplary damages; and
- (d) an apology.

Particulars

- A. *The loss suffered by the Applicant will be calculated by reference to the difference between the amounts paid to the Applicant under the Scheme and the amount to which the Applicant would be entitled as particularised in paragraph 148 above. Further particulars of the Applicant's loss will be provided after the service of the Applicant's expert evidence.*
- B. *Particulars of the losses of the Group Members will be provided prior to the trial of their individual claim, following the trial of common issues.*

GLOSSARY OF DEFINED TERMS

1

1936 Act	4
1936 Act Regulations	6
1954 Act	4
1954 Act Regulations	6
1963 Act	4
1963 Act Regulations	7
1972 Act	6

A

Aborigines Act 1905	5
Agreement	15

B

Breaches of Ward Duties	52
Breaches of Work Duties	50

C

Characteristics	68
Claim Period	4
Commissioner	8
Commissioner Breaches of Trust	55
Commissioner Trusts	55
Controlled Native	4

D

Deceased Working Controlled Native	4
Department	8
Departmental Trust Account	21

F

FCAA	4
-------------------	---

G

Group Members	4
----------------------------	---

I

ICCPR	70
ICERD	70
Inspectors	8

L

Lost Wages	26
Lost Wages Native	26
Lost Wages Trust Account	20
Lost Wages Trusts	29

M

Managed Native	30
Managed Property	30
Management Duties	34
Management Trusts	36
Manager	9

N

Native Inmate	14
Native Institution	13
Native Wards	36

P

Permit	15
Protectors	8

R

Racial Discrimination	70
Representative	9
Reserves	13

S

Saved Wages	43
Saved Wages Native	43
Saved Wages Trusts	45
Scheme	67
Slave Trade Act	58
Slavery Abolition Act	57
State Breaches of Trust	54
State of WA	4
State Trusts	53
Station & Domestic Natives	48
Statutory Duty	62
Statutory Duty Breaches	63
Superintendents	8

T

Taskforce	67
------------------------	----

W

<i>WA Stolen Wages Report</i>	48
Ward Duties	40
Ward Trusts	42
Work Duties	26
Working Controlled Native	4

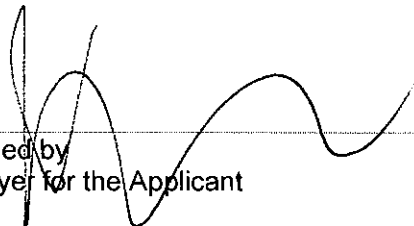
This pleading was prepared by Ryan J May, Alexander H Edwards and Joshua Creamer of counsel and settled by William Edwards of counsel.

Certificate of lawyer

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

Date: 19 October 2020

Signed by
Lawyer for the Applicant

A handwritten signature in black ink, consisting of a series of loops and curves, is written over a horizontal dotted line. The signature appears to be 'Janice Saddler'.