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Details of Filing

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

Registrar

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Form 17
Rule 8.05(1)(a)

AMENDED STATEMENT OF CLAIM

No. VID312 of 2021

Federal Court of Australia
District Registry: Victoria
Division: General

MINNIE MCDONALD

Applicant

COMMONWEALTH OF AUSTRALIA

Respondent

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A. INTRODUCTION

1. The Applicant brings these proceedings on her 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 the Northern Territory during all or part of the period from 1 June 1933 to 12 November 1971 (**Claim Period**);
 - (b) during all or part of the Claim Period were:
 - (i) an “aboriginal” or “half-caste” as defined by s 3 of the *Aboriginals Ordinance 1918-1933* (NT) (as amended in the Claim Period) (**Aboriginals Ordinance**);
 - (ii) gazetted as “wards” pursuant to s 14 of the *Welfare Ordinance 1953-1955* (NT) (as amended in the Claim Period) (**Welfare Ordinance**);
 - (iii) subject to the *Wards Employment Ordinance 1953-1959* (NT) (as amended in the Claim Period) (**Employment Ordinance**); and/or
 - (iv) an inmate of any placed declared to be an “Aboriginal institution” (**Aboriginal Institution**) in the meaning of s 13 of the *Aboriginals Ordinance* or s 40 of the *Welfare Ordinance* (**Aboriginal Inmate**), (**Controlled Aboriginal**); and
 - (c) during all or part of the Claim Period worked in the Northern Territory or had their property controlled by the Commonwealth or its servants under the *Aboriginals Ordinance, Welfare Ordinance or Employment Ordinance* at a time when they were a Controlled Aboriginal,

and if a Group Member has died (**Deceased Group Member**), then any legal personal representative or beneficiary of the estate of the Deceased Group Member 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 Group Member 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 (**Commonwealth**) within the meaning of s 33C of the FCAA.

B. THE APPLICANT

4. The Applicant was:
 - (a) born on or about 30 July 1938;
 - (b) an “aboriginal” as defined by s 3 of the Aboriginals Ordinance and gazetted as a “ward” pursuant to s 14 of the Welfare Ordinance (and accordingly, at all material times, a Controlled Aboriginal); and
 - (c) subject to the Aboriginal Ordinance, Welfare Ordinance, Employment Ordinance and the regulations made thereunder.

C. LEGISLATIVE FRAMEWORK

C.1. Ordinances

C.1.1. Aboriginals Ordinance (1933-1957)

5. The *Aboriginals Ordinance 1933* (NT):
 - (a) came into effect on 1 June 1933;
 - (b) amended the *Aboriginals Ordinance 1918-1930* (NT); and
 - (c) provided that the *Aboriginals Ordinance 1918-1930* (NT) as amended may be cited as the Aboriginals Ordinance.
6. The Aboriginals Ordinance was amended by Ord No.4 1936, Ord No.5 1937, Ord No.7 1937, Ord No.4 1939, Ord No.11 1941, Ord No.5 1943, Ord No.8 1947, Ord No.7 1953, Ord No.9 1953 and Ord No.6 1955.
7. The Aboriginals Ordinance was repealed on 13 May 1957 by the Welfare Ordinance, prior to the commencement of the amending Ord No.7 1953 and Ord No.6 1955.

C.1.2. Welfare Ordinance (1957-1964)

8. The *Welfare Ordinance 1956* (NT):
 - (a) came into effect on 13 May 1957;
 - (b) amended the *Welfare Ordinance 1953* (NT) (prior to that ordinance coming into effect); and
 - (c) provided that the *Welfare Ordinance 1953* (NT) as amended may be cited as the Welfare Ordinance.
9. The Welfare Ordinance was amended after its coming into effect by Ord No.29 1957, Ord No.42 1957, Ord No.27 1959, Ord No.10 1960, Ord No.12 1962 and Ord No.38 1963.
10. The Welfare Ordinance was repealed on 15 September 1964 by the *Social Welfare Ordinance 1964* (NT) (**Social Welfare Ordinance**).

C.1.3. Employment Ordinance (1959-1971)

11. The *Wards Employment Ordinance 1959* (NT):
 - (a) came into effect on 1 October 1959;
 - (b) amended the *Employment Ordinance 1953* (NT) (prior to that ordinance coming into effect);
 - (c) repealed the *Employment Ordinance 1958* (NT) (prior to that ordinance coming into effect); and
 - (d) provided that the *Employment Ordinance 1953* (NT) as amended may be cited as the Employment Ordinance.
12. The Employment Ordinance was amended by Ord No.2 1961, Ord No.2 1963 Ord No.18 1963, Ord No.46 1964 and Ord No.2 1966.
13. The Employment Ordinance was repealed on 12 November 1971 by the *Wards Employment Ordinance Repeal Ordinance 1971* (NT).

C.2. Regulations under the Aboriginals Ordinance

14. The Aboriginals Ordinance provided that the Minister could make regulations under the Aboriginals Ordinance (s 67).
15. The *Regulations under the Aboriginals Ordinance 1918-1933* (NT):
 - (a) were made under the Aboriginals Ordinance and were gazetted on 29 June 1933;
 - (b) repealed all previous regulations made under the *Aboriginals Ordinance 1918* (NT) except the *Apprentices (Half castes) Regulations 1930* (NT); and
 - (c) were relevantly amended on 8 April 1936,

and are referred to (as amended from time to time) as the **Aboriginals Ordinance Regulations**.
16. The *Aboriginals (Pastoral Industry) Regulations 1949* (NT):
 - (a) were made under the Aboriginals Ordinance and were gazetted on 30 June 1949; and
 - (b) from the date of commencement, ceased the application of parts of the Aboriginals Ordinance Regulations to the employment of aboriginals in the pastoral industry,

and are referred to (as amended from time to time) as the **(Aboriginals Pastoral Regulations)** .

C.3. Definitions of Aboriginal (1933-1957)

C.3.1. Aboriginals Ordinance 1933-1953

17. Section 3 of the Aboriginals Ordinance defined “*aboriginal*” (**Aboriginal**) as meaning:

“any person who is-

- (a) *an aboriginal native of Australia or of any of the islands adjacent or belonging thereto; or*
- (b) *a half-caste who lives with an aboriginal native as wife or husband; or*

- (c) *a half-caste, who, otherwise than as the wife or husband of such an aboriginal native, habitually lives or associates with such aboriginal natives; or*
- (d) *a half-caste male child whose age does not apparently exceed eighteen years; or*
- (e) *a female half-caste not legally married to a person who is substantially of European origin or descent and living with her husband; or*
- (f) *a male half-caste whose age exceeds twenty-one years and who, in the opinion of the Chief Protector, is incapable of managing his own affairs and is declared by the Chief Protector to be subject to this Ordinance."*

18. Section 3 of the Aboriginals Ordinance defined "*half-caste*" as meaning "*any person who is the offspring of parents, one but not both of whom is an aboriginal and includes any person one of whose parents is a half-caste*" (**Half-Caste**).

C.3.2. Aboriginals Ordinance 1953-1957

19. The *Aboriginals Ordinance 1953* (NT) (Ord No.9 1953) (**Aboriginals Ordinance 1953**):
- (a) came into effect on 2 September 1953;
 - (b) amended the Aboriginals Ordinance.
20. By the amending Aboriginals Ordinance 1953:
- (a) the defined term "*half-caste*" was removed from s 3 of the Aboriginals Ordinance;
 - (b) the definition of Aboriginal in s 3 of the Aboriginals Ordinance was amended to mean:
 - "(a) *a person who is an aboriginal native of Australia or of an island which, being subject to the laws of the Commonwealth, of a Commonwealth or of the Northern Territory, is adjacent to Australia;*
 - (b) *a person who lives after the manner of, follows, adheres to or adopts the customs of persons described in paragraph (a) of this definition and at least one of whose ancestors was a person described in that paragraph;*

- (c) *a person, being under the age of eighteen years, at least one of whose ancestors was a person described in paragraph (a) of this definition, and-*
 - (i) *whose care, custody, or control has been undertaken by the Director under section six of this Ordinance before the date when the Aboriginals Ordinance (No. 2) 1953 comes into operation; or*
 - (ii) *whom the Director has caused to be kept in a reserve or an aboriginal institution under section sixteen of this Ordinance, before the date when the Aboriginals Ordinance (No. 2) 1953 comes into operation; or*
- (d) *a person, at least one of whose ancestors was a person described in paragraph (a) of this definition, in respect of whom a declaration is made under section three A of this Ordinance”; and*
- (c) a new s 3A to the Aboriginals Ordinance provided that the Director may gazette that certain persons were deemed to be Aboriginals for the purposes of the Aboriginals Ordinance.

C.4. Definition of Ward (1957-1971)

21. Section 14 of the Welfare Ordinance provided that:

- “(1) *Subject to the provisions of this section, the Administrator may, by notice in the Gazette, declare a person to be a ward if that person, by reason of-*
 - (a) *his manner of living;*
 - (b) *his inability, without assistance, adequately to manage his own affairs;*
 - (c) *his standard of social habit and behaviour; and*
 - (d) *his personal associations,**stands in need of such special care or assistance as is provided for by this Ordinance.*

- (2) *A person shall not be declared to be a ward if that person is-*
- (a) *a person who, under Part V of the Northern Territory Electoral Regulations-*
 - (i) *is entitled to vote at an election of a member of the House of Representatives for the Northern Territory;*
 - (ii) *would, but for his being under twenty-one years of age, be entitled to enrolment, subject to the provisions of Part VI of those regulations and to vote at such an election; or*
 - (iii) *would, but for his not having resided in Australia for six months continuously, be entitled to enrolment, subject to the provisions of Part VI of those regulations and to vote at such an election; or*
 - (b) *a person who holds a certificate of exemption issued, and in force, under section four of the Immigration Act 1901-1949”,*

(persons gazetted as wards from time to time under the Welfare Ordinance being **Wards**).

22. Section 15 of the Welfare Ordinance further provided that a person who is legally in the care, custody or control, or under guardianship of a person or authority cognate legislation in force in other States, shall, if he enters the Northern Territory, and while he remains in the Northern Territory, be deemed to be a ward for the purposes of the Welfare Ordinance.
23. By the *Northern Territory Gazette* No. 19B of 13 May 1957, 15,439 persons who had been defined as or dealt with as Aborigines under the Aborigines Ordinance were gazetted as Wards under the Welfare Ordinance.
24. The *Commonwealth Electoral Act 1962* (Cth) amended the *Commonwealth Electoral Act 1918–1961* (Cth) to provide that Indigenous Australians should have the right to enrol and vote at federal elections.

25. In consequence of the extension of the Commonwealth franchise, Indigenous Australians resident in the Northern Territory were no longer eligible to be declared as Wards by reason of s 14(2)(a) of the Welfare Ordinance.
26. The Employment Ordinance provided:
 - (a) that references in the Employment Ordinance to “ward” had the same meaning as in the Welfare Ordinance between 1959 and 1964 (s 4); and
 - (b) from the commencement of the amending *Wards’ Employment Ordinance 1964* (NT) (**Employment Ordinance 1964**), that “‘ward’ means a person who immediately before the commencement of the Social Welfare Ordinance was a ward by virtue of the Welfare Ordinance 1953-1963”.

C.5. Entities and roles under the Aboriginals Ordinance

C.5.1. Outline

27. The Aboriginals Ordinance provided for:
 - (a) the appointment of a Chief Protector between the commencement of the claim period and the commencement of the *Aboriginals Ordinance 1939* (NT) (**Aboriginals Ordinance 1939**), and thereafter a Director of Native Affairs (**Director**) (ss 3 and 4);
 - (b) the appointment of Protectors by the Director (**Protectors**) (ss 4 and 5);
 - (c) the appointment of superintendents to reserves or Aboriginal Institutions by the Minister (**Superintendents**) (ss 2 and 11).

C.5.2. Director

28. Section 4 of the Aboriginals Ordinance provided that Director was, under the Administrator and from the commencement of the Aboriginals Ordinance 1939, the Minister, responsible for the administration and the execution of the Aboriginals Ordinance.
29. Section 5 of the Aboriginals Ordinance provided that the duties of a Protector included to exercise a general supervision and care over all matters affecting the welfare of the aboriginals, and to protect them against immorality, injustice, imposition and fraud.

30. Section 7 of the Aboriginals Ordinance provided that the Director was the legal guardian of every Aboriginal and Half-Caste child notwithstanding that the child has a parent or other relative living, until such child attains the age of eighteen years except while the child is a State child within the meaning of the *State Children Act 1895* (SA) or substituting legislation.
31. The Aboriginals Ordinance 1953:
 - (a) amended s 6 of the Aboriginals Ordinance by omitting the words “half-caste”;
 - (b) repealed s 7 of the Aboriginals Ordinance; and
 - (c) inserted a new s 7 providing that the Director was the legal guardian of all Aboriginals.

C.5.3. Protectors

32. Section 4(3) provided each Protector shall have and exercise such powers and duties as are prescribed.

C.5.4. Superintendents

33. Section 5 of the Aboriginals Ordinance provided that every Aboriginal and Half-Caste child for the time being an Inmate of any Aboriginal Institution shall be under the control and supervision of the Superintendent.
34. Regulation 5 of the Aboriginals Ordinance Regulations required the Superintendent of any Aboriginal Institution to furnish half-yearly report to the Director showing the number of aboriginal and half-caste children provided for and educated during the preceding six months.

C.6. Entities and roles under the Welfare Ordinance and Employment Ordinance

C.6.1. Outline

35. The Welfare Ordinance provided for:
 - (a) the appointment of a Director of Welfare (also, Director) (s 7);
 - (b) the appointment of welfare officers by the Administrator (**Welfare Officers**) (s 11);

- (c) the appointment of superintendents by the Administrator (also, Superintendents) (s 12).

36. The Employment Ordinance provided that references in the Employment Ordinance to “the Director” or “welfare officer”:

- (a) had the same meaning as in the Welfare Ordinance between 1959 and 1964 (s 4); and
- (b) from the commencement of the amending Employment Ordinance 1964, had the same meaning as in the Social Welfare Ordinance.

C.6.2. Director

37. Section 8 of the Welfare Ordinance provided that the duties of the Director included to:

- (a) in relation to Wards:
 - (i) to promote their social, economic and political advancement for the purpose of assisting them and their descendants to take their place as members of the community of the Commonwealth;
 - (ii) to arrange as far as is practicable for the education of Wards, including their vocational training, by collaboration with, and assistance to, the education authority and educational institutions and in other appropriate ways;
 - (iii) to promote their physical well being, to inculcate proper habits of hygiene and sanitation and to improve their standards of nutrition and housing;
 - (iv) to arrange for their vocational training and to obtain suitable employment for them in industrial and other enterprises and for this purpose to establish and maintain liaison with appropriate organisations;
 - (v) to provide such relief and assistance as is necessary or appropriate; and
 - (vi) to exercise a general supervision and care over matters affecting their welfare;
- (b) subject to direction by the Administrator, to apply and apportion moneys made available for the purposes of the Aboriginals Ordinance in such manner as he considers proper;

- (c) to supervise and regulate the use and management of Aboriginal Institutions, other than Aboriginal Institutions established by the Commonwealth;
 - (d) to control the management of Aboriginal Institutions established by the Commonwealth;
 - (e) to supervise and regulate the use and management of Reserves.
38. Section 24 of the Welfare Ordinance provided that the Director was the guardian of all Wards except in respect of proceedings by a Ward against the Director or another officer.
39. The *Welfare Ordinance 1961* (NT) (**Welfare Ordinance 1961**) repealed s 24 of the Welfare Ordinance.

C.6.3. Welfare Officers

40. Section 11 of the Welfare Ordinance provided that a Welfare Officer shall exercise such powers and perform such duties and functions as he is directed and as are prescribed.

C.7. **Servants or agents of Commonwealth**

41. On 1 January 1911, the NT was transferred from South Australian to Commonwealth administration, effected by the *Northern Territory Acceptance Act 1910* (Cth) (**Acceptance Act**).
42. By s 11 of the Acceptance Act, the “*Public Service of the State of South Australia*” serving in the Northern Territory were transferred to the Public Service of the Commonwealth.
43. The *Commonwealth of Australia Constitution Act 1900* (Cth) (**Constitution**) provided that:
- (a) following the surrender of the Northern Territory by South Australia, the Northern Territory became “*subject to the exclusive jurisdiction of the Commonwealth*” (s 111);
 - (b) the Commonwealth Parliament may make laws for the government of any territory (including any territory surrendered by any State and accepted by the Commonwealth) (s 122); and

- (c) “*executive power of the Commonwealth... extends to the execution and maintenance of this Constitution, and of the laws of the Commonwealth*” (s 61).
44. Pursuant to s 61 of the Constitution, the Commonwealth Parliament passed the *Northern Territory (Administration) Act 1910* (Cth) (**Administration Act**), which commenced on the date of commencement of the Acceptance Act.
45. The Administration Act provided:
- (a) for the appointment of an Administrator of the Northern Territory under the seal of the Commonwealth to exercise and perform all powers and functions that belong to his office according to the tenor of his Commission, and according to such instructions as are given to him by the Minister (ss 4(1) and (2));
 - (b) for the appointment of such officers as are necessary for the administration of the Acceptance or the Administration Act or for the proper government of the Northern Territory (s 4(3)); and
 - (c) for the making of ordinances having the force of law in the Territory by the Governor-General of the Commonwealth (s 13).
46. The terms of the Administration Act were amended by the *Northern Australia Act 1926* (Cth) but restored to the terms pleaded in the preceding paragraph by the *Northern Territory (Administration) Act 1931* (Cth), save that the ordinance-making power became s 21 of the Administration Act.
47. Following the amending *Northern Territory (Administration) Act 1947* (Cth) and the repeal of s 21, the Administration Act provided that:
- (a) the ordinance-making power was granted to a Legislative Council consisting of appointed and elected members (s 4U); and
 - (b) ordinances passed by the Council Legislative were required to be assented to by the Administrator or the Governor-General, save that ordinances relating to aboriginals or aboriginal labour could only be assented to by the Governor-General (ss 4V and 4Y).
48. By reason of the matters pleaded at paragraphs 27 to 34 and 41 to 47 above, at all times between 1 June 1933 and 13 May 1957, the Director, Protectors, Superintendents and any public officers under their direction or control:

(a) were servants or agents of the Commonwealth; and

(b) acted for and on behalf of the Commonwealth,

in connection with the exercise of their functions, powers and duties under the
Aboriginals Ordinance and subordinate legislation.

49. By reason of the matters pleaded at paragraphs 35 to 47 above, at all times between
13 May 1957 and 12 November 1971, the Director, Welfare Officers, Superintendents
and any public officers under their direction or control:

(a) were servants or agents of the Commonwealth; and

(b) acted for and on behalf of the Commonwealth,

in connection with the exercise of their functions, powers and duties under the Welfare
Ordinance, Employment Ordinance and subordinate legislation.

D. REGULATION OF CONTROLLED ABORIGINALS' LIFE AND WORK UNDER THE ORDINANCES

D.1. Regulation of Life and Work on Reserves and Aboriginal Institutions

D.1.1. Reserves & Aboriginal Institutions (1933-1957)

50. Section 3 of the Aboriginals Ordinance provided that a "reserve" meant:

(a) any reserve for Aboriginals declared the Administrator under s 10 (prior to the
repeal of s 10 by the *Aboriginals Ordinance 1924* (NT) (**Aboriginals Ordinance
1924**));

(b) following the Aboriginals Ordinance 1924, any area proclaimed or declared,
under the *Northern Territory Crown Lands Act 1890* (SA), the Aboriginals
Ordinance or the *Crown Lands Ordinance 1924* (NT) (s 78(1)(a)(i)) "*to be a
reserve for the Aboriginal native inhabitants of the Territory*"; and

(c) following the Aboriginals Ordinance 1939, "*any lands which, in pursuance of any
Ordinance or other law now, heretofore or hereafter in force in the Territory, are
declared to be a reserve for aboriginals or are reserved for the use and benefit*

of the aboriginal native inhabitants of the Territory or for the use and benefit of the aboriginal inhabitants of the Territory”,

(together, **Reserve**).

Particulars

Insofar as the Applicant is able to say with her present state of knowledge, at various times during the Claim Period the areas declared as Reserves included:

- A. *Bagot.*
- B. *Arnhem Land.*
- C. *Bathurst Island.*
- D. *Melville Island.*
- E. *Daly River.*
- F. *Catfish.*
- G. *Yuendumu.*
- H. *Haasts Bluff.*
- I. *Jay Creek.*
- J. *Bungalow.*
- K. *Larrakia.*
- L. *Woolwonga.*
- M. *Waugait.*
- N. *Warramunga.*
- O. *South-west.*
- P. *Manassie.*
- Q. *Berrimah.*

51. Section 13(1) of the Aboriginals Ordinance provided that the Administrator may declare “*any mission station, reformatory, orphanage, school, home or other institution established by private contributions to be an aboriginal institution for the maintenance, custody, and care of aboriginal and half-caste children*” (that is, an Aboriginal Institution).
52. Section 13(1) of the Aboriginals Ordinance was amended by:
 - (a) the *Aboriginals Ordinance 1941* (NT) (**Aboriginals Ordinance 1941**) by omitting:
 - (i) the words “*established by private contributions*”;
 - (ii) from the definition the words “*aboriginal and half-caste children*” and inserting in their stead the words “*aboriginals and half-caste*”; and

- (b) the Aboriginals Ordinance 1953 by omitting from the definition the words "*the aboriginal or half-caste inhabitants of the Northern Territory*" and inserting in their stead the word "*aboriginals*".
- 53. Regulation 6 of the Aboriginals Ordinance Regulations provided that Protectors may at their discretion forward any Aboriginal children to the nearest Aboriginal Institution or school, and shall report the reason for such action to the Chief Protector.
- 54. Section 13(6) of the Aboriginals Ordinance provided that every "*aboriginal and half-caste child for the time being an inmate of any aboriginal institution shall be under the control and supervision of the Superintendent*".
- 55. Section 13(6) of the Aboriginals Ordinance was amended by:
 - (a) the Aboriginals Ordinance 1941 by omitting the word "*child*"; and
 - (b) the Aboriginals Ordinance 1953 by omitting from the words "*and half-caste*".
- 56. Section 15 and 16 of the Aboriginals Ordinance provided that the Director may cause any Controlled Aboriginal to be removed to and kept within the boundaries of a Reserve or an Aboriginal Institution or to be removed from one Reserve or an Aboriginal Institution to another Reserve or an Aboriginal Institution and kept therein, except any Controlled Aboriginal:
 - (a) who is lawfully employed by any person;
 - (b) who is the holder of a permit to be absent from the Reserve or Aboriginal Institution;
 - (c) who is a female lawfully married to and residing with a husband who is not himself an Aboriginal; or
 - (d) for whom, in the opinion of the Director, satisfactory provision is otherwise made.
- 57. Section 52 of the Aboriginals Ordinance provided that any "*aboriginal or half-caste*" who neglects or refuses to obey an order lawfully given under the Aboriginals Ordinance shall be guilty of an offence.
- 58. Section 52 of the Aboriginals Ordinance was amended by the Aboriginals Ordinance 1953 by omitting from the words "*half-caste*".

D.1.2. Reserves and Aboriginal Institutions (1957-1971)

59. Section 3 of the Welfare Ordinance provided that a “reserve” meant “*land which, in accordance with the provisions of a law of the Territory, is declared to be a reserve for wards*” (also, Reserve).
60. Section 5(a) of the Welfare Ordinance provided that any Reserve set apart under the Aboriginals Ordinance remained a Reserve for the purposes of the Welfare Ordinance despite the repeal of the Aboriginals Ordinance.
61. Section 40 of the Welfare Ordinance provided that the Administrator may “*subject to such conditions as he thinks fit and as are prescribed, approve a mission station, reformatory, orphanage, school, home or other establishment, whether within the Territory or otherwise, as an institution for the purposes of this Ordinance*” (also, Aboriginal Institution).
62. Section 17 of the Welfare Ordinance provided that where the Director considers that it is in the best interests of a Ward, he may:
 - (a) take the Ward into his custody;
 - (b) authorise a person to take the Ward into custody on behalf of the Director;
 - (c) order that the Ward be removed to, and kept within, a Reserve or Aboriginal Institution;
 - (d) order that the Ward be kept within a Reserve or Aboriginal Institution; and
 - (e) order that the Ward be removed from one Reserve or Aboriginal Institution to another Reserve or Aboriginal Institution,

subject to certain restrictions where the removal would affect the separation of parent and child.
63. Section 20 of the Welfare Ordinance provided that a Ward subject to an order under s 17 must not refuse to comply with the order or be guilty of an offence.
64. The Welfare Ordinance 1961 amended the Welfare Ordinance:
 - (a) to place the s 17 power of removal into the hands of a court of summary jurisdiction on application by the Director or Welfare Officer;

- (b) to repeal s 20 and replace it with a requirement that a Ward placed by order into a Reserve or Aboriginal Institution not leave that Reserve or Aboriginal Institution for six months or be guilty of an offence (s 17(11)); and
- (c) to repeal ss 61 through 70 and insert a new s 61 to provide that:
 - (i) the Superintendent of a Reserve or Aboriginal Institution or, in the absence of the Superintendent, a Welfare Officer, may, for the purpose of controlling the management of or maintaining order on the- Reserve or Aboriginal Institution, give orders and directions to a Ward who is on the Reserve or Aboriginal Institution;
 - (ii) a Ward to whom such an order or direction is given shall comply with that order or direction or be guilty of an offence; and
 - (iii) a Welfare Officer or the Superintendent of the Reserve may arrest without warrant a Ward whom he believes on reasonable grounds to have committed such an offence.

D.2. Supervision of Controlled Aboriginals' Work outside Reserves and Aboriginal Institutions

D.2.1. Licences under the Aboriginals Ordinance (1933-1957)

- 65. Section 22 of the Aboriginals Ordinance provided that a person was prohibited to employ or engage under a contract to perform work or services an Aboriginal except under licence in the prescribed form (**Licence**), save for Aboriginal children undertaking apprenticeships in accordance with the Aboriginals Ordinances Regulation or *Apprentices (Half-Castes) Regulations 1930* (NT) as amended from time to time.
- 66. Section 26(1) of the Aboriginals Ordinance required that employers of Aboriginals in Town Districts were also required to enter into an agreement with the employee in the prescribed form (**Agreement**).
- 67. Regulations 9, 11 and the Forms to the Aboriginals Ordinance Regulations provided for the prescribed form of Licences and Agreements under the Aboriginals Ordinance.
- 68. Regulation 13 of the Aboriginals Ordinance Regulations provided that every Licence to employ Aboriginals in a town district (Form 3) was subject to certain conditions, including:

- (a) that the grantee of the licence shall pay wages at the rate of five shillings per week to or for each Aboriginal employed by him (provided that, where the Aboriginal employed is a female Half-Caste, the rate of wages shall be six shillings per week);
- (b) that, when wages are to be paid in accordance with the Licence, the grantee of the Licence shall pay eight shillings of such wages every four weeks to the Director in trust for the Aboriginal and shall pay the remaining three shillings per week of such wages to the Aboriginal (provided that, where the Aboriginal employed is a female Half-Caste, the grantee shall pay the wages every four weeks at the rate of six shillings per week to the Director in trust);
- (c) that the grantee of the Licence shall, to the satisfaction of a Protector, keep each Aboriginal employed by him in food and clothing and shall (except in the case of a female Half-Caste) supply such aboriginal with such an amount of tobacco as the Director considers to be sufficient;
- (d) that, whenever any Aboriginal is sick, injured or affected by any disease and it is expedient in the interests of the Aboriginal that he should be removed to some place for medical attention or treatment, the grantee of the Licence by whom that Aboriginal is employed shall:
 - (i) as soon as is reasonably possible, provide free transport for the Aboriginal and send him to a Protector; and
 - (ii) if required so to do by a Protector, arrange and pay for the transport of the Aboriginal to such place as the Protector specifies; or
 - (iii) as soon as is reasonably possible, provide free transport for the Aboriginal and send him to the nearest or most accessible hospital.

69. Regulation 14 of the Aborigines Ordinance Regulations provided that every Licence to employ Aborigines in a country district (Form 4) was subject to certain conditions, including:

- (a) that the grantee of the Licence shall pay wages at the rate of five shillings per week for each Aboriginal employed by him (provided that, where it is proved to the satisfaction of the Director that the grantee of the Licence is maintaining the relatives and dependants of any Aboriginal employed by him, the Director may

exempt the grantee from the payment of any wages in respect of that Aboriginal **(Dependants Exception))**;

- (b) that, when wages are to be paid in accordance with the Licence, the grantee of the Licence shall pay such wages amounting to one pound every four weeks to the Director to be held in trust by him for the Aboriginal;
- (c) that the grantee of the Licence shall, to the satisfaction of a Protector, keep each Aboriginal employed by him in food and clothing and shall supply such Aboriginal with such an amount of tobacco as the Director considers to be sufficient;
- (d) that the grantee of the licence shall, as soon as is reasonably possible, notify in writing to the nearest or most accessible Protector the condition of any aboriginal employee who is sick, injured or affected by any disease;
- (e) that, whenever any Aboriginal is sick, injured or affected by any disease and it is expedient in the interests of the Aboriginal that he should be removed to some place for medical attention or treatment, the grantee of the Licence by whom that Aboriginal is employed shall:
 - (i) as soon as is reasonably possible, provide free transport for the Aboriginal and send him to a Protector; and
 - (ii) if required so to do by a Protector, arrange and pay for the transport of the Aboriginal to such place as the Protector specifies; or
 - (iii) as soon as is reasonably possible, provide free transport for the Aboriginal and send him to the nearest or most accessible hospital.

70. Regulation 15 of the Aborigines Ordinance Regulations provided that the conditions of Licences to employ Aborigines in a country district where the Aboriginal was employed as a drover or drover's assistant were varied as follows:

- (a) the conditions pleaded at subparagraphs 69(a), 69(b), 69(c), 69(e) did not apply;
- (b) that the grantee of the Licence shall pay to each Aboriginal employed as a drover or as a drover's assistant wages at the rate of twenty-four shillings per week whilst travelling with stock and at the rate of sixteen shillings per week whilst travelling with plant only (provided that the Director may, at his discretion, in the case of any or all Aborigines employed as drovers or drovers' assistants, direct

the grantee of the Licence to pay all or any portion of the wages prescribed by this paragraph to the Director);

- (c) that the grantee of the Licence shall, for each Aboriginal employed as a drover or as a drover's assistant, provide food to the satisfaction of a Protector; and
- (d) that whenever any Aboriginal employed as a drover or as a drover's assistant is sick, injured or affected by any disease and it is expedient in the interests of that Aboriginal that he should be removed to some place for medical attendance or treatment, the grantee of the licence under whom that aboriginal is employed shall:
 - (i) as soon as is reasonably possible, provide transport for the Aboriginal and send him to a Protector; and
 - (ii) if required so to do by a Protector, arrange for the transport of the Aboriginal to such place as the Protector specifies; or
 - (iii) as soon as is reasonably possible, provide transport for the Aboriginal and send him to the nearest or most accessible hospital.

71. Regulation 16 of the Aborigines Ordinance Regulations further provided in respect of Licences to employ Aborigines in a country district where the Aboriginal was employed as a drover or drover's assistant that, notwithstanding anything contained in r 15, where it was shown to the satisfaction of the Director that any Aboriginal:

- (a) has been and still is employed by the owner, manager or overseer of a station who has a Licence to employ Aborigines in a country district; and
- (b) is employed as a drover or a drover's assistant by that owner, manager or overseer for the purpose of droving stock which are or have been depasturing on the station of which the employer of that Aboriginal is the owner, manager or overseer,

the conditions of r 14 of shall, and the provisions of r 15 shall not, apply in the case of that Aboriginal, if the owner, manager or overseer, as the case may be, who is the employer of that Aboriginal, satisfies the Director that the relatives and dependants of that Aboriginal will be adequately maintained during the period in which he is conducting droving operations (also, Dependants Exception).

72. Regulation 20 of the Aboriginals Ordinance Regulations provided that the Director may, if he thinks fit, direct that, in lieu of any wages or portion of any wages to be paid by the grantee of any Licence in pursuance of the conditions prescribed in any of the provisions of the Aboriginals Ordinance Regulations, the grantee shall pay to any Aboriginal employed by him in any country district such remuneration in kind as the Director specifies (**Wages in Kind Exception**).
73. Regulation 37 of the Aboriginals Ordinance Regulations provided that:
- (a) an Aboriginal may be apprenticed to learn a trade in any town district between the ages of thirteen and eighteen;
 - (b) an apprenticed Aboriginal shall be provided food, clothing, blankets, and reasonable accommodation by the employer;
 - (c) the apprentice shall be paid according to a scale, with a certain amount to be paid direct the apprentice and the balance to be paid to the Director to be held in trust for the apprentice.

D.2.2. *Aboriginals Pastoral Regulations (1949-1957)*

74. The Aboriginals Pastoral Regulations commenced on 30 June 1949 and from the date of commencement, ceased the application of rr 9, 10, 14, 15, 16, 18, 20, 21, 27, 28, 38 and 41 of the Aboriginals Ordinance Regulations to the employment of aboriginals in the pastoral industry.
75. Regulation 3(1) of the Aboriginals Pastoral Regulations defined “the pastoral industry” as including “*work of every description in, on, or in connexion with any station, pastoral lease, grazing licence or other holding used wholly or partly in the raising of cattle or sheep, and includes any work in, or in connexion with, droving, travelling or entraining of cattle or sheep anywhere in the Territory*”.
76. The Aboriginals Pastoral Regulations provided the prescribed form of the licence for the employment of Aboriginals in the pastoral industry (**Pastoral Licence**), being:
- (a) Form 2 in respect of Aboriginals in the pastoral industry generally; and
 - (b) Form 4 in respect of Aboriginals in the pastoral industry employed in droving operations.

77. Forms 2 and 4 of the Aboriginal Pastoral Regulations provided every Pastoral Licence was
- (a) to be granted by a Protector on satisfaction that the applicant was a proper person to be licensed;
 - (b) to remain in force until the thirtieth day of June next following the grant of the Pastoral Licence;
 - (c) subject to cancellation at any time by a Protector if he is satisfied that the holder is or has become an unfit person to be licensed or has failed to comply with the Aborigines Ordinance.
78. Regulations 5 and 7 of the Aboriginal Pastoral Regulations provided that every Pastoral Licence was subject to certain conditions, including:
- (a) a licensee shall pay wages in respect of each Aboriginal employed by him at the appropriate rate specified in the Aboriginal Pastoral Regulations (or higher) as set out at Schedule 1 to this Amended Statement of Claim;
 - (b) where the licensee and a Protector agree that an Aboriginal is not sufficiently competent to be paid the appropriate rate specified in the Aboriginal Pastoral Regulations, the licensee may employ that aboriginal at such lesser rate as is agreed upon between the licensee and the Protector (**Slow Worker Exception**);
 - (c) a licensee shall keep a true record of all Aborigines employed by him, all moneys earned by, or paid to or expended for or on behalf of, those Aborigines and all clothing or other articles supplied to any such Aborigines or their dependants and shall, upon demand by a Protector, produce that record to the Protector for his inspection;
 - (d) a licensee shall pay out or expend such of the moneys earned by Aborigines employed by him in such manner and in such amounts as a Protector duly authorized in writing by the Director in that behalf, by writing under his hand, directs, and shall not, without such a written direction, pay out or expend the whole or any part of any such moneys;
 - (e) a licensee of a licence in accordance with Form 4 (in respect of Aborigines employed in droving operations), shall, at least once a month, pay all moneys earned by Aborigines employed by him to a Protector authorised in writing by

the Director to receive such moneys, to be held by the Director in trust for those Aboriginals;

- (f) shall supply, free of charge, to the Aboriginals employed by him and their wives and children, food, clothing and other articles in accordance with the Aboriginals Pastoral Regulations;
- (g) shall not charge or deduct, in respect of any tobacco or clothing bought by or on behalf of any Aboriginal, an amount greater than the net landed cost, to the licensee of the tobacco or clothing, at the place where the tobacco or clothing is bought; and
- (h) shall, as soon as is reasonably possible, notify the nearest and most accessible medical officer of the condition of an Aboriginal employee, or the wife or child of an Aboriginal employee residing with the employee, who is sick, injured or affected by any disease, and shall, if required to do so by the medical officer, provide immediate free transport of the Aboriginal or his wife or child to such place as the medical officer specifies.

- 79. Regulation 8 of the Aboriginal Pastoral Regulations provided that a person shall not employ in the pastoral industry any Aboriginal under the age of fourteen years.
- 80. Regulation 9 of the Aboriginal Pastoral Regulations provided that the owner of any station, pastoral lease, grazing licence or other holding on which an Aboriginal is employed shall, within twelve calendar months after the date of commencement of the Aboriginal Pastoral Regulations (being 30 June 1950) or such further time as the Director specifies in writing or, where the Aboriginal becomes employed after the commencement of these Regulations, within such time as the Director specifies in writing, provide, in respect of that Aboriginal and his dependants, to the satisfaction of the Director, free of charge, the accommodation, buildings, facilities and articles specified in the Aboriginal Pastoral Regulations.

D.2.3. Aboriginal employees under supervision under the Aboriginals Ordinance (1933-1957)

- 81. The Aboriginals Ordinance provided that:
 - (a) the Director shall be entitled at any time to undertake the care, custody, or control of any Aboriginal or Half-Caste, if, in his opinion it is necessary or desirable in the interests of the Aboriginal or Half-Caste for him to do so, and for

that purpose may enter any premises where Aboriginal or Half-Caste is or is supposed to be, and may take him into his custody (s 6);

- (b) every Licence was:
 - (i) to be granted by a Protector on satisfaction that the applicant was a fit person to be licensed (s 23);
 - (ii) to remain in force until the thirtieth day of June next following the grant of the Licence (s 24(1));
 - (iii) subject to cancellation at any time by a Protector if he is satisfied that the holder is or has become an unfit person to employ Aboriginals or has failed to comply with the Aboriginals Ordinance or with any term of the Licence (s 24(1A));
- (c) every holder or past holder of a Licence to employ Aboriginals to, within three months after the termination of each period of six months of the term for which the Licence is granted, furnish a return in accordance with Form 14 of the Aboriginals Ordinance Regulations of the Aboriginals employed by him (s 25 and r 38 of the Aboriginals Ordinance Regulations);
- (d) that a copy of any Agreement shall be lodged with the Director, who may at any time investigate any complaint as to any alleged breach of the Agreement by the employer or the Aboriginal (s 26(2));
- (e) any employer or Aboriginal who is guilty of a breach of an Agreement shall be guilty of an offence (s 27);
- (f) every employer shall:
 - (i) produce to any Protector or Police Officer, on demand, the Licence or Licence and Agreement, as the case may be, under which any Aboriginal or Half-Caste is employed by him (s 29(1)(a));
 - (ii) allow any Protector or Police Officer, on demand, to have access at all reasonable times, to any Aboriginal or Half-Caste employed by him, and to enter any house, ship, vessel, boat or premise where the Aboriginal or Half-Caste is or is employed, for the purpose of inspection or inquiry (s 29(1)(b));

- (g) any person who entices or persuades an Aboriginal or Half-Caste to leave his lawful employment shall be guilty of an offence against this Ordinance (s 33); and
- (h) any action or other proceedings against any person for the recovery of wages due to an Aboriginal or Half-Caste who is or has been employed by that person, or for the breach of an agreement made with an Aboriginal or Half-Caste, may be instituted and carried on by, or in the name of, any Protector authorised in that behalf by the Administrator (s 57).

82. The Aboriginals Ordinance 1953 amended the Aboriginals Ordinance to remove the words “Half-Caste” where appearing in ss 6, 29, 33 and 57 (subparagraphs 81(a), 81(f), 81(g) and 81(h) above).

D.2.4. Wards and the Employment Ordinance (1959-1971)

- 83. The Employment Ordinance empowered the Director to declare a Ward a “ward-in-training” and make provision for him or her to undertake a course of vocational training at a training centre or with an approved employer (ss 15 to 31).
- 84. Section 32 of the Employment Ordinance provided that a person shall not employ a Ward unless he is the holder of a licence which is in force (also, Licence).
- 85. Section 38 of the Employment Ordinance provided that:
 - (a) a licensee shall not employ a Ward except in accordance with the prescribed conditions of employment and at not less than the prescribed minimum wages (s 38(1));
 - (b) a licensee may employ a slow, aged or infirm ward at a wage less than the prescribed wage, being a wage agreed upon between the licensee and a welfare officer (also, Slow Worker Exception) (s 38(3)(a)).
- 86. The *Wards’ Employment Ordinance 1960* (NT) (**Employment Ordinance 1960**):
 - (a) repealed s 32 of the Employment Ordinance and replaced the requirement to obtain a Licence with provision that a person employing a Ward was required to give notice to the Director of the fact (s 32(1)); and

- (b) amended s 38 of the Employment Ordinance by omitting the word “licensee” and inserting in the stead the word “person”.
87. The prescribed minimum wages for the purposes of s 38 of the Employment Ordinance were gazetted insofar as the Applicant is presently able to say with her state of knowledge:
- (a) on 16 September 1959 as set out at Schedule 2 to this Amended Statement of Claim;
 - (b) on 19 December 1962 as set out at Schedule 3 to this Amended Statement of Claim.
88. Following the Equal Wages decision (*In the matter of the Conciliation and Arbitration Act 1904-1965, and of the Cattle Station (Northern Territory) Award 1951* (C no. 830 of 1965, (1966) 113 C.A.R 651), the *Wards’ Employment Regulations 1966* (NT) (**Employment Regulations 1966**):
- (a) repealed the *Wards’ Employment Regulations 1959-61* (NT);
 - (b) prescribed the conditions of employment of a Ward other than a Ward already employed in accordance with an award or industrial agreement (r 6);
 - (c) provided that an employer shall pay to a Ward employed by him the wages and other moneys payable to the Ward at the time and in the manner specified in an award or industrial agreement applicable in respect of the calling or industry in which the Ward is employed (r 7);
 - (d) provide that any Ward employed shall enjoy the conditions of employment specified in the award or industrial agreement applicable in respect of the calling or industry in which the Ward is employed (rr 8 to 15);
 - (e) provide that an employer shall, without charge, supply to each Ward employed by him food and other articles and to one wife (not being a Ward employed by him) and one child of each Ward employed by him if they reside with the ward on the property of the employer, food, clothing and other articles in accordance with the First and Second Schedules to the *Employment Regulations 1966*, such articles to be new and of good quality (rr 18(1), (3) and (4));

- (f) provide that an employer shall be exempted from the supply of clothing and other articles if the employer pays to the Ward an allowance of:
 - (i) one dollar per week in respect of the wife of the Ward;
 - (ii) fifty cents per week in respect of a child of the ward (r 18(2));
 - (g) provide that where the Director is satisfied that special circumstances exist, he may, by writing under his hand and subject to such conditions as he specifies, exempt an employer from the whole or part of the requirements to supply food, clothing and other articles (r 18(5));
 - (h) provide that an employer shall provide buildings and facilities in for the use of employed Wards in accordance with the Third Schedule to the Employment Regulations 1966 (r 20); and
 - (i) provide that an employer shall provide facilities by which a Ward employed by him may purchase provisions, tobacco, clothing and other articles reasonably needed by the ward or his family, at no more than ten percent markup to cost (r 22).
89. Regulation 26 of the Employment Regulations 1966 provided that where an employer employs Wards in a marine industry, the Director may, by notice in writing:
- (a) exempt the employer from the requirements of rr 18 and 20 of the Employment Regulations 1966 in respect of those Wards; and
 - (b) specify alternative requirements in respect of those Wards.
90. Regulation 28 of the Employment Regulations 1966 provided that where there was no award or industrial agreement providing for the conditions of employment of persons in an industry, the Director may having regard to the existing conditions of employment of persons in that industry, determine the conditions under which a Ward may be employed in that industry, but did not otherwise prescribed a minimum or basic wage in respect of Wards.

D.2.5. Aboriginal employees under supervision under the Employment Ordinance (1959-1971)

91. The Employment Ordinance provided that:

- (a) every Licence was:
 - (i) to be granted by a Welfare Officer on satisfaction that the applicant was a fit person to be licensed (s 33);
 - (ii) to remain in force until the thirtieth day of June next following the grant of the Licence (s 34(1));
 - (iii) subject to cancellation at any time by a Welfare Officer if he is satisfied that the holder is or has become an unfit person to employ Wards or has failed to comply with the Licence or the Employment Ordinance (s 34); and
- (b) a licensee or a person who held a Licence shall, within three months after the end of each period of six months of the term for which the Licence was granted, furnish to the Director a return in the prescribed form of the Wards employed by him (s 36).

92. The Employment Ordinance 1960:

- (a) repealed ss 33, 34 and 36 of the Employment Ordinance;
- (b) provided that the Director may by notice in writing direct a person not to employ any ward or a ward specified in the notice on the ground that the person is not a fit and proper person to employ a Ward, having regard to previous conduct of that person in relation to a Ward (s 33(1)); and
- (c) provided that a person who employs a Ward during any period of six months ending on the thirtieth day of June or the thirty-first day of December in any year shall furnish to the Director a return in the prescribed form of all Wards so employed by him, not later than three months after the end of the period to which it relates (s 35).

E. CONTROL OF WAGES PAID OR OWING TO CONTROLLED NATIVES

E.1. General power in respect of Aboriginal or Ward property

E.1.1. Aboriginals Ordinance (1933-1957)

93. Section 43(1) of the Aboriginals Ordinance provided that the Director “*may undertake the general care, protection, and management of the property of any aboriginal or half-caste and may*”:

- (a) “*take possession of, retain, sell, or dispose of and give a valid title to any of the property, whether real or personal*” (s 43(1)(a));
- (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 any aboriginal or half-caste, or damages for any conversion of or injury to any such property*” (s 43(1)(b)); and
- (c) “*exercise, in the name of any aboriginal or half-caste, any power which the aboriginal or half-caste might exercise for his own benefit*” (s 43(1)(c)),

provided that the powers conferred by s 34 must not be exercised without the consent of the Aboriginal or Half-Caste except so far as may be necessary to provide for the due preservation of such property.

94. Section 43(2) of the Aboriginals Ordinance provided that the Director shall keep proper records and accounts of all moneys and other properties and the proceeds thereof received or dealt with by him under the provisions of s 43.

95. The Aboriginals Ordinance 1953 amended s 43 of the Aboriginals Ordinance to omit the words “or half-caste”.

E.1.2. Welfare Ordinance (1957-1961)

96. Section 25(1) of the Welfare Ordinance provided that the Director “*shall undertake the general care and management of the property of a ward and for that purpose may*”:

- (a) “*take possession of, retain, let, sell, mortgage or dispose of any of that property whether real or personal*”, such transactions involving real property to be

recognised by the Registrar-General for the Territory as being duly signed by the Director as attorney for the Ward concerned (ss 25(1)(a) and 25(2));

- (b) *“in the name of the ward, receive or sue for the recovery of money or any other property due or belonging to or held in trust for the benefit of a ward and sue for damages for the conversion of, or injury to, the property of a ward” (s 25(1)(b));*
and
- (c) *“in the name of, and on behalf of, a ward exercise any power exercisable by a ward and appoint a person to act as attorney or agent for any purpose connected with the property of a ward” (s 25(1)(c)).*

97. The *Welfare Ordinance 1957* (NT) amended s 25 to:

- (a) omit property to which Part VA of the *Welfare Ordinance* applied (relating to paintings or drawings made by Wards);
- (b) provide that:
 - (i) where a Ward transfers or agrees to transfer goods or articles which are in the Ward's actual possession and are of a value not greater than ten pounds, the transfer or agreement to transfer is as effective to pass the property in the goods or articles or to create an obligation as if the transfer or agreement had been made by the Director (s 25(3)); and
 - (ii) except as provided in the preceding sub-paragraph, a transfer, purported transfer or agreement to transfer, made by a Ward with respect to property of the Ward held by the Director as trustee for the Ward, has no effect to transfer the property or create an obligation in relation to the property (s 25(4)).

98. Section 26 of the *Welfare Ordinance* provided that the Director may pay, or cause to be paid, out of the property or the income from the property of a Ward:

- (a) any debt, judgment or costs, for the payment of which he is satisfied the Ward is liable;
- (b) such payments and allowances for the support or maintenance of a dependant of the Ward as the Director sees fit; and

- (c) all costs, charges and expenses incurred, in respect of the Ward, by the Director in exercising any of the powers conferred by Division 3 of the Welfare Ordinance (ss 25 to 29).
99. Section 27 of the Welfare Ordinance provided that the Director shall keep a proper record and account of all the moneys and other property of a Ward which come into his hands or are dealt with by him under Division 3 of the Welfare Ordinance (ss 25 to 29).
100. Section 28 of the Welfare Ordinance provided that, Subject to the provisions of Division 3 of the Welfare Ordinance (ss 25 to 29), the Director shall preserve and hold in trust all property and the income from the property of a Ward for the benefit of the Ward and, when he ceases to be a Ward, the Director shall restore that property and the accumulated income from it to him, or in the event of his death to his executor, administrator or heirs.

E.1.3. Welfare Ordinance – vesting orders (1961-1964)

101. The Welfare Ordinance 1961 amended the Welfare Ordinance:
- (a) to repeal and replace Division 3 of the Welfare Ordinance (ss 25 to 29);
 - (b) to provide that:
 - (i) subject to Division 3 of the Welfare Ordinance, the making of a declaration that a person is a Ward does not affect the right, title or interest in property, whether real or personal, of any person the subject of the declaration and such a person is able to deal with his property in all respects as though no declaration had been made (s 25); and
 - (ii) the Director may apply to a court of summary jurisdiction for a vesting order (**Vesting Order**), which operated to vest in the Director all property of a Ward at the date of the Vesting Order and subsequently acquired by the Ward, save for personal chattels used to maintain the Ward or his family, tools of the trade, and goods in the Ward's actual possession worth less in total than ten pounds (s 26).
102. Following the Welfare Ordinance 1961, s 27 of the Welfare Ordinance provided that while a Vesting Order was in force, a person may buy from or sell to the Ward property

or services in aggregate value in any month over ten pounds without the written consent of the Director or a Welfare Officer.

103. Following the Welfare Ordinance 1961, s 28 of the Welfare Ordinance provided that while a Vesting Order was in force, Director may deal with any of the property of the Ward, in the name of the ward, receive or sue for the recovery of money or any other property due or belonging to, or held in trust for the benefit of the Ward and exercise any power exercisable by the Ward and appoint a person to act as attorney or agent for any purpose connected with the property of the Ward.
104. Following the Welfare Ordinance 1961, s 29 of the Welfare Ordinance provided that while a Vesting Order was in force the Director may pay, or cause to be paid, out of the property or the income from the property:
 - (a) any debt, judgment or costs, for the payment of which he is satisfied the Ward is liable;
 - (b) such payments and allowances for the support or maintenance of a dependant of the Ward as the Director sees fit; and
 - (c) all costs, charges and expenses incurred by the Director in the care, control or management of the property.
105. Following the Welfare Ordinance 1961, s 29A of the Welfare Ordinance provided that the Director shall keep a proper record and account of all the moneys and other property coming into his hand or dealt with by him under and by virtue of the Vesting Order.
106. Following the Welfare Ordinance 1961, s 29B of the Welfare Ordinance provided that, subject to the provisions of Division 3, where property of a Ward is subject to a Vesting Order, the Director shall preserve and hold in trust the property and the income from the property for the benefit of the Ward and, when he ceases to be a Ward or the vesting order expires or is rescinded, the Director shall restore to the Ward or, in the event of the Ward's death, to his executor, administrator or the persons entitled by law to his property, all property held by the Director under or in pursuance of the Vesting Order.
107. Following the Welfare Ordinance 1961, ss 29C(1) to 29(3) of the Welfare Ordinance provided that:

- (a) where a Vesting Order is made it is the duty of the Director to take possession of and get in the property of the Ward;
- (b) the Director is not answerable for or in respect of any property of a Ward which has not actually come into his hands under a Vesting Order; and
- (c) when a Vesting Order expires or is rescinded or the Ward in respect of whose property it is made ceases to be a Ward or dies, the Director shall account to the Ward or to his executor or administrator or the persons entitled by law to his property for all property which has come into the Director's hands under the Vesting Order.

E.2. Specific trust accounts

E.2.1. Saved wages (1933-1957)

108. Section 29A of the Aboriginals Ordinance provided that:

- (a) the Director or any authorised Protector may direct an employer to pay to him such portion as is prescribed of the wages of any Aboriginal employed by or apprenticed to the employer (s 29A(1));
- (b) the Director or any authorised Protector shall pay into a trust account to be opened by him at the nearest branch of the Commonwealth Savings Bank any moneys received by him under s 29A (**Saved Wages Trust Account**) and shall keep an account of the receipt and expenditure thereof (s 29A(2));
- (c) the interest accruing on the moneys paid into the Saved Wages Trust Account shall, once in every twelve months, be withdrawn by the Director or authorised Protector and placed to the credit of the prescribed fund (s 29A(3));
- (d) when the total of the sums received by the Director or any authorised Protector in respect of any individual Aboriginal, after deduction of all moneys lawfully expended on behalf of, or for the benefit of, that Aboriginal, amounts to twenty pounds, the Chief Protector or authorized Protector shall withdraw the amount paid on account of that Aboriginal to the Saved Wages Trust Account and shall pay the amount to the credit of a trust account at the nearest branch of the Commonwealth Savings Bank in the name of that Aboriginal (**Individual Saved**

Wages Trust Account), and shall thereafter pay all amounts received in respect of that Aboriginal to that account (s 29A(4)); and

- (e) moneys paid into a Saved Wages Trust Account or Individual Saved Wages Trust Account in pursuance of s 29A may be expended by the Aboriginal in respect of whom it was paid if the Director or authorised Protector approves of the expenditure, or may be expended by the Director or authorised Protector on behalf of, and for the benefit of, the Aboriginal, but not otherwise (s 29A(6)).

109. Regulation 19 of the Aboriginals Ordinance Regulations required the Director to keep proper records and accounts of all moneys paid into any trust account in accordance with the provisions of s 29A of the Aboriginals Ordinance.

E.2.2. Saved wages (1959-1971)

110. Section 41 of the Employment Ordinance provided:

- (a) the Director may direct an employer to pay to him or to an authorised Welfare Officer such portion as may be determined, from time to time, by the Director of the wages of any Ward employed by the employer (s 41(1));
- (b) the Director or an authorized welfare officer shall pay into a trust account to be opened by him at the nearest branch of the Commonwealth Savings Bank any moneys received by him under s 41 (s 41(3));
- (c) where the Director or an authorized welfare officer opens a trust account in accordance with the provisions of the last preceding sub-section, he shall cause the trust account to be entitled "Wards' Trust Account" (also, Saved Wages Trust Account) (s 41(3A));
- (d) when the total of the sums of money received by the Director or authorised Welfare Officer in respect of a Ward, after deduction of all moneys lawfully expended on behalf of, or for the benefit of, that Ward, exceeds fifty pounds or in any other case in which the Director or an authorised Welfare Officer thinks fit, the Director or authorised Welfare Officer shall pay the amount to the credit of a trust account opened at the nearest branch of the Commonwealth Savings Bank in the name of the Ward (also, Individual Saved Trust Account) and thereafter pay all amounts received in respect of that ward to that account (s 41(4));

- (e) interest payable in respect of moneys paid into the Wards' Trust Account shall be allocated to the benefit of the Wards on whose behalf the moneys were received in such amounts as the Director thinks reasonable (s 41(5)); and
 - (f) moneys paid into a Saved Wages Trust Account of Individual Saved Wages Trust Account shall be deemed to be the property of the Ward and shall be held and dealt with in accordance with Division 3 of Part III of the Welfare Ordinance, save that such moneys may be expended by the Ward in respect of whom they were paid if the Director or an authorised Welfare Officer approves of the expenditure (ss 41(6) and 41(7)).
111. Sections 41(8) and 41(9) of the Employment Ordinance further provided that the Saved Wages Account and any Individual Wages Accounts existing at the time of the repeal of the repeal of the Aboriginals Ordinance were:
- (a) to be dealt with under s 41 of the Employment Ordinance; and
 - (b) where the Aboriginal (as defined under the Aboriginals Ordinance) concerned was not a Ward, to be restored to that person in accordance with s 28 of the Welfare Ordinance.
112. Section 41 of the Employment Ordinance was repealed by the Employment Ordinance 1964.
- E.2.3. Lost wages (1933-1964)*
113. Section 34 Aboriginals Ordinance provided that if an Aboriginal or Half-Caste dies whilst in the service of any person, the person shall forward to the Protector or to the Director any wages due to the deceased, and any money or property in the possession of the deceased at the time of his death.
114. The Aboriginals Ordinance 1953 amended s 34 of the Aboriginals Ordinance to omit the words "or half-caste".
115. Section 42 of the Employment Ordinance provided:
- (a) if a Ward who is employed dies or leaves his employment all Wages due to him up to the time of his death or of leaving his employment shall be paid to the Director (s 42(1)); and

- (b) any moneys so received by the Director shall be dealt with in accordance with s 28 of the Welfare Ordinance (s 42(2)) (paragraph 100 above).

116. Section 42 of the Employment Ordinance was repealed by the Employment Ordinance 1964.

F. THE FIDUCIARY OBLIGATIONS AND TRUSTS

F.1. Work Duties

117. By reason of:

- (a) the undertaking of the Commonwealth to exercise its statutory powers under ss 6, 23, 24(b), 29, 29A and 57 of the Aboriginals Ordinance, rr 14(a), 16 and 20 of the Aboriginal Regulations, rr 5(1)(c) and 5(2) of the Aboriginal Pastoral Regulations, ss 33, 34 and 38(3)(a) of the Employment Ordinance (and following the Employment Ordinance 1960, ss 33 and 38(3)(a)), and rr 26 and 28 of the Employment Regulations 1966 in the interests of Controlled Aboriginals by:
 - (i) the protective purpose of the Aboriginals Ordinance, Welfare Ordinance and Employment Ordinance;
 - (ii) the duties of the Director under s 5 of the Aboriginals Ordinance and s 8 of the Welfare Ordinance;
 - (iii) the guardianship by the Director of all Aboriginals between 1953 and 1957 (paragraph 31 above) and of all Wards between 1957 and 1961 (paragraphs 38 to 39 above);
- (b) the power of the Commonwealth under the Aboriginals Ordinance, Welfare Ordinance and Employment Ordinance to affect (including adversely) the interests of Controlled Aboriginals, including by reason of:
 - (i) the exercise of the powers enumerated in paragraph 117(a), including the making of Dependants Exceptions, Slow Worker Exceptions, Wages in Kind Exceptions and determining wages;
 - (ii) during the currency of the Aboriginals Ordinance, the matters pleaded in paragraphs 53 to 58, 65, 68 to 70, 73, 78, 80 and 81 above;

(iii) during the currency of the Welfare Ordinance, the matters pleaded in paragraphs 62 to 64 above; and/or

(iv) during the currency of the Employment Ordinance, the matters pleaded in paragraphs 83 to 89 above,

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

(c) the vulnerability on the part of Controlled Aboriginals as against the Commonwealth's exercise of its statutory powers, including by reason of:

(i) the exercise of the powers enumerated in paragraph 117(a), including the making of Dependants Exceptions, Slow Worker Exceptions and Wages in Kind Exceptions, and determining wages;

(ii) during the currency of the Aboriginals Ordinance, the matters pleaded in paragraphs 53 to 58, 65, 68 to 70, 73, 78, 80 and 81 above;

(iii) during the currency of the Welfare Ordinance, the matters pleaded in paragraphs 62 to 64 above; and/or

(iv) during the currency of the Employment Ordinance, the matters pleaded in paragraphs 83 to 89 above,

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

(v) 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

(d) the reliance by Controlled Aboriginals upon the Commonwealth's exercise of its statutory powers for or on behalf of them or in their interests,

during the Claim Period, the Commonwealth owed fiduciary and/or equitable obligations to Controlled Aboriginals.

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

- (a) the undertaking of the Director, Superintendents, Protectors and Welfare Officers to exercise their statutory powers under the Aboriginals Ordinance, Welfare Ordinance and/or Employment Ordinance for or on behalf of or in the interests of Controlled Aboriginals or Wards by (as applicable):
 - (i) the protective purpose of the Aboriginals Ordinance, Welfare Ordinance and Employment Ordinance;
 - (ii) the duties of the Director under s 5 of the Aboriginals Ordinance and s 8 of the Welfare Ordinance;
 - (iii) the guardianship by the Director of all Aboriginals 1953 to 1957 (paragraph 31 above) and of all Wards between 1957 and 1961 (paragraphs 38 to 39 above);
- (b) the power of the Director, Superintendents, Protectors and Welfare Officers to exercise their statutory powers to affect (including adversely) the interests of Controlled Aboriginals, including by reason of:
 - (i) the exercise of the powers enumerated in paragraph 117(a), including the making of Dependants Exceptions, Slow Worker Exceptions, Wages in Kind Exceptions and determining wages;
 - (ii) during the currency of the Aboriginals Ordinance, the matters pleaded in paragraphs 53 to 58, 65, 68 to 70, 73, 78, 80 and 81 above;
 - (iii) during the currency of the Welfare Ordinance, the matters pleaded in paragraphs 62 to 64 above; and/or
 - (iv) during the currency of the Employment Ordinance, the matters pleaded in paragraphs 83 to 89 above,

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

(c) the vulnerability on the part of Controlled Aboriginals as against the exercise of its statutory powers by the Director, Superintendents, Protectors and Welfare Officers, including by reason of:

- (i) the exercise of the powers enumerated in paragraph 117(a), including the making of Dependants Exceptions, Slow Worker Exceptions, Wages in Kind Exceptions and determining wages;
- (ii) during the currency of the Aboriginals Ordinance, the matters pleaded in paragraphs 53 to 58, 65, 68 to 70, 73, 78, 80 and 81 above;
- (iii) during the currency of the Welfare Ordinance, the matters pleaded in paragraphs 62 to 64 above; and/or
- (iv) during the currency of the Employment Ordinance, the matters pleaded in paragraphs 83 to 89 above,

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

- (v) 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

(d) the reliance by Controlled Aboriginals upon the exercise of statutory powers for or on behalf of them or in their interests by the Director, Superintendents, Protectors and Welfare Officers,

during the currency of the Aboriginals Ordinance, the Director, Protectors and Superintendents owed fiduciary and/or equitable obligations to Controlled Aboriginals and during the currency of the Welfare Ordinance and Employment Ordinance, the

Director, Welfare Officers and Superintendents owed fiduciary and/or equitable obligations to Controlled Aboriginals.

119. The fiduciary and/or equitable obligations owed by the Commonwealth, the Director, Protectors, Superintendents and/or Welfare Officers to Controlled Aboriginals included:
- (a) exercising due care and skill in protecting the interests of Controlled Aboriginals in connection with their work, including by exercising their powers (as applicable) under:
 - (i) ss 6, 23, 24(b), 29, 29A and 57 of the Aboriginals Ordinance;
 - (ii) rr 14(a), 16 and 20 of the Aboriginal Regulations;
 - (iii) rr 5(1)(c) and 5(2) of the Aboriginal Pastoral Regulations;
 - (iv) ss 33, 34 and 38(3)(a) of the Employment Ordinance (and following the Employment Ordinance 1960, ss 33 and 38(3)(a)); and
 - (v) rr 26 and 28 of the Employment Regulations 1966;
 - (b) accounting for any benefit received in conflict of interest and the interests of Controlled Aboriginals or from or by the use of its or their fiduciary position,
- (together, **Work Duties**).

F.2. Lost Wages Trusts

120. From time to time in the Claim Period to the commencement of the Employment Ordinance 1964, wages due to some Controlled Aboriginals (**Lost Wages Aboriginal**) were required to be paid and/or were paid to the Director under s 34 of the Aboriginals Ordinance or s 42 of the Employment Ordinance (such wages being (**Lost Wages**).

Particulars

- A. *The Applicant was not a Lost Wages Native.*
- B. *The identity of those Controlled Aboriginals who are Lost Wages Natives is unknown to the Applicant, though infers they do exist because the Trust Fund had a positive balance from time to time as identified in at least the following Reports on the Administration of the Northern Territory:*

- i) 1934, p 11;
- ii) 1935, pp 12-13;
- iii) 1936, p 13;
- iv) 1937, p 26;
- v) 1938, p 23;
- vi) 1939, p 24.

C. *The existence of Aboriginal Trust Accounts was further referred to in the Annual Report 1958-59 Northern Territory Administration Welfare Branch, p 16.*

121. By reason of:

- (a) the protective purpose of the Aboriginals Ordinance, Welfare Ordinance and Employment Ordinance;
- (b) the duties of the Director under s 5 of the Aboriginals Ordinance and s 8 of the Welfare Ordinance;
- (c) the guardianship by the Director of all Aboriginals 1953 to 1957 (paragraph 31 above) and of all Wards between 1957 and 1961 (paragraphs 38 to 39 above);
- (d) during the currency of the Welfare Ordinance and prior to the Welfare Ordinance 1961, the express obligation on the Director to hold the Lost Wages on trust for the Ward concerned under s 42(2) of the Employment Ordinance and s 28 of the Welfare Ordinance;
- (e) the accounting obligations on the Director under s 42(2) of the Aboriginals Ordinance and s 27 of the Welfare Ordinance (and s 29A of the Welfare Ordinance as amended by the Welfare Ordinance 1961);
- (f) the particular circumstances and vulnerability of Lost Wages Aboriginals during the Claim Period, including by reason of:
 - (i) during the currency of the Aboriginals Ordinance, the matters pleaded in paragraphs 53 to 58, 65, 68 to 70, 73, 78, 80 and 81 above;

(ii) during the currency of the Welfare Ordinance, the matters pleaded in paragraphs 62 to 64 above; and/or

(iii) during the currency of the Employment Ordinance, the matters pleaded in paragraphs 83 to 89 above,

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

(iv) 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

(g) the manifest statutory intendment that Lost Wages be specifically and exclusively held by the Director on behalf of the Lost Wages Aboriginal 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 Aboriginal,

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

122. 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 43 of the Aborigines Ordinance; or

(b) s 28 of the Welfare Ordinance prior to the Welfare Ordinance 1961, and subsequently in accordance with the terms of any Vesting Order.

123. 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 of each Lost Wages Aboriginal took place in accordance with:
 - (A) a Licence or Licence and Agreement that complied with the Aboriginals Ordinance and the regulations thereunder;
 - (B) a Licence that complied with the Welfare Ordinance and the regulations thereunder until the Employment Ordinance 1960;
 - (C) the terms of r 37 of the Aboriginals Ordinance Regulations or ss 25-31 of the Welfare Ordinance with respect to a Lost Wages Aboriginal who was an apprentice or Ward-in-Training;
 - (ii) ensuring that all Lost Wages required to be paid by an employer into the Lost Wages Trusts in respect of a Lost Wages Aboriginal was paid in accordance with the terms of employment identified in the preceding paragraph;
 - (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 s 41(1) of the Aboriginals Ordinance, s 25(1) of the Welfare Ordinance, or any Vesting Order;
 - (e) not to delegate its duties and powers under the Lost Wages Trusts;
 - (f) properly invest the Lost Wages held in the Lost Wages Trusts;
 - (g) keep proper accounts and records of the administration of the Lost Wages Trusts;

- (h) 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
- (i) not deal with the Lost Wages Trusts so as to benefit from its position as trustee.

F.3. Management Duties and Trusts

124. From the commencement of the Claim Period and until the repeal of the Welfare Ordinance, the Director was capable of exercising his power under:

- (a) s 43 of the Aboriginals Ordinance;
- (b) s 28 of the Welfare Ordinance prior to the Welfare Ordinance 1961; or
- (c) in accordance with the terms of any Vesting Order.

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

125. By reason of:

- (a) the existence of a recognised fiduciary relationship as between bailee and bailor or agent and principal between the Director acting as servant or agent of the Commonwealth and any Managed Aboriginal;
- (b) the undertaking of the Commonwealth to exercise its statutory powers under s 43 of the Aboriginals Ordinance, s 28 of the Welfare Ordinance prior to the Welfare Ordinance 1961, and thereafter under any Vesting Order, for or on behalf of or in the interests of Managed Aboriginals by:
 - (i) the protective purpose of the Aboriginals Ordinance and Welfare Ordinance;
 - (ii) the duties of the Director under s 5 of the Aboriginals Ordinance and s 8 of the Welfare Ordinance;
 - (iii) the guardianship by the Director of all Aboriginals 1953 to 1957 (paragraph 31 above) and of all Wards between 1957 and 1961 (paragraphs 38 to 39 above);

- (iv) during the currency of the Welfare Ordinance and prior to the Welfare Ordinance 1961, the express obligation on the Director to hold the Managed Wages on trust for the Ward concerned under s 28 of the Welfare Ordinance;
 - (v) the accounting obligations on the Director under s 42(2) of the Aboriginals Ordinance and s 27 of the Welfare Ordinance (and s 29A of the Welfare Ordinance as amended by the Welfare Ordinance 1961);
- (c) the power of the Commonwealth under the Aboriginals Ordinance, Welfare Ordinance and Employment Ordinance to affect (including adversely) the interests of Controlled Aboriginals, including by reason of:
- (i) the exercise of the powers enumerated in paragraph 117(a), including the making of Dependents Exceptions, Slow Worker Exceptions, Wages in Kind Exceptions and determining wages;
 - (ii) during the currency of the Aboriginals Ordinance, the matters pleaded in paragraphs 53 to 58, 65, 68 to 70, 73, 78, 80 and 81 above;
 - (iii) during the currency of the Welfare Ordinance, the matters pleaded in paragraphs 62 to 64 above; and/or
 - (iv) during the currency of the Employment Ordinance, the matters pleaded in paragraphs 83 to 89 above,
- and the controls they and their family members thereby lived under;
- (d) the vulnerability on the part of Controlled Aboriginals as against the Commonwealth's exercise of its statutory powers, including by reason of:
- (i) the exercise of the powers enumerated in paragraph 117(a), including the making of Dependents Exceptions, Slow Worker Exceptions, Wages in Kind Exceptions and determining wages;
 - (ii) during the currency of the Aboriginals Ordinance, the matters pleaded in paragraphs 53 to 58, 65, 68 to 70, 73, 78, 80 and 81 above;
 - (iii) during the currency of the Welfare Ordinance, the matters pleaded in paragraphs 62 to 64 above; and/or

- (iv) during the currency of the Employment Ordinance, the matters pleaded in paragraphs 83 to 89 above,

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

- (v) 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

- (e) the reliance by Controlled Aboriginals upon the Commonwealth's exercise of its statutory powers for or on behalf of them or in their interests,

during the Claim Period, the Commonwealth owed fiduciary and/or equitable obligations to Managed Aboriginals.

126. 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 Director acting as servant or agent of the Commonwealth and Managed Aboriginals;

- (b) the undertaking of the Director to exercise its statutory powers under s 43 of the Aboriginals Ordinance, s 28 of the Welfare Ordinance prior to the Welfare Ordinance 1961, and thereafter under any Vesting Order, for or on behalf of or in the interests of Managed Aboriginals by:

- (i) the protective purpose of the Aboriginals Ordinance and Welfare Ordinance;

- (ii) the duties of the Director under s 5 of the Aboriginals Ordinance and s 8 of the Welfare Ordinance;

- (iii) the guardianship by the Director of all Aboriginals 1953 to 1957 (paragraph 31 above) and of all Wards between 1957 and 1961 (paragraphs 38 to 39 above);
 - (iv) during the currency of the Welfare Ordinance and prior to the Welfare Ordinance 1961, the express obligation on the Director to hold the Managed Wages on trust for the Ward concerned under s 28 of the Welfare Ordinance;
 - (v) the accounting obligations on the Director under s 42(2) of the Aboriginals Ordinance and s 27 of the Welfare Ordinance (and s 29A of the Welfare Ordinance as amended by the Welfare Ordinance 1961);
- (c) the power of the Director under the Aboriginals Ordinance, Welfare Ordinance and Employment Ordinance to affect (including adversely) the interests of Controlled Aboriginals, including by reason of:
- (i) the exercise of the powers enumerated in paragraph 117(a), including the making of Dependants Exceptions, Slow Worker Exceptions, Wages in Kind Exceptions and determining wages;
 - (ii) during the currency of the Aboriginals Ordinance, the matters pleaded in paragraphs 53 to 58, 65, 68 to 70, 73, 78, 80 and 81 above;
 - (iii) during the currency of the Welfare Ordinance, the matters pleaded in paragraphs 62 to 64 above; and/or
 - (iv) during the currency of the Employment Ordinance, the matters pleaded in paragraphs 83 to 89 above,
- and the controls they and their family members thereby lived under;
- (d) the vulnerability on the part of Managed Aboriginals as against the Director's exercise of the powers, including by reason of:
- (i) the making of Dependants Exceptions, Wages in Kind Exceptions and determining wages;
 - (ii) during the currency of the Aboriginals Ordinance, the matters pleaded in paragraphs 54 to 58, 65, 69, to 73, 78, 80 and 81 above;

(iii) during the currency of the Welfare Ordinance, the matters pleaded in paragraphs 62 to 64 above; and/or

(iv) during the currency of the Employment Ordinance, the matters pleaded in paragraphs 83 to 89 above,

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

(v) 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

(e) the reliance by Controlled Aboriginals upon the Commonwealth's exercise of its statutory powers for or on behalf of them or in their interests,

during the currency of the Aboriginals Ordinance and Welfare Ordinance, the Director owed fiduciary and/or equitable obligations to Managed Aboriginals.

127. The fiduciary and/or equitable obligations owed by the Commonwealth and/or the Director to Managed Aboriginals included:

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

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

(i) s 43 of the Aboriginals Ordinance;

(ii) s 28 of the Welfare Ordinance prior to the Welfare Ordinance 1961;

(iii) any Vesting Order; and

- (c) accounting for any benefit received in conflict of interest and the interests of Managed Aboriginal or from or by the use of fiduciary position,

(together, **Management Duties**).

128. From time to time in the Claim Period, the Director managed the property of Managed Aboriginals under s 43 of the Aboriginals Ordinance or ss 25 to 28 of the Welfare Ordinance.

129. By reason of:

- (a) the existence of the fiduciary relation pleaded at paragraph 125 and/or paragraph 125(c) and the Management Duties;
- (b) the protective purpose of the Aboriginals Ordinance and Welfare Ordinance;
- (c) the duties of the Director under s 5 of the Aboriginals Ordinance and s 8 of the Welfare Ordinance;
- (d) the guardianship by the Director of all Aboriginals 1953 to 1957 (paragraph 31 above) and of all Wards between 1957 and 1961 (paragraphs 38 to 39 above);
- (e) during the currency of the Welfare Ordinance and prior to the Welfare Ordinance 1961, the express obligation on the Director to hold the Managed Property on trust for the Ward concerned s 28 of the Welfare Ordinance;
- (f) the accounting obligations on the Director under s 42(2) of the Aboriginals Ordinance and s 27 of the Welfare Ordinance (and s 29A of the Welfare Ordinance as amended by the Welfare Ordinance 1961);
- (g) the particular circumstances and vulnerability of Managed Aboriginals during the Claim Period, including by reason of:
 - (i) during the currency of the Aboriginals Ordinance, the matters pleaded in paragraphs 53 to 58, 65, 68 to 70, 73, 78, 80 and 81 above;
 - (ii) during the currency of the Welfare Ordinance, the matters pleaded in paragraphs 62 to 64 above; and/or
 - (iii) during the currency of the Employment Ordinance, the matters pleaded in paragraphs 83 to 89 above,

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

(iv) 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

(h) the manifest statutory intendment that Managed Property be specifically and exclusively held by the Director on behalf of the Managed Aboriginal so entitled; 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 Aboriginal,

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

130. 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 Aboriginal was not properly liable; and

(b) would pay and transfer all or part of the trust property and its income to a Managed Aboriginal upon termination.

131. The trustee of each of the Management Trusts owed a duty to Managed Aboriginals 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

132. By reason of the matters pleaded in paragraphs 30, 31, 38, 39 above, the Director was the legal guardian of:

- (a) every Aboriginal and Half-Caste under the age of eighteen years except while the child is a State child between the start of the Claim Period and the commencement of the Aboriginals Ordinance 1953;
- (b) every Aboriginal between the commencement of the Aboriginals Ordinance 1953 and the repeal of the Aboriginals Ordinance; and
- (c) every Ward between the commencement of the Welfare Ordinance and the commencement of the Welfare Ordinance 1961,

(together, **Aboriginal Wards**).

133. By reason of:

- (a) the existence of a recognised fiduciary relationship as between guardian and ward between the Director acting as servant or agent of the Commonwealth and Aboriginal Wards;
- (b) the protective purpose of the Aboriginals Ordinance, Welfare Ordinance and Employment Ordinance;

- (c) the duties of the Director under s 5 of the Aboriginals Ordinance and s 8 of the Welfare Ordinance;
- (d) the power of the Commonwealth under the Aboriginals Ordinance and Welfare Ordinance to affect (including adversely) the interests of Aboriginal Wards, including by reason of:
 - (i) the exercise of the powers enumerated in paragraph 117(a), including the making of Dependents Exceptions, Slow Worker Exceptions, Wages in Kind Exceptions and determining wages;
 - (ii) during the currency of the Aboriginals Ordinance, the matters pleaded in paragraphs 53 to 58, 65, 68 to 70, 73, 78, 80 and 81 above;
 - (iii) during the currency of the Welfare Ordinance, the matters pleaded in paragraphs 62 to 64 above; and/or
 - (iv) during the currency of the Employment Ordinance, the matters pleaded in paragraphs 83 to 89 above,

and the controls they and their family members thereby lived under;
- (e) the vulnerability on the part of Aboriginal Wards as against the Commonwealth's exercise of its statutory powers, including by reason of:
 - (i) the exercise of the powers enumerated in paragraph 117(a), including the making of Dependents Exceptions, Slow Worker Exceptions and Wages in Kind Exceptions, and determining wages;
 - (ii) during the currency of the Aboriginals Ordinance, the matters pleaded in paragraphs 53 to 58, 65, 68 to 70, 73, 78, 80 and 81 above;
 - (iii) during the currency of the Welfare Ordinance, the matters pleaded in paragraphs 62 to 64 above; and/or
 - (iv) during the currency of the Employment Ordinance, the matters pleaded in paragraphs 83 to 89 above,

and the controls they and their family members thereby lived under;
- (v) 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) the reliance by Aboriginal Wards upon the Commonwealth's exercise of its statutory powers for or on behalf of them or in their interests,

from the start of the Claim Period to the commencement of the Welfare Ordinance 1961, the Commonwealth owed fiduciary and/or equitable obligations to Aboriginal Wards.

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

- (a) the existence of a recognised fiduciary relationship as between guardian and ward between the Director and Aboriginal Wards;
- (b) the existence of a recognised fiduciary relationship as between bailee and bailor or agent and principal between the Director acting as servant or agent of the Commonwealth and Managed Aboriginals;
- (c) the undertaking of the Director to exercise its statutory powers under s 43 of the Aboriginals Ordinance, s 28 of the Welfare Ordinance prior to the Welfare Ordinance 1961, and thereafter under any Vesting Order, for or on behalf of or in the interests of Managed Aboriginals by:
 - (i) the protective purpose of the Aboriginals Ordinance and Welfare Ordinance;
 - (ii) the duties of the Director under s 5 of the Aboriginals Ordinance and s 8 of the Welfare Ordinance;

- (iii) the guardianship by the Director of all Aboriginals 1953 to 1957 (paragraph 31 above) and of all Wards between 1957 and 1961 (paragraphs 38 to 39 above);
 - (iv) during the currency of the Welfare Ordinance and prior to the Welfare Ordinance 1961, the express obligation on the Director to hold the Managed Wages on trust for the Ward concerned under s 28 of the Welfare Ordinance;
 - (v) the accounting obligations on the Director under s 42(2) of the Aboriginals Ordinance and s 27 of the Welfare Ordinance (and s 29A of the Welfare Ordinance as amended by the Welfare Ordinance 1961);
- (d) the power of the Director under the Aboriginals Ordinance, Welfare Ordinance and Employment Ordinance to affect (including adversely) the interests of Controlled Aboriginals, including by reason of:
- (i) the exercise of the powers enumerated in paragraph 117(a), including the making of Dependants Exceptions, Slow Worker Exceptions, Wages in Kind Exceptions and determining wages;
 - (ii) during the currency of the Aboriginals Ordinance, the matters pleaded in paragraphs 53 to 58, 65, 68 to 70, 73, 78, 80 and 81 above;
 - (iii) during the currency of the Welfare Ordinance, the matters pleaded in paragraphs 62 to 64 above; and/or
 - (iv) during the currency of the Employment Ordinance, the matters pleaded in paragraphs 83 to 89 above,
- and the controls they and their family members thereby lived under;
- (e) the vulnerability on the part of Managed Aboriginals as against the Director's exercise of the powers, including by reason of :
- (i) the making of Dependants Exceptions, Wages in Kind Exceptions and determining wages;
 - (ii) during the currency of the Aboriginals Ordinance, the matters pleaded in paragraphs 54 to 58, 65, 69, to 73, 78, 80 and 81 above;

(iii) during the currency of the Welfare Ordinance, the matters pleaded in paragraphs 62 to 64 above; and/or

(iv) during the currency of the Employment Ordinance, the matters pleaded in paragraphs 83 to 89 above,

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

(v) 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) the reliance by Aboriginal Wards upon the Commonwealth's exercise of its statutory powers for or on behalf of them or in their interests,

from the start of the Claim Period to the commencement of the Welfare Ordinance 1961, the Director owed fiduciary and/or equitable obligations to Aboriginal Wards during the period of their wardship.

135. The fiduciary and/or equitable obligations owed by the Commonwealth and/or the Director to Aboriginal Wards included one or more of the following:

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

(b) exercising due care and skill in protecting the interests of Aboriginal Wards generally, including by exercising its or their statutory powers under the Aboriginal Ordinance, Welfare Ordinance and Employment Ordinance; and

(c) accounting for any benefit received in conflict of interest and the interests of Aboriginal Wards or from or by the use of fiduciary position,

(together, **Ward Duties**).

136. From time to time in the Claim Period, the Director received wages or part of the wages, or other property of Controlled Aboriginals who were Aboriginal Wards.

137. By reason of:

- (a) the existence of the fiduciary relationship pleaded at paragraph 133 and the Ward Duties;
- (b) the protective purpose of the Aboriginals Ordinance and Welfare Ordinance;
- (c) the duties of the Director under s 5 of the Aboriginals Ordinance and s 8 of the Welfare Ordinance;
- (d) the accounting obligations on the Director under s 42(2) of the Aboriginals Ordinance and s 27 of the Welfare Ordinance (and s 29A of the Welfare Ordinance as amended by the Welfare Ordinance 1961);
- (e) the particular circumstances and vulnerability of Aboriginal Wards during the Claim Period, including by reason of:
 - (i) during the currency of the Aboriginals Ordinance, the matters pleaded in paragraphs 53 to 58, 65, 68 to 70, 73, 78, 80 and 81 above;
 - (ii) during the currency of the Welfare Ordinance, the matters pleaded in paragraphs 62 to 64 above; and/or
 - (iii) during the currency of the Employment Ordinance, the matters pleaded in paragraphs 83 to 89 above,

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

- (iv) 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) the manifest statutory intendment that property of Aboriginal Wards be specifically and exclusively held by the Director on behalf of the Aboriginal Wards so entitled; and/or

(g) the absence of a governmental interest or function involved in the obligation to hold the property of Aboriginal Wards until distribution to the Aboriginal Wards,

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

138. 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 Aboriginal Ward was not properly liable; and
- (b) would pay and transfer the trust property and its income held in a Ward Trust to an Aboriginal Ward upon majority.

139. 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

140. The wages or part of the wages of some Controlled Aboriginals (**Saved Wages Aboriginals**) were required to be and were in fact paid to the Director:

- (a) pursuant to s 29A of the Aboriginals Ordinance, by employers :
 - (i) of Aboriginals in town districts (paragraph 68 above);
 - (ii) of Aboriginals in country districts (paragraph 69 above);
 - (iii) of Aboriginals in country districts employed as drovers, if directed (paragraph 70 above);
 - (iv) of Aboriginals in the pastoral industry from 1949 (paragraph 78 above);
 - (v) Aboriginal apprentices (paragraph 73);
 - (vi) otherwise subject to a direction under s 29A(1),
- (b) pursuant to s 41 of the Employment Ordinance prior to the commencement of the Employment Ordinance 1966, by employers subject to a direction under s 41(1),

to be held on trust for that Aboriginal or Ward in a Saved Wages Trust Account or Individual Saved Wages Trust Account, as the case may be (**Saved Wages**).

Particulars

- A. *The Applicant was not to her knowledge a Saved Wages Aboriginal.*
- B. *The identity of those Controlled Aboriginals who are Saved Wages Aboriginals is unknown to the Applicant with her present state of knowledge, though infers they do exist because the Trust Fund had a positive balance from time to time as identified in the following Reports on the Administration of the Northern Territory:*
 - i) 1934, p 11;
 - ii) 1935, pp 12-13;

- iii) 1936, p 13;
- iv) 1937, p 26;
- v) 1938, p 23; and
- vi) 1939, p 24.

C. *The existence of Aboriginal Trust Accounts was further referred to in the Annual Report 1958-59 Northern Territory Administration Welfare Branch, p 16.*

141. By reason of:

- (a) the express reference to holding the Saved Wages on trust in s 29A of the Aboriginal Ordinance, s 41 of the Employment Ordinance and s 28 of the Welfare Ordinance (via s 41 of the Employment Ordinance);
- (b) the accounting obligations attached to the Saved Wages Trust Account or Individual Saved Wages Trust Account by r 19 of the Aboriginal Ordinance Regulations and s 27 of the Welfare Ordinance (via s 41 of the Employment Ordinance);
- (c) the protective purpose of the Aboriginals Ordinance and Welfare Ordinance;
- (d) the duties of the Director under s 5 of the Aboriginals Ordinance and s 8 of the Welfare Ordinance;
- (e) the particular circumstances and vulnerability of Aboriginal Wards during the Claim Period, including by reason of:
 - (i) during the currency of the Aboriginals Ordinance, the matters pleaded in paragraphs 53 to 58, 65, 68 to 70, 73, 78, 80 and 81 above;
 - (ii) during the currency of the Welfare Ordinance, the matters pleaded in paragraphs 62 to 64 above; and/or
 - (iii) during the currency of the Employment Ordinance, the matters pleaded in paragraphs 83 to 89 above,

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

 - (iv) 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;
- (f) the manifest statutory intendment that wages or part of wages earned by Saved Wages Aboriginal be required to be paid by employers on behalf of each respective Saved Wages Aboriginal to the Director be specifically and exclusively held by the Director on behalf of the Saved Wages Aboriginal 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 Aboriginal,

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

142. 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 Aboriginal 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 Aboriginal upon termination.

143. 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 of each Saved Wages Aboriginal took place in accordance with a Permit or Permit and Agreement that complied with the Aboriginal Ordinance or with any direction under s 41 of the Employment Ordinance;
 - (ii) ensuring that all Saved Wages required to be paid by an employer into the Saved Wages Trusts in respect of a Saved Wages Aboriginal was paid in accordance with each Permit or Permit and Agreement or direction;
 - (iii) taking appropriate recovery action against any person failing to pay the Saved Wages into the Saved Wages Trusts as required by exercising any its statutory powers to, in the name of the Director or in the name of the Controlled Aboriginal;
- (e) not to delegate its duties and powers under the Saved Wages Trusts;
- (f) properly invest the Saved Wages held in the Saved Wages Trusts;
- (g) keep proper accounts and records of the administration of the Saved Wages Trusts;
- (h) 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
- (i) not deal with the Saved Wages Trusts so as to benefit from its position as trustee.

G. WORK FOR NO OR INADEQUATE WAGES

144. The Applicant and other Controlled Aboriginals worked in the Northern Territory for some or all of the Claim Period.

Particulars

- A. *The Applicant worked at the following stations between about 1942 and about 1954 as a domestic and general worker: Lake Nash Station, Georgina Downs Station and Argardagada Station. The Applicant was paid a small amount of wages at Georgina Downs Station but not at all (whether by wages, pocket money, or station store credit) elsewhere. The Applicant is presently unable to provide better particulars of her employment history or the wages received by*

her. Further particulars of the Applicant's employment history may be provided following discovery.

- B. Particulars of the work history of those Controlled Aboriginals who assert they worked in the Northern Territory 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.*

145. During the Claim Period, some Controlled Aboriginals (being Aboriginal Wards and Aboriginal Inmates domiciled at Aboriginal Institutions or government stations or settlements) performed work:

- (a) in compliance with directions or requirements by the Superintendent at the Aboriginal Institution or the officer with charge of the government station or settlement at which they were domiciled;
- (b) for no or inadequate wages.

Particulars

- A. Reports on the Administration of the Northern Territory:*

- i) 1934, pp 12 – 14;*
- ii) 1935, pp 13 – 14;*
- iii) 1936, pp 13 – 15;*
- iv) 1937, pp 26 and 28;*
- v) 1938, pp 23 and 25;*
- vi) 1939, p 26; and*
- vii) 1940, p 19.*

- B. The Department of Social Services classified cattle stations on which Aboriginal pensioners were resident as institutions, and pensioners' funds were paid into the general account of the station. In some cases, the Aboriginal pensioners continued to work and were paid out of their pension (Stevens, *Aborigines in the Northern Territory Cattle Industry* (1991), pp 157-158).*

C. *Insofar as the Applicant is able to say with her present state of knowledge, at various times during the Claim Period the areas operated as Aboriginal Institutions or government stations or settlements included at least:*

- i) *Retta Dixon Home.*
- ii) *Croker Island.*
- iii) *St Mary's Hostel.*
- iv) *Garden Point.*
- v) *Kahlin Compound, Half-caste Home (Darwin).*
- vi) *Half-caste Home, Darwin.*
- vii) *Half-caste Institution, Alice Springs.*
- viii) *Bagot Settlement.*
- ix) *Snake Bay Settlement.*
- x) *Hooker Creek Settlement.*
- xi) *Yuendumu Settlement.*
- xii) *Haasts Bluff Settlement.*
- xiii) *Jay Creek Settlement.*
- xiv) *Bungalow Settlement.*
- xv) *Phillip Creek Settlement.*
- xvi) *Delissaville Settlement.*
- xvii) *Beswick Cattle Station and Beswick Creek Settlement.*

D. *The Applicant did not to her knowledge perform work at any Aboriginal Institution or government station or settlement. The Applicant does not know the identity of individual Controlled Aboriginals who were Aboriginal Wards and Aboriginal Inmates, repeats the particulars to paragraph 144, and says that particulars will be provided prior to the trial of their individual claim, following the trial of common issues.*

146. During the Claim Period, the Applicant and some Controlled Aboriginals performed work:
- (a) at stations or other private workplaces for the owner or operator or his or her employees or agents (**Station & Domestic Aboriginals**);
 - (b) for no or inadequate wages, either because:
 - (i) to the extent they worked under a Licence, Licence and Agreement, or other contract of employment, that arrangement 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), including because of the making of a Dependants Exception, Slow Worker Exception or Wages in Kind Exception;
 - (ii) to the extent they worked without a Licence, Licence and Agreement, or other 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. *The Aboriginal Trust Account Investigation conducted by V. J. White (Secretary, Native Affairs Branch) on 12 June 1940 noted that while Indigenous people in Northern Territory town districts had monies paid into trust funds, 'very few accounts operate in respect of aboriginals employed in pastoral districts' due to the exercise of wage exemptions.*
- B. *A survey by the anthropologists RM and CH Berndt in 1944 to 1946 reported that the Aboriginal employees on pastoral stations surveyed "owned neither the huts in which they lived nor the land on which these were built, they had no rights of tenure, and in some cases have been sold or transferred with the property. Their security depended on the new land-holders – a precarious security at times and in places where there were few, if any, checks or curbs on the treatment accorded these people who had, for a long period, no effective rights at law" (R M and C H Berndt, End of an Era: Aboriginal Labour in the Northern Territory (1987), pp 272-273).*

- C. *A survey conducted by F Stevens in or around 1965 established the widespread use and exploitation of the "booking down" system, by which Aboriginal employee wages were credited to the store account, and purchases from the store either unscrupulously marked up or overcharged (Stevens, Aborigines in the Northern Territory Cattle Industry (1991), pp 155-156 and 180-181).*
- D. *In respect of the individual claims of the Applicant, the Applicant repeats the particulars to paragraph 144, and is unavailable to provide further particulars of the extent to which she was paid no or inadequate wages.*
- E. *The Applicant does not know the identity of individual Controlled Aboriginals who were Station & Domestic Aboriginals, repeats the particulars to paragraph 144, 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

147. In breach of the Work Duties, the Commonwealth failed to exercise due care and skill in protecting the interests of the Applicant and Controlled Aboriginals in connection with their work during the Claim Period by failing to:
- (a) exercise its statutory powers to, in the name of the Director or in the name of the Controlled Aboriginal, to:
 - (i) require payment to be made to Aboriginal Inmates in respect of work done by them on Aboriginal Institutions;
 - (ii) ensure that any employment arrangements with Station & Domestic Aboriginals 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 Controlled Aboriginals, by permitting, authorising or facilitating Controlled Aboriginals working for no or inadequate wages;

- (i) by Aboriginal Inmates at Aboriginal Institutions, as pleaded at paragraph 145 above (and/or in the circumstances pleaded in paragraphs 159 to 169 below); and/or
 - (ii) by Station & Domestic Aboriginals, as pleaded at paragraph 146 above (and/or in the circumstances pleaded in paragraphs 170 to 174 below);
- (c) exercise its statutory powers to, in the name of the Director or in the name of the Controlled Aboriginal, pursue any claim arising from work for no or inadequate wages:
- (i) by Aboriginal Inmates at Aboriginal Institutions, as pleaded at paragraphs 145 above and/or 159 to 169 below; and/or
 - (ii) by Station & Domestic Aboriginals, as pleaded at paragraphs 146 above and/or 170 to 174 below,
- promptly after the work was done by the Controlled Aboriginal, or at all;
- (d) avoid any conflict between its interests and the interests of Controlled Aboriginals in relation to employment, by:
- (i) controlling Controlled Aboriginals' access to higher wages by denying Aboriginal Inmates permission to work outside Aboriginal Institutions or Reserves;
 - (ii) the making of a Dependants Exception where the maintenance of the person or persons designated as a dependant would otherwise be an obligation upon the Commonwealth; and
- (e) account for any benefit received in conflict of its interests and the interests of Controlled Aboriginal 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) *The Aboriginal Trust Account Investigation conducted by V. J. White (Secretary, Native Affairs Branch) on 12 June 1940 noted that while Indigenous people in Northern Territory town districts had monies paid*

into trust funds, "The Director of Native Affairs has power to exempt an employer from paying wages to the Trust Account if the employer maintains the dependents of the employee. In consequence, very few accounts operate in respect of aboriginals employed in pastoral districts.";

- (ii) *V G Carrington (then Acting Director of Native Affairs) stated in correspondence in 1945 that "no application for exemption from wages could reasonably be refused under existing provisions" (Report on Aboriginal Employment to the Administrator (Darwin, 10 October 1945, 1, 2) Noel Butlin Archives (Canberra) 42/12);*
- (ii) *Report on the Administration of the Northern Territory 1946, p 'C' 10 ("An extensive investigation into conditions prevailing in the pastoral industry has disclosed many shortcomings and a comprehensive report embodying recommendations for improvements has been submitted by me to the Government");*
- (iv) *E C Evans (NT Chief Welfare Officer from 1955 to 1976) stated that when pastoral cash payment was introduced by the Aboriginals Pastoral Regulations in 1949, station managers "weren't required to pay that in cash...the practice was not to pay it in cash but to give credit in the store...[i]t was open to all kinds of abuse as you can well imagine, and with only one or two visits a year, which was the most that I could make, it was pretty hard to police" (Mary Stephenson, Interview with Mr E C (Ted) Evans (Oral history transcript, 1982, 30) Northern Territory Archives Service NTRS 266 TS46 (Box 3);*
- (v) *A R Driver (NT Administrator from 1946 to 1951) stated in correspondence in 1949 that not paying wages prevented labour mobility and enforced "a system of serfdom...to maintain strict control of a subject people" (Correspondence to the Secretary, Department of the Interior, 6 July 1949, National Archives (Darwin) CA1070, F1 43/24); and*
- (vi) *L W Loveless (NT Director of Social Services) observed in 1952 that there was "nothing to prevent a Station Manager from using child endowment moneys for payment of wages to the natives" and that "Child endowment payments are now being used to reimburse Cattle Station Managers for expenditure previously borne by them, ie in the feeding, clothing etc of the natives; therefore no benefit is derived by the natives from such payments." (All subjects: Payment of Child*

Endowment in respect of Aboriginal Children (Memorandum to Director-General, Department of Social Services Melbourne, 12 March 1952) National Archives (Canberra) A885, B456 Part 2 and NT Natives (Memorandum to Director-General, Department of Social Services Melbourne, 24 July, 1952) National Archives (Canberra) A885, B456 Part 2).

- (v) *Inspections conducted by the Welfare Branch of Aboriginal camps on pastoral stations were normally in the presence of the employer. Aboriginal employees were expected to make their complaints in the face of the representatives of the Administration in Darwin and the manager of the station (Stevens, Aborigines in the Northern Territory Cattle Industry (1991), p 177).*
- (vi) *In 1965, the Director was aware that only 20 pastoral stations had attempted to meet their legal employment requirements with respect to general station hands (Peter Read, 'Northern Territory' in Ann McGrath (ed), Contested Ground, (1995), p 288).*

and may provide further particulars following discovery and inspection.

- B. *As to sub-paragraph (e), the Applicant says that to the extent the Commonwealth engaged in any of the breaches alleged at paragraphs 147(a) to 147(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 Controlled Aboriginals or from or by the use of its fiduciary position.*
- C. *In respect of the individual claims of the Applicant and Controlled Aboriginals other than the Applicant:*
 - (i) *the Applicant relies upon the breaches pleaded in sub-paragraph (a) and (c)(ii), and repeats paragraph 144 and 173, and the particulars thereto are repeated.*
 - (ii) *Particulars of the individual claims of Controlled Aboriginals other than the Applicant will be provided prior to the trial of their individual claim, following the trial of common issues.*

- 148. Further or in the alternative, each person holding the office of Protector, Welfare Officer, Superintendent and/or the Director at the time such Breaches of Work Duties occurred committed the Breaches of Work Duties.

Particulars

The particulars to paragraph 147 are repeated.

149. The Breaches of Work Duties by Protector, Welfare Officer, Superintendent and/or the Director as pleaded in paragraph 148 were committed by each such person as a servant and/or agent of the Commonwealth in the course of their service and/or agency, as pleaded in paragraphs 48 and 49 above.
150. In the premises pleaded in paragraphs 148 to 149, the Commonwealth is liable to the Applicant and Controlled Aboriginals who were Controlled Aboriginals for the Breaches of Work Duties.

H.2. Breach of Ward Duties

151. In breach of the Ward Duties, the Commonwealth failed to exercise due care and skill in providing for, maintaining and protecting the interests of Controlled Aboriginals who were Aboriginal Wards during the Claim Period until the commencement of the Welfare Ordinance 1961, by failing to:
 - (a) exercise its statutory powers, in the name of the Director or in the name of the Aboriginal Ward, to:
 - (i) require payment to be made to Aboriginal Inmates who were Aboriginal Wards in respect of work done by them on Aboriginal Institutions;
 - (ii) ensure that any employment arrangements with Station & Domestic Aboriginals who were Aboriginal 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 Aboriginal Wards, by permitting, authorising or facilitating Aboriginal Wards working for no or inadequate wages;
 - (i) by Aboriginal Inmates who were Aboriginal Wards at Aboriginal Institutions, as pleaded at paragraph 145 above (and/or in the circumstances pleaded in paragraphs 159 to 169 below); and/or
 - (ii) by Station & Domestic Aboriginals who were Aboriginal Wards, as pleaded at paragraph 146 above (and/or in the circumstances pleaded in paragraphs 170 to 174 below);

- (c) exercise its statutory powers to, in the name of the Director or in the name of the Controlled Aboriginal who was an Aboriginal Ward, pursue any claim arising from work for no or inadequate wages:
- (i) by Aboriginal Inmates who were Aboriginal Wards at Aboriginal Institutions, as pleaded at paragraphs 145 above and/or 159 to 169 below; and/or
 - (ii) by Station & Domestic Aboriginals who were Aboriginal Wards, as pleaded at paragraphs 146 above and/or 170 to 174 below,
- promptly after the work was done by the Controlled Aboriginal who was an Aboriginal Ward, or at all;
- (d) account for any benefit received in conflict of its interests and the interests of Controlled Aboriginals who were Aboriginal 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 Commonwealth engaged in any of the breaches alleged at paragraphs 147(a) to 147(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 Aboriginal Wards or from or by the use of its fiduciary position.*
- C. *The Applicant was not an Aboriginal Ward, and in respect of the individual claims of Controlled Aboriginals other than the Applicant, particulars will be provided prior to the trial of their individual claim, following the trial of common issues.*

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

Particulars

The particulars to paragraph 151 are repeated.

153. The Breaches of Ward Duties by the Director as pleaded in paragraph 152 were committed by each such person as an employee and/or agent of the Commonwealth in the course of their employment and/or agency.
154. In the premises pleaded in paragraphs 152 to 153, the Commonwealth is liable to the Controlled Aboriginals for the Breaches of Ward Duties.

H.3. Breaches of Trusts

155. The Commonwealth breached its duties to Controlled Aboriginals who were beneficiaries of the Management Trusts, Ward Trusts, Saved Wages Trusts and/or Lost Wages Trust (together, **Commonwealth Trusts**) as trustee of each of those respective Commonwealth Trusts by failing to:
 - (a) exercise due care and skill in respect to the Commonwealth Trusts;
 - (b) adhere to and carry out the terms of the Commonwealth 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 Commonwealth Trusts by failing to pay and transfer all or part of the trust property and its income to a beneficiary upon termination;
 - (d) get in the Lost Wages into the Commonwealth Lost Wages Trusts or Saved Wages into the Commonwealth 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 Commonwealth Trusts;
 - (f) render accounts of the Commonwealth 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 Commonwealth Trusts so as to not benefit from its position as trustee,

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

Particulars

- A. *"When aboriginals cease employment they are often lost touch of and never collect their balances which are paid to Revenue after 6 years." (Memorandum for the Chief Clerk and Accountant, Trust Fund – N.T. Aboriginals, 16 January 1936)*

- B. *"I have to advise that the Secretary and Chief Inspector, Audit Office, has written to me regarding the abovementioned subject: ... 'In some cases, the grantee of the licence fails to pay the wages [due under r 13 of the Aboriginals Ordinance Regulations] to the Protector of Aboriginals and, after all means of recovery have been exhausted, it becomes necessary to write off the amount...The Commonwealth is virtually trustee for the affairs of the aboriginals and, in many cases, the money becomes irrecoverable through the carelessness of officers in not following up late payments'" (Memorandum for the Administrator of the NT from the Secretary, Department of the Interior, Irrecoverable Amounts Due to Aboriginals: Darwin, 16 January 1936)*

- C. *"The Ledger Cards kept in the past were not complete as they do not show the dates of employment of the aborigines and the name of the employer is not shown to assist in the identification of the aboriginal and it is questionable whether some of the names on the cards could be identified, quite a number of accounts are not active." (Memorandum for the Chief Auditor, Audit Inspection of Commonwealth Accounts – Alice Springs, 15 September 1936)*

- D. *"I received a copy of a memorandum addressed by you to the Secretary ...commenting on a report of mine on the question of authority to write off irrecoverable amounts due to Aboriginals...Another paragraph states 'Exception is taken to the statement of the Auditor that, in many cases, the money becomes irrecoverable through the carelessness of officers in not following up late payments'. This statement by me in a general way and I consider it is fully justified...The following cases make my point clear (Memorandum for the Administrator of the NT, Irrecoverable Amounts Due to Aboriginals, 3 August 1936)*

- E. *"Wages collected from employers on behalf of aboriginals are paid into the Commonwealth Savings Bank Accounts...Withdrawals from the accounts...referred to above have been used for the payment of wages to aboriginals other than those for whom the accounts were opened. This is obviously irregular...Apparently little or no action is taken by the Department to see that wages payable by employers to the Deputy Protector are regularly*

collected" (Memorandum for the Chief Auditor, Audit Inspection of Commonwealth Accounts – Alice Springs, 10 October 1937)

- F. *"Aboriginal Trust Fund. The question of the dormant accounts referred to by Mr Mundy is again raised. It would be desirable for some instructions to be given to effect a transfer to Trust Fund, Other Trust Moneys, or to some such appropriate account after the account has not been operated on for say 12 to 24 months." (Memorandum for the Secretary, Department of the Interior, Central Australia Accounts - Audit Inspection July 1938, 24 October 1938)*
- G. *"Figures are not available as at 30th June, 1937, of the amounts owing to aboriginals and half-castes by employers, but the total amount due at 31st December, 1937, was £355 14s. 6d. Quite a considerable portion of this money was paid as soon as the four weekly accounts were rendered, but a sum of £263 13s. 4d. is included in the outstandings on account of drovers and it appears that it will be necessary to write off much of it. Considerable sums have been outstanding for long periods, and some of it since 1931. This reflects on the efficiency of the Aboriginals Branch" (Page 19 to the archival file Trust Fund Aboriginal Employment NAA: F1, 1938/17 (Barcode: 331637) held by the National Archives of Australia. Further particulars of this document are presently unknown to the Applicant).*
- H. *"I attach hereto a list showing amounts standing to the credit of all aboriginals in the Aboriginal Trust A/C at Alice Springs as at 31st October, 1940. Many of these aboriginals have had money in this Fund for several years and have not operated on their accounts; it appears therefore that they are in ignorance of their financial position" (Memorandum to All Protectors – Southern Section N.T., Aboriginal Trust Fund Alice Springs, 19 November 1940)*
- I. *"A Memorandum to the Secretary, Department of Territories dated 3 April 1952 identified the existence of 2,056 Aboriginals concerned in individual savings accounts and added, "During 1943 an amount of £827.4.11 representing balances unclaimed for six years and over, was paid to Revenue..." (Memorandum to the Secretary, Department of Territories, 3 April 1952)*
- J. *"This Trust Account has on several occasions been used for purposes other than originally intended...(c) As a type of Suspense Account for child endowment payments prior to checking and disbursement on behalf of the Department of Social Services, Adelaide, to Station Managers. The legality of these disbursements is considered questionable...These activities appear to be outside the scope of the defined purposes of this account...An amount in the vicinity of £20,000 of such compulsorily acquired moneys has been, or as*

it appears (most probably) will be, eventually disposed of other than to the original and proper recipients. (Crown Law Officer memorandum c. 1954, p 13 to the archival file Aboriginal Trust Account - Northern Territory NAA: A1831, 1955/243 (Barcode: 6815472). Further particulars of this document are presently unknown to the Applicant).

- K. *A survey conducted by F Stevens in or around 1965 established that only 30 per cent of the pastoral stations visited were conscious of their responsibilities to establish of a trust fund for pensioners' housing, and only 20 per cent of them had spent the money on accommodation for their charges (Stevens, Aborigines in the Northern Territory Cattle Industry (1991), pp 83-84).*
- L. *As to sub-paragraph (g), the Applicant says that to the extent the Commonwealth engaged in any of the breaches alleged at paragraphs 155(a) to 155(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.*
- M. *In respect of the individual claims of Controlled Aborigines other than the Applicant, particulars will be provided prior to the trial of their individual claim, following the trial of common issues.*

156. Further or alternatively, to the extent the Director was trustee of the Management Trusts, Saved Wages Trusts, Ward Trusts and/or Lost Wages Trusts (and the Commonwealth was not trustee), the Director breached his duties to Controlled Aborigines who were beneficiaries of those trusts (together, **Director Trusts**) by failing to:

- (a) exercise due care and skill in respect to the Director Trusts;
- (b) adhere to and carry out the terms of the Director 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 Director Trusts by failing to pay and transfer all or part of the trust property and its income to a beneficiary 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, **Director Breaches of Trust**).

Particulars

The particulars to paragraph 155 are repeated.

157. The Director Breaches of Trust were committed by:

- (a) each person holding the office of Director at the time such Director Breaches of Trust occurred as an employee and/or agent of the Commonwealth in the course of his employment and/or agency; and/or
- (b) to the extent those breaches continued, by:
 - (i) the successor in law of the Director from such time as legal title to the funds the subject of the Director Trusts passed from the control of the Director to the Minister following the enactment of the Social Welfare Ordinance and/or s 30 of Act No 128 of 1979 (NT); and/or
 - (ii) by the Commonwealth as trustee de son tort of the Commonwealth Trusts, by reason of its failure to appoint an alternative person to act as trustee of, and carry out the terms of, the Director Trusts.

158. In the premises pleaded in paragraphs 156 to 157, the Commonwealth is liable for the Director Breaches of Trust (including by reason of s 72 of the *Northern Territory (Self-Government) Act 1978* (Cth)).

I. OTHER CLAIMS IN RESPECT OF UNPAID WAGES

I.1. Claims against Commonwealth in respect of Aboriginal Institution Work

I.1.1. Proper construction

159. On their true construction:

- (a) the Aboriginals Ordinance;

- (b) the Welfare Ordinance; and
- (c) the Employment Ordinance,

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

160. To the extent any Aboriginal Ward or Aboriginal Inmate was required to work by the Superintendent of an Aboriginal Institution for no or inadequate wages as pleaded in paragraph 145, such requirement was adverse to the interests of that Aboriginal Ward or Aboriginal Inmate and/or unreasonable in the circumstances, and by reason thereof such requirement was beyond the power provided by:

- (a) the Aboriginals Ordinance;
- (b) the Welfare Ordinance; and
- (c) the Employment Ordinance,

and accordingly invalid.

161. To the extent any Controlled Aboriginal being an Aboriginal Ward or Aboriginal Inmate performed work in the circumstances alleged in paragraphs 145 and 160 above, that Native had and has a claim against the Commonwealth for the payment of reasonable wages on a *quantum meruit* basis.

Particulars

The Applicant was not an Aboriginal Ward or Aboriginal Inmate. The Applicant does not know the identity of individual Controlled Aboriginals who were Aboriginal Wards and Aboriginal Inmates, repeats the particulars to paragraph 144, and says that particulars will be provided prior to the trial of their individual claim, following the trial of common issues.

I.1.2. Repugnancy

162. 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 the Northern Territory during the Claim Period.

163. 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).

164. 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 the Northern Territory during the Claim Period.

165. 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).

166. 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 162 to 163, the Commonwealth 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 164 to 165 the Commonwealth 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.

167. In the alternative to paragraphs 159 to 161, to the extent any Controlled Aboriginal being an ~~Aboriginal Ward or~~ Aboriginal Inmate was required to work by the Superintendent of an Aboriginal Institution for no or inadequate wages:

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

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

168. In the premises of paragraph 167, to the extent the Aboriginal Ordinance or Welfare Ordinance authorised a state of forced labour of any Controlled Aboriginal (being an ~~Aboriginal Ward or~~ Aboriginal Inmate) at an Aboriginal Institution 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 166 above.

169. To the extent any Controlled Aboriginal being an ~~Aboriginal Ward or~~ Aboriginal Inmate performed work in the circumstances alleged in paragraphs 145 and 168 above, that ~~Aboriginal Ward or~~ Aboriginal Inmate had and has a claim against the Commonwealth for the payment of reasonable wages on a *quantum meruit* basis.

Particulars

The particulars to paragraph 161 are repeated

I.2. Existence of claims against employers in respect of Station & Domestic Work

170. The non-payment of wages, or adequate wages, to the Applicant and Station & Domestic Aboriginals pleaded in paragraph 146 occurred:

- (a) in accordance with a Dependents Exception, Wages in Kind Exception, or Slow Worker Exception;

- (b) in breach of the contract of employment, or for the provision of contract labour, of those Station & Domestic Aboriginals; or
 - (c) otherwise in circumstances where the station owner was obliged to make proper compensation to the Station & Domestic Aboriginals for their labour.
171. To the extent the employment of any Station & Domestic Aboriginal for no or inadequate wages occurred while:
- (a) the Station & Domestic Aboriginal was under the supervision of the servants or agents of the Commonwealth;
 - (b) the Station & Domestic Aboriginal was practicably unable to refuse to perform his or her employment as a result of the fact that they were, or were likely to:
 - (i) ~~(A)~~ be performing their employment in remote areas of the Northern Territory and substantially reliant upon their employer for the provision of basic food, services and facilities;
 - (ii) ~~(B)~~ be unable to accumulate sufficient money to leave their location or employment by reason of being paid no or inadequate wages in conjunction with the operation of station stores by employers on a credit system;

Particulars

- A. *"The legal conditions of employment under the Aboriginal Ordinance or Welfare Ordinance required the establishment of a store where the Station & Domestic Aboriginals could purchase merchandise as a 'price which did not exceed the cost'." (Stevens, Aborigines in the Northern Territory Cattle Industry (1991), p 19).*
- B. *"Aborigines would approach the counter with a full hand of cash, having little appreciation of how much it was or how much it would buy. They would then point out what they wanted to purchase and hand over the total sum in their possession. If there was any left they would make another selection." (Stevens, Aborigines in the Northern Territory Cattle Industry (1991), p 78).*
- C. *"the store was a company store and was subject to whatever management decreed as acceptable for the natives. Some stations used the store as a powerful weapon of administration by not paying the Aboriginal any cash wage at all. They simply allowed credit for the equivalent of the wage due." (Stevens, Aborigines in the Northern Territory Cattle Industry (1991), p 94).*

D. *“In some company stores it was noted that Aborigines were not informed of the prices of the commodities that they received. In these cases the employee simply asked for goods, and if his account was in credit, he was handed them without reference to the price. A sum was then deducted from the employee’s account.”*
(Stevens, *Aborigines in the Northern Territory Cattle Industry* (1991), p 156).

E. *“In other situations prices were attached to goods purchased from the store and in many cases these were quite exorbitant. In some cases it was noted that the mark up for goods in the company store was 300 per cent above town prices.”*
(Stevens, *Aborigines in the Northern Territory Cattle Industry* (1991), p 156).

- (iii) ~~(C)~~ have either no or low levels of formal education;
 - (iv) ~~(D)~~ have limited levels of literacy or were illiterate (and have limited levels of numeracy or were innumerate);
 - (v) ~~(E)~~ have limited or no ability to read and understand English;
 - (vi) ~~(F)~~ be impecunious or have limited financial means;
 - (vii) ~~(G)~~ possess cultural attributes peculiar to Aboriginal and/or Torres Strait Islanders; and
- (c) while the employer exercised substantial control over the liberty of the Station & Domestic Aboriginal,

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

172. In the premises of paragraph 171, to the extent:

- (a) ss 5 and 13(6) of the Aboriginal Ordinance, rr 14, 16, 20 of the Aboriginals Ordinance Regulations made thereunder with respect to Dependants Exceptions and Wages in Kind Exceptions, and r 5 of the Aboriginal Pastoral Regulations made thereunder with respect to Slow Worker Exceptions,
- (b) s 17 and (subsequent to the Welfare Ordinance 1961) s 61 of the Welfare Ordinance, or
- (c) s 31(3)(a) of the Employment Ordinance with respect to Slow Worker Exceptions,

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 166 above.

173. In the premises, to the extent the Applicant and Station & Domestic Aboriginals performed work in the circumstances alleged in paragraphs 146 and 170 and 171 to 172 above, 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 144 to 146, 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 Controlled Aboriginals who were Station & Domestic Aboriginals, repeats the particulars to paragraph 144 to 146, and says that particulars will be provided prior to the trial of their individual claim, following the trial of common issues.*

174. The Commonwealth took no steps either itself in the name of the Director or in the name of the Controlled Aboriginal, to pursue any claim the Station & Domestic Aboriginals had, as pleaded in paragraphs 170 to 173 above.

J. RACIAL DISCRIMINATION ACT CLAIMS

J.1. Comparable jurisdictions and reparations schemes

175. Each of the States of New South Wales, Queensland and Western Australia had in place during or around the Claim Period legislative protective regimes in respect of Aboriginal and Torres Strait Islander peoples similar in terms and effect to that in place in the Northern Territory, comprising respectively:
- (a) the *Aborigines Protection Act 1909* (NSW) and subordinate legislation;
 - (b) *The Aboriginals Preservation and Protection Act of 1939* (Qld), *The Torres Strait Islanders Act of 1939* (Qld), *The Aborigines' and Torres Strait Islanders' Affairs Act of 1965* (Qld), and subordinate legislation; and

- (c) the *Native Administration Act 1905-1936* (WA) (including as amended by the *Native Welfare Act 1905-1954* (WA), the *Native Welfare Act 1963* (WA), and subordinate legislation.
176. Each of the States of New South Wales, Queensland and Western Australia established a compensation scheme for Aboriginal and Torres Strait Islander peoples in respect of persons whose income was affected by the legislative protective regimes outlined in paragraph 175, comprising respectively:
- (a) On 12 December 2011, the Western Australian Cabinet approved a Stolen Wages Reparation Scheme providing for an ex-gratia payment for eligible applicants, being persons who from 14 years or older was a resident at a Government Native Welfare Settlement and had their income controlled, which operated from 6 March 2012 to 6 September 2012 and was extended to 30 November 2012;
 - (b) On 16 May 2002 the Premier of Queensland announced a reparation scheme to pay compensation for the controls exercised by earlier Queensland Governments over the wages and savings of Aboriginal and Torres Strait Islander people, which operated from 16 May 2002 to 31 January 2006 and was reopened in August 2008 and December 2015;
 - (c) In 2004, the NSW Government established a panel for the Aboriginal Trust Fund Repayment Scheme to assess claims to repay monies that were paid into the Aboriginal Trust Funds on behalf of Aboriginal and Torres Strait Islander peoples between 1900 and 1969 and not repaid, which operated from 2005 to 2011.
177. Further, the Commonwealth has recognised other obligations to make reparations for defective or harmful administration and established compensation schemes in response, including:
- (a) voluntary "act of grace" payments, which may be made administratively under s 65 of the *Public Governance, Performance and Accountability Act 2013* (Cth);
 - (b) the Compensation for Detriment caused by Defective Administration Scheme, which allows non-corporate Commonwealth entities to make discretionary redress payments for detriment caused as a result of defective administration;
 - (c) the National Redress Scheme for Institutional Child Sexual Abuse;

- (d) the Territories Stolen Generations Redress Scheme; and
- (e) the Defence Abuse Reparation Scheme.

J.2. Failure by the Executive of the Commonwealth to take steps

178. The Commonwealth has:

- (a) not conducted a reparations scheme with respect to harm and loss suffered by Aboriginal and Torres Strait Islander peoples under the legislative protective regimes in place in the Northern Territory prior to and during the Claim Period despite the comparable regimes and subsequent reparations schemes in New South Wales, Queensland and Western Australia and the existence of other Commonwealth compensation schemes; and
- (b) required prospective claimants in the Northern Territory to use the existing court system and the legal remedies as a means of accessing compensation in relation to the withholding, underpayment or non-payment of Indigenous wages and welfare entitlements,

(together and individually, **Relevant Acts**).

J.3. Unlawful racial discrimination

179. By virtue of their race, the Applicant and Group Members, generally:

- (a) were subjected to the statutory controls of the Aboriginals Ordinance, Welfare Ordinance and Employment Ordinance during the Claim Period and as a result:
 - (i) have either no or low levels of formal education;
 - (ii) have limited levels of literacy or were illiterate (and have limited levels of numeracy or were innumerate);
 - (iii) have limited or no ability to read and understand English;
 - (iv) are likely to be impecunious or have limited financial means;
- (b) are likely to live in areas of the Northern Territory where it is difficult to access the civil justice system; and
- (c) possess cultural attributes peculiar to Aboriginal and/or Torres Strait Islanders.

(together and individually, the **Characteristics**).

180. By virtue of the Characteristics, the Commonwealth knew it was unlikely the Applicant or Group Members could:
 - (a) access documents in the possession of the Commonwealth sufficient to establish the operation of the Aboriginals Ordinance, Welfare Ordinance and Employment Ordinance generally or to themselves during the Claim Period;
 - (b) access legal services; and/or
 - (c) have the capacity to institute legal proceedings; and/or
 - (d) otherwise enjoy the right to access effective remedies, or to access courts and tribunals administering justice, on an equal footing with other residents of the Northern Territory.

181. Having regard to the Characteristics, the Relevant Acts increased the likelihood that the Applicant and Group Members:
 - (a) could not communicate their experience, loss and damage under the statutory controls of the Aboriginals Ordinance, Welfare Ordinance and Employment Ordinance during the Claim Period to the Commonwealth;
 - (b) would not commence legal proceedings against the Commonwealth; and
 - (c) in the event they did commence legal proceedings, would be unsuccessful.

182. The conduct of the Commonwealth as pleaded in paragraphs 175 to 181 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.
183. By the matters pleaded at paragraphs 179 to 182, the Commonwealth engaged in conduct which was in breach of s 9 of the *Racial Discrimination Act 1975* (Cth) (**Racial Discrimination**).

K. CAUSATION, LOSS AND DAMAGE

184. By reason of the:

- (a) Breaches of Work Duties;
- (b) Breaches of Ward Duties;
- (c) Commonwealth Breaches of Trust; and/or
- (d) Director Breaches of Trust,

the Applicant and Group Members 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 Controlled Aboriginals other than the Applicant will be provided prior to the trial of their individual claim, following the trial of common issues.*

185. Further to paragraph ~~475~~ 183, to the extent the Commonwealth retained the benefit of the use of the proceeds of any Breach of Work Duties, Breach of Ward Duties, or Commonwealth Breaches of Trust (and/or Director Breaches of Trust) causing loss to the Applicant and Controlled Aboriginals (or any of them) as pleaded at paragraph ~~475~~ 183:

- (a) the Commonwealth 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 Commonwealth holds its interest in such benefit subject to a constructive trust in favour of the Applicant or the Controlled Aboriginal (as applicable).

AND THE APPLICANT CLAIMS on her own behalf (and on behalf of Group members), the relief specified in the Amended Originating Application.

This pleading was prepared by Alexander H Edwards and Joshua Creamer of counsel and settled by William A D Edwards of counsel.

SCHEDULE 1 – ABORIGINAL PASTORAL REGULATIONS RATES (1949 – 1957)

(Schedule 2 to the Aboriginal Pastoral Regulations)

SECOND SCHEDULE.			
RATES OF WAGES.			
Classification.	Wages per week.		
	£	s.	d.
MALES—			
During the first year if no previous experience in stock camps	0	12	6
After a total of one year's experience in stock camps	0	15	0
After a total of two years' experience in stock camps	0	17	6
After a total of three years' experience in stock camps	1	0	0
<i>Drovers and Drovers' Assistants—</i>			
Whilst travelling with stock		15	0
Whilst travelling with plant only		0	0
FEMALES—			
Wife of, living with, male employee	0	7	6
Unmarried or not living with male employee	0	10	0

SCHEDULE 2 – EMPLOYMENT ORDINANCE RATES (1959 – 1962)

(Report on the Administration of the Northern Territory 1960-61, p 51)

	Weekly Wages.					
	Adult Males.			Adult Females.		
	£	s.	d.	£	s.	d.
Agricultural	2	0	0	1	0	0
Building	5	0	0	..		
Domestic	2	0	0	1	0	0
Droving—						
(a) With plant and stock	10	0	0	..		
(b) With plant only	5	0	0	..		
Fishing	4	0	0	1	0	0
Mining—						
(a) Surface work	2	0	0	..		
(b) Underground	6	0	0	..		
Municipal	3	10	0	..		
Pastoral	2	0	0	1	0	0
Pearling	4	0	0	..		
Timber	2	0	0	..		
Transport	2	0	0	..		
Other	2	0	0	1	0	0
Percentage of Appropriate Adult Rate Specified for Industry or Calling.						
<i>Juniors—Male and female—</i>						
Under 17 years of age				40		
At 17 years of age				60		
At 18 years of age				80		
At 19 years of age				100		

SCHEDULE 3 – EMPLOYMENT ORDINANCE RATES (1962 – 1966)

(Report on the Administration of the Northern Territory 1962-64, p 50)

Industry or Calling	Weekly Wages	
	Adult Males	Adult Females
	£ s. d.	£ s. d.
Agricultural	2 8 3	1 5 3
Building	5 7 3	..
Domestic	2 8 3	1 5 3
Droving—		
With plant and stock	11 12 3	..
With plant only	5 17 3	..
Fishing	4 14 3	1 5 3
Mining—		
Surface work	2 8 3	..
Underground	7 0 3	..
Municipal	4 2 9	..
Pastoral	2 8 3	1 5 3
Pearling	4 14 3	..
Timber	2 8 3	..
Transport	2 8 3	..
Other	2 8 3	1 5 3

Juniors—Male and Female	Percentage of Appropriate Adult Rate Specified for Industry or Calling
Under 17 years of age	40
At 17 years of age	60
At 18 years of age	80
At 19 years of age	100

GLOSSARY OF DEFINED TERMS

A

Aboriginal	7
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Certificate of lawyer

I, Tristan Roland Gaven, certify to the Court that, in relation to the amended 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: 15 November 2021



Signed by Tristan Roland Gaven
Lawyer for the Applicant