Supreme Court of Western Australia Decision: COLLARD -v- THE STATE OF WESTERN AUSTRALIA [No 4] [2013] WASC 455

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Body

Perth WA: Supreme Court of Western Australia has issued the following decision 2 April 2014:
JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA
IN CIVIL

CITATION : COLLARD -v- THE STATE OF WESTERN AUSTRALIA [***No*** 4] [2013] WASC 455

CORAM : PRITCHARD J

HEARD : 4 - 8 FEBRUARY 2013, 13 - 26 FEBRUARY 2013, 1 MARCH 2013, 5 - 8 MARCH 2013 & 7 JUNE 2013

DELIVERED : 20 DECEMBER 2013

FILE ***NO***/S : CIV 1772 of 2010

BETWEEN : DONALD COLLARD
First-named First Plaintiff

SYLVIA RACHEL COLLARD
Second-named First Plaintiff

GLENYS DALE COLLARD
Second Plaintiff

ELLEN THOMAS
Third Plaintiff

EVA JETTA
Fourth Plaintiff

WESLEY ROHAN COLLARD
Fifth Plaintiff

BEVERLEY ANNE HUMPHRIES
Sixth Plaintiff

DARRYL FREDERICK COLLARD
Seventh Plaintiff

BONNIE COLLARD MILLER
Eighth Plaintiff

AND

THE STATE OF WESTERN AUSTRALIA
First Defendant

Catchwords:

Whether the State was under a fiduciary duty to the plaintiffs - Whether fiduciary duties owed by the State to aboriginal people - Whether State in position of guardian - Whether alleged duty not to fail to act in the best interests of a ward is a fiduciary duty of a guardian - Indicia of a fiduciary relationship - Nature of fiduciary duties - Whether the duty to obtain legal advice is a fiduciary duty - Whether the State breached alleged fiduciary duties owed to the plaintiff - Whether necessary to discharge fiduciary duties to a particular standard

Application of the Native Welfare Act 1954 (WA) and Native Welfare Act 1963 (WA) - Application of the Child Welfare Act 1947 (WA)

Operation of s 6(1) of the Crown Suits Act 1947 (WA)
Legislation:

Aboriginal Affairs Planning Authority Act 1972 (WA)

Aborigines Act 1905 (WA)

Aborigines Protection Act 1886 (WA)

Canada Act 1982 (UK)

Child Welfare Act 1947 (WA)

Child Welfare Act Amendment Act 1972 (WA)

Community Welfare Act 1972 (WA)

Constitution Act 1889 (WA)

Crown Suits Act 1947 (WA)

Indian Act RSC 1985

Justices Act 1902-1957 (WA)

Limitation Act 1935 (WA)

Native Administration Act 1905-1936 (WA)

Native Welfare Act 1905-1954 (WA)

Native Welfare Act 1954 (WA)

Native Welfare Act 1963 (WA)

State Owned Enterprises Act 1986 (NZ)
Result:

Plaintiffs' claim is dismissed

Category: A

Representation:
Counsel:
First-named First Plaintiff : Mr G M G McIntyre SC & Mr J I Crabtree
Second-named First Plaintiff : Mr G M G McIntyre SC & Mr J I Crabtree
Second Plaintiff : Mr G M G McIntyre SC & Mr J I Crabtree
Third Plaintiff : Mr G M G McIntyre SC & Mr J I Crabtree
Fourth Plaintiff : Mr G M G McIntyre SC & Mr J I Crabtree
Fifth Plaintiff : Mr G M G McIntyre SC & Mr J I Crabtree
Sixth Plaintiff : Mr G M G McIntyre SC & Mr J I Crabtree
Seventh Plaintiff : Mr G M G McIntyre SC & Mr J I Crabtree
Eighth Plaintiff : Mr G M G McIntyre SC & Mr J I Crabtree
First Defendant : Mr R M Mitchell SC & Mr T C Russell
Solicitors:
First-named First Plaintiff : Lavan Legal
Second-named First Plaintiff : Lavan Legal
Second Plaintiff : Lavan Legal
Third Plaintiff : Lavan Legal
Fourth Plaintiff : Lavan Legal
Fifth Plaintiff : Lavan Legal
Sixth Plaintiff : Lavan Legal
Seventh Plaintiff : Lavan Legal
Eighth Plaintiff : Lavan Legal
First Defendant : State Solicitor for Western Australia

Case(s) referred to in judgment(s):

PRITCHARD J:

(Annexure A is a list of key persons mentioned in these reasons and their occupation or relationship to the Plaintiffs. Annexure B is a description of key ***places*** and institutions mentioned in these reasons. Annexure C is a list of defined terms. Annexure D is an extract from the Plaintiffs' statement of claim which sets out the pleaded fiduciary duties.)

INTRODUCTION

1 This action was brought by Donald and Sylvia Collard, and some of their children Glenys, Ellen, Eva, Wesley, Beverley, Darryl and Bonnie (the Children). (To avoid confusion, I refer to the plaintiffs by their first names in these reasons, and to the first plaintiff, Donald Collard, as Don. I also refer to Don and Sylvia's children as the Children notwithstanding that they are all well into their adulthood. I also refer to four of Don and Sylvia's other children, Glen, Sylvia, Donald and William, by their first names, although they are now deceased. ***No*** disrespect is intended.)

2 On 13 March 1958, by an order made by the Children's Court at Brookton, Ellen was committed to the care of the Child Welfare Department. On 3 December 1961, Donald, William, Glenys, Eva, Wesley, Beverley, Darryl and Bonnie (the Siblings), were committed to the care of the Child Welfare Department, pursuant to an order of the Children's Court at Brookton.

3 Ellen was just six months old when she was committed to the care of the Department. The other Children ranged in age from eight months old (in the case of Wesley) to 10 years old (in the case of Donald, the eldest of the Siblings) when they were committed to the care of the Department. All of the Children remained subject to an order committing them to the care of the Child Welfare Department until they reached 18 years of age (the wardships).

4 After they were made wards, most of the Children spent little (if any) time with Don and Sylvia until their teens or early adulthood. There is ***no*** doubt that all of the Children, and Don and Sylvia, have been deeply scarred by their separation, by the fracturing of their family relationships, and by their disconnection from their aboriginal culture, which occurred as a result of the Children being made wards.

5 I am conscious that it is difficult for a third party to comprehend the enormity of the emotional pain and heartache experienced by all of the plaintiffs as a result of the Children being made wards and living apart from their family for so many years. Having said that, it is impossible not to be deeply moved by the plaintiffs' experiences, and one cannot help but admire their efforts to rebuild and maintain their family relationships.

6 The plaintiffs claimed that the State was subject to fiduciary duties to them during the wardships, because it was the guardian of the Children. The plaintiffs claim that the State was subject to various fiduciary duties to each of them to act in the best interests of the Children, and not to disregard their interest in being raised in their natural family unit, and that it breached those duties in various ways during the wardships. In these reasons, I refer to these fiduciary duties as the primary fiduciary duties.

7 The plaintiffs alleged that the State was, and remains, under a fiduciary duty to provide the plaintiffs with independent legal advice or representation in relation to its possible liability to them for a breach of its fiduciary duties during the wardships, and that it failed to do so. In addition, the plaintiffs alleged that after the termination of the wardships, the State continued to owe the Children a duty to take all reasonable steps (through the provision of education, counselling, psychiatric treatment and access to independent legal advice) to avoid the occurrence of further loss and damage to the plaintiffs as a result of its breaches of its duties as a fiduciary, and that it has failed to do so. In these reasons, I refer to these fiduciary duties as the secondary fiduciary duties.

8 The plaintiffs brought this action seeking a declaration that the State breached its duties to them, and equitable compensation or damages, including exemplary damages and aggravated damages, for the injuries, loss and damage they claim to have suffered as a result of the alleged breach by the State of its duties to them.

9 The State denied that it was, or is, subject to the duties alleged by the plaintiffs, and denies any breach of those duties. It also relied on a number of defences namely that the plaintiffs have ***no*** right of action against the State because they have failed to comply with the requirements of the Crown Suits Act 1947 (WA), and that the plaintiffs are precluded from obtaining any relief by the application, by analogy, of the limitation periods in the Limitation Act 1935 (WA) or the Crown Suits Act 1947. The State also pleaded that the plaintiffs were precluded from seeking the relief sought or any relief by reason of the equitable defence of laches.

10 Quite apart from the legal remedies they sought, the plaintiffs clearly hope that this litigation will provide answers to many questions they have about why the Children were removed. By way of example, Don's evidence was that he commenced the proceedings because he 'wanted answers'.[1] Beverley's evidence was that 'while it has been

hurtful to go back into the past and face everything that happened, I am ready to get some answers about why our family had to go through what we did and why my childhood was taken from me'.[2] And Ellen's evidence was that she wanted 'some explanation why I was taken as a little baby and why my life turned out the way it did because of this'.[3]

11 Perhaps the process of discovery, and the evidence adduced at the trial, will have provided more information to the plaintiffs than they previously had as to what occurred when the Children were made wards, and during their wardships. However, a trial is an adversarial means of resolving a dispute, rather than an inquisitorial process intended to ascertain all of the facts concerning particular events, and explanations or motivations for, particular conduct. In resolving a dispute between litigants, the Court addresses the issues raised by the pleadings, and can do so only on the basis of the facts proved by the evidence before it. In this case the evidence is subject to many significant limitations: the wardships were between 34 and 55 years ago, many of the people involved in the events in question have since died, or are ***no*** longer in a position to give evidence, or cannot be found, the available witnesses (including the plaintiffs) do not have perfect recollections of what took ***place***, and there is an incomplete documentary record of what occurred.

12 The resolution of the plaintiffs' claims requires the application of the law to the facts established by the evidence before the Court. The application of the applicable legal principles to the facts established on the balance of probabilities by the evidence leads to the conclusion that the State was not, and is not, subject to the fiduciary duties alleged by the plaintiffs. Even if the State was subject to those duties, the plaintiffs did not establish that the State breached those duties, other than in relation to a decision which was made in November 1959 not to return Ellen to Don and Sylvia's care (see below [1355]). Furthermore, the plaintiffs have ***no*** right of action against the State because they did not comply with the requirements of the Crown Suits Act. Accordingly, the plaintiffs' action must be dismissed. I explain my reasons for those conclusions below.

13 It is appropriate at this point to deal with a submission which was made in opening by counsel for the plaintiffs, characterising the nature of this case. He submitted that when the Children were ***placed*** in care in this case, that was: a continuation of the deliberate removal of part-Aboriginal children from their natural parents. ... [I]t was part of the continuation of the policies of Mr Neville, and all of the States of the Commonwealth it would appear, to deal with part-Aboriginal children in a way which is different from what were then called full-bloods or natives and to try and breed out their Aboriginality and make them useful citizens of the community by taking them away ... .[4]

14 The evidence did not support the conclusion that when the Children were made wards, that that action was carried out in the pursuit of a policy of assimilation, of the kind described by counsel for the plaintiffs. Counsel for the plaintiffs acknowledged that that was so in closing.[5] Instead, the evidence established that the orders made by the Children's Court, which ***placed*** the Children in the care of the Child Welfare Department, depended upon a finding by the Children's Court in each case that the Children had been neglected. The decisions made, and actions taken, with respect to the Children during their wardships, and which are the subject of this litigation, were made pursuant to child welfare legislation in force at the time.

15 In these reasons, I deal with the following matters: The parties, witnesses, other persons involved and the institutions where the Children lived; The legislative framework, and Don and Sylvia's early life experiences under the legislation; The facts; Did the State owe the primary fiduciary duties to the Children during their wardships; Did the State breach the alleged fiduciary duties owed to the plaintiffs; Did the State owe the secondary fiduciary duties to the plaintiffs and, if so, did it breach those duties? Other defences, and laches; Issues in relation to equitable compensation.

1. PARTIES, WITNESSES AND OTHER PERSONS

16 In this part of my reasons, I deal with the following matters:

(a) the plaintiffs;

(b) the witnesses at the trial;

(c) other persons involved in the events the subject of the action;

(d) institutions where the Children lived at various times during the wardships, and which are referred to in the reasons;

(e) the documentary evidence;

(f) findings as to the credibility of the witnesses.

(a) The Plaintiffs

17 Don and Sylvia are 80 and 81 years of age, respectively.[6] They were both born in Brookton, and spent much of their childhood and adult lives there. They were married in Pingelly in August 1950.

18 Don left school at about 14 years of age, and throughout his late teens and his adult working life Don did seasonal work shearing and crutching sheep, stripping mallet bark, picking mallee roots, labouring and farmhand work, and trapping rabbits. Throughout their marriage, Sylvia has supported Don and raised their children. During the late 1950s and throughout the 1960s, Don and Sylvia lived an itinerant lifestyle, staying on farms where they were employed at various times throughout the year but returning regularly and frequently to Brookton, where they lived on a block of land owned by Sylvia's mother Bessie Ninyette (Bessie Nineyette's block). Bessie Ninyette's block was a block of about four acres located about a mile outside Brookton, or about a fiveminute walk into the town.[7]

19 Together Don and Sylvia have had 14 children. Their first child, Glen Ninyette, was born on 1 May 1950 at Beverley District Hospital.[8] Glen died on 18 October 1950 at the age of five months after a short illness.[9]

20 Don and Sylvia's second child, Donald John Collard, was born on 19 September 1951 at Beverley District Hospital.[10] Donald was killed in a car accident on 15 January 1970 when he was 18 years old.[11]

21 Don and Sylvia's third child, Darryl Frederick Collard was born on 21 September 1952 at Beverley District Hospital.[12]

22 Don and Sylvia's fourth child, Bonnie Lynette Collard was born on 22 May 1954 at Beverley District Hospital.[13]

23 Don and Sylvia's fifth child, William Glen Collard, was born on 20 September 1955 at Beverley District Hospital.[14] William was killed in a car accident on 7 July 1977 when he was 22 years old.[15]

24 Don and Sylvia's sixth child, Beverley Anne Collard, was born on 5 October 1956 at Vailima Hospital in Narrogin.[16]

25 Don and Sylvia's seventh child, Ellen Jane Collard, was born on 25 September 1957 at Beverley District Hospital.[17]

26 Don and Sylvia's eighth child, Glenys Dale Collard, was born on 15 December 1958 at Kondinin District Hospital.[18]

27 Don and Sylvia's ninth child, Eva Michale Collard, was born on 1 March 1960 at Beverley District Hospital.[19]

28 Don and Sylvia's tenth child, Wesley Rohan Collard, was born on 12 March 1961 at Beverley District Hospital.[20]

29 Don and Sylvia's eleventh child, Sylvia, was stillborn on 3 June 1962 at Beverley District Hospital.[21]

30 Don and Sylvia's twelfth child, Joseph Collard, was born on 30 May 1963 at Beverley District Hospital.[22]

31 Don and Sylvia's thirteenth child, Philip Dean Collard, was born on 8 March 1966 at King Edward Memorial Hospital in Perth.[23]

32 Don and Sylvia's fourteenth child, Arthur Ashley Collard, was born on 31 May 1967 at Beverley District Hospital.[24]

(b) The witnesses at the trial

33 Each of the plaintiffs gave evidence at the trial. A witness statement or affidavit, or both, was tendered on behalf of each of the plaintiffs as their evidenceinchief.

34 Some of the documents tendered in evidence disclosed the views or beliefs of the plaintiffs in relation to particular events. The documents concerned were admitted by consent on the basis that statements in them as to the beliefs, views or feelings of the witnesses were evidence of those beliefs, views or feelings, and not evidence of the objective truth of the matters the subject of those beliefs, views or feelings.[25] I have dealt with that evidence on that basis.

35 Only two witnesses gave oral evidence for the State: Mr Keith Maine, a psychologist within the Child Welfare Department (from 1958) and later Director of that Department (from 1968 to 1984), and Mrs Mary Patullo, who was a cottage mother at Sister Kate's Home where the Siblings first lived after they were made wards.

36 In addition, a number of witness statements and reports of expert witnesses were tendered by consent without those witnesses being called for crossexamination.

(c) Other persons involved in the events the subject of the action

37 Annexure A to these reasons contains a list of the people who are referred to in the judgment, together with their job or position title, or their relationship, relevant to the proceedings. In Annexure A, I have also indicated whether

the person gave evidence, and if the reason why the person did not give evidence was made known to the Court in evidence, that reason.

38 The State filed affidavits deposing to the enquiries which have been made to locate potential witnesses with knowledge of the matters the subject of these proceedings. Those affidavits established that there were numerous people who would in all likelihood have been called as witnesses for the State but who have died or are not now in sufficiently good mental or physical health to give evidence.

39 The State also tendered witness statements from a number of persons who deposed that although they had been shown documents bearing their names, handwriting, signatures, or text which appeared to have been written by them, they had ***no*** recollection of the contents of those documents or the individuals to whom they pertained, although they had ***no*** reason to doubt the accuracy of the information contained in the documents. Some of those witnesses also deposed to other matters of relevance to these proceedings, which they were able to recall, such as the policy or procedures of the Child Welfare Department or the Department of Native Welfare at relevant times.

40 I have discussed the unavailability of witnesses further, below, in relation to the facts concerning the State's defence of laches.

(d) Institutions where the Children lived at various times during the wardships, and which are referred to in the reasons

41 At the time each of the Children was committed to the care of the Child Welfare Department, aboriginal children who were committed to the Department's care fell within the administrative responsibility of the Department of Native Welfare (although they were in fact wards of the Director of Child Welfare). Officers and employees of that Department appear to have exercised power with respect to wards as authorised officers under the Child Welfare Act 1947 (WA). From 1 July 1964, by arrangement with the Department of Native Welfare, all aboriginal wards (with some limited exceptions) became the responsibility of the Child Welfare Department.[26]

42 The Siblings spent time in a variety of institutions during their wardships. I have set out below a brief description of Sister Kate's Home where the Siblings lived for some time. The other institutions where some of the Siblings were ***placed*** are described in Annexure B. These descriptions were drawn from a publication entitled 'Signposts A Guide for Children and Young People in Care in WA from 1920' prepared by the Department for Community Development.[27]

Sister Kate's home/Burnbrae

43 Sister Kate's Home was established in Queens Park in 1935 by Sister Kate Clutterbuck, an Anglican nun, to care for indigenous children, and it provided residential child care and family support for indigenous children and their families. Sister Kate's was originally called the Children's Cottage Home, then Sister Kate's Home and from about 1988 it became known as Manguri. Sister Kate ran the Children's Cottage Home from 1933 until 1946. It was later operated by a board, and from 1956 by the Presbyterian Church. The philosophy underlying Sister Kate's Home was that children should be brought up in a loving and familial environment. In order to achieve this environment, children of a variety of ages were housed in cottages staffed either by a cottage mother, or a cottage mother and father, and each cottage was intended to function like a family in its own right. Very young children, however, were accommodated together in a nursery cottage.

44 By early 1962 there were 76 children accommodated at Sister Kate's, including 27 children who were wards within the responsibility of the Department of Native Welfare and 18 children who were wards within the responsibility of the Child Welfare Department.[28] There were a number of cottages at Sister Kate's. There were three older cottages, constructed in the 1930s and 1940, accommodating 10, 13 and 11 children respectively. There were also two cottages constructed in approximately 1961, accommodating 14 children and 10 children respectively. There was also a cottage accommodating 18 very young children which was the nursery of Sister Kate's.[29] The facilities at Sister Kate's included a central kitchen, a laundry, a chapel, a library housed in an older cottage,[30] a swimming pool, a tennis court and a basketball court.[31] There was also a kindergarten on site for children of kindergarten age, while older children attended the Queens Park Primary School or high schools in the area.[32]

45 Sister Kate's also operated an annex at Byford, known as Burnbrae. Burnbrae was located on a farming property.

(e) The documentary evidence

46 The State tendered a large number of documents in evidence, drawn mostly from its records, particularly the records of the Child Welfare Department.

47 Counsel for the plaintiffs submitted that the Court should infer that all of the documents which existed in relation to the Children's removal and wardships had been identified by the State and put before the Court in evidence. Counsel for the plaintiffs submitted that as a consequence, it was open to the Court to rely on the absence of any evidence that something was done as the basis for an inference that that thing was not in fact done. By way of example, he submitted that the absence of documents evidencing any checks on the welfare of the Children between 1961 and 1964 could be relied upon to draw the inference that ***no*** checks were made on the Children's welfare during that period. By way of further example, counsel for the plaintiffs submitted that it was open to the Court to conclude that when the Siblings were made wards, the State did not give consideration to alternative accommodation apart from Sister Kate's, such as ***placing*** the Children with family members or with members of the aboriginal community.[33]

48 I am unable to accept the submission advanced by counsel for the plaintiffs that the absence of documentary evidence that something was done permits the inference that that thing was not done. The premise on which the submission was made was not well founded, as the following example illustrates. In support of his submission, counsel for the plaintiffs pointed to the fact that numerous records existed in relation to Don's obligation to pay maintenance in respect of the Children. Although there were a number of documents in evidence in relation to maintenance, they particularly related to payments owed by Don between 1958 and 1964, and there were very few documents in evidence in relation to the payment of maintenance after that time.[34] Having regard to the content of such documents as there were in evidence, it cannot be concluded that maintenance was not pursued from Don after 1964 in fact it is quite clear that it was pursued, until as late as 1982.[35] Accordingly in relation to maintenance payments, the possibility thus clearly exists that the State ***no*** longer has in its possession all of the documents which were created in relation to those payments in respect of the Children.
49 Furthermore, it was apparent that the documents in evidence did not constitute a complete documentary record of the events the subject of these proceedings, for the following reasons.

50 First, there was virtually ***no*** documentary evidence in relation to the Children during the period between 1961 and July 1964, when the Siblings lived at Sister Kate's. (This was the period of time during which the Department of Native Welfare was responsible for all of the Children, as wards.) The existence of documents from July 1964 coincides with the transfer of responsibility for aboriginal wards from the Department of Native Welfare back to the Child Welfare Department. There was ***no*** evidence in relation to the existence or whereabouts of documents in relation to the Children during this period.

51 Secondly, there were other significant gaps in the documentary evidence, particularly in relation to the documents likely to have been held by third parties. There were, for example, very few documents in evidence which appeared to have been drawn from the records kept by Sister Kate's in relation to the Siblings, or in relation to the arrangements relevant to wards who resided at Sister Kate's during the 1960s when the Siblings lived there. Although some documents in evidence appeared to have come from the records kept by Sister Kate's it appeared that these documents had made their way onto the files held by the Child Welfare Department. By way of further example, there were ***no*** records available from Beverley Hospital in 1958 at the time when Ellen was committed to the care of the Child Welfare Department.
52 Thirdly, there was specific evidence explaining that certain significant documents could not be found. By way of example, despite extensive searches of court records and records held by the Department of Child Protection, and other agencies, a signed copy of the court order committing the Siblings to the care of the State could not be located.[36] Further, medical records pertaining to the possible admission of Sylvia Collard to the Pingelly, Narrogin and Kondinin Hospitals during late 1967 to early 1968 (which was the period during which there was some suggestion in the evidence that she may have required hospitalisation for treatment for injuries following an assault by Don) were not able to be located.[37]

53 It is apparent that the absence of the documents to which I have referred is consistent with other inferences apart from that which counsel for the plaintiffs submits should be drawn. To demonstrate the point, it will suffice to

refer to the absence of almost any records for the significant period of time between late 1961 (after the Siblings were made wards) and July 1964. It is possible that the State did not itself hold any records in relation to the Siblings for this period of time, perhaps because those records were retained by Sister Kate's. Alternatively, it is possible that such records that the State had were in the possession of officers of the Department of Native Welfare, and were not transferred to the Child Welfare Department when responsibility for the wards was transferred, and that those records ***no*** longer exist. Finally, it is possible that records in relation to the period of time prior to 1964 when the Siblings were in Sister Kate's were transferred to the Child Welfare Department but were subsequently lost. In my view, each of those inferences is equally, if not more, plausible than the inference that the documents before the Court represent all the records which were created in relation to the Children during their periods of wardship. That is all the more so when consideration is given to the very large number of documents which are in evidence in relation to the Children for the period after July 1964 during which each of them remained in institutional or foster care.

54 Furthermore, it would hardly be surprising if a complete documentary record ***no*** longer existed in relation to the events in question, having regard to the following considerations: the very long period of time since the Children's wardships ended; the very long period of time of the Children's wardships themselves (from 1958 until 1979 when Wesley's wardship ended); the fact that any records kept would have been paper records (rather than electronic records); the fact that after about 1962 or 1963 (when Donald, Darryl and Bonnie went to live at Burnbrae) the Children resided in multiple locations during their wardships; the number of departmental officers who appear to have been involved in inspections of, or decisions about, the welfare of the Children over the years; and the fact that the departmental officers responsible for the welfare of the Children were located in metropolitan and regional areas.

55 Finally, the possibility cannot be excluded that in respect of some decisions reached by departmental officers, that those decisions or the bases for them were not recorded in writing. That is a possibility that is clearly open, having regard to the absence of electronic communications, and thus the fact that any records had to be made in handwriting or typed, in circumstances where the evidence established that the resources of field officers or welfare workers in the Child Welfare Department and the Department of Native Welfare at the relevant times were limited, having regard to the case load of those officers.

(f) Findings as to the credibility and reliability of the witnesses

56 It is appropriate at this point to set out my findings in relation to the credibility of witnesses. I start by making some general observations before turning to make specific findings about credibility.

Issues relating to evidence given by aboriginal witnesses

57 In assessing the credibility of the plaintiffs, I have taken into account the fact that the plaintiffs are all aboriginal people. Counsel for the plaintiffs submitted that complexities may arise with respect to language, body language, meaning and the way aboriginal witnesses give evidence in a courtroom' and that these complexities 'should be considered when assessing the evidence and general credibility of aboriginal witnesses ... including the plaintiffs in this case.[38]

58 It is well recognised that a number of factors may impact on the evidence given by aboriginal witnesses. These include some characteristics of communication in aboriginal society such as the avoidance of direct eye contact as a sign of courtesy and respect, the greater use of silence in communication, gratuitous concurrence with questions, and a preference for ascertaining information indirectly, rather than by asking direct questions. Some aboriginal people especially those from remote or regional areas, or those for whom English is not their first language may experience particular language difficulties.[39]

59 Counsel for the plaintiffs submitted that such difficulties were exhibited during the evidence of Don and Sylvia, and that I should take these into account in assessing their evidence. He submitted that Sylvia displayed a tendency to gratuitous concurrence, especially when she appeared tired. I accept that on numerous occasions during her evidence, Sylvia became emotional. After the crossexamination had proceeded for some time, she appeared tired. Sometimes Sylvia was confused by what was put to her, especially when the questions were based on what was said in documents. These responses were entirely understandable, given Sylvia's age, educational background, and the traumatic nature of the events about which she was crossexamined.

60 Very occasionally, Sylvia appeared inclined to simply accept what was being put to her. However, I viewed this as a sign of frustration with the process of being crossexamined, rather than of gratuitous concurrence. In any

event, when this occurred, either counsel for the State, or the Court, clarified with Sylvia what her evidence in fact was. On the other hand, on very many other occasions, Sylvia made quite clear that she disagreed with the basis for questions put to her by counsel for the State.

61 Taking all of these considerations into account, I am satisfied that on the whole, Sylvia's evidence in crossexamination reflected her recollections of events, rather than merely gratuitous concurrence with the questions put to her by counsel for the State.

62 Counsel for the plaintiffs also submitted that on some occasions Sylvia had trouble specifying dates or times with precision. Although Sylvia did express such difficulties, the nature of the questions involved did not suggest that the difficulty was attributable to her aboriginality. The more compelling inference is that Sylvia's evidence was at times vague, or imprecise, or inaccurate in some respects, as a result of the very long period of time which has passed since the events in question. Accordingly, as I have observed below, where there were differences between Sylvia's recollection of the dates on which certain events occurred, for example, and documentary evidence as to when those events occurred, I have preferred to rely on the documentary evidence, which was apparently prepared concurrently, or proximately, to the events in question, as being a more accurate indicator of when those events in fact occurred.

63 Counsel for the plaintiffs also submitted that Don displayed a tendency to 'feel the need to recall details when answering questions from the State's counsel' and that 'it appeared he was trying to please the State's counsel', rather than answering that he may not have recalled the particular event. I do not agree. Nothing in Don's evidence led me to discern that his answers to questions in crossexamination were affected by a desire to please counsel for the State. He displayed ***no*** inhibition about disagreeing with counsel for the State on many occasions.

64 Counsel for the plaintiffs submitted that the plaintiffs may have experienced difficulty in their comprehension of the meaning of English words and phrases when they were asked questions about the Children 'coming home' or 'coming to live at home' or 'living at home'. He submitted that it appeared from Don's evidence that Don did not want to describe the Children being under his 'care' whilst they were wards. In my view, Don's reluctance to agree that the Children returned to live at home at various times during their wardships resulted from a concern to avoid any admission that he had assisted the Children to run away and return to live with him and Sylvia. Moreover, Don displayed the ability to be quite precise about his use of language in relation to such questions. For example, he made clear that 'none of them [the Children] ever come back into our custody ... they come back to live but not in our custody'.[40]

65 None of the other plaintiffs gave the appearance of having any difficulty in understanding the questions put to them, or in answering in English, or if they did, they sought clarification from counsel. Glenys and Beverley, in particular, displayed the ability to clarify precisely what was being asked of them, and to answer that precise question.

66 Counsel for the plaintiffs submitted that the evidence given by Glenys and Bonnie that other family members had assisted to raise their children reflected a common experience among aboriginal families. I have taken this into account.

The impact of emotion

67 I have taken into account that for a number of the other plaintiffs, in addition to Sylvia (who I mentioned at [59]), giving their evidence was at times emotionally difficult. That was not at all surprising their evidence dealt with highly traumatic events, from the separation of the Children from their parents over the many years they spent as wards, to the deaths of Donald and William, to traumatic events later in their lives. However, the plaintiffs managed to give their evidence despite the distress that they experienced in referring to some aspects of that evidence. This was ***no*** doubt assisted by the fact that the evidenceinchief of the plaintiffs was given in the form of witness statements or affidavits.

The evidence given by Don and Sylvia

68 On the whole, I formed the view that Don and Sylvia gave evidence that they genuinely believed was true. There was, however, one exception to this, namely in relation to Don and Sylvia's evidence concerning the amount of time they spent at the humpy. As I explain below at [236] to [246] and [560] to [564], I find that during crossexamination both Don and Sylvia deliberately sought to diminish the amount of time they spent at the humpy.

69 In my view, some significant aspects of Don and Sylvia's evidence were not reliable, for a number of reasons. Each of these is explained further in relation to the evidence in question, but in summary, my reasons in overview are as follows.
70 First, some of Don and Sylvia's evidence was inaccurate in some respects, including as to significant events. By way of example, in crossexamination Don was questioned about when Constable Wall came to see him prior to the Siblings being made wards. His answers to this question varied (see [271]). Sylvia's evidence was also inaccurate in some respects. Sylvia denied that she had been arrested for fighting in 1956. She said that she had never heard of that charge.[41] However, in evidence was the charge sheet showing her conviction for fighting in 1956.[42] The most likely explanation is that Don's and Sylvia's memories of the events in question have deteriorated over the many years since the events in question.
71 Secondly, both Don and Sylvia's recollections of the circumstances in which the Children were made wards have clearly been affected by their belief as to two things: first, that the Children were taken from them and that the committals were without any justification,[43] and secondly, that Don and Sylvia and their family had been victimised and targeted by the police, especially Constable Wall, and a missionary in Brookton, Ms Jones.[44] Their belief that Constable Wall and Ms Jones were responsible for taking the Siblings appears to have impacted on their recollection of other events, in that they recollected Constable Wall and Ms Jones having a role in those events, when other evidence clearly contradicted that recollection. By way of example, Sylvia's evidence was that Ms Jones had told her she should not take Glen with her to Moore River (see below [154] to [161]). However, Sylvia later accepted that Ms Jones was not actually present with Constable Wall when he came to take her to Moore River.[45] Similarly, in his evidenceinchief, Don attributed his arrest on a number of occasions to victimisation by Constable Wall,[46] yet the documentary evidence suggested that other police officers were responsible for those arrests.[47]
72 Thirdly, there was evidence that Don and Sylvia had told their story to different persons and for different purposes on a number of occasions (for a publication entitled 'Echoes of the Past' in 2002,[48] and in preparing affidavits in 2011 for the trial) and they have told their story together, rather than individually, on at least one occasion (in 1995[49]). Several problems arise from this. By telling their story together, there is a real risk that they have unconsciously incorporated each other's recollections into their own. In addition, there is a danger that if their recollection of events has varied from one occasion to the next, that altered recollection, by its repetition, may have become embedded as their genuinely held (albeit inaccurate) memory. These risks appear to have been realised in relation to certain key aspects of their recollection of events especially that the Siblings were taken from them by Ms Jones.

73 Fourthly, there were some inconsistencies between versions of events given by Don and Sylvia on earlier occasions, and their evidence at the trial. By way of example, in a joint statement Don and Sylvia provided to the ALS in February 1995,[50] Don said that when Ellen was born, he and Sylvia saw an English nurse at Beverley Hospital, who told them that they could not look after their children. When crossexamined about that statement, Don said that nobody had said that to them '***no*** welfare or anybody'.[51]
74 Fifthly, the evidence given by Don and Sylvia was inconsistent in some significant respects in relation to the amount of time they had spent at Bessie Ninyette's block before the Siblings were committed to the care of the Child Welfare Department, and in relation to whether they had arranged for, or consented to, the Siblings being taken to Sister Kate's before the Siblings were committed to the care of the Child Welfare Department.
75 For these reasons, where the evidence given by Don and Sylvia differed from the evidence as to factual matters contained in contemporaneous documents, I have preferred that documentary evidence.

76 There is one final aspect of Don's evidence which it is convenient to mention here. I am unable to give rely on the affidavit sworn by Don on 13 February 2013[52] which set out his evidenceinchief, for two reasons. First, in crossexamination, Don accepted that there were errors in the affidavit.[53] Secondly, Don gave evidence that he had not read that affidavit, or his affidavit of 9 November 2011[54] (on which his later affidavit was largely based) in their entirety.[55] Counsel for the plaintiffs accepted that in those circumstances ***no*** weight could be ***placed*** on those affidavits.[56] That having been said, Don's evidence as to what happened emerged sufficiently clearly in crossexamination, and I have taken that evidence into account.
The evidence of the Children

77 I accept that Darryl, Bonnie, Ellen, Wesley, and Eva were truthful witnesses. Subject to the caveats set out below (in relation to their perceptions of why they were committed to the care of the Child Welfare Department) I accept their evidence.
78 I accept that Beverley and Glenys were truthful witnesses, although they both appeared defensive in giving their evidence. I attributed that defensiveness to the sensitive nature of the evidence they gave (particularly in relation to having been sexually assaulted) and to their concern that they might not be believed about that evidence. I accept their evidence as to their recollections of their living conditions prior to being committed to the care of the Child Welfare Department, and as to the events of 7 December 1961, and their evidence as to their lives while in care.

79 However, in some respects, the evidence given by each of the Children was not reliable. Their beliefs and perceptions as to why they were taken into care, while genuinely held, have in my view been influenced by the views of others as to what occurred, and I therefore ***place no*** weight on that evidence. Other specific aspects of their evidence are, as I explain below, likely to have been affected by the views of others, and I have not ***placed*** weight on that evidence.
80 Finally, other aspects of the Children's evidence as to when events occurred (particularly the events of December 1970) were not reliable, because of the passage of time. In so far as the evidence given by each of the Children in these respects differed from the evidence as to factual matters contained in contemporaneous documents, I have preferred that documentary evidence.
81 I explain these conclusions further below.
Reliability the passage of time

82 Ellen, Eva and Wesley said they had ***no*** memory of their lives before they were committed to the care of the Child Welfare Department, or the circumstances in which they were committed. That is to be expected: Ellen was six months old, Wesley was eight months old and Eva was 21 months old, when they were committed into the care of the Child Welfare Department.
83 Bonnie did not have a very detailed recollection of the events prior to, and at the time of, her committal to the care of the Child Welfare Department. She agreed that it was difficult to try to 'reconstruct' memories from when she was seven years old.[57]

84 However, in so far as the events of 7 December 1961 were concerned, some of the plaintiffs had clear recollections of that day, despite being very young at the time. Beverley, for instance, was five years old when she was committed to the care of the Child Welfare Department, yet she had a detailed recollection of what happened on 7 December 1961, down to a recollection of what the Siblings were wearing at the time.[58] Darryl also had a recollection of some of the events of 7 December 1961. Beverley and Glenys also had vivid memories of the sexual assaults to which they were subjected while they were in care. Counsel for the State submitted that the recollections of some of the plaintiffs as to what occurred when they were committed to the care of the Child Welfare Department should be viewed with some caution because it was unlikely that very small children would have such detailed recollections of what occurred after so many years. There is ***no*** doubt that as a general observation, the memory of an event begins to deteriorate quite quickly after that event, and a person's memory of an event many years after that event may well be quite inaccurate. On the other hand, our common human experience is that significant events, especially traumatic ones, can sometimes be recollected with clarity, even many years later. In my view, this explains how some of the Children recall the events so long ago. The clarity of their recollections of those events does not lead me to doubt the credibility of their evidence but as I explain below, in some respects the evidence given by the Children as to what happened in 7 December 1961 was not reliable.
85 In addition, some of the Children (for example, Beverley, Bonnie, and Darryl) gave evidence about what they recollected of their lives as small children. Some of this evidence (such as the details of their living conditions) was broadly consistent with factual matters referred to in the contemporaneous documentary evidence, and I accept it.
Reliability contamination of recollection
86 Counsel for the plaintiffs submitted that during their crossexamination each of the Children gave evidence that they had not spoken with Don and Sylvia in detail about why they were taken into the care of the Child Welfare Department. He submitted that [n]o negative inference should be drawn about this. This is not peculiar when considering aboriginal families and the way many of them communicate. The concept of inner privacy may explain

to some extent the plaintiffs' evidence that they have not discussed in detail their removal, life before their removal ... and what happened to them following their removal.[59]

87 I accept that some aboriginal people may not readily discuss highly personal matters with others. There was some evidence in this case to support the conclusion that the plaintiffs had not engaged in much discussion about what had occurred, because the events in question were too painful to dwell on. Wesley's evidence was that 'none of us really talk about being taken. ***No*** one gets in each other's business about it or talks about the past.'[60] In Echoes of the Past, Wesley is quoted as saying 'we hold back, keep it to ourselves. Some of our feelings, we won't give them all out. It's too painful to go there.'[61] Beverley also said that it hurt too much to talk about what had occurred.[62]
88 Quite apart from the effect of cultural differences, it is not difficult to envisage that other factors might have meant that the plaintiffs have not discussed with each other, in a great deal of detail, what happened to them when they were committed to the care of the Child Welfare Department the memories may have been too painful, or represented experiences overshadowed by shame or regret, or were too connected with other painful memories, such as the loss of Donald and William.

89 Even allowing for the influence of these possible factors, however, the evidence supports the conclusion that each of the plaintiffs has discussed what occurred when the Children were taken into care with at least one other plaintiff, and in the majority of cases that other plaintiff was Don or Sylvia (or both). Don initially denied that he had had any discussion with the Siblings, since they were ***placed*** into care, about what happened when they were ***placed*** into care.[63] However, he later conceded that there may have been some discussion about what happened.[64] Sylvia also initially denied having talked with any of the Children about their being ***placed*** into care.[65] However, she accepted that Ellen had asked about it,[66] and that Wesley had asked about what occurred and she had told him.[67]

90 The remaining plaintiffs gave evidence that they had discussed with their parents or some of their siblings what happened when they were ***placed*** into care. Darryl said that when he went back to Brookton he had talked to his parents about what had happened, although he also independently recollected what had happened to the Siblings.[68]
91 Bonnie recollected that when she was in her 20s, she had a discussion with Don (and possibly Sylvia) about how she was taken into care. Her evidence was that Don didn't go into a lot of detail 'he just said we were stolen, he never put us there [that is, in Sister Kate's]'.[69] Bonnie said Don and Sylvia didn't give her any details, just that 'we were taken'.[70]
92 Ellen's evidence was that she had asked questions of her parents and of other people about what had happened although she had not had much discussion with her parents because it had been quite painful.[71]

93 Glenys' evidence was that Bonnie had told her some details of what happened when they were taken into care, although Bonnie had ***no*** recollection of this.[72]
94 Beverley said that about four or five years after she met them, she had talked with her parents about what had happened, and she told them what had happened to her,[73] although she denied that they had told her about the way in which she was actually removed from their care or the way they lived prior to when they were taken.[74]
95 Eva's evidence was that for as long as she could remember she'd been told by family members (aunties and an uncle) that Ms Jones removed the Siblings from her parents and they were made wards of the State.[75] Eva also said that she had talked about what happened with Glenys, Beverley and Bonnie.[76]
96 Wesley's evidence was that he talked once with Don about being taken into care, and that Don told him that he had been stolen and that Don had to steal him back.[77] In telling his story for Echoes of the Past, Wesley is quoted as saying that The only thing I listen to is my father, what he tells me. We were taken away by the Native Welfare from the reserve in Brookton. From what I have been told, wadjelas [that is, white Australians] just turned up and took us away. That was it.[78]
97 Wesley confirmed that he believed that was what happened because his father told him.[79] Wesley also confirmed that he had spoken with Sylvia about what happened, and accepted that he would have spoken to his siblings about what happened, but he couldn't now remember what was said.[80]

98 As the summary above indicates, the evidence supports the conclusion that such discussion as occurred between the plaintiffs related to the circumstances in which the Children came to be committed to the care of the Child Welfare Department.
99 Darryl, Bonnie, Glenys and Beverley had some recollection of the events of 7 December 1961, and of the circumstances in which they lived prior to that time, but they did not have (and could not have been expected to have) any independent contemporaneous knowledge of the reasons why they were committed to the care of the Child Welfare Department. The primary sources of information for the Children about why they were committed to the care of the Child Welfare Department were necessarily Don and Sylvia. Don and Sylvia have clearly long held the view that the Children were taken from them without justification, and in the case of the Siblings that they were taken to Sister Kate's by Ms Jones without Don and Sylvia's consent.

100 The fact that there has been discussion between the plaintiffs about what occurred in March 1958, about what occurred prior to, and on, 7 December 1961 and about why the Children were ***placed*** into the care of the Child Welfare Department, has had the consequence that the Children's understanding or belief as to why they were committed to the care of the Child Welfare Department has been affected by the beliefs or perceptions of others, especially Don and Sylvia. For that reason, to the extent that the Children gave evidence as to their belief that they were ***placed*** in the care of the Child Welfare Department without justification, I give ***no*** weight to that evidence.
101 In addition, the evidence of some of the Children dealt with matters in respect of which young children could not be expected to have had knowledge or insight. By way of example, Beverley's evidence dealt with whether Don and Sylvia had been drinking heavily prior to the time when the Children were committed to the care of the Child Welfare Department. I do not accept that a child of five years old would be capable of making a reliable assessment of the extent to which the adults around her were drinking alcohol. Furthermore, Beverley accepted that she had told a foster care assessor who interviewed her in 2002 that she had been told by the staff of Sister Kate's that the reason she had been removed from her home was because Don and Sylvia were alcoholics, but that she later learned that Don and Sylvia did not start to drink until all of the Children were removed.[81] This evidence also supports the conclusion that Beverley's understanding as to why she was made a ward was largely based on what she was told by Don and Sylvia.
Reliability inconsistencies in statements
102 There was evidence that some of the Children, namely Glenys and Beverley, had previously made statements concerning what happened to them when they were taken into care. Glenys confirmed that she had provided a number of statements. At some time prior to 1996, and with the assistance of the ALS, she prepared a statement about her experiences.[82] In 2008 she prepared a statement, and later a revised statement, in support of her application for an ex gratia payment under the Redress Scheme.[83] She provided information (possibly in connection with the Stolen Generation enquiry[84]) for the purposes of a publication entitled 'Telling our Stories'.[85] She provided a statement dated 5 October 2010 for the purpose of this action.[86] With the assistance of a friend she also drafted notes to assist the ALS to prepare a statement for the purpose of these proceedings.[87] She provided a statement dated 9 June 2011 for the purpose of these proceedings[88] which Glenys said she signed but did not read,[89] and finally, Glenys provided a witness statement dated 15 February 2013.[90]
103 There are some differences in the content of these documents, both as to the details of the events recounted, and as to the omission to mention some events or details altogether, particularly in relation to the sexual assaults upon Glenys while she was in care.
104 Similarly, Beverley recalled speaking to someone from the ALS in about 1995 in relation to her family's experiences, and her experiences appear to have formed the basis for one of the stories told in 'Telling our Stories'.[91] Beverley accepted that some of the sexual assaults referred to in that publication (apparently in relation to her) did not appear in her witness statement in this action.[92] Beverley's evidence was that the assaults to which she had been subject were those described in 'Telling Our Stories' report as well as those described in her witness statement.[93]

105 Although there were discrepancies in the various statements Beverley and Glenys provided in relation to the sexual assaults to which they had been subject while in care, those discrepancies do not lead me to doubt the truthfulness of the evidence given by Glenys and Beverley as to what occurred. Recounting a sexual assault can be a highly traumatic experience for a victim. In contexts where it may not be crucial to recount the full details of what

has occurred it would not be surprising if a victim chose not to recount the entirety of the experience. Furthermore, the tenor of Beverley's and Glenys' stories has been consistent over the years, even if the precise details have not been exactly recounted on each occasion. Glenys' and Beverley's evidence was consistent in relation to the circumstances surrounding some of the assaults (namely those which were committed on Glenys and Beverley while they were on weekend ***visits*** with foster carers) and that consistency supports the veracity of their evidence. Accordingly, as I explain further below, I accept the evidence given by Beverley and Glenys that they were subjected to sexual assault on more than one occasion and circumstance while they were in the care of the Child Welfare Department.

Credibility of the State's witnesses

106 Mr Maine's evidence was primarily directed to the policies and practices of the Child Welfare Department at various times. I accept his evidence.

107 Mrs Patullo gave evidence of her experience as a cottage mother at Sister Kate's and particularly her recollection of the arrival of the Siblings at Sister Kate's and her care for Wesley, who lived in her cottage. As I explain below, while I accept that Mrs Patullo was truthful in her evidence, in these key respects I find her evidence unreliable.

108 First, Mrs Patullo recalled that Don and Sylvia themselves accompanied the Siblings to Sister Kate's on 7 December 1961. Mrs Patullo's evidence in this respect was at odds with the evidence of all of the plaintiffs, and with the documentary evidence. In my view, it is likely that Mrs Patullo's recollection pertained to the first ***visit*** by Don and Sylvia to Sister Kate's, which appears to have been within a week of the Siblings' arrival.

109 Secondly, Mrs Patullo's evidence was that Wesley showed signs of malnutrition when he arrived at Sister Kate's.[94] I do not accept this aspect of her evidence. The Sibling's physical health at the time of their admission to Sister Kate's was noted in a document apparently prepared by the Superintendent of Sister Kate's, Mr Daniel. It is highly likely that had Wesley been showing signs of malnutrition, Mr Daniel would have commented on that is his report, yet there was ***no*** such indication in that document.

2. LEGISLATIVE FRAMEWORK

110 In order to understand the facts, and to assess the plaintiffs' claim that the State was the subject of duties to them as a fiduciary, it is necessary to consider the statutory framework for the decisions made, and actions taken, with respect to the plaintiffs, which are the subject of this action. There was ***no*** dispute about the applicable legislative framework, but the plaintiffs and the State took a different view of the implications of that framework in the resolution of the plaintiffs' claims.

111 Two pieces of legislation which applied specifically to aboriginal people at the time of the events the subject of this action were the Native Welfare Act 1905 1954 (WA) (the NW Act) and the Native Welfare Act 1963 (WA) (the 1963 NW Act). I discuss below the key provisions of this legislation.

112 After undertaking an overview of the Native Welfare legislation, I then turn to consider two examples which illustrate how the NW Act applied to Don and Sylvia, prior to the Children being committed to the care of the Child Welfare Department.

113 At the time the Children were taken into care, and while they remained in the care of the Child Welfare Department, the legislation which dealt with the welfare of children, and enabled children to be made wards of the State, was the Child Welfare Act 1947 (WA) (the Child Welfare Act) and the Community Welfare Act 1972 (WA) (the Community Welfare Act). I discuss below the key provisions of this legislation.

(a) Overview of the Native Welfare Acts

114 In this section of my reasons, I provide an overview of the Native Welfare Acts which were applicable to aboriginal people during the events the subject of this action, by reference to the following subjects:

(i) Application of the Native Welfare Acts;

(ii) Administration of the Native Welfare Acts;

(iii) Restrictions on the rights of aboriginal people;

(iv) Guardianship of aboriginal people.

115 However, it is useful to consider the legislation within some historical context, so in each subject area I have also examined the provisions of the legislation prior to the 1950s.

(i) Application of the legislation

116 The NW Act was originally enacted as the Aborigines Act 1905 (WA) (the Aborigines Act). The Aborigines Act was an Act 'to make provision for the better protection and care of the aboriginal inhabitants of Western Australia'.[95] It applied to 'aboriginal' persons and to 'halfcastes' within the meaning of the Act.

117 Under the Aborigines Act, persons deemed to be 'aboriginal persons' for the purposes of the Act were aboriginal inhabitants of Australia, a 'halfcaste who lives with an aboriginal as wife or husband', a 'halfcaste who, otherwise than as wife or husband, habitually lives or associates with aborigines' or a 'halfcaste child whose age apparently does not exceed sixteen years', and for the purposes of this deeming provision, a 'halfcaste' included any person born of an aboriginal parent on either side, and the child of any such person.[96] The term 'halfcaste' for the remainder of the Act was defined to mean 'any person being the offspring of an aboriginal mother and other than an aboriginal father' excluding persons deemed to be 'aboriginal' for the purposes of the Act.[97] In addition, the term 'halfcaste' did not apply to 'quadroons' (which term was not defined in the Act).[98]

118 Under the Aborigines Act, the Minister responsible for the administration of the Act was able to issue an exemption to an aboriginal or halfcaste who, in the Minister's opinion, ought not to be subject to the Act.[99]

119 In 1936, some significant amendments were made to the Aborigines Act.[100] The name of the Act was changed to the Native Administration Act 1905 1936 (WA) and there was a shift in terminology in relation to the persons subject to the Act (from 'aboriginal' and 'halfcaste' to 'native').

120 In 1936, the deeming provision which identified aboriginal people for the purposes of the Act, and the definition of 'halfcaste', were repealed,[101] and replaced with a definition of 'native' which encompassed 'any person of the full blood descended from the original inhabitants of Australia', and any person of less than full blood who was descended from the original inhabitants or from their full blood descendants, other than persons who were 'quadroons' in certain circumstances.[102] A 'quadroon' was defined to mean a 'person who is descended from the full blood original inhabitants of Australia or their full blood descendants but who is only onefourth of the original full blood'.[103]

121 In 1936, a quadroon over 21 years of age was able to apply to a magistrate, with the consent of the Minister, to be classed as a native under the Act, and the Commissioner of Native Affairs could also make such an application in relation to any quadroon over 21 years of age.[104] Further, any person 'of less than quadroon blood' who was born before the end of 1936 could apply to the Minister to be classed as a native.[105]

122 In 1954, further significant amendments were made to the Native Administration Act 1905 (WA) by the Native Welfare Act 1954 (WA).[106] The name of the principal Act was changed to the Native Welfare Act 1905 1954 (WA) (the NW Act),[107] and there was a change in nomenclature, if not in focus, in that Act from 'native affairs' to 'native welfare'.

123 Despite the amendments of the legislation in 1954, its key provisions to which I have already referred continued to apply. Accordingly, the definitions of 'native' and of 'quadroon' remained unchanged.[108]

124 In 1960, the NW Act was amended again,[109] in several important respects. First, the definition of 'native' was amended to mean 'any person of the full blood descended from the original inhabitants of Australia' and 'any person of less than full blood who is descended from the original inhabitants of Australia or from their full blood descendants, except a quadroon or person of less than quadroon blood'.[110] Secondly, the provisions in the Act which permitted a quadroon to be classed as a native were repealed.[111]

125 The 1963 NW Act was an Act to consolidate and amend the law relating to and providing for the welfare of the native inhabitants of Western Australia.[112] It repealed the NW Act,[113] but as its long title suggested, the Act retained many of the provisions of the NW Act in identical or very similar terms.

126 The term 'native' was relevantly defined in the 1963 Act to eliminate references to the term 'quadroon' while nevertheless retaining the distinction that term had embodied: 'native' means(a) any person of the full blood descended from the original inhabitants of Australia; and

(b) any person of less than full blood who is descended from the original inhabitants of Australia or from their full blood descendants, except a person so descended who is only onefourth or less than onefourth of the original full blood;

... .[114]

127 In addition, the Minister was able to extend any or all of the benefits and privileges conferred on natives under the Act to any person who established that he or she was 'a person of less than full blood descended from the original inhabitants of Australia' but not a native under the Act.[115]

128 For completeness, I note that the 1963 NW Act was repealed by the Aboriginal Affairs Planning Authority Act 1972 (the AAPA Act) which, as its name suggests, established an Aboriginal Affairs Planning Authority charged with the duty of promoting the wellbeing of persons of aboriginal descent in Western Australia and which was required to take into account the views of such persons as expressed by their representatives. It suffices to say that the object,[116] terminology and focus of this Act represented a marked change from the 1963 NW Act. It is unnecessary to say anything further about the provisions of the AAPA Act.

(ii) Administration of the legislation

Personnel

129 Under the Aborigines Act, the key bodies or offices referred to under the Aborigines Act 1905 were the Minister responsible for the administration of the Act, an Aborigines Department, a 'Chief Protector of Aborigines' and persons called 'protectors' who within particular districts within the State were able to exercise powers and duties under the Act.[117] (After an amendment to the Aborigines Act 1905 in 1911, a deputy Chief Protector was also appointed.[118])

130 The Aborigines Department was given the duty of promoting the welfare of aborigines, providing them with food, clothing, medicine and medical attendance, providing for the education of aboriginal children and generally assisting in the preservation and wellbeing of the aborigines.[119] The Department had express duties which included providing for the custody, maintenance, and education of the children of aborigines, managing and regulating the use of reserves set apart for the benefit of aborigines, and exercising a 'general supervision and care over all matters affecting the interests and welfare of the aborigines, and to protect them against injustice, imposition and fraud'.[120]

131 In 1936, the legislation was amended to change the name of the Department (to the Department of Native Affairs), and the title of the Chief Protector of Aborigines (to the Commissioner of Native Affairs).[121]

132 The 1936 amendments also created the office of inspector, and those persons appointed an inspector were required to report to the Commissioner on the conditions of natives generally.[122]

133 In 1954, the Department became known as the Department of Native Welfare, and the Commissioner was known as the Commissioner of Native Welfare.[123] Inspectors under the Act became 'Protectors' under the NW Act. However, the functions of the Department remained the same.[124]

134 In 1960, the NW Act was amended to permit the appointment of a Deputy Commissioner of Native Welfare.[125]

135 The 1963 NW Act established a Department of Native Welfare, under the Minister responsible for the administration of the Act, which was charged with the duty of promoting the welfare of natives.[126] The Minister was established as a body corporate.[127] The Commissioner of Native Welfare, under the Minister, was responsible for the administration of the Act and of the Department.[128] A Deputy Commissioner could also be appointed.[129]Representatives (formerly protectors) could be appointed by the Minister, and offices could be established by the Governor for the purpose of carrying out the Act.[130]

136 In the balance of these reasons I refer to the Commissioner of Native Welfare as the Commissioner.

137 The Minister, Commissioner, Deputy Commissioner and officers of the Department of Native Welfare were not liable for acts or omissions in good faith in connection with the exercise of their powers under the NW Act and the 1963 NW Act.[131]

(iii) Restrictions on the rights of aboriginal people

138 The Aborigines Act made provision for where 'aboriginal' persons and 'halfcastes' could live, who they could live with, who would be responsible for them and for their property, and their employment, amongst other things. The Act adopted a paternalistic approach to aboriginal people, whose rights were significantly confined, and whose autonomy was significantly curtailed, as compared with nonindigenous Australians at the time.

139 It is not necessary for present purposes to outline the variety of ways in which the rights of aboriginal people were confined under the Aborigines Act. For present purposes, it suffices to mention only those provisions dealing with guardianship, residence, marriage and the maintenance of children.

140 Under the Aborigines Act, the marriage of an aboriginal woman to any person other than an aboriginal man had to be authorised by the Chief Protector.[132] It was an offence for a nonaboriginal man to cohabit with an aboriginal woman, and it was an offence for any person other than an aboriginal person to habitually live with aborigines.[133]
141 The movement of aboriginal people around the State was restricted. It was an offence to remove an aboriginal, a male halfcaste under sixteen years of age, or a female halfcaste from one district to another without authority.[134] In addition, the Aborigines Act provided for reserves to be established where aboriginal people would live.[135] Moreover, the Minister could cause an aboriginal person to be removed to and kept within the boundaries of a reserve, or be removed from one reserve or district to another and kept there.[136] It was also an offence for a person other than an aboriginal person to enter onto a reserve without authorisation.[137]
142 In 1936, the provisions of the Aborigines Act with respect to marriage and cohabitation were repealed and new provisions inserted into the Act. The effect of those new provisions was that a person who was a 'native' under the Act could not marry unless the Commissioner had been given prior notice and the opportunity to object to the marriage.[138] In addition, it was an offence for any person who was not a native to habitually live with natives or with any native not his wife or her husband, or to cohabit with any native not his wife or her husband.[139]

143 As I have already observed, following the amendments in 1954, the key provisions of the NW Act (in so far as the restrictions on the rights of aboriginal people were concerned) remained the same. It remained the case that a person (not a native) who habitually lived with natives, or with a native to whom he or she was not married, or who cohabited with a native to whom he or she was not married, committed an offence.[140] However, the NW Act was amended so that it was ***no*** longer necessary to advise the Commissioner of the proposed marriage of a native, so as to permit the Commissioner the opportunity to object to the marriage.[141]
144 Under the NW Act, it continued to be an offence for a person other than a native to enter onto a reserve without authorisation.[142]
145 Under the 1963 NW Act, the express duties of the Department of Native Welfare were in similar terms to its duties under the earlier legislation and include providing for the custody, maintenance and education of the children of natives, and exercising: such general supervision and care in respect to all matters affecting the interests and welfare of natives as the Minister in his discretion considers most fit to assist in their economic and social assimilation by the community of the State, and to protect them against injustice, imposition and fraud.[143]
146 Under the 1963 NW Act, reserves for natives could still be established,[144] and it remained an offence for any person other than a native to enter onto a reserve without authorisation.[145]

147 However, the 1963 NW Act did not ***place*** any restriction on marriage to, or cohabitation or residence with, an aboriginal person.
(iv) Guardianship of aboriginal people
148 Under the Aborigines Act, the Chief Protector was the 'legal guardian of every aboriginal and halfcaste child until such child attains the age of sixteen years'.[146] In an amendment made in 1911, the Chief Protector's guardianship of 'an illegitimate halfcaste child' excluded the rights of the mother of that child.[147] In addition, a Protector was able to apply to justices of the peace for an order requiring the father of a halfcaste child of less than 14 years of age who was being maintained in an aboriginal institution, or at the cost of the Government, for maintenance payments for the support of the child. The failure to pay maintenance could result in the imprisonment of the father.[148]
149 In 1936, the guardianship provision in the Act was amended to provide that the Commissioner was the legal guardian of every native child 'notwithstanding that the child has a parent or other relative living' until such child attained the age of twenty one years.[149] The provisions dealing with the payment of maintenance for children were also amended in 1936 so that a protector could apply for an order for the payment of maintenance by the father of a child of 'a native and some person other than a native' who was being maintained in a native institution or at the cost of the Government.[150]
150 In 1954, the provisions of the NW Act dealing with guardianship of children, and the payment of maintenance in respect of children in institutions or being maintained at the cost of the Government were amended to align with the provisions of the Child Welfare Act. Section 8 of the NW Act, which dealt with the guardianship of native children, was amended[151] so that it provided: The Commissioner shall be the legal guardian of every native child notwithstanding that the child has a parent or other relative living, until such child attains the age of twentyone years

except while the child is a ward according to the interpretation given to that expression by section four of theChild Welfare Act 1947; and the Commissioner may, from time to time direct what person is to have the custody of a native child of whom he is the legal guardian, and his direction has effect according to its tenor.

151 The amendments in 1954 permitted an application for an order for maintenance to be made by a protector pursuant to the provisions of the Child Welfare Act.[152]

152 The 1963 NW Act did not contain any reference to the guardianship of aboriginal people.

(b) Don and Sylvia: two illustrative experiences under the Native Welfare Acts

153 As the overview above indicates, the application of the Native Welfare Acts turned on whether a person was classified as a 'native' or a 'quadroon'. Don was initially classified as a 'native' but in 1956, his classification was changed to that of a 'quadroon' under the NW Act.[153] Sylvia was classified as a 'native' on the basis that she possessed 11/32nds native blood.[154] Those classifications, and the application of the Native Welfare Acts to Don and Sylvia, had significant practical impacts on their lives, illustrated by the following two examples.

154 First, when Don was almost 17 years old, and Sylvia just over 17 years old, officers from the Department of Native Welfare became aware that they were living together and that Sylvia was pregnant. With the support of their parents they wished to get married. Because they were subject to the NW Act, they needed the permission of the Commissioner to do so.

155 Mr WrightWebster, then the District Officer for the Great Southern Region, wrote to the Commissioner on 12 May 1950 in relation to their case.[155] Rather than recommend that permission be given for Don and Sylvia to marry, or that they be provided with support to look after their baby when it arrived, Mr WrightWebster instead recommended that Don and Sylvia each be removed to an institution for three months, at the end of which time their baby would have been born and they could be permitted to marry. The reasoning behind this recommendation was to deter other couples from engaging in similar 'undesirable' behaviour. Mr Wright-Webster noted: I feel that the prompt removal ... should have the salutary effect on other young couples in this district who contemplate adopting this dubious course of living together while unmarried or while too young to get married.[156]

156 Ultimately, however, the Commissioner recommended to the Minister for Native Affairs that only Sylvia should be removed to the Moore River Native Settlement, as there was ***no*** institution to which Don could be removed.[157]

157 The Minister issued a warrant pursuant to s 18 of the Native Administration Act 1905 1947 for Sylvia to be apprehended by the police and taken to the Moore River Native Settlement and kept there during the Minister's pleasure.[158] Sylvia was admitted to the Moore River Native Settlement on 15 June 1950.[159] Sylvia's evidence was that she was not told why she was taken to Moore River.[160]

158 Unbeknownst to the Department for Native Affairs, when Sylvia was apprehended by the police, she had already given birth to Glen, who was then three weeks old. The Commissioner of Police advised the Commissioner that Glen did not accompany Sylvia to the Moore River Native Settlement but was instead left behind with his grandmother (Bessie Ninyette) at Brookton.[161]

159 One of the documents in evidence suggested that Glen had been left behind at Brookton at Sylvia's express wish.[162] However, in her evidence, Sylvia denied that that was the case. Her evidence was that Constable Wall told her that she could not take her baby with her, and told her it would be better if she left Glen behind with her mother. Sylvia's evidence was that she did not feel like she had any choice, so she left Glen behind.[163] Given Glen's young age, and the fact that Sylvia was breastfeeding him at the time, it is very difficult to envisage that Sylvia would have voluntarily decided not to take Glen with her to the Moore River Native Settlement. I accept Sylvia's evidence that she acted upon Constable Wall's advice that she could not take Glen with her to Moore River, and that that was the reason he stayed in Brookton with Bessie Ninyette.

160 Sylvia's evidence was that she felt frightened, lonely and isolated at the Moore River Settlement, and missed Don and Glen.[164]

161 The fact that Sylvia had already had her baby by the time she was removed to the Moore River Native Title Settlement subsequently came to the attention of Mr WrightWebster. He recommended to the Commissioner that in view of the birth of Glen, and in view of the fact that Don and Sylvia's marriage was supported by their parents, they should be permitted to marry upon Sylvia's release from Moore River.[165] The Commissioner then recommended that the Minister cancel the warrant for Sylvia's removal to the Moore River Native Settlement. It appears that Sylvia spent three to four weeks at the Moore River Native Title Settlement.

162 The Commissioner also recommended that prior to her marriage Sylvia be returned to Brookton so that Glen could live with her, and that Ms Jones, a Missionary Worker in Brookton, had offered to supervise Sylvia and arrange employment for her until her marriage.[166]
163 Don and Sylvia were married on 12 August 1950.

164 The second example of how the Native Welfare Acts had a significant practical impact on Don and Sylvia's lives can be more succinctly stated, but its impact was significant nevertheless. The Department of Native Welfare provided 'housing' on an aboriginal reserve at Brookton (the Brookton Reserve). The evidence suggested that this 'housing' consisted of tin humpies comprising three rooms, with ***no*** insulation, concrete floors, and walls which did not meet the floor, where the water supply to each humpy consisted of a tap at the front, and with toilet and shower facilities in a separate ablution block used by everyone who lived on the reserve.
165 Although Sylvia was classified as a native, and she and any of her children were entitled to live on the Brookton Reserve, she and Don were not able to get accommodation on the Brookton Reserve because of Don's classification as a 'quadroon'. That classification meant that Don was not permitted to enter onto the Brookton Reserve other than to get water.[167]
166 Consequently, Don and Sylvia had to find their own accommodation. As I explain below, for a substantial period each year until 1970, Don and Sylvia lived in a humpy at a camp on Bessie Ninyette's block which was adjacent to the Brookton Reserve.
167 In the balance of these reasons, I refer to the humpy in which Don and Sylvia lived on Bessie Ninyette's block as 'the humpy'.
(c) Overview of the Child Welfare Act
168 By way of overview of the provisions of the legislation in force at the time when the Children were removed and during the term of their wardships, I deal with the following matters:
(i) Grounds on which a child could be removed into the care of the Child Welfare Department;
(ii) The administration of the legislation;
(iii) The process for removing a child into the care of the Child Welfare Department;
(iv) Guardianship and supervision of wards;

(v) Where wards could be ***placed*** into care;
(vi) Maintenance for wards.
(i) Grounds on which a child could be removed into the care of the Child Welfare Department

169 At the time when Ellen, and later the Siblings, were ***placed*** into care, one of the objectives of the Child Welfare Act was to make provision for the care of destitute and neglected children.[168] An application could be made to the Children's Court for a child to be committed to the care of the Child Welfare Department if that child was destitute or neglected.
170 A 'destitute child' included a child who did not appear to have a sufficient means of subsistence and whose near relatives were in indigent circumstances and unable to support that child.[169] A 'neglected child' was one who, amongst other things, lived with a person known to the police as of bad repute, or who had been or was reputed to be, a habitual drunkard, or was a child under the guardianship or in the custody of any person whom the Children's Court considered was unfit to have such guardianship or custody, or was a child who was not being maintained properly or at all.[170]
(ii) The administration of the legislation
The Child Welfare Department
171 The administration of the Child Welfare Act was carried out by the Child Welfare Department, under the control of the Minister.[171] The Child Welfare Department was headed by a Director, who (under the direction of the Minister) was subject to the duty to carry into operation the provisions of the Act, save in so far as those duties were expressly committed to some other person.[172] An Assistant Director, inspectors and other officers could be appointed with such powers and functions as were deemed necessary to carry out the purposes of the Act.[173]The Director, Assistant Director, and inspectors and officers with powers and functions to carry out the purposes of the Act, were all appointed by the Governor.
The Department of Community Welfare

172 In 1972, the Department of Community Welfare was established by the Community Welfare Act 1972 (WA). The Child Welfare Act was amended at the same time, to transfer the administration of the Act to the Department of Community Welfare. Accordingly, the amendments to the Child Welfare Act provided that the Department of Community Welfare established under the Community Welfare Act would administer the Act, while the Director and Assistant Director referred to in the Child Welfare Act were thereafter to be referred to, and to be in the position of, the Director and deputy of the Director of the Department of Community Welfare.[174] All inspectors and officers of the former Child Welfare Department were deemed to have been appointed and engaged under the Community Welfare Act, although they continued to be subject to the Child Welfare Act.

173 Under the Community Welfare Act, the control of the Department was vested in the Minister established as a body corporate.[175] The office of Director of Community Welfare was established, and provision made for the appointment of a deputy to the Director, and of officers and employees of the Department.[176] In 1978, theCommunity Welfare Act was amended to provide that the Director, deputy of the Director, and any officer of the Department while acting in the exercise or purported exercise of his or its powers or functions was deemed to be an agent of the Minister as the body corporate.[177]

174 In the balance of these reasons, I use the term Director to refer to the Director of the Child Welfare Department or the Department of Community Welfare.

Administration in more recent years

175 I note for completeness that from 1 January 1985, the Community Welfare Act was renamed the Community Services Act, the Department of Community Welfare became known as the Department for Community Services, references in the Community Services Act and the Child Welfare Act to the office of Director of Community Welfare were replaced with the Director General of the Department for Community Services, and the role of deputy to the Director was replaced by an Assistant Director General.[178]

176 The Department has subsequently been renamed the Department of Family and Children's Services and the Department for Community Development.

Immunity from personal liability

177 In 1958, the Child Welfare Act was amended to provide that a person who occupied, or had occupied, the office of Minister, Director, or officer of the Department, or who had carried out duties or functions under the Act was not personally liable for any act or omission in good faith in connection with that exercise or purported exercise of power.[179]

178 In 1972, the Community Welfare Act was amended to include a provision providing immunity from civil liability for the Minister in his personal capacity, the Director, the deputy Director, any officer of the Department, or any delegate for any act or omission in good faith in the exercise or purported exercise of the powers or functions or duties under the Community Welfare Act.[180]

(iii) The process for removing a child into the care of the Department

179 Children's Courts were established by Order in Council of the Governor under the Child Welfare Act.[181] Those courts had to be constituted by a special magistrate or at least two members.[182] (A member of a Children's Court had the same powers as a justice of the peace.[183]) Magistrates for a magisterial district, or other magistrates, could be appointed a special magistrate for the Children's Court in a district.[184]

180 At the time that each of the children was made a ward, Children's Courts had jurisdiction to hear an application brought in respect of a destitute or neglected child.[185] If satisfied that the child was destitute or neglected, a Children's Court could make a declaration to that effect and make an order that the child be committed to the care of the Child Welfare Department, sent to an institution specified in the order to be detained there or otherwise dealt with under the Act, or released on probation, for a specified period or until 18 years of age.[186]

181 The Court could direct that the child be detained in a particular institution, at which special training or supervision could be provided to meet the needs of any special case,[187] or it could make recommendations in respect of a child who was the subject of an application.[188] In those cases where the Children's Court had made a recommendation in relation to the child, that recommendation could not be departed from without the consent of the Minister.[189] (Amendments to the Child Welfare Act in 1959 removed the requirement for the consent of the Minister before a recommendation made by a Children's Court could be departed from.[190])

182 The order of the Children's Court committing the child to the care of the Child Welfare Department, or to an institution, had to be set out in a prescribed form and indicate the age and religion of the child, and the cause for which the child was detained.[191]

183 An order made under the Child Welfare Act in respect of a child in the absence of his or her parent or guardian, in circumstances where reasonable notice of the complaint had not been given to the parent or guardian, could be set aside by the Children's Court upon application by the parent or guardian within three months of the making of the order.[192] Otherwise, if a parent or guardian wished to challenge a decision of the Court to declare a child neglected or destitute, they could apply to the Supreme Court, within a month of the decision made by the Children's Court, for a review of that decision.[193]
184 A parent could, by writing signed before a special magistrate, commit the care of a child to a person or society approved by the Governor as a person or society to whose care destitute or neglected children could be committed. If that person or society consented in writing to accept the care of the child, the person or society would become the guardian of the child to the exclusion of his or her parent.[194]

185 A child who was committed under the provisions of the Child Welfare Act, to an institution, or to the care of the Child Welfare Department, became a 'ward'.[195] Subject to some exceptions which are not presently relevant, ***no*** ward could be detained in an institution or remain under the control of the Child Welfare Department after reaching 18 years of age.[196]
186 A ward who absconded from an institution or from a foster parent could be apprehended without a warrant by any police officer or by any officer of the Child Welfare Department and conveyed to an institution as directed by the Director.[197]
(iv) Guardianship and supervision of wards
187 As at the time when Ellen, and later the Siblings, were made wards, the Child Welfare Act provided that the Director had the care, management and control of the persons and property of all wards, subject to the direction of the Minister.[198]
188 The Child Welfare Act was amended in 1962. One of those amendments provided that subject to the regulations, and to the direction of the Minister, the Director was the guardian, and had the care, management and control of the persons and property of all wards.[199]

189 In addition, the Child Welfare Department retained a general supervision over all wards detained in an institution or ***placed*** out.[200]

190 The Child Welfare Act required that the Director cause all wards ***placed*** out to be ***visited*** once every six months by an officer of the Department, to ensure that the treatment, education, and care of such children was satisfactory.[201] In addition, if a child was committed to the care of a person or society, that person or society was required to permit the child to be ***visited***, and the ***place*** of residence to be inspected, by the Director or an officer of the Child Welfare Department from time to time.[202]

(v) Where wards could be ***placed*** into care

191 The Director had the power to deal with any child committed to the care of the Department by (amongst other things) ***placing*** the child in a receiving depot, detaining the child in an institution, or ***placing*** the child in the custody of a suitable person willing to take charge of the child.[203] An 'institution' included any government industrial school, any orphanage or reformatory school, any receiving depot, and all other ***places*** under the supervision of the Department.[204] The Governor could declare any building or ***place*** to be a Government institution or a subsidised institution for the purposes of the Act.[205]

192 In addition, the Child Welfare Department could (with the consent of the person or society concerned) commit a child in the Department's care to the care of a person or society approved by the Governor for that purpose.[206] The Director could also ***place*** out a ward to board with a relative, or with a suitable person approved by the Director for such period as the Director thought fit.[207] A ward ***placed*** in one institution could be transferred to another institution, with the approval of the Minister.[208] In 1959, amendments to the Child Welfare Act permitted the Minister to delegate to the Director his power to approve the transfer of a ward from one institution to another.[209]
193 As I have already observed, at the time of making an order in relation to a child, the Children's Court could commit that child to an institution, and in doing so, the Court was required to have regard to the future welfare of the

child.[210] So, for example, the Court could direct that the child be detained in a particular institution, at which special training or supervision could be provided to meet the needs of any special case.[211]

194 It was an offence for any person to remove a ward from any institution or from a foster parent to whom the child had been ***placed*** out, before the term of that child's placement expired.[212]

(vi) Maintenance for wards

195 The Child Welfare Act provided for the collection of maintenance from near relatives of a ward (which included the parents of that child), and a near relative who had an ability to contribute towards the maintenance of the child could be summonsed to appear before the Children's Court.[213] If the Court was satisfied that the relative was able to pay for, or contribute to, the maintenance of the child, an order could be made that that person do so.[214] An order for the payment of maintenance by a near relative could be made at the time the Children's Court made an order declaring a child to be destitute or neglected, without any complaint having been served on the near relative. However, this could only be done if the near relative was present when the maintenance order was applied for, or had received notice of the Department's intention to apply for a maintenance order.[215]

196 A person who failed to comply with a maintenance order could be summoned before the Children's Court on complaint, and subjected to a term of imprisonment or to other orders.[216]

3. THE FACTS

197 In this section of my reasons I set out my findings as to the facts relevant to the allegations pleaded in the Statement of Claim. I have made each finding of fact on the balance of probabilities, having regard to the evidence adduced at the trial.

198 A large number of documents were tendered in evidence. Save where I have specifically indicated to the contrary, in the discussion which follows I accept that the information set out in the documents is reliable, and where I refer to a fact evidenced by information in a document, I rely on that document to establish that fact.

199 Before turning to consider the facts, it is appropriate to deal with an issue which arose in relation to the question of the knowledge which should be attributed to the State in relation to the events the subject of these proceedings.

200 Counsel for the plaintiffs submitted that: the knowledge of the servants and agents of the State is taken to be the knowledge of the State, because those servants and agents comprise the directing mind of the State, or because the State is taken to know what the servants or agents of the State had a duty to communicate to the State represented by the Minister. The State, as a principal, must be taken to know whatever the agents had a duty to communicate. The State does not escape liability where employees of the State did not know about risks of harm of which the State, through its directing mind was aware.[217]

201 In support of each of these propositions, counsel for the plaintiffs relied on Western Australia v Watson.[218]

202 These submissions were directed to the question of what knowledge (as to the risks of harm which could arise as a result of separating children from their parents) could be imputed to the State. The submissions were advanced in support of the proposition that if it could be said that the Director had knowledge of the risks of harm to the plaintiffs, then that knowledge could be imputed to the State.

203 The issue, however, has a broader significance than the knowledge of the risks of harm from separating children from their parents. In this case, that broader question concerns the extent to which the knowledge of one officer or employee of the State – as to a particular fact or state of affairs - can be imputed to the State itself.

204 The State's position was that if the State owed fiduciary duties to the plaintiffs, its conduct (relevant to the alleged breaches of those duties) fell to be judged from the observations all public officers had made.[219] That appeared to be a submission that the knowledge of the employees of the State could be imputed to the Director, and in turn to the State itself.

205 In Western Australia v Watson the Full Court of this Court dealt with an appeal by the State against a finding of negligence and an award of damages to a plaintiff who had been exposed to asbestos dust while employed in the Harbour and Light Department. One of the issues on the appeal concerned whether it was reasonably foreseeable by the State that the inhalation of asbestos dust was hazardous and could cause disease. There was evidence that at the relevant time, the Ministers for Health and Mines, and the Commissioner for Health, were aware of the dangers of exposure to asbestos dust, but there was ***no*** direct evidence as to the state of knowledge of the Minister

responsible for the Harbour and Light Department. The question was whether the knowledge of the former could be attributed to the government as a whole.

206 The Full Court held that the directing mind and will of the State comprised the Ministers in the government, who were effectively delegates of the State, so that knowledge acquired by the Ministers, in that capacity, would be regarded as actual knowledge of the State.[220] They had a duty to communicate relevant knowledge to one another.[221]

207 The Court also held that the directing mind and will of the State extended beyond Ministers to heads of government departments, including the Commissioner for Health who, subject to the Minister, was also to be considered a delegate of the Government. The Commissioner had a statutory duty to communicate information to the Minister. The Court held that the State, as the principal, would be taken to know whatever the agents had a duty to communicate.[222] Furthermore, knowledge of agents could be aggregated in such circumstances.[223]

208 Accordingly, actual knowledge by the Commissioner in relation to a public health matter would constitute knowledge by the Government.[224] Even if that were not so, the Court held that in view of the fact that the Commissioner was a servant or agent of the State he had a duty to communicate that knowledge to the State represented by the Minister.[225]

209 Applying these principles to the facts of this case, knowledge of the Commissioner relevant to the NW Act, the 1963 NW Act and the administration of the Department of Native Welfare, constituted knowledge of the State. Knowledge of the Director relevant to the Child Welfare Act and the administration of the Child Welfare Department, also constituted knowledge of the State. The employees within those Departments, as servants or agents of the State, can be regarded as under a duty to communicate knowledge relevant to the administration of the legislation and their Departments, to the Commissioner and the Director respectively. The State (as the principal) would be taken to know what those agents had a duty to communicate. For this reason, in my view, information obtained by an employee of either the Department of Native Welfare or the Child Welfare Department relevant to the implementation of the NW Act, or the Child Welfare Act, in relation to the Collard case, can be imputed to the Commissioner or the Director, respectively, and in turn can be taken to be known by the State.

210 In the discussion which follows, when I make findings as to the knowledge of the State, I mean to refer to that knowledge which the Commissioner or the Director actually held, or knowledge which was held by, or knowledge which can be imputed to, the Commissioner or the Director because that knowledge was the knowledge of employees of the Department of Native Welfare or the Child Welfare Department.

211 It is convenient to discuss the facts by reference to the key events or issues which are the subject of the pleadings, namely:

(a) The circumstances surrounding Ellen's placement into the care of the Child Welfare Department;

(b) The evidence as to Ellen's state of health when she was admitted to hospital in 1958, and as to where Don and Sylvia and the Children were living in 1958;

(c) The circumstances surrounding the Siblings' placement into the care of the Child Welfare Department;

(d) Where were Don and Sylvia and the Siblings living in 1961?

(e) Responsibility for the Children after they became wards;

(f) Where the Children lived during their wardships;

(g) Don and Sylvia's family and living situation between 1962 and 1970;

(h) The events of Christmas 1970;

(i) Don and Sylvia's care for other children during the 1970s;

(j) Aspects of the Children's experiences during their wardships, including supervision of the Children by the Child Welfare Department;

(k) The extent of supervision or monitoring of the Children's welfare by officers of the Child Welfare Department;

(l) Contact between Don and Sylvia and the Children during the course of their wardships;

(m) The process followed, and factors considered, by officers of the Child Welfare Department and the Department of Native Welfare during the late 1950s and early 1960s by which an application would be made for an order that a child be made a ward;

(n) Was the removal of the Children undertaken pursuant to a policy of assimilation of aboriginal children?

(o) The knowledge possessed by officers of the Department of Native Welfare and the Child Welfare Department of the potential adverse psychological implications for children removed from their families;

(p) Knowledge of cultural implications of removing aboriginal children from their families;

(q) Was the return of the Children to Don and Sylvia considered by the Child Welfare Department at any stage during their wardships?
(r) Attempts by State authorities to obtain housing assistance for Don and Sylvia;
(s) Maintenance orders made in relation to the care of the Children;
(t) Injuries and causation;
(u) Actions taken by the plaintiffs in pursuit of their claims.
(a) The circumstances surrounding Ellen's placement into the care of the Child Welfare Department
212 Don and Sylvia gave evidence that when Ellen was nearly six months old, she became ill.[226] She was unable to hold down any food and began to lose weight quickly, so they took her to Beverley Hospital.[227]
213 Their evidence was that they took Ellen to Beverley Hospital on 12 February 1958. I accept that evidence. It is consistent with a file note prepared by an officer of the Child Welfare Department, Mr John Waghorne, to which I refer below.[228]
214 Don and Sylvia's evidence was that they were told that Ellen would have to remain in hospital for a few days.[229] At the time, Don was doing shearing work on a farm near Beverley which was owned by a Mr and Mrs McLean, so after they took Ellen to the hospital, Don and Sylvia returned to the McLean's farm. They, or Mrs McLean, telephoned the hospital every day[230] or every few days[231] to check on Ellen. Sylvia's evidence was that 'each time we called we ... were told that Ellen was 'going alright' but was not yet ready to be collected'.[232]
215 There were some inconsistencies in the evidence as to when Don and Sylvia returned to the hospital. Don's evidence was that he thought it was about a week after they first took Ellen to hospital,[233] but accepted that it may have been a couple of weeks later,[234] although he denied it was as long as a month later that they returned.[235] Sylvia's recollection was that Ellen had been in hospital for around two weeks when they returned to the hospital to collect her.[236] A file note prepared by Mr Waghorne, dated 13 March 1958[237] indicates that Ellen remained in Beverley hospital until 13 March 1958. The date of that file note suggests that it was written very shortly after the events to which it refers, and I find that it constitutes more reliable evidence as to the time frame than Don and Sylvia's recollections. I find that Ellen remained in hospital for 1 month.
216 I find that Don and Sylvia returned to Beverley Hospital to collect Ellen some time on or after 13 March 1958. Don and Sylvia's experience when they returned to Beverley Hospital was nothing short of dreadful. Sylvia's evidence as to what they were told, which I accept, was as follows: When we arrived at the hospital, we said to the nurse at the front door of the hospital that we had come to take Ellen home. The nurse rushed back inside to get the matron.

...

When she arrived at the entrance, the matron told us that Ellen had 'gone'.

I was devastated when the Matron said Ellen was 'gone'. I thought that she meant that Ellen had died, just like the doctor in York told me Glen had died. ***No*** one knows how hard that was for me. It was terrible, it really affected me and I know it also affected Don. I think that I may have almost fallen over from the shock.

When I came back to my senses we worked out that the Matron was saying that Ellen had been 'fostered' out or 'adopted'. I can't remember which word the matron used. I felt numb and sick inside and felt as if I couldn't breathe. All this happened while I was at the front door of the hospital.

It was such a shock to hear that Ellen had been fostered out because each time we had rung we had been told that Ellen was going 'alright'. ... I felt that it had all been arranged without our knowledge and that we had been intentionally deceived by the hospital staff who were saying Ellen was going to be alright.

The matron would not let us into the hospital and I am not sure why. Don and I kept asking questions to try and find out where Ellen was. They wouldn't answer any of our questions and Don and I were just told that we needed to go to the aboriginal Affairs/ Native Welfare office in Wellington Street, Perth for more details of Ellen's whereabouts.

The nurse told me Ellen would be 'better off' where she had gone. We had a row with her because we were obviously upset. The nurse threatened to call the police, so we left because we were scared we would be put in jail for nothing if they arrived.[238]

217 In fact, what had occurred was that an application had been made to the Beverley Children's Court for an order that Ellen be committed to the care of the Child Welfare Department until she was 18 years of age. Having regard to a copy of the order which was in evidence, I find that an application was made to the Court on 13 March 1958, and on the same day, an order was made by two justices of the peace sitting as the Beverley Children's Court by which Ellen 'was adjudged to be a neglected child within the meaning of s 4 definition of the Child Welfare Act' and committed to the care of the Child Welfare Department until she was 18 years of age.[239]However, the order was made with a recommendation that the committal be subject to a review of the Collard's home conditions in 12 months' time.[240]

218 The State did not call any witnesses in relation to the circumstances concerning the decision to apply for an order committing Ellen to the care of the Child Welfare Department. However, the State tendered a small number of documents which shed some light on the circumstances surrounding the decision to apply for an order in respect of Ellen.

219 The decision to apply for an order, and the application itself, appears to have been made by Mr Waghorne, an officer in the Child Welfare Department, who has since died.[241] The key document in relation to that application was a file note of the Child Welfare Department prepared by Mr Waghorne and dated 13 March 1958,[242] in which he noted the following: I have to advise that the matron of the Beverley hospital phoned me on the 12th inst to the effect that a baby named Ellen Collard born 25957 had been admitted to the hospital on the 12258 suffering from malnutrition and lack of proper care. She knew the parents as this baby had been born at the hospital and was then the normal weight of 6lbs 3ozs. When brought to the hospital it was five lbs and underweight for its age. The baby was now ready for discharge. She knew that the parents were living in filthy conditions and she considered it would be dangerous to return the baby to such a home. ...

In view of the urgency of the case I came to Beverley, where with Const Whitney I went to Brookton where I inspected the Collard home. This home consisted of a tin humpy of one room with a partition constructed of galvanised iron, unlined with a dirt floor. There was practically ***no*** furniture and the sleeping arrangements consisted of one double bed and one single bed. The bedding was dirty and the premises generally was not clean.

Mrs Collard told me that she came under the Native Welfare Act. ... Mr Wright-Webster [the then District Officer for the Native Welfare Department] said that he could not get to Beverley for a week or so. In view of this fact I considered it would be detrimental and in fact dangerous, to the child's welfare to allow it to be returned to such filthy conditions so I decided to make application to the Court to have it made a ward of the State. This application was successful in the Beverley Children's Court this date.

In view of the fact that the children come within ... the Native Welfare I decided to leave the remaining five children with their parents until the matter can be looked into by that Department. ...

The baby is being escorted to Perth this date by ... a nurse from the Beverley Hospital. ...

I was successful in getting a maintenance order against the father. ...

220 Another of the documents in evidence constituted a portion of a document headed 'Informative Report on Child' which bears a reference to a date of hearing on 13 March 1958.[243] It appears from the document that it was prepared for use in the application to the Children's Court. Those parts of that document which can be deciphered contain a description of the Collards' home as follows: ... House: Tin Humpy. State of Repair: Poor.

Number of bedrooms: One room for all purposes.

Sleeping arrangements: Very poor.

...

Cleanliness: Dirty.

Conditions adequate for Child's needs? ***No***.

221 The Informative Report on Child thus appears to be consistent with the file note prepared by Mr Waghorne.

222 I infer that the matters set out in the 'Informative Report on Child' formed part of the evidence given by Mr Waghorne to the Children's Court at Beverley and were the basis for the order made by that Court that Ellen be committed to the care of the Child Welfare Department.

223 Don and Sylvia disputed a number of aspects of Mr Waghorne's file note of 13 March 1958, and of the 'Informative Report on Child'. Sylvia claimed that the matron at the Beverley hospital was new, and could not have known anything about Ellen's living conditions.[244] However, there were ***no*** records available from the Beverley hospital from 1958, and ***no*** staff who worked at the hospital at the time gave evidence, or had been located, so these aspects of Mr Waghorne's file note could not be tested.

224 In addition, Sylvia disputed that she had ever spoken with Mr Waghorne.[245] Her evidence was that before Ellen was taken, the Department of Native Welfare had never had any contact with her at all, and that officers from the Child Welfare Department had never come to her home or spoken to her.[246]

225 In crossexamination, it was put to Don that native welfare officers had come to Bessie Ninyette's block on a number of occasions before Ellen was taken, or before the Siblings were taken. Don denied that this was the case. He said that welfare officers had never come to their ***place*** at Brookton.[247]

226 However, those denials were inconsistent with the joint statement Don and Sylvia made to the ALS in 1995. In that statement, Don and Sylvia had said that native welfare used to come around and see where we lived in Brookton at Sylvia's mum's ***place***. Native welfare was feared by us.[248]

227 In crossexamination, Don was asked about this statement, and he said it was Constable Stan Wall ... mainly, and those welfare officers never come around ... whatever they said, we never saw them once but they wrote ... about us.[249]

228 Sylvia was also asked about the statement she and Don made to the ALS in 1995. Her evidence was: they wasn't feared, but my mother they never came to my mother's block because she was classed as white. She lived on her own and they never came to her, they wouldn't come on her ***place*** when they did come up there, if they came up there.[250]

229 I do not accept Sylvia and Don's evidence, in so far as they denied that officers of the Department of Native Welfare had ***visited*** the humpy prior to Ellen being removed from their care, for three reasons. First, those denials were inconsistent with the joint statement Don and Sylvia provided to the ALS in which they acknowledged that native welfare officers had come to see them at Bessie Ninyette's block. Secondly, it is difficult to envisage any plausible reason why Mr Waghorne would have fabricated the contents of his report, particularly when that report was to form the basis for evidence given to the Children's Court. Thirdly, as I explain below at [854] to [856] the evidence as to departmental practice within both the Department of Native Welfare and the Child Welfare Department suggests that it was the practice of inspectors to inspect a child's living conditions before an application was brought for that child to be made a ward. That evidence also supports the conclusion that it is more likely than not that Mr Waghorne did inspect the living conditions at the humpy prior to preparing his report, and making the application to the Children's Court that Ellen be made a ward.

230 I turn next to consider the evidence as to the accuracy of Mr Waghorne's understanding that the humpy was Don and Sylvia's home, and as to the accuracy of his report as to Ellen's state of health when she was admitted to hospital, and of the conditions at the humpy.

(b) The evidence as to Ellen's state of health when she was admitted to hospital in 1958, and as to where Don and Sylvia and the Children were living in 1958

Ellen's state of health in March 1958

231 The key aspects of Mr Waghorne's file note of 13 March 1958 in relation to Ellen's health are that she was admitted to hospital suffering from malnutrition and lack of proper care, and that when she was admitted (at approximately five months of age) she weighed less than she had when she was born.[251]

232 Don and Sylvia's evidence was that Ellen had contracted gastroenteritis (or at least that was what they thought the problem was). Sylvia's evidenceinchief was that that was what they were told by the doctor at the Beverley hospital.[252] However, there was ***no*** documentary evidence from the hospital, and ***no*** one from the hospital at the time gave evidence. Whether or not Ellen was suffering malnutrition, it was not suggested that Mr Waghorne's report was inaccurate in so far as it concerned his report of what he had been told. I find that Mr Waghorne's file note accurately indicated what he was told by the matron of the Beverley hospital in relation to Ellen's admission to hospital.

233 Don and Sylvia's evidence was that Ellen quickly lost a lot of weight when she became ill.[253] Evidence of her weight loss is consistent with Mr Waghorne's note of the matron's report to him (namely that on admission, Ellen weighed less than she had when she was born). I accept that in so far as it refers to Ellen's weight loss, that part of Mr Waghorne's file note of 13 March 1958 was accurate. I digress to note that given Ellen was only five months old the amount of weight she had lost was significant.

Where were Don and Sylvia living in March 1958?

234 I turn to the evidence as to where Don and Sylvia were living at the time Ellen was taken into care. In his report, Mr Waghorne referred to a 'humpy' where Don and Sylvia lived.[254] The humpy was a humpy located on Bessie Ninyette's block. Don and Sylvia had moved to Bessie Ninyette's block around eight months after their marriage.[255]

235 The humpy was located at a camp on Bessie Ninyette's block. There was some evidence to suggest that in the early days of Don and Sylvia's marriage, other members of Sylvia's family including her sisters and their partners also lived at the camp on Bessie Ninyette's block, in humpies and tents.[256] However, by the time the Siblings were taken into care, Bessie Ninyette was the only other person who resided on the block.[257] Bessie lived in a tent on her block.[258] Don's brother and sister in law, Fred and Jean Collard, lived in a house on a block a short distance away.[259]

236 There were inconsistencies in the evidence given by Don and Sylvia as to where they were living at the time that Ellen was taken into care. At times, Don and Sylvia gave evidence that at the time Ellen was taken from their care they were not living at the humpy. Don's evidence was that at the time when they took Ellen to hospital, and while Ellen was in hospital, they were living in tents on the McLean's farm.[260] (I note that at the time, Don and Sylvia had six children Donald, Darryl, Bonnie, William, Beverley and Ellen although it was not clear from the evidence whether all of the children were staying with them at the McLean's farm.[261])

237 Sylvia's evidenceinchief was that at the time when Ellen was taken from their care, we were living in a small cottage on the farm with a few beds and all of us living together as family in the aboriginal way. It was small, but it was clean and we had fresh well water and food and bedding.[262]

238 Having regard to Don and Sylvia's evidence, I find that at the time that Ellen became ill, Don was doing seasonal work at the McLean's farm and Don and Sylvia and at least some of their children, including Ellen, were staying there while Don undertook that work.

239 However, it is also clear that Don was undertaking seasonal work at the McLean's farm, as he did every year, and that after doing that work he would move back to Brookton, or to another farm where he would undertake other seasonal work. In this respect, I bear in mind Don's evidence that he undertook seasonal work in and around Brookton and in regional areas generally not far from Brookton, throughout each year. That conclusion leaves open the possibility that the humpy was Don and Sylvia's permanent home, to which they returned when Don was not undertaking seasonal work away from Brookton, and to which they returned on the weekends when Don was working nearby to Brookton. Don and Sylvia's own evidence establishes that that was the case.

240 At a number of points in their evidence, Don and Sylvia accepted that they lived at the humpy at various times during the year. Their evidence as to what proportion of the year was spent living at the humpy was inconsistent. As I have already observed earlier in these reasons, it was apparent that Don and Sylvia sought to minimise the amount of time they spent at the humpy.

241 In her evidenceinchief, Sylvia said that they spent about six months of the year at the humpy on Bessie Ninyette's block.[263] However, in her oral evidence, Sylvia said that they used to come in on the weekends to stay

at the humpy,[264] and that '[e]very weekend when we knock off work and that we'd go',[265] by which I understood her to mean that they would stay at the humpy every weekend. Later in her evidence, Sylvia said that they would go to the humpy on the weekends to stay.[266]

242 In her evidenceinchief, Sylvia also indicated that when they went to collect Ellen from the Beverley hospital the 'shearing was almost done at the McLean's farm so we brought the rest of the children with us and planned to drop them off at my mother Bessie's block when we had collected Ellen so we could pack up at the McLean's farm and join them back in Brookton later that day.'[267] That evidence indicated that Don and Sylvia intended to return to the humpy when they finished the work at the McLean's farm.

243 It was put to Don in crossexamination that when Ellen was born they were living in Brookton. His answer was that it 'wasn't necessary' for them to be living in Brookton, but he accepted that 'Brookton' (by which I understood he was referring to the humpy at Brookton) 'was our home'.[268] However, he then went on to suggest that 'most of the time we spent six or seven, eight, 10 months away and we'd come back'.[269]

244 In addition, in the joint statement Don and Sylvia gave to the ALS in 1995, they indicated that when we had Ellen, Don was shearing in Beverley when Ellen was born at Beverley Hospital. We were still living in Brookton but moving around with the work, staying at the McLean's farm in Beverley, camping where Don was working.[270]

245 On the other hand, both Don[271] and Sylvia[272] gave evidence that Ellen had never been taken to Bessie Ninyette's block. As Ellen was just over five months old when she became ill, this would mean that Don and Sylvia had not returned to the humpy in the five months following Ellen's birth. I am unable to accept this evidence, having regard to the other evidence given by Don and Sylvia, which established that they regularly returned to the humpy throughout the year.

246 Having regard to all of the available evidence, I find that the humpy was Don and Sylvia's permanent home, at which they resided when they were not working away from Brookton, and to which they returned both in between periods of seasonal work away from Brookton, and on the weekends while undertaking seasonal work nearby to Brookton. It is neither necessary nor possible to make a finding as to precisely how much time Don and Sylvia and their children spent at the humpy, but I accept that they spent a substantial period of time there each year. I find that Don and Sylvia intended that once they collected Ellen from the hospital, they would take her to stay at the humpy.

Living conditions at the humpy in March 1958

247 I turn, next, to consider the evidence in relation to the living conditions at the humpy. There was little evidence specifically about the living conditions at the humpy at the time when Ellen was removed from Don and Sylvia's care most of the evidence about the humpy focused on the period when the Siblings were taken into care. However, Sylvia did give evidence about the construction and contents of the humpy in 1958.

248 Sylvia's evidence in this respect generally accorded with the description given by Mr Waghorne in his file note of 13 March 1958. Sylvia accepted that the humpy was made of sheets of iron, with a hessian partition to separate the sleeping area from the kitchen area. Sylvia said there were bits of linoleum on the dirt floor. She said there was a double bed, and two or three single beds. The only other furniture was a table, and stools to sit on. There was also a food cooler, and a little black stove, although mostly they cooked outside on a fire.[273]

249 Sylvia's description of the construction and contents of the humpy is broadly consistent with other evidence in relation to the construction and content of the humpy in 1961 when the Siblings were removed into care. I deal with that evidence at [344] to [351] below.

250 Having regard to Sylvia's evidence, and the evidence as to the construction and contents of the humpy in 1961, I find that the construction and contents of the humpy remained broadly the same between 1958 and 1961.

251 Having regard to Sylvia's evidence, and to the evidence as to the construction and contents of the humpy in 1961, I find that the description of the humpy's construction and its contents, which was contained in Mr Waghorne's file note of 13 March 1958, was accurate.

252 The humpy did not have electricity, gas or running water. Instead, Don and Sylvia and their family collected water from the Brookton Reserve. They also used showers and toilets at the Reserve,[274] although they made do with camping toileting arrangements as well.[275]

253 The real dispute as to the description of the humpy in Mr Waghorne's file note of 13 March 1958 concerned its observations on the cleanliness of the humpy. Don disputed the description that the bed linen was dirty and the premises generally not clean. He said that the humpy was always clean.[276] Sylvia denied that the bed linen was dirty she said she did the washing at the Reserve.[277] Sylvia's evidence was that the humpy was always clean. Her evidence was that she swept every day.[278]

254 Two observations can be made about the available evidence as to the cleanliness of the humpy. First, other than for the reference to dirty bed linen it is not possible to discern what Mr Waghorne's note means in its reference to the premises generally being 'not clean'. The fact that the humpy had a dirt floor suggests that it was inevitable that there would have been dust and dirt inside the humpy. Similarly, the fact that the bed linen was dirty might have been due to ***no*** more than the fact that there was a dirt floor, as clean linen would quickly have become dusty and dirty when feet bearing dust from the floor made contact with the bed linen.
255 Secondly, with six children and two adults residing in what was essentially one room, with a dirt floor (or largely a dirt floor), it would have been even more difficult to keep the humpy free of dust and dirt. Cleaning the bed linen would also have been difficult without running water, and washing facilities, at the humpy.
256 With these qualifications, I find that the description in Mr Waghorne's file note of 13 March 1958 as to the premises being 'not clean' was accurate.
(c) The circumstances surrounding the Siblings' placement into the care of the Child Welfare Department
257 In this section of my reasons I deal with the following matters:
(i) the events of 7 December 1961;
(ii) did Don and Sylvia arrange for the Siblings to be sent to Sister Kate's?
(iii) did Don and Sylvia take the Siblings to Sister Kate's themselves?
(iv) the application to the Children's Court for the Siblings to be made wards.
(i) The events of 7 December 1961
258 December 1961 was a deeply sad and traumatic day for all of the members of the Collard family.
259 At one point in his evidence, Don suggested that he was at home at the humpy on Bessie Ninyette's block on 7 December 1961.[279] However, Don's evidence was inconsistent with Sylvia's evidence. She said that he was away working at the Yeo's farm that day.[280] Beverley recalled that Don was not present, but was away working[281] and Darryl's evidence was that Don was not at home either.[282] I find that Don was not at home at the humpy on 7 December 1961. Consequently, although Don gave evidence that he was at home and that the Siblings were taken to Sister Kate's by Ms Jones and a man I do not accept that evidence.
260 Sylvia, the Siblings, Bessie Ninyette, and possibly Don's mother,[283] were present at the camp on Bessie Ninyette's block on the morning of 7 December 1961. Beverley's evidence was that the Siblings saw a car coming up the driveway to Bessie Ninyette's block.[284] It was an old black or grey Austin. Bonnie, Beverley, and Darryl recalled that Ms Jones was inside the car.[285] Beverley recalled hearing her grandmothers shouting.[286]
261 Sylvia's evidence was that when the Siblings told her that Ms Jones' car was coming, she walked away up to Fred and June Collard's block because (in her words) she 'didn't want to be there when Ms Jones was taking them'.[287]
262 The only evidence as to what then occurred on 7 December 1961 came from the Siblings. Eva and Wesley did not have any recollection of what occurred, which is not surprising given that Eva was 21 months old, and Wesley eight months old, at the time. Glenys' recollections were more limited than those of the older Siblings. (Glenys was almost three years old, Beverley was five years old, William was six years old, Bonnie was seven years old, Darryl was nine years old and Donald was 10 years old at the time they were taken.) Despite their young ages at the time, the Siblings who gave evidence had some vivid memories of what had occurred. As I have already found, it is quite possible that such a significant and traumatic event for the Siblings may have left them with vivid memories that have survived even after such a long period of time. Although there were some inconsistencies in the evidence given by the Siblings, there was considerable consistency as well.
263 The evidenceinchief given by Bonnie and Beverley supports the finding that Ms Jones came to the humpy during the day, in the late morning.[288] (Darryl's evidence was that the Siblings were collected after dinner,[289]but in this respect I find that his recollection was not accurate.)
264 There were inconsistencies in the Siblings' evidence as to whether Ms Jones was alone. Bonnie's evidence was that a man was with Ms Jones, and accompanied them to Sister Kate's.[290] Beverley recollected that Ms Jones was alone[291] and that it was only Ms Jones who accompanied them to Sister Kate's.[292] However, Beverley thought Constable Wall arrived at some point and told the Siblings to get in the car.[293] Darryl's recollection was that Ms Jones and two or three other people from the Department of Native Welfare came to collect the Siblings, and that they took the Siblings in the car also.[294] In crossexamination, he suggested that it was Ms Jones, Constable Wall, and two other people (although he did not know who they were) and that one of

those other persons accompanied Ms Jones in the car to take them to Sister Kate's.[295] None of the other Siblings recollected the presence of two other people, or of officers from the Department of Native Welfare.

265 The State tendered a witness statement from Mr Humphries, who was the Welfare Inspector in the Narrogin officer of the Department of Native Welfare at the time. His evidence was that he had ***no*** memory of taking any children from Brookton to Sister Kate's at any time during his employment at Narrogin, and had ***no*** memory of ever ***visiting*** Sister Kate's in his whole life, so he was certain that he had not escorted the Children to Sister Kate's.[296] Having regard to all of this evidence, I find that Darryl's recollection as to the presence of two or more officers from the Department of Native Welfare is mistaken.
266 I find that on 7 December 1961, Ms Jones came to Bessie Ninyette's block, collected the Siblings and drove them to Sister Kate's. As for whether there was another person present, given the conflicting evidence I am not satisfied that it is more likely than not that another person accompanied Ms Jones to collect the Siblings and take them to Sister Kate's.
267 Either just before Ms Jones arrived, or after she arrived, all of the Siblings were given a bath or a wash by Bessie Ninyette.[297] Beverley recollected that Ms Jones provided the Siblings with clothes to wear all the girls were given red tartan allinone pinafores, white tops and brown sandals, while the boys were given shorts, a tshirt and a short sleeved shirt with a collar in a greyblue colour.[298]
268 All of the Siblings then got into the car. They sat in the front and back seats.[299] Bonnie and Beverley recollected that the Siblings thought they were going for a ride in the car they didn't realise that they were being taken away.[300] Darryl recollected that they had been told that they were being taken for a picnic.[301] However, during the journey the awful realisation must have dawned on the older Siblings that they were not merely going on a drive or on a picnic, but were being taken away from their parents. Darryl recalled that all of the Siblings cried during the car trip.[302] Glenys also recalled the Siblings crying.[303]
269 When they arrived at Sister Kate's, Ms Jones introduced the Siblings to the superintendent of Sister Kate's, Mr Daniel.[304] Bonnie recalled that the Siblings had to sit and wait while a number of forms were filled in, and then Ms Jones left.[305]
(ii) Did Don and Sylvia arrange for the Siblings to be sent to Sister Kate's?

270 When the Siblings were taken to Sister Kate's ***no*** order had been made by any court to make them wards. That fact gives rise to three questions. First, did Don and Sylvia have any prior notice of an application to the Court for the Siblings to be ***placed*** in the care of the Child Welfare Department? Secondly, did Don and Sylvia make the decision to send the Siblings to Sister Kate's and did Ms Jones take the Siblings to Sister Kate's with the authority of Don and Sylvia? Thirdly, why were the Siblings taken to Sister Kate's?
Prior notice of an application to the Court

271 The evidence given by Don and Sylvia established that they had notice that an application was to be made to the Children's Court that the Siblings be ***placed*** in the care of the Child Welfare Department. In crossexamination, Don stated that the first occasion when he became aware that the Siblings were going to be ***placed*** in care was about three or four days before the application was made to the Court on 8 December 1961.[306] Initially Don said that he saw Constable Wall three or four days before the Siblings were committed to the care of the Child Welfare Department.[307] He later said that he was 'pretty sure' that the application for the committal of the Siblings was the following day, although he accepted some doubt about that,[308] and he later agreed that there were a few days between when he spoke to Constable Wall and when Ms Jones took the Siblings away.[309]
272 Don's evidence was that Constable Wall told him that the Siblings were to be taken because of neglect.[310] He said Constable Wall told him not to take the kids anywhere because 'they're being put in the welfare's care'.[311]Don also said that Constable Wall told him that the matter would go to Court, and Don confirmed that Sylvia and Ms Jones subsequently went to Court when the application was made.[312]
273 It is likely that on this occasion, Constable Wall served Don with a summons to attend the Children's Court for the hearing of the application. In approximately 2002, Don recounted what had occurred for the purposes of the publication entitled 'Echoes of the Past Sister Kate's Home Revisited'.[313] In that publication, Don is quoted as having said that [w]hen I got the summons to go to court over the kids, I was trying to work out what to do. Well I couldn't run away with the kids, there wasn't anywhere I could take them. I really didn't know what to do.[314]

274 Don's evidence was that after Constable Wall told them the Siblings were to be removed he and Sylvia 'were too stunned really. There was nothing we could do because we were warned and told not to take them.'[315]
275 Sylvia's evidenceinchief was that: One morning in December 1961 Ms Jones came to the humpy at our camp on my mother Bessie's block. She drove up to the block. At the time, the children were all living with us at the camp and were attending school in Brookton.

Ms Jones told me that the DNW were coming to get the children. I said words to the effect, 'What for?' She said words to the effect, 'They're going to take the kids to Sister Kate's for a while, just for a while, and you can get a home then get them back.' By 'a home' I understood that she meant a house.

I was in shock and I don't remember what I said to her in response or if I said anything at all.[316]
276 However, in crossexamination, Sylvia said that she couldn't remember when she had heard that the Siblings were to be removed into care, but thought she and Don heard it from Ms Jones and Constable Wall. She thought Constable Wall told Don that they were going to come and Ms Jones was going to take the kids.[317]

277 Although Sylvia's evidenceinchief suggested that her conversation with Ms Jones was the first indication she (and, by implication, Don) had had that the Siblings were to be the subject of an application for the Siblings to be ***placed*** in the care of the Child Welfare Department, in that respect I find that that evidence was mistaken given her evidence in crossexamination.

278 I find that early in December 1961 Don was served with a summons by Constable Wall, and subsequently Ms Jones spoke to Sylvia in relation to the application by officers from the Department of Native Welfare to the Children's Court for the Siblings to be ***placed*** in the care of the Child Welfare Department.
Did Don and Sylvia decide to send the Siblings to Sister Kate's?

279 Don recalled that when Ms Jones came to ***visit*** them she told them that the best thing to do with the Siblings would be to have them put into Sister Kate's.[318] Don's evidence was that he and Sylvia agreed to do so, so that the Siblings could all be together.[319] However, Don's evidence was that they first asked Ms Jones to call the Wandering Mission, so that he and Sylvia could also go with the Siblings and live with them on the Mission. His recollection was that Ms Jones went away and called the Wandering Mission, but subsequently told them (possibly the next day) that the Mission was not able to take the Siblings.[320]

280 Later in crossexamination, Don said that he thought this discussion with Ms Jones about the Wandering Mission may have taken ***place*** a few days before the Siblings were taken. His evidence as to that conversation was that 'that's long before ever these other things. Long before this'.[321] However, he then suggested that the conversation took ***place*** 'a few days before'[322] the Siblings were removed. Don said that Ms Jones 'was actually making inquiries, you see, where we could dump them and over a period of maybe two or three days'.[323]
281 Don's evidence was that they then 'decided to take them down and put them in [Sister Kate's]'.[324] Don's evidence was that Ms Jones picked the Siblings up the following day,[325] but he accepted that it was possible that it may have been the day after that.[326]
282 Sylvia's evidenceinchief was that: Ms Jones said that it would be best if the children were taken to Sister Kate's Children's Home in Queens Park, Perth. She asked me if I would let the kids go with her for just for a while, she would take them to Sister Kate's for me. She also told me that if it went to court the children would be split up but if I let her take them there, they would all be together and then we (meaning Don and I) could pick them all up from there so it would be better.

She never told me anything about having to go to Court and I don't recall if she told me what would happen if Welfare took the children instead of her.

Don was away shearing at the time and I didn't know how to get in touch with him to let him know what was happening. I asked Ms Jones if she could do something to try and get the message to Don about the children and what was happening. I think she said she was going to try and find Don and tell him. She then left my mother's block. I think Don was working at the Overhau's farm at the time.[327]

283 Sylvia also accepted that she had had a discussion with Ms Jones about trying to get the Siblings into the Wandering Mission. Initially, Sylvia said that she thought this discussion was before the Siblings were taken, she then said it was afterwards, when the Siblings were in Sister Kate's,[328] and she later said she couldn't remember when she had that discussion.[329]

284 At various other points in their evidence, however, Don and Sylvia both sought to disavow any prior knowledge that the Siblings were likely to be removed from their care or that they had any role in arranging for the Siblings to be sent to Sister Kate's. The tenor of this evidence was that the Siblings were simply taken apparently without any authority by Ms Jones. By way of example, at one point in crossexamination, Sylvia said that prior to the day Ms Jones came, she had never seen her at Bessie Ninyette's block, she had never seen any native welfare officers at the block, and she did not know Mr WrightWebster or Mr Humphries[330] (who were the native welfare officers who made the application to the Children's Court). Sylvia also said that prior to Ms Jones driving up 'we did hear that she was going to take the kids to Sister Kate's as it was and I didn't want that to happen'.[331] Sylvia also said that she had not agreed to Ms Jones taking the children to Sister Kate's: ***No*** I never gave permission ***no***. We had ***no*** say... There was ***no*** say.[332]
285 Sylvia denied that she had changed her mind about the Wandering Mission and asked could the children go to Sister Kate's instead[333] and she denied that she had ever expressed a wish that the children go to Sister Kate's.[334]
286 I do not accept Don and Sylvia's denials of any role in arranging for the Siblings to be sent to Sister Kate's, for five reasons. First, it is inconsistent with Don and Sylvia's other evidence to which I have referred.
287 Secondly, it is highly improbable that Ms Jones simply attended at the humpy without any notice or warning, and without any authority proceeded to take the Siblings away.
288 Thirdly, Sylvia's conduct on 7 December 1961 is consistent with her having prior knowledge that Ms Jones was coming to take the Siblings to Sister Kate's. Sylvia accepted that when she was told by the Siblings that Ms Jones was coming up the drive to Bessie Ninyette's block, she (Sylvia) had already heard that Ms Jones may be going to take the children.[335] That prior knowledge also explains why Sylvia ran away when Ms Jones' car approached. Sylvia's evidence was that she didn't speak to Ms Jones when she came to collect the Siblings, because she (Sylvia) was 'too angry'.[336] Instead, she went to the home of her sister in law, Jean Collard, and remained there, and returned to the humpty later in the afternoon, after the Siblings had left.[337]
289 Fourthly, the evidence of Bonnie, Beverley and Darryl was that they thought Ms Jones was going to take them for a ride in the car, or for a picnic. That is consistent with the evidence given by Don that he and Sylvia had told the children that they were 'going for a holiday, a ride and they (the Siblings) thought everything was right'.[338]

290 Fifthly, there was documentary evidence in relation to the admission of the Siblings into Sister Kate's which supports the conclusion that the Siblings were admitted to Sister Kate's by Ms Jones, but with the knowledge and authority of Don and Sylvia. In evidence were documents entitled 'Returns Required to be Filled in by Licensee of ***Place*** for Reception of Children under Six Years of Age' (the Returns) which appear to have been completed by Mr Daniel, the Superintendent of Sister Kate's, in relation to the receipt of Beverley, Glenys, Eva and Wesley (each of whom were under six years of age when admitted to Sister Kate's).[339] The Returns indicated that the reason for ***placing*** the child in Sister Kate's was 'parents unable to care for children'.

291 Each of the Returns was dated 12 December 1961. As I have said, the Siblings were admitted to Sister Kate's on 7 December 1961. However, as I explain below, the evidence of Don and Sylvia (which, for the reasons set out below, I accept) was that the first time they went to ***visit*** the Siblings at Sister Kate's was a week after the Siblings were taken there by Ms Jones. That time frame corresponds with the completion of the Returns.
292 Three pieces of information in the Returns support the conclusion that Don and Sylvia authorised the Siblings' admission to Sister Kate's, and subsequently completed the documentation for the Siblings' admission.
293 First, each of the Returns required the 'Name of Person from whom the Child was received' and in each case the name entered was Donald Collard of Brookton. That suggests that even if Ms Jones took the Siblings to Sister Kate's, that she did so on behalf of Don and Sylvia.
294 Secondly, each of the Returns required answers for 'Amount agreed to be paid per week for the Child's maintenance' and 'By whom' to which the answers given were '7/6' and 'Donald Collard'. It is difficult to see how any

agreement could have been reached with Don for the payment of maintenance if he was not present, or had not provided instructions to someone acting on his behalf that he consented to pay maintenance to Sister Kate's.
295 Finally, the date of birth for each child was set out in the Return for that child. The dates of birth entered for two of the Siblings did not correspond to the official records of their dates of birth, but in one case did correspond with evidence given by Sylvia. The Return for Glenys' admission indicated that her date of birth was 18 December 1958 (which was consistent with Sylvia's evidence about her date of birth[340]) whereas Glenys' birth certificate indicated that her date of birth was 15 December 1958. On the other hand, the Return in relation to Eva indicated that her date of birth was 26 April 1960, yet her birth certificate indicates that Eva's date of birth was 1 March 1960. (Sylvia's evidence was that Eva's date of birth was either 31 March or 1 April 1960.[341]) The discrepancies suggest that the Siblings' dates of birth as noted in the Returns were not obtained from official records, but were provided by a parent or family member. (In her evidence, Sylvia thought that perhaps Don had given Mr Daniel the Siblings' dates of birth.[342]) At least in the case of Glenys' Return, the information in that document as to her date of birth supports the inference that either Sylvia or Don, or both of them, were present at the time of the completion of the Returns, or that they provided Mr Daniel with information necessary for the completion of the forms.
296 For completeness, I note that documents entitled 'Application to Admit Native Ward to a Mission' in relation to the admission to Sister Kate's of Beverley, Eva, William, Glenys, Donald, 'Daryl' and 'Bonny' (the Applications to Admit) were in evidence.[343] Each of the Applications to Admit was dated 22 December 1961. Each of them appears to have been completed by Mr Daniel, the Superintendent of Sister Kate's. The Applications to Admit indicate that the 'Reason for Admission' was 'maintenance and education'. The date on which the Applications to Admit were completed, and the terminology used in them (specifically, references to Native Wards) suggests that fresh admission documents were completed after the Siblings were made wards, at which point the authority for their placement at Sister Kate's derived from the orders made by the Children's Court at Brookton.
297 The conclusion that Don and Sylvia authorised Ms Jones to take the Siblings to Sister Kate's is also consistent with two other pieces of evidence. First, in a Report prepared in support of the application to the Children's Court, Mr Humphries of the Department of Native Welfare noted: Children taken by mother, with assistance from Ms Jones of Brookton, to Sister Kate's Home 7/12/61. Children not in attendance and hearing held in their absence.[344]
298 Secondly, in a memorandum dated 12 December 1961 to the Director, Mr WrightWebster advised that the Children's Court had ordered that the Siblings be made wards, and observed: On November 30th, the Mother requested Mr Humphries and Mrs O'Dea to arrange that the children be sent to Wandering Mission and considerable effort was made to arrange this. The Mother however, changed her mind and assisted by Ms Jones of Brookton, took the children and lodged them in Sister Kate's home the day prior to the hearing despite being told by the District Welfare Officer that the children must appear at the Court.[345]

299 Having regard to all of the evidence, I find that after Don and Sylvia were told that an application was to be made to the Children's Court in respect of the Siblings, and after discussing with Ms Jones what might happen if that application were successful, Don and Sylvia decided to ***place*** the Siblings into Sister Kate's themselves. I find that Don and Sylvia first asked Ms Jones to make enquiries of the Wandering Mission to see if Don and Sylvia and the Siblings could live there, and when those enquiries were not successful, Don and Sylvia decided to ***place*** the Siblings at Sister Kate's. On behalf of Don and Sylvia, and with their authority, Ms Jones took the Siblings to Sister Kate's on 7 December 1961.
Why were the Siblings taken to Sister Kate's?

300 As to why Don and Sylvia decided to ***place*** the Siblings into Sister Kate's, I find that Don and Sylvia did so in the expectation that that would enable the Siblings to remain together, and that Don and Sylvia would be able to remove the Siblings from care at a later date when their financial position and accommodation improved. The evidence which supports that finding is as follows.
301 In her evidenceinchief, Sylvia said: I thought there was an agreement between Ms Jones and I and Sister Kate's, made the day the children went to Sister Kate's that all the children would stay together and that they could come home as soon as Don and I got a house and permanent jobs.

This was the only reason we signed them into Sister Kate's, because Ms Jones had told us that if the Court was left to decide where the children went to, there was ***no*** guarantee they would all be kept together. After all, this was the only thing we thought we had some control over at least the children would be kept together and we could ***visit*** them because we would know where they were.[346]

302 Initially in crossexamination, Sylvia said that she could not recall giving this evidence in the affidavit which constituted her evidenceinchief.[347] She then accepted that perhaps the agreement had been reached after the children were taken, although she accepted that it couldn't have been long after they were taken.[348]

303 Don gave evidence that he thought that there was an 'agreement' between he and Sylvia, and Sister Kate's, that the Siblings would stay together at Sister Kate's until he got a house and a permanent job, at which point they would be able to come home. He said he understood that that was the agreement because he and Sylvia 'went down and signed with the welfare'.[349] Don said he and Sylvia went to Sister Kate's and spoke with 'Danny Daniel. I think he was an orderly of Sister Kate's at the time'.[350] Don's evidence was that he was 'pretty sure' that this agreement was reached after the Siblings were made wards of the State because 'we had to go down and sign them out so that they had the control of them'.[351] When asked what he meant by 'sign them out' Don said that he meant 'out of our care and into the control of Sister Kate's'.[352] Don said that he and Sylvia signed a document to pass the Siblings into the care of Sister Kate's.[353] When crossexamined further about when this document was signed, Don initially maintained that it was not signed before the Siblings were made wards, although he later accepted that 'once the welfare got them [that is, the Siblings] it was their concern'.[354]

304 The tenor of this evidence was consistent with the version of events recounted by Don in approximately 2002, for the purposes of the publication entitled 'Echoes of the Past Sister Kate's Home Revisited'.[355] In that publication, Don's recollection was that after he was served with the summons to attend Court for the application for the Siblings to be removed into care: this church lady came to us and said, 'Oh, we'll take them and put them in Sister Kate's Home then you can get them out whenever you want to!' ... The Police told me I could go to jail for not putting them in there. They were going to have me up for contempt. Plus they were going to put my kids all over the ***place***, separate the brothers and sisters out from each other and split them up. They said if I didn't bring them in they were going to take them and distribute them anywhere. So we thought, we will put them in there and let things quieten down with the authorities. We'll get a house and then take the kids back again and there'd be ***no*** argument. We thought it was a way of beating the authorities. I didn't sign any papers before the kids went into Sister Kate's. The only papers I may have signed was when I went to the Home, papers to say that they had been received. But when you look back those bits of paper could have been anything.[356]

305 The evidence in the documents gives rise to one further factual question, about which it is appropriate to make a finding for the sake of completeness, namely whether Sylvia accompanied, or followed, Ms Jones to Sister Kate's on 7 December 1961 when the Siblings were ***placed*** there.

Did Sylvia attend at Sister Kate's when the Siblings were ***placed*** there on 7 December 1961?

306 Mr Humphries' report, and Mr WrightWebster's memorandum, suggest that Sylvia attended with Ms Jones when the Siblings were taken to Sister Kate's. In addition, evidence was given by Mrs Patullo who worked at Sister Kate's at the time of the Siblings' admission. Mrs Patullo gave evidence that when the Siblings arrived at Sister Kate's she spoke to Sylvia. Mrs Patullo's evidence was that she had asked Mrs Daniel (the wife of Mr Daniel, the Superintendent of Sister Kate's) if she could speak to Sylvia, so that Sylvia could see the nursery cottage where Eva and Wesley would be living. Mrs Patullo's evidence was that this conversation took ***place*** on the day that the Siblings arrived at Sister Kate's.[357] Mrs Patullo had a good recollection of a conversation, and of Eva and Wesley in particular, and I am satisfied that it is more likely than not that she did speak to Sylvia.

307 However, I find that Sylvia did not accompany Ms Jones to Sister Kate's, but rather that she and Don first went to Sister Kate's almost a week after the Siblings were taken there by Ms Jones that finding is supported by the following evidence.

308 First, Don and Sylvia both denied that they accompanied the Siblings to Sister Kate's. Don said that he and Sylvia didn't accompany Ms Jones or follow in another car.[358] He said that the suggestion in Mr WrightWebster's report that Sylvia and Ms Jones took the Siblings to Sister Kate's was wrong.[359] Don's evidence was that the first

time that he went to Sister Kate's after was a week or two weeks after Ms Jones took the Siblings to Sister Kate's.[360] Don suggested that Mrs Patullo's contrary recollection was mistaken.[361] Sylvia's evidence was that after the Siblings were taken by Ms Jones, the next time she saw them was a week or so later.[362] Sylvia said that she signed the children into Sister Kate's after Ms Jones took them. She said she and Don had to sign something when they went to ***visit*** the children at Sister Kate's, but that she didn't know what it was.[363]

309 Secondly, in crossexamination, Don confirmed that he had told the authors of 'Echoes of the Past' that 'I didn't sign any papers before the kids went into Sister Kate's. The only papers I may have signed was when I went to the home papers to say that they had been received'[364] and he said that he signed those papers two weeks after the Siblings were taken to Sister Kate's.[365]

310 Thirdly, none of the Siblings who recollected the trip to Sister Kate's recalled either of their parents being present when they arrived.[366] Given that Darryl, Bonnie and Beverley recollected the day's events, it would be surprising if they had ***no*** recollection of Sylvia attending at Sister Kate's.

311 Fourthly, in so far as Mrs Patullo's evidence is concerned, Mrs Patullo had ***no*** independent recollection of the date on which she spoke to Sylvia. She thought it was the day on which the Siblings arrived at Sister Kate's but accepted that she did not actually see the Siblings arrive at Sister Kate's. In my view, Mrs Patullo's conclusion that the conversation with Sylvia took ***place*** on the day that the Siblings arrived at Sister Kate's was mistaken.

312 Finally, I note that some of the Applications for Admission contain a notation (in answer to a question concerning why the Siblings' admission to Sister Kate's occurred without the consent of the Commissioner) to the effect that 'Admission requested by Miss Mary Jones of Brookton (see covering letter)'.[367] (Unfortunately that covering letter was not in evidence.) In addition, a subsequent letter from Mr Daniel to the Commissioner, dated 22 December 1961 also noted that the Children 'were admitted to the Home on the request of Miss Mary Jones of Brookton'.[368] Those two pieces of information provide some additional support for the conclusion that Sylvia did not actually accompany Ms Jones to admit the Children to Sister Kate's on 7 December 1961.

(iii) The application to the Children's Court for the Siblings to be made wards

313 On 8 December 1961, a Special Magistrate sitting in the Children's Court at Brookton determined that the Siblings were deemed to be neglected children and made an order that the Siblings be committed to the care of the Child Welfare Department until they were 18 years of age.[369] The Magistrate also made a strong recommendation that the children be retained at Sister Kate's Home until such time as parents can afford them proper and appropriate accommodation and that [the] children all be kept together in any event at the one ***place***.[370]

314 Mr WrightWebster sent a memorandum dated 12 December 1961 to the Director in relation to the outcome of the application to the Court.[371] Mr WrightWebster advised: The application to have the children declared neglected was made by myself and Mr Humphries and Constable Wall gave evidence of squalid conditions and of drunkenness by the parents.

On November 30th, the Mother requested Mr Humphries and Mrs O'Dea to arrange that the children be sent to Wandering Mission and considerable effort was made to arrange this. The Mother however changed her mind and assisted by Ms Jones of Brookton, took the children and lodged them in Sister Kate's home the day prior to the hearing despite being told by the District Welfare Officer that the children must appear at the Court.

Both the Mother and Ms Jones were present in the Court and were severely reprimanded by the Magistrate who heard the application in the children's absence. To comply with the Mother's wishes and the District Welfare Officer's report, the Court recommended that the children be retained at Sister Kate's Home until such time as the parents can afford them proper and appropriate accommodation and that the children all be kept together in any event at the one ***place***. The father was not present in Court hence a maintenance order could not be obtained.

315 As I have already mentioned, an 'Informative Report on Child' was prepared by Mr Humphries in support of the application made to the Children's Court (the 1961 Informative Report).[372] (A copy of the 1961 Informative Report was forwarded by Mr WrightWebster to the Director, under cover of his memorandum dated 12 December 1961.[373])

316 In the 1961 Informative Report,[374] Mr Humphries described the Collards' home in the following way: Type of House: Iron and Bag Humpy.

State of Repair: Bad.

Number of Bedrooms: Not defined.

Other rooms: Humpy divided into two rooms.

Sleeping arrangements for Child: 3 beds for 10 people.

Other Sleeping Arrangements, adequate or not? Inadequate.

Is Bedding Adequate? ***No***.

Other Furniture, adequacy and suitability: Very Little.

Remarks re Cleanliness: Bad. Squalid Conditions.

Are Home Conditions adequate for Child's needs? ***No***.

If not, indicate deficiencies and prospects of rehabilitating home. Not possible in present conditions.

317 Mr Humphries also set out the 'Departmental Opinion' which was: Parents both drink heavily and ***no*** provision made for children. ***No*** food, water or sanitary convenience at the home when inspected.

318 The 1961 Informative Report indicates that the 'Departmental Recommendation' was: Strong recommendation that children be retained at Sister Kate's Home until such time as parents can afford them their proper and appropriate accommodation and that children all be kept together in any event at the one ***place***.
319 The recommendation made by the Children's Court when it made its Order on 8 December 1961 was in almost identical terms, which suggests that the Court accepted the recommendation in the terms in which it was put by officers of the Department of Native Welfare at the hearing.

320 The State tendered a witness statement as the evidenceinchief of Mr Humphries,[375] and he was not required for crossexamination. In his witness statement, Mr Humphries stated that he recalled working as a Welfare Officer at the Narrogin officer of the Department of Native Welfare in 1961 or 1962.[376] However he did not recall any contact with any of the plaintiffs during his time at the Narrogin Office of the Department of Native Welfare,[377]nor did he remember Ms Jones[378] or Constable Wall,[379] nor did he recall dealing with any police officers from Brookton as he seldom went to Brookton in the course of his duties. Mr Humphries acknowledged that the signature on the 1961 Informative Report was his signature and that the handwriting in that Report was his handwriting.[380] Although he did not recall writing the Informative Report, Mr Humphries had ***no*** reason to doubt the accuracy of that document.[381]

321 Mr Humphries also had ***no*** recollection of the matters referred to in Mr WrightWebster's memorandum of 12 December 1961 to the Director.[382] Although Mr Humphries acknowledged that the reference in that memorandum to 'Mr Humphries' was very likely to be a reference to him, Mr Humphries stated that he had ***no*** recollection of any request by Sylvia Collard to arrange for her children to be sent to Wandering Mission, or of making 'substantial efforts' to do so and he had ***no*** memory of appearing in Court and giving evidence on the occasion referred to in the memorandum (although he often did appear in court on behalf of the Department in child committal cases).[383] Mr Humphries recalled that Mr WrightWebster 'was very particular about following rules. He did everything precisely in

accordance with procedure.'[384] Consequently, Mr Humphries' evidence was that he thought the memorandum very likely to be correct given what he knew of Mr WrightWebster's work practices.[385]
322 The content of the 1961 Informative Report, when read with the Order made by the Court, and with Mr Humphries' evidence, supports the inference that Mr Humphries' evidence to the Court reflected what was set out in the 1961 Informative Report.
323 In her evidenceinchief, Sylvia stated that she was 'fairly certain' that she did not attend the Children's Court on 8 December 1961.[386] In crossexamination, Sylvia denied that she was present in the Children's Court when the committals orders were made.[387] In this respect, I find that Sylvia's recollection is erroneous. Sylvia acknowledged in her evidenceinchief that her recollection of these events was not entirely clear.[388] Having regard to the content of Mr WrightWebster's memorandum of 12 December 1961, I find that Sylvia was present in the Children's Court on 8 December 1961 when the Siblings were made wards.
324 It was Don's evidence that to his knowledge he was not given any papers in relation to the Court date for this application.[389] The fact that Sylvia attended the hearing suggests that a summons had been given to Don and Sylvia in respect of that application. As I have already found, it is likely that that summons was served on Don by Constable Wall, when he saw Don in early December 1961 to advise him that the application was to be made. Furthermore, as I have also noted above, in 2002, Don recounted what had occurred for the purposes of a publication entitled 'Echoes of the Past Sister Kate's Home Revisited'[390] and in that publication, Don referred to having received a 'summons to go to court over the kids'.
325 However, I find that Don was not present in the Children's Court on 8 November 1961. This much can be inferred from Mr WrightWebster's letter, and is also expressly noted in a further memorandum from Mr WrightWebster to the Commissioner dated 9 January 1962.[391] It was also confirmed by Don in his evidence. He said that Ms Jones had told him what had occurred at the hearing.[392]
(d) Where were Don and Sylvia and the Siblings living in 1961?
326 In this section of my reasons I deal with:

(i) The evidence as to whether officers of the Department of Native Welfare or the Child Welfare Department had ***visited*** the Collards at Bessie Ninyette's block prior to the application to the Court in relation to the Siblings;
(ii) The evidence as to the circumstances of the Collard family's living arrangements and living conditions in 1961.

(i) The evidence as to whether officers of the Department of Native Welfare or the Child Welfare Department had ***visited*** the Collards at Bessie Ninyette's block prior to the application to the Court in relation to the Siblings
327 As I have noted above, Mr WrightWebster's memorandum dated 12 December 1961 states that he made the application to the Children's Court for the Siblings to be made wards, and 'Mr Humphries and Constable Wall gave evidence of squalid conditions and of drunkenness by the parents'.[393]

328 In the course of the hearing, Don and Sylvia denied that they had had any contact with welfare authorities in the period immediately before the application was made to the Children's Court in respect of the Siblings. Don's evidence was that prior to the point three or four days before 7 December 1961 when Constable Wall came to see him, he had had ***no*** reason to think that the welfare authorities were concerned about the Siblings.[394] Don denied that there had been any ***visits*** from the welfare authorities before Constable Wall's ***visit***.[395] Later in crossexamination, it was put to Don that native welfare officers had come to Bessie Ninyette's block on a number of occasions before the Siblings were taken (and before Ellen was taken). Don denied that that was the case [396]
329 Sylvia was asked whether she'd ever seen officers of the Department of Native Welfare coming to her mother's block. Her evidence was 'if I saw them come I'd be gone, I'd run away'.[397] Sylvia said that in the period after Ellen was taken, and before the Siblings were taken, she had never seen a native welfare officer come to Bessie's block.[398]

330 I do not accept Sylvia and Don's evidence, in so far as they denied that native welfare officers had ***visited*** the humpy prior to the application to the Children's Court in relation to the Siblings, for three reasons. First, their denials were inconsistent with other evidence Don and Sylvia gave during the hearing. For example, when Don was crossexamined about the contents of Mr WrightWebster's report, he admitted that he had seen Mr Humphries, possibly two or three times, prior to 8 December 1961, and possibly at Bessie Ninyette's block.[399] In addition, in

crossexamination, Sylvia accepted that native welfare officers could have come to Bessie Ninyette's block, but said that she could not recall that they had done so.[400]

331 Secondly, Don and Sylvia's evidence that they had never been ***visited*** at the humpy on Bessie Ninyette's block by officers of the Department of Native Welfare was inconsistent with the joint statement they provided to the ALS in 1995 (to which I referred at [226]), and with the version of events Don recounted in 2002 for the purposes of the publication entitled 'Echoes of the Past Sister Kate's Home Revisited'.[401] In that publication, Don's recollection was as follows: The thing is we never neglected our kids, ***no*** fear, we always looked after them the best we could. With the eight kids we lost, they were going to take us to court over them. I had a summons to appear in court for negligence. We didn't know what that meant. I mean our kids weren't neglected or anything like that.

... We were happy, but the Welfare used to come around and check up a lot. They would hound you and really pressurise you.[402]

332 When crossexamined about his reference to checks 'by the welfare', Don tried to suggest that in speaking of the 'welfare' he may have meant Ms Jones. However, I do not accept that explanation, given that in the Echoes of the Past document Don clearly distinguished between Ms Jones and welfare authorities.

333 Thirdly, the evidence of Mr Humphries support the conclusion that it is more likely than not that he ***visited*** the humpy prior to preparing the 1961 Informative Report and giving evidence at the Children's Court. Mr Humphries' evidence was that he had ***no*** memory of ***visiting*** the humpy but: it was not my practice to simply rely upon the reports of others when giving evidence in court. The normal practice was that Mr Wright-Webster would receive a report from a Police officer or another person about a possible neglect case, and then I or another officer of the Department would then be instructed to ***visit*** the house to investigate.

... [I]t was our usual practice to ***visit*** the home of a suspected neglect case at least once before giving evidence in court.

When we ***visited*** a house to investigate a possible neglect case we checked such things as the condition of the child, whether there was food in the house, and whether the parents were drunk. If the parents were present we would talk to them.

... If the parents were absent at the time of our ***visit*** to the house, or if the home conditions appeared to be better than as reported to us, we would usually ***visit*** a second or third time in order to properly assess the situation.[403]

334 Having regard to all of this evidence, and in particular to Don's acceptance that officers of the Department of Native Welfare ***visited*** them 'two or three times' prior to the Siblings being taken into care, I find that Mr Humphries ***visited*** the humpy two or three times prior to preparing the 1961 Informative Report, and that the observations contained in that Report reflected what he saw during his ***visits*** to the humpy, and formed the basis for the evidence he gave to the Children's Court.

(ii) Evidence as to the circumstances of the Collard family's living arrangements and living conditions in 1961

335 In the 1961 Informative Report, Mr Humphries expressed a number of value judgments, for example in relation to the adequacy of Don and Sylvia's parenting. I have not ***placed*** any weight on those value judgments, because their meaning is not entirely clear, and because Mr Humphries did not have any recollection of the matter in the 1961 Informative Report, and was not crossexamined about that document.

336 At [316] to [318] I set out relevant portions of the 1961 Informative Report. One of the observations made in that Report was that 'parents both drink heavily'.

337 Don denied that that was so.[404] His evidence was that when the Siblings were taken he and Sylvia weren't drinking.[405] Don acknowledged that he and Sylvia would have had a beer but denied any drunkenness on their part.[406] Sylvia also denied that she and Don were drinking heavily at this time.[407] While I accept that the 1961

Informative Report was based on Mr Humphries' observations, the observation that the parents 'drink heavily' is a value laden one, which is not capable of any objective measure. As Mr Humphries was not crossexamined, it is not possible to determine whether his observation that Don and Sylvia drank heavily was able to be reconciled in any way with Don and Sylvia's denial that they were drunk at this point in time. Accordingly, I do not rely on this aspect of the 1961 Informative Report.

338 However, there were a number of other factual observations set out in the 1961 Informative Report. As I have found that the observations contained in that Report reflected what Mr Humphries saw during his ***visit*** to the humpy, those observations constitute evidence in relation to the conditions at the humpy in December 1961. The plaintiffs contested the accuracy of those observations.

Whether Don, Sylvia and the Siblings were living at the humpy when the Siblings were made wards

339 At various stages in his evidence, Don either sought to deny that in December 1961 he and his family lived at the humpy on Bessie Ninyette's block, or to minimise the amount of time that they spent living at the humpy. He sought to emphasise that when he was working on farms away from Brookton, they would stay on those farms. But Don accepted that even during those periods, the family would return to Bessie Ninyette's block on the weekends,[408] and he said that even when he was away working, 'two or three' of the Siblings would stay at the camp while they went to school.[409]

340 In crossexamination, Don accepted that he and his family spent 'a little time'[410] at the humpy on Bessie Ninyette's block. When asked to give an estimate he said that the time spent at the humpy would not have been more than three months of the year in total (although not in one consecutive period).[411] Don was crossexamined about the evidence given in his affidavit where he stated: We probably spent about six months of the year on Betty Ninyette's block in Brookton and the rest of the year, July to October, we moved around to wherever there was work.[412]

341 When asked whether this evidence was incorrect, Don answered that 'it could be ... these were only approximate'.[413]

342 Sylvia's evidence was that they 'spent about six months of the year on my mother's block in Brookton and we moved around the rest of the year to wherever there was work'.[414] She said that if they went away to work, their 'schoolage children would stay with my mother while we worked, so that they could attend school in Brookton and we would take the younger children with us to the farm we were working at'.[415]

343 Having regard to Don and Sylvia's evidence, I find that in 1961, the humpy was home for Don and Sylvia and the Siblings. I accept that Don undertook seasonal farm work away from Brookton during some periods in the year, during which time Don and Sylvia and the younger Siblings, would live in accommodation provided on those farms. However, they would return to live in the humpy on Bessie Ninyette's block on weekends, and in between that seasonal work, Don and Sylvia and their children would also return to live at the humpy. The schoolaged Siblings would remain in Brookton on Bessie Ninyette's block so that they would attend school in Brookton. I find that Don and Sylvia and the Siblings spent a substantial period of time at the humpy each year, and having regard to Don and Sylvia's evidence, I find that they spent between three months and six months of the year in 1961.

The construction and contents of the humpy

344 The description of the humpy contained in the 1961 Informative Report was consistent with the evidence given by Don and Sylvia, and by some of the Siblings.

345 In crossexamination, Don was asked about the description of the humpy in the 1961 Informative Report. Don accepted Mr Humphries' description of their accommodation on Bessie Ninyette's block as an iron and bag humpy with a tin roof, tin around the sides, and bag doors, and with a wooden floor in the front room and a dirt floor for the remainder.[416] Don said the humpy was divided into two rooms by an iron partition with a wooden frame.[417] Don's recollection was that the humpy was not in need of repair.[418]

346 Sylvia agreed that the description of the humpy as an iron and bag humpy was correct, and that it was divided into two rooms.[419]

347 Don disputed that the humpy housed 10 people as suggested in the 1961 Informative Report. Don's evidence was that he and Sylvia and their eight children may have lived there for a night on a weekend, but said it was seldom that all of the family would stay in the humpy.[420] Don's evidence was that sometimes some of the children would stay with his parents. However, his evidence was that in December 1961 his parents were living in South Kumminin, 150 km away.[421] That aspect of his evidence was inherently improbable and I do not accept it.

348 Don agreed that there were three beds a double and two singles in the humpy, and said that the family members would also sleep on the ground or on mattresses.[422] Sylvia's evidence was that there was a double bed and three single beds.[423]

349 Don said that apart from the beds, the humpy contained a wooden table and some chairs.[424] He confirmed that there was ***no*** electricity at the block, and they cooked with wood on a stove inside the humpy, or on a fire outside.[425] Sylvia's recollection was that there was a table, a cooler, a cupboard and a little stove.[426]
350 Don strongly disagreed with Mr Humphries' description of the 'squalid conditions' at the humpy. He said that floor was swept clean,[427] and the sheets and clothing were washed once a week at a washhouse on the Reserve.[428] Sylvia also said that the area in and around the humpy was swept every night.[429]

351 Don[430] and Sylvia both confirmed that there was ***no*** water supply at the humpy.[431] Sylvia said that they used to cart water from the reserve, or sometimes get it from Jean and Fred Collard's ***place***.[432]
352 Don said the children had showers in a toilet and shower block opposite the Brookton Reserve, as and when they needed to wash, which may have been two or three times a day or a week.[433] Sylvia said that the family used the showers and toilets near the Brookton Reserve,[434] but Don recalled that they also used to dig a toilet at the camp site near the humpy.[435]
353 Bonnie recollected the construction and condition of the humpy prior to December 1961. Her evidence was that the humpy was made of galvanised iron, that it was partitioned into two rooms, had hessian bags on the walls, hessian bags or mats on the dirt floor, a table, a cool safe, and some stools to sit on.[436] She recalled that there was a double bed and a couple of single beds.[437] Bonnie confirmed that they would get their water from a well near the Brookton Reserve, or from Fred Collard's house nearby, and that there was a big tub which they would bring inside to wash in.[438] She said they would have a bath every couple of days or so.[439] Bonnie also said that they used toilets at the Reserve, although they had an old toilet (tin) at the camp as well.[440] She remembered that the humpy was kept in a neat condition by her grandmother.[441]

354 Darryl also recollected life on Bessie Ninyette's block before he was taken into care. He recalled that the camp was kept clean, and the dirt floor of the humpy was swept every day.[442] He recalled collecting water from Fred Collard's house[443] and bathing in a big tub every second day, using water heated on the campfire.[444] Darryl also recalled that the humpy was an iron or tin humpy and there was a partition that divided the area into two rooms and a little kitchen area. He recalled that there was a dirt floor with ***no*** floor coverings. Darryl recalled that the furniture comprised a double bed and four single beds, a cooler for keeping food cool, a table and a couple of old chairs, and a couple of old car seats outside to sit on.[445] He also confirmed that they used the showers and toilets at the Reserve.[446]
355 Beverley also had some memory of life at Bessie Ninyette's block prior to December 1961.[447] She recalled that the humpy was made of iron and had two rooms. In the bedroom area she recalled that there was a double bed and a single bed. She remembered that Don and Sylvia slept in the double bed with Glenys, Eva and Beverley. Donald, Darryl and Bill shared the single bed. When the double bed was too crowded, Beverley would sleep in the boys' bed, while Wesley used to sleep in a pram or bassinet next to the double bed.[448] She also recalled water being carried to the humpy. She remembered that the Siblings 'would get dirty very easily from running around but we were always clean and bathed'.[449]
356 Glenys also recalled that the humpy was made of tin with a dirt floor covered with hessian bags and a hessian bag for a door.[450] She recalled that Sylvia and Bessie would pick up the bags every day and use a broom to clean them, and the floor would be swept every evening.

357 Having regard to this evidence, I accept that Mr Humphries' observations as to the construction and the contents of the humpy in December 1961 were accurate. I find that the humpy in which Don and Sylvia and the Siblings lived prior to December 1961 was made of galvanised tin, with hessian bags lining the walls. There was a dirt floor, with some hessian bags or lino to cover it. There was a partition dividing the space into two rooms. There was little furniture, comprising a table and some stools, a cooler for food, and a stove. There was a double bed and two or three single beds, which was clearly inadequate for a family of two adults and eight children. Cooking was done on an outside fire or on the stove. There was ***no*** electricity, gas or running water, and consequently ***no***

bathing or toilet facilities, apart from a camp (dug) toilet near the humpy. The family used the bathing and washing facilities at the nearby Brookton Reserve.

The observation that there was '***no*** food' in the humpy

358 As for the observation in the 1961 Informative Report that there was '***no*** food' in the humpy, Don's evidence was there were ***no*** fridges in those days, but he said they did have a meat safe at the humpy. He said that they always had food in the humpy such as potatoes, onions, flour, tea, sugar, tinned meat, eggs and tomatoes, which made up the family's daily diet.[451] He said a farmer would occasionally give them a sheep to eat, and they would eat food caught from the land such as kangaroo or a rabbit 'maybe once a week or once a month'.[452] However, he said that most of their food such as bacon, eggs and tomatoes was purchased from the shops.[453]
359 Sylvia also said that there was always plenty of food, which they purchased at the shops, or which Don brought home from the farms (such as a sheep) or which they caught (such as rabbits).[454]
360 Some of the Siblings had memories of the food they ate before they went to Sister Kate's. Bonnie remembered eating damper for lunch and dinner, and kangaroo meat. She recalled that sometimes Don would bring home a sheep from a farm, that there were always lots of eggs, and that they would buy fruit and tomatoes.[455] Darryl recalled that there was always lots of food at the camp including sausages and mince, kangaroo, and sometimes lamb which Don would bring home from the farms. They would also buy fresh eggs, bread from the bakery, and meat from the butcher in Brookton.[456] Beverley recalled that there was always plenty of food, and that Don would bring food home from the farms he worked on. She remembered cooking being done on the fire outside when the weather was warm and fine, and inside on the stove when it was cold.[457]
361 For completeness, I note that Mrs Patullo gave evidence that when Wesley first arrived at Sister Kate's he came to live in the nursery cottage with her. She recalled having been told that Wesley had only been fed milk and water before he came to live at Sister Kate's despite being eight months old at the time.[458] Mrs Patullo recalled that Wesley had a bloated stomach when he arrived, which she thought suggested he was starving.[459] It appears that she also thought he was small in size for his age.[460] In contrast, in crossexamination Don confirmed that by December 1961 Wesley was eating solid food such as potato or carrot as well as a bottle of milk.[461] He denied Wesley had any bloating around his stomach at the time.[462]

362 I accept that Mrs Patullo recalled Wesley (and she clearly had a great deal of affection for him). However, there were a number of details in Mrs Patullo's evidence about Wesley which were not accurate in important respects. For example, Mrs Patullo thought Wesley was 10 months old when he arrived,[463] when in fact he was only eight months old. She also had ***no*** recollection that he wore surgical boots as a child because of a problem with his feet, but Wesley gave evidence that this was so.[464] Further, as I noted at [109], had Wesley been suffering from malnutrition on his admission to Sister Kate's, it is very likely that that would have been noted by Mr Daniel in his Report on the Siblings' health. There was ***no*** such indication. Accordingly, I am not satisfied that Mrs Patullo's recollections of Wesley's health when he first came to Sister Kate's were sufficiently reliable to warrant any weight being ***placed*** on them.

363 For the reasons I have set out above, I accept that the 1961 Informative Report reflected what Mr Humphries observed when he ***visited*** the humpy. As for Mr Humphries' observation that there was ***no*** food in the house, I bear in mind that the Collards did not own a refrigerator, that much of their food consisted of fresh supplies from farms in the area, and that Don and Sylvia's evidence was that they were not living continuously at the humpy, but would spend some of the year living on farming properties where they worked. In those circumstances, it would not be surprising to find only a modest amount of food, or perhaps little fresh food, in the humpy at any point in time. Even taking all of that into account, however, in a house where two adults and eight children were living on a regular basis it would be a matter of considerable concern to welfare officers to find ***no*** food whatsoever in the house.
364 The evidence given by Don and Sylvia, and the Siblings, paints a generally rosy picture of the Siblings' lives up to December 1961. However, it seems very likely that the passage of time, and their happy memories from the years before the Siblings were made wards, has tempered the plaintiffs' memories of the harsh conditions in which they lived. The evidence clearly supports the conclusion that in December 1961, the Collard family lived in extremely impoverished conditions, with none of the basic facilities which would be regarded as essential today. Furthermore, although I accept that the Siblings had enough food to eat, their physical wellbeing was far from ideal.

In a letter to the Commissioner dated 22 December 1961, Mr Daniel, the Superintendent of Sister Kate's observed that the Children were 'all under treatment for trachoma, vermin and ringworm'.[465]
Evidence as to the conditions in which aboriginal people lived at the time

365 At this point, it is appropriate to note that there was some, albeit limited, evidence about the living conditions of aboriginal people on the Brookton Reserve in 1961. Sylvia gave evidence as to the conditions of housing for aboriginal people at the time. She said: There were ***no*** State homes in the area at the time, but the Department of Native Welfare provided housing on the Brookton Reserve for aboriginal people.

We didn't live on the Reserve but I did ***visit*** there often because so many aboriginal people lived there.

The Reserve houses were threeroom, tin humpies with concrete floors and a big verandah. But there was a gap between the walls and the floor so they were cold and the dust blew into them all the time. The houses had one tap out the front and you had to walk a long way for a shower and the toilet.

There were four or five of what we called 'dog houses' on White Street [in Brookton]. They were built by the government for Aborigines to live in just out of the main town in Brookton. Usually they were cement houses with tin around the sides. They were in pretty bad shape.

They were such poor accommodation that we preferred to stay on Bessie's block in our humpies.[466]
366 Sylvia said that the humpy in which she and her family lived was similar in size to the houses on the Reserve: but was much cooler in summer and warmer in winter because it was lined with hessian, had a dirt floor covered in hessian bags rather than a concrete floor and the walls of the humpy met the floor.[467]
367 Sylvia also said that their humpy was 'much better and cleaner than the houses provided by the [Department of Native Welfare] to aboriginal people on the Reserve'.[468]

368 Don also gave evidence that 'a humpy, shack, tents ... it was the order of the day in which aboriginals lived'.[469] Don maintained that the humpy was typical of the accommodation in which aboriginal people lived at the time.[470] Similarly, in approximately 2002, in recounting his recollection of what had happened when the Siblings were taken, for the purposes of the publication entitled 'Echoes of the Past Sister Kate's Home Revisited',[471] Don said that: If our kids were neglected then so was hundreds of others. We had a proper camp and we lived like any aboriginal mob, in a tent. You couldn't find a house or even a shed to live in, in those days. You couldn't find any tin to make a decent humpy. Some used to cut up four gallon tins, hessian bags and tents. ***No*** matter how hard it was, they were the living conditions then and to me they were beautiful days.[472]

369 I accept Don and Sylvia's evidence as to the housing for aboriginal people on the Brookton Reserve at the time. That evidence was consistent with the evidence given by Mr Maine. He was asked about the Child Welfare Department's view of accommodation for aboriginal people on the reserves:[473] Was there any general effort by your department to move aboriginal families from what you have described as the primitive housing conditions on reserves?---Well, the department had the objective of closing down the reserves because we did not consider they were satisfactory ***places*** to bring children up ... .
370 He was then asked what was the problem with the conditions on the reserves:[474] From your perspective, what was the problem with the reserve?---I think there was a general feeling in the department that they were unhealthy environments in which to raise children. The accommodation was very basic. It wasn't until the department put some extra money in that we even got electricity connected to the houses; so parents had to try and bring children up in homes that were simply not fitted out with the normal kinds of provisions you have to raise and care for a family. The toilets and showers were in the form of ablution blocks and in that kind of situation it's very difficult to get anyone to take proper care of them because nobody owns them individually. The grounds of the reserve were difficult to maintain. There often tended to be drinking and things like that on the reserve, and overall it was there was children had a very poor chance of achieving any kind of reasonable adjustment if they grew up on the reserve.

371 In the course of the hearing, I asked Mr Maine whether the Child Welfare Department employed the same approach to neglected children living on aboriginal reserves as was applied to neglected children living outside reserves, or in towns. His evidence was: Generally, yes. The department would have to show to the Children's Court that the children were being neglected or in danger of being neglected and that could occur in any kind of accommodation, because as much as anything, it was the fact of the parents' quality of care or the parents' ability to care and that could be lacking even in a good conventional home. So the test of whether the child was endangered by the situation was applied overall, but it was probably more central when you came to look at children on reserves, because you not you also had an impoverished environment in which the child was living, whereas in the normal community, there are likely to be some compensations that the children might make use of.

But your evidence is that the same general approach applied to everybody, all children, regardless of where they lived, in terms of whether they needed to be ***placed*** in care?---The general approach of whether the child was neglected or in danger of neglect, that applied to everybody, but the measures by which you might demonstrate that would have varied to some degree where you were dealing with children on a reserve.[475]

372 The evidence as to the conditions on the Brookton Reserve did not detract from the implications of the evidence as to the impoverished living conditions in which the Siblings lived prior to 1961. But it did serve as a reminder that many aboriginal people lived in extremely impoverished circumstances, including on the reserves set aside by the State as ***places*** where aboriginal people could live.

(e) Responsibility for the Children after they became wards

373 Although Ellen had been ***placed*** in the care of the Child Welfare Department following an application to the Children's Court made by Mr Waghorne, an officer of the Child Welfare Department, the practical responsibility for Ellen's wardship was subsequently transferred to the Department of Native Welfare because she was an aboriginal child.[476]

374 Similarly, in so far as the Siblings were concerned, on 17 January 1962 the Director wrote to the Commissioner of Native Welfare in response to Mr WrightWebster's memorandum of 12 December 1961. The Director advised that the Child Welfare Department was 'in agreement that the children remain at Sister Kate's Home and in view of the circumstances, would be pleased if you would see fit to accept the custody of the children'.[477] The Department of Native Welfare accepted the custody of the Siblings on 26 January 1962.[478]

375 I find that the Department of Native Welfare assumed the practical responsibility for decisions in relation to the care of Ellen from shortly after she was made a ward on 13 March 1958, and in respect of the Siblings from 26 January 1962.

376 The Department of Native Welfare retained that practical responsibility for decisions in relation to the Children until July 1964. At that time, the Child Welfare Department resumed responsibility for all State wards who had previously been within the responsibility of the Department of Native Welfare, including the Children.

(f) Where the Children lived during their wardships

377 The primary source of evidence in relation to where the Children were ***placed*** during their wardships was the documentary evidence. Save where I indicate to the contrary, I accept the documentary evidence is accurate in so far as it discloses where each of the Children lived during their wardships.

378 A number of the documents indicate that Don and Sylvia removed the Siblings from the ***places*** where they were living at various times. As I indicate below, on many occasions during the course of their evidence, Don and Sylvia denied that they had taken the Siblings. I refer to these specific denials below, but by way of example, I note that in her evidenceinchief, Sylvia said: I never removed the children from Sister Kate's. I remember that several of our children ran away from Sister Kate's. We would hear from other people in town that the police would pick them up on their way to see us. The police would always come to us as soon as they went missing, but often we didn't see them because they didn't get to us. If they ran away they never let us know if or where they had found them.

I remember Darryl was our only child who actually was able to run away and spend some time with us before he was picked up and taken back. ...

The only child we ever 'took' was Wesley. Don took Wes from his school in Mt. Lawley. We had a house by then in Kondinin that Don had bought and we wanted to show it to him. I don't recall getting permission for taking Wesley and I remember there were people enquiring about him but we managed to keep him for a few weeks and then he came back to school in Perth.

I remember that sometimes when we went to ***visit*** the kids in Sister Kate's or at school they would say they were dying to come home but, Glenys in particular and Beverley would say, 'we're scared to come home because we think you and Dad would get in trouble or go to jail.[479]

379 As I explain further below, I do not accept Don and Sylvia's denials that they removed the Siblings from care. As Sylvia's evidenceinchief suggests, Don and Sylvia's reluctance to admit that they had removed the Siblings from care at various times appears to have been attributable to concern about whether such an acknowledgment even today would constitute an admission that they had breached the law, for which they might be punished.

Donald

380 Although it is not strictly necessary to do so in order to resolve the issues in dispute in this action, I set out my findings as to where Donald lived during his wardship, although the documentary evidence in relation to Donald was limited.

381 Donald was 10 years old when he was made a ward in December 1961. In October 1966, he left school during his second year of high school.[480] In late 1962 or during 1963,[481] Donald was transferred to Burnbrae, together with Darryl and Bonnie. At the time he left school, Donald also left Burnbrae, and went to board with Mr and Mrs Smith in order to commence an apprenticeship as a sheet metal worker.[482]

382 In late 1966 Don collected Donald and took him back to the Brookton area.[483] Having been made aware of this, Constable Wall spoke to Donald and ascertained that he did not like sheet metal work. Constable Wall spoke to officers of the Child Welfare Department and suggested that they leave Donald with his parents over Christmas, and Constable Wall would 'keep an eye on him'.[484]

383 By at least March 1967, Donald had returned home to live with his parents at Brookton, and was working with Don. Mr Hill, the Child Welfare Department's District Officer at Narrogin, prepared a file note dated 10 April 1967 in which he reported that he had ***visited*** Don and Donald on 15 March 1967. At that time, Donald Junior said straight out that he was not prepared to go back to the Metropolitan area to continue his apprenticeship. He said he wanted to stay with his family. I could see ***no*** useful purpose in picking him up and returning him after so long an absence had elapsed, so left him with parents, whilst he is of good behaviour.[485]

384 Mr Hill wrote a further file note on 11 April 1967 in which he noted: Donald Collard [junior] was ***placed*** out with Mr D. Smith, as a sheet metal worker. His Father removed him. ...

... As soon as I saw Donald Jun. he said straight out that he wanted to stay home with his parents, and get work with his Father. He said straight out that he would not go back to his job, but wanted to stay in Brookton. I could see ***no*** point in attempting to pick him up forcibly, and take him to Perth, so told him that we would allow him to stay home whilst he kept himself usefully employed, and out of trouble, and whilst of good behaviour. ...

It is rather a pity that I had not been advised to go to Brookton to pick up this child, when first he left his job. However, I very much doubt whether he would have stayed with his employer, even if he had been returned ... .

... I feel this home is not a suitable ***place*** for this boy to stay in, but I feel sure that he will return to his home whatever we do, unless we were to ***place*** him in such a ***place*** as 'Hillston'. So far, however, he has not to my knowledge done anything to ***place*** him there. I recommend that we leave him with his parents 'whilst of good behaviour' and I will ***visit*** him as soon as possible.[486]

385 In his evidence, Don confirmed that he was not sure precisely when Donald returned home to live with them, nor what age Donald was at the time, but he recollected that Donald stayed with Don and Sylvia until February

1968.[487] Sylvia didn't recall Donald ever coming home to them while he was a ward. Her evidence was that he came home when he was 19 years old, just before he was killed.[488] (In fact, Donald was 18 years old when he was killed.) However, Sylvia then said that if Donald 'had come home or run away', he 'could have gone down to the sheds with Don', but that she did not know whether this had happened.[489] Given the ambivalence in Sylvia's evidence, and in view of the documentary evidence, and Don's evidence, I am unable to accept Sylvia's evidence that Donald did not return home to live with her and Don at the humpy while he was still a ward.

386 For reasons which are not presently relevant, in early 1968 the Children's Court ordered that Donald be sent to Longmore detention centre.[490] After assessment there, it was determined that he should be ***placed*** at Hillston.[491] Departmental records suggest that Donald absconded from Hillston three times.
387 On 12 September 1968 Donald commenced work as a farm hand on a farm in Moora,[492] but on 26 September 1968 he left that position.[493] As a result of a further order of the Children's Court in April 1969, Donald briefly stayed at Longmore in 1969.[494] Donald's wardship ended when he reached 18 years of age on 19 September 1969.[495]
388 Donald was killed in a car accident on 15 January 1970 when he was 18 years old.[496]
Darryl

389 Darryl was nine years old when he was made a ward. He resided at Sister Kate's for some time, before being moved to Burnbrae. There was ***no*** evidence as to the precise date when this occurred. However, it appears that this occurred during late 1962 or in 1963 because Darryl's evidence was that he had been moved to Burnbrae by the time he was 10 years old.[497] Donald and Bonnie were transferred to Burnbrae at the same time.
390 There was little evidence in relation to Darryl's wardship between then and about August 1967 by which time Darryl was almost 15 years old. It is apparent from the documents that by that time, Darryl was (or remained) unhappy about being separated from his family, and did not wish to remain at Burnbrae.
391 The documents suggest that on a number of occasions, Darryl was either removed by Don and Sylvia from Burnbrae and taken back to Brookton, or that Darryl himself ran away to Brookton.
392 The documents in evidence indicated that on 7 August 1967, Darryl and Bonnie were taken from Burnbrae by Don and Sylvia.[498] A report from the manager of Burnbrae, Mr Scott, to the Director, indicated that 'Donald Collard called at Burnbrae with the intention of seeing the children. Apparently he took them out for the day and failed to return them.'[499] Don did not have permission to do so.[500] The Child Welfare Department requested that the Brookton police remove the children from their parents' care immediately and return them to Burnbrae.[501]
393 On 8 August 1967, the Director wrote to the Commissioner and requested that one of his officers investigate whether Darryl and Bonnie should be returned to Burnbrae, or 'if conditions are satisfactory ... [whether] you would be accepting supervision in this case if these children were released to their parents'.[502] However, by that stage, Constable Wall had located Darryl and Bonnie, who were with their parents at Langley Farm where Don was shearing, and returned them to Burnbrae.[503]

394 Darryl denied that he had gone with Don and Sylvia from Burnbrae.[504] However, this denial appears to have resulted from the fact that he had ***no*** independent recollection of doing so.[505]
395 There was also a record[506] that Darryl ran away from Burnbrae in about October 1967. Darryl did not recall running away on this occasion.[507]

396 There was also evidence that in about midNovember 1967 Don came and collected Darryl (who by then was 15 years of age), over the objections of staff at Burnbrae.[508] Again, Darryl said he had ***no*** recollection of these events.[509]

397 Don was crossexamined as to whether he had removed Darryl (and Bonnie) from Burnbrae in 1967. His evidence was that he could not recall taking them, but he acknowledged that 'they may have run away and I picked them up somewhere. I can't recall.'[510] He was also vague as to whether he could remember Darryl and Bonnie being collected by Constable Wall from a farm where Don was shearing. When asked if he recalled this, Don's evidence was that 'I probably just can', and then 'I'm not sure that I do remember well' and finally '***no***, I don't remember it'.[511] However Don accepted that Constable Wall 'continually warned' him and Sylvia not to remove the children without approval.[512]

398 Don was also asked whether he collected Darryl from Burnbrae in November 1967. Don's evidence was that he couldn't remember removing Darryl on this occasion[513] and denied any recollection of Darryl working with him before Darryl was 18 years old.[514]
399 Sylvia also denied any recollection that Don, or she and Don, had removed Darryl (and Bonnie) from Burnbrae in August 1967. She accepted that they might have come home but said she couldn't remember taking them, nor could she remember Constable Wall coming out to Langley's farm to remove them.[515]

400 Documents from the Department's files indicate that in January 1968, Mr and Mrs Romer of Byford made an application to foster Darryl.[516] It appears that they had previously lived and worked at Burnbrae, and while there, they had become fond of Darryl, and now hoped to be able to assist Darryl to find work.[517] Darryl was collected from Brookton where he was living at that date, and was taken to live with Mr and Mrs Romer. Darryl's evidence was that he agreed to go to Mr and Mrs Romer because it would be an 'easier ***place*** to get away from ... when [he] was ready to make the next move'.[518] Darryl thought he was with the Romers for about two weeks,[519]after which he ran away again.[520] On this occasion, Darryl rode to Brookton on his bike.[521] Darryl recalled being home for about two weeks and then the police came and picked him up.[522] After he was returned, and started work, he recalled that Don came and picked him up from work and took him home to Brookton.[523] Darryl's evidence was that he 'left the new bike and everything' and went with his father.[524] This appears to have been in late January or February 1968.
401 For the reasons I have already given, I do not accept Don and Sylvia's evidence in so far as they denied removing Darryl from Burnbrae in 1967 and I prefer the documentary evidence on that issue.
402 Reports and memoranda prepared by the staff of the Child Welfare Department in mid to late 1967 were in evidence. Those documents noted that the staff at Burnbrae had advised that Darryl was very attached to his father and had indicated that he did not intend to stay in any job found for him by the authorities, but rather intended to go home to his family.[525] Welfare officers at the Child Welfare Department then concluded that there was little point in trying to prevent Darryl from staying with his family, and instead he should be permitted to return, but monitored by officers of the Child Welfare Department and the Department of Native Welfare in Narrogin.[526]
403 It appears that Darryl resumed living with Don and Sylvia from late January or February 1968.
404 For reasons which are not presently relevant, in July 1968 the Midland Children's Court recommitted Darryl to the care of the Child Welfare Department and recommended that he be sent to Hillston.[527] There was evidence that suggested that by early 1969 Darryl was not living with his immediate family. His evidence was that at this time he was 'living with my people any of them ... wherever I wanted to stay as I could stop with any of them'.[528]

405 It appears, however, that by July 1969, Darryl had returned to live with his parents in Brookton, and was doing seasonal work with Don.[529] A file note prepared by Mr Moulton, following a ***visit*** to the Collard family in July 1969,[530] indicated that Darryl was living in Brookton with his family while his parents were away shearing, and that Darryl was attending school in Brookton. Mr Moulton also ***visited*** in September 1969, and reported that Darryl was said to be working with Don at that time. A file note made by Mr Moulton on 14 October 1969[531]indicated that he had received information that Darryl and William had gone to Boyup Brook to work with Don.
406 Darryl's evidence was that between the age of 16 and his late 20s he worked with his father doing seasonal work.

407 In her evidence, Sylvia either denied that Darryl had returned to work with Don, or said she had ***no*** recollection of him doing so, on the occasions to which I have referred above.[532] In view of the documentary evidence, and Darryl's evidence that he was working with his father during this period, I do not accept this aspect of Sylvia's evidence.
408 For reasons which are not presently relevant, in December 1969, the Children's Court at Narrogin recommitted Darryl to the care of the Child Welfare Department,[533] although Mr Moulton determined that in all of his circumstances he should be released to the care of his parents.[534]
409 According to a file note made by Mr Moulton on 21 May 1970, Darryl was then living in Doodlakine where he was employed.[535]
410 On 27 May 1970, for reasons which are not presently relevant, Darryl was returned to Longmore,[536] and was then transferred to Hillston[537] On 25 June 1970 he was released into the care of Sylvia.[538] Darryl returned to

Longmore on 13 July 1970,[539] although he was again transferred to Hillston.[540] He was released from Hillston on 21 July 1970[541] into the care of his aunt, Mrs Jean Collard.[542] Darryl confirmed that this had occurred.[543]
411 Darryl's period of wardship expired when he reached 18 years of age on 21 September 1970.
Bonnie

412 Bonnie was seven years old when she was made a ward. Like Darryl, she resided at Sister Kate's for some time, before being moved to Burnbrae, although there was ***no*** evidence as to the precise date when this occurred. It appears that this occurred during late 1962 or in 1963.[544]
413 As I have already found, on 7 August 1967, Bonnie and Darryl were taken by Don and Sylvia, without permission, from Burnbrae.[545] Bonnie was 13 years old at the time. Bonnie and Darryl were located at Brookton and returned by the police to Burnbrae.[546] As I have noted above, the Director wrote to the Commissioner and requested that one of his officers investigate whether Darryl and Bonnie should be returned to Burnbrae, or whether the conditions at home were satisfactory so that they could remain with their parents.[547] However, by that stage, Darryl and Bonnie had been located and returned to Burnbrae.[548]

414 In late January 1968, Bonnie was ***placed*** with foster parents, Mr and Mrs Scott.[549] She remained with them until late May 1968 when she was temporarily returned to Sister Kate's while Mr and Mrs Scott's house was being renovated.[550] Bonnie was briefly fostered by Mrs Scott's mother, Mrs Helen Roemer, in Byford, from midJuly 1968[551] but then returned to live with Mr and Mrs Scott from later in July 1968.[552] She remained with Mr and Mrs Scott until December 1968 when she was fostered to her aunt, Mrs Farmer, in Doubleview.[553]
415 In February 1969, Miss Hobcroft, a Welfare Officer for the Child Welfare Department, made a file note in which she noted that Bonnie (who was 14 years old at that stage) had applied to the Department for an exemption from school, as she had found a job.[554]
416 Bonnie remained with Mrs Farmer until about March 1969. Bonnie recollected that Don came and collected her from Mrs Farmer's house in March 1969.[555]
417 A file note of the Child Welfare Department[556] indicates that on 18 March 1969, Don and Sylvia arrived in Perth to fetch William, and that they had already picked up Bonnie with the intention of taking both children to Brookton. Don was crossexamined about this.[557] He denied any recollection of having collected William and Bonnie from where they were living in March 1969.[558] He also denied any recollection that Bonnie and William had returned to live with them in 1969. Don's evidence was that 'they never come back to live with us. They were never allowed to.'[559] By March 1969, however, Bonnie had been released by the Child Welfare Department to live with her parents in Brookton.[560]
418 An inspection by Mr Moulton on 30 July 1969 confirmed that Bonnie was living with her parents at that time.[561] A further inspection by Mr Moulton, on 30 September 1969, confirmed that Bonnie was still living with her parents in Brookton, although she was not attending school.[562]
419 Sylvia was crossexamined about Bonnie's return to live with her and Don in Brookton. As was the case in relation to her evidence concerning Darryl, Sylvia denied any recollection of Bonnie returning home.[563] She later accepted that William and Bonnie may have come home in around 1969, although she didn't remember collecting them.[564] Later, she again denied that Bonnie had returned home to live with her her evidence was that after the Siblings went to Sister Kate's 'they never came back in my care at all'.[565] Sylvia was also crossexamined about a letter dated 14 April 1969 sent to her by Ms Hobcroft,[566] which referred to a meeting with Sylvia at which it had been agreed that William and Bonnie should return to Brookton with her. Sylvia denied that this was true.[567]Sylvia also denied ever seeing Mr Moulton in Brookton.[568]
420 For the reasons I have already given, I do not accept Don and Sylvia's evidence, in so far as it involved a denial that Bonnie had returned to live with them in Brookton during 1969. I prefer Bonnie's evidence, together with the documentary evidence, to the evidence given by Don and Sylvia in this respect.
421 Bonnie said that she went with her parents to a farm near Pingelly in July 1969 and that she did not return to Brookton, but stayed in Pingelly on the reserve there.

422 By December 1969, Bonnie was pregnant and living in a de facto relationship with Basil Little. They lived with Mr Little's parents on the Brookton Reserve.[569] Bonnie gave birth to a son at Narrogin Hospital on 2 January 1970 and thereafter she lived with Basil Little at the Brookton Reserve.[570] By July 1970, Bonnie and Basil had moved from the Brookton Reserve to a house in Pingelly. Mr Moulton ***visited*** Bonnie at that time and reported that

she was 'fit, well and happy'.[571] Bonnie continued to live in Pingelly until at least June 1971.[572] In March 1972, Mr Moulton noted that he had received information that Bonnie was living on the Native Reserve at Pingelly.[573]
423 Bonnie did not dispute that she lived with Basil Little and his family in Pingelly while she was a ward. Her evidence was that she did not receive any help from welfare authorities while she was living with Basil and his family during her wardship.[574]
424 Bonnie's wardship ended on 22 May 1972 when she reached 18 years of age.
William
425 Although it is not strictly necessary to do so in order to resolve the issues in dispute in this action, I set out my findings as to where William lived during his wardship.
426 William was six years old when he was made a ward in December 1961. Although there is little documentary evidence about his time at Sister Kate's, it appears that William lived there until October 1968 (when he was 13 years old).
427 In October 1968, William ran away from Sister Kate's and returned to Brookton. He was located and returned to Sister Kate's. He ran away again on 7 November 1968.[575] On 26 November 1968 he was found to be at the home of his aunt, Mrs Farmer, in Doubleview, who reported that she was happy to have him stay with her, and Ms Hobcroft recommended that William (or Bill as he was known) remain with her.[576] However, William was subsequently collected from Mrs Farmer by other members of his family.[577]

428 On 6 December 1968, for reasons which are not presently relevant, the Children's Court at Pingelly recommitted William to the care of the Child Welfare Department.[578] From 30 December 1968, he was ***placed*** at Longmore.[579]

429 William was ***placed*** at Sister Kate's on 27 February 1969 but ran away on 9 March 1969. A file note of the Child Welfare Department[580] indicated that after William ran away from Sister Kate's he was collected by Constable Wall and brought back to Perth, but Sister Kate's would not accept him back.
430 William was then returned to the Child Welfare Reception Home but was released to his parents on 18 March 1969.[581] As I have already observed, a file note of the Child Welfare Department[582] indicated that on 18 March 1969, Don and Sylvia arrived in Perth to collect William, and that they had already collected Bonnie, with the intention of taking both children to Brookton. As I have already noted, Don was crossexamined about this.[583] He denied any recollection of having collected William and Bonnie from where they were living in March 1969.[584] He also denied any recollection that Bonnie and William had returned to live with them in 1969. Don's evidence was that 'they never come back to live with us. They were never allowed to.'[585]

431 Mr Moulton ***visited*** the Collards in July 1969 and after that ***visit*** he reported that William was living with his parents in Brookton,[586] although he was working in a shearing shed with his father rather than attending school.
432 A file note prepared in August 1969 by Ms Hobcroft indicated that William had sent a message to her, indicating that he wished to return to Sister Kate's.[587]

433 Mr Moulton ***visited*** the Collards again in September 1969, and reported that William was still in Brookton with his parents, and had advised Mr Moulton that he did not wish to return to Sister Kate's.[588] Mr Moulton indicated that at this time, William was refusing to attend school and was working occasionally with his father.
434 A file note made by Mr Moulton on 14 October 1969[589] indicated that he had received information that Darryl and William had gone to Boyup Brook to work with Don.

435 Sylvia and Don were crossexamined about William's return to live with them. On several occasions, Sylvia denied that William had returned to live with them in 1969, and that he had gone to work with Don.[590] Don also gave evidence that William did not return to live with them when he was of school age[591] or alternatively that he had ***no*** recollection of William working with him.[592] Don was also crossexamined about Mr Moulton's report that in September 1969 William was living with him and Sylvia. He denied having any recollection that William came home to live with them[593] and he said: Not one of those kids that were taken by the welfare were ever allowed to come home to us or were we ever given permission to take them. They came home either with a girlfriend or a boyfriend and that was the state's bringing up.[594]

436 For the reasons I have already given at [69] to [75], I do not accept Don and Sylvia's evidence in so far as it constituted a denial that William had returned to live with them in 1969, and was working with Don during 1969. I prefer the documentary evidence as to the timing of William's return to Brookton to live with his parents in 1969.

437 On 10 November 1969, for reasons which are not presently relevant, the Albany Children's Court recommitted William to the care of the Child Welfare Department.[595] By January 1970, William had been ***placed*** at Burnbrae.[596] When Burnbrae closed in February 1970, William was temporarily ***placed*** with Mrs Farmer in Doubleview,[597]before being ***placed*** with Mrs Jean Collard (Don's sisterinlaw) in White Gum Valley.[598]

438 In March 1970, William went to Brookton to ***visit*** his parents, but when it was time to return he could not be located.[599] By May 1970, Mr Moulton had ascertained that William was in Brookton and was working on a farm in the area.[600] William remained in Brookton for several months but had difficulty finding employment,[601] and returned to Mrs Jean Collard in White Gum Valley later in 1970.[602] In December 1970, the Perth Children's Court recommitted William to the care of the Child Welfare Department until he reached 18 years of age.[603]
439 The evidence in relation to where William lived during the balance of his wardship was sketchy. By July 1971, William was living with another aunt, Mrs Collard, in Bunbury.[604]
440 There was evidence that in December 1972, William was living in Maylands.[605]
441 In January and March 1973, the Child Welfare Department returned William to the care of Don and Sylvia.[606]
442 William's period of wardship expired when he reached 18 years of age on 20 September 1973.
443 William was killed in a car accident on 7 July 1977 when he was 22 years old.[607]
Beverley

444 Beverley was five years old when was she made a ward and ***placed*** at Sister Kate's. She lived there until September 1968. Beverley gave evidence that she ran away from Sister Kate's for the first time when she was about nine years old. She said that she made it all the way back to Brookton.[608]

445 From 23 September 1968, Beverley was ***placed*** in foster care with Mr and Mrs Stephenson in Yokine, with whom Wesley was living.[609] Following the breakdown of that placement, on 12 February 1969, Beverley was ***placed*** at the Bridgewater Assessment Centre for a short time for assessment.[610] She was then transferred to Sister Kate's.[611]
446 Beverley ran away from Sister Kate's on 11 March 1969[612] and returned home to her parents in Brookton.[613]Beverley confirmed that this was the case.[614]
447 A file note by Ms Hobcroft dated 10 April 1969 indicated that she had received information through Queen's Park School ... that Beverley is with parents in Brookton. She is enrolled at Brookton Primary School.

It seems pointless to insist on this child's return to Sister Kate's as she will most likely abscond again.[615]

448 Mr Moulton ***visited*** the Collards in July 1969 and reported that Beverley was living with her parents and attending Brookton Primary School.[616] Beverley recalled going to the Brookton Primary School in this period.[617]
449 Beverley recalled that when she returned home to Brookton in mid1969, Bonnie, William, Darryl and Donald were already living there, and Glenys came afterwards.[618]

450 Mr Moulton ***visited*** the Collards' humpy in Brookton on 30 September 1969. As a result of that ***visit*** (the details of which are referred to elsewhere in these reasons), he recommended that Beverley and Glenys (who was also living with Don and Sylvia by then) be ***placed*** in foster care in Perth.[619]

451 In her evidence, Sylvia denied any knowledge of Beverley running away from Sister Kate's on 11 March 1969 and returning home, and she denied that Beverley was later found to be living with her and Don in Brookton and attending Brookton Primary School.[620] Sylvia claimed that she was living in Kondinin then.[621] She then suggested that Beverley may have run away and that the Siblings ran away a lot.[622] Sylvia also denied any meeting with Mr Moulton when Beverley was living at home with her in Brookton,[623] and she denied that Beverley was attending the Brookton Primary School at the time of Mr Moulton's ***visits***.[624]

452 For the reasons set out above at [69] to [75] and having regard to Beverley's evidence and the documentary evidence, in so far as Sylvia denied that Beverley had returned to live with her and Don in Brookton during 1969, I do not accept her evidence.

453 The documents in evidence indicate that on about 7 October 1969, Don and Sylvia left Beverley, Glenys and Eva (who by that stage were also living in Brookton with them) with Ms Jones in Brookton.[625] On 10 October 1969, Beverley, Glenys and Eva were driven to Perth by Constable Brennan and Ms Jones.[626] Beverley was then ***placed*** in an emergency foster placement with Mrs Piercy in Wanneroo.[627] She confirmed this placement.[628] Her evidence was that she was taken to Bridgewater Receiving Home and was ***placed*** with Mrs Piercy temporarily until there was a vacancy at Sister Kate's.[629]
454 Beverley denied that Don and Sylvia had left her and her sisters with Ms Jones. She said she had never stayed with Ms Jones.[630] Sylvia also denied that she and Don had left the girls with Ms Jones.[631] Don's evidence was that he would not have left the girls with Ms Jones.[632]

455 I do not accept this aspect of the evidence given by Beverley, Sylvia and Don, having regard to the fact that Beverley was ***placed*** in an emergency foster placement with Mrs Piercy, which she did not deny. The most likely explanation for why that emergency placement was required is that Beverley, Glenys and Eva were unable to remain living with Don and Sylvia. The only evidence as to why that was so is that Don and Sylvia left the girls with Ms Jones. I find that that is what occurred.

456 Subsequently, Mrs Price of Gosnells (who had fostered Beverley for holidays while she was living at Sister Kate's) contacted the Child Welfare Department and asked to foster Beverley.[633] On 15 December 1969, Beverley and Eva were ***placed*** in foster care with Mrs Price in Gosnells.[634] Beverley confirmed that this had occurred.[635]

457 Beverley and Eva remained with Mrs Price until around late July 1970 when they were ***placed*** in foster care with Mrs Mathews in Armadale.[636]
458 Following their return to Don and Sylvia for Christmas in 1970 (which is discussed elsewhere in these reasons), Beverley, Glenys and Eva ran away and returned to Perth, and on 15 January 1971 they went to the home of their cousin, Mrs McIntyre, in Hamilton Hill.[637] Beverley remained with Mrs McIntyre for the remainder of January 1971.
459 On 2 February 1971, Beverley returned to live with Mrs Mathews in Armadale.[638] She remained with Mrs Mathews throughout 1971 and 1972 and attended high school in Armadale. She finished high school at the end of 1972, and obtained employment with a view to commencing nursing aide training in June 1973.[639]
460 In the latter half of 1973, Beverley sought the permission of the Child Welfare Department to marry her boyfriend Kevin Hill.[640] Approval was given by the Department in October 1973, by which time Beverley was 17 years of age.[641] Beverley's recollection was that she was married on 17 December 1973.[642]
461 Beverley's wardship ended on 5 October 1974 when she reached 18 years of age.[643]
462 I note that Beverley's recollection of events and of her placements from around 1970 was rather vague – for example she recalled going home for Christmas one year, but not which year it was or from whose house she went, and she could not recall how long stayed with Mrs McIntyre.[644] Given Beverley's limited recollection, I find that the facts set out in the documents in evidence, to which I have referred, are a more reliable source of evidence as to Beverley's placements and the dates of those placements, than Beverley's recollection, to the extent that there was any inconsistency in that evidence.
Ellen
463 Ellen was received into the Child Welfare Reception Home on 14 March 1958.[645] On 18 March 1958 she was discharged into the care of a foster parent, Mrs Betty Dwyer, of Carlisle.[646]
464 Ellen resided with Mr and Mrs Dwyer until her late teens when she joined the army and later married and had children. On the whole, Ellen had a very stable childhood. Numerous reports in relation to her foster care with the Dwyers were in evidence. The consistent tenor of those reports was that she was progressing satisfactorily and was normal for her age in health and conduct.[647]
Glenys

465 Glenys was almost three years old when she was made a ward in December 1961. She lived at Sister Kate's until June 1969, by which time she was 10 years old.
466 The documents in evidence indicate that on about 11 June 1969, Glenys and Eva were collected from Sister Kate's by Don and Sylvia and taken back to Brookton. Ms Hobcroft recommended that in the circumstances, their release to Don and Sylvia should be approved[648] and the girls were permitted to remain with Don and Sylvia at that stage.[649]
467 Glenys recalled going home to Brookton when she was nine or 10 years old (that is, in 1969). She recollected a time when Don and Beverley came and collected her from Sister Kate's.[650]
468 Beverley also recollected that a couple of months after March 1969 (in other words, around June 1969) she drove to Sister Kate's with her parents and that she went in to fetch Glenys. Beverley recollected that Glenys lived at home with Don and Sylvia for a time after that.[651]

469 Mr Moulton of the Child Welfare Department ***visited*** the Collards in July 1969 and reported that Glenys was living with her parents and attending Brookton primary school.[652] Mr Moulton also ***visited*** the Collards' humpy in Brookton on 30 September 1969. He noted that at the time of his ***visit***, Glenys was attending school. As a result of that ***visit*** (the details of which are referred to elsewhere in these reasons), Mr Moulton recommended that Glenys and Beverley (who was also living with her parents in Brookton at that time) be ***placed*** in foster care in Perth.[653]
470 Glenys also recollected that she had attended Brookton primary school for a couple of months during 1969.[654] Glenys recalled that during this time, she lived at the humpy on Bessie Ninyette's block.[655] She recalled her parents going away to work and that she stayed at Bessie Ninyette's block with family and went to school in Brookton. Glenys confirmed that Mr Moulton's report to that effect was correct.[656]
471 Don was asked whether he and Sylvia collected Glenys and Eva on 11 June 1969. He denied any recollection of that incident. His evidence was that 'they never came with us'.[657] Sylvia also denied that they had collected Eva and Glenys from Sister Kate's in June 1969. Her evidence was that the only time the Department had permitted Glenys and Eva to come home was for Christmas in 1969.[658]
472 Sylvia denied that Glenys was living in Brookton with her and Don in July 1969.[659] She also denied any recollection that Glenys ever attended Brookton Primary School.[660] For the reasons I have already given at [69] to [75], and having regard to the documentary evidence and to the evidence of Glenys and Beverley, I do not accept Don and Sylvia's denials that Glenys returned to live with them in mid1969.
473 As I have already noted, on about 7 October 1969, Glenys (together with Beverley and Eva, who were also living in Brookton with Don and Sylvia) were left with Ms Jones in Brookton by Don and Sylvia.[661] Don was asked about a file note[662] which indicated that Eva and Glenys had gone from living with their parents in Brookton to live with Mrs Gethin in Dianella in October 1969. The note indicated that the parents 'dumped' the girls at the door of ... Ms Jones. As Ms Jones could not keep the girls any longer emergency care homes had to be found.[663]

474 Don denied any knowledge of this having occurred.[664] Sylvia also denied having left the girls with Ms Jones.[665] Glenys recollected that she and her sisters were picked up at a roadhouse by Ms Jones and spent a night or two with her.[666] Glenys' recollection is not inconsistent with the documentary evidence that Don and Sylvia left the girls in Ms Jones' care on this occasion, save as to the ***place*** where the girls were left before they were collected by Ms Jones.

475 For the reasons set out at [69] to [75] I do not accept Don and Sylvia's evidence to the extent that they denied having left Beverley, Glenys and Eva with Ms Jones on this occasion. That the girls were left with Ms Jones is also consistent with the other documentary evidence, which establishes that on 10 October 1969, Glenys, Beverley and Eva were driven to Perth by Constable Brennan and Ms Jones.[667] Glenys and Eva were ***placed*** in emergency foster care with Mrs Gethin in Dianella, but ran away and were ***placed*** in St Joseph's in Subiaco.[668] Glenys recalled that she and Eva went to Mrs Gethin's for one night and then went to St Joseph's.[669] She confirmed that she ran away from Mrs Gethin's home.[670] Glenys' recollection was that she was at St Joseph's for six or seven weeks.[671]

476 Glenys' evidence was that in September or October 1969 she was living at Sister Kate's. She recollected that that was so because she recalled ***visiting*** the Perth Royal Show at that time that year and recalled seeing her brother Donald there, which was the last time she saw him before his death. She denied she had the years mixed

up.[672] I am unable to accept Glenys' evidence that she was living at Sister Kate's in September or October 1969. In so far as her evidence suggested that she went to the Royal Show in October 1969, that recollection was inaccurate. It was an agreed fact between the parties that the 1969 Perth Royal Show was held between 18 and 25 September 1969. Furthermore, there was not just one document, but several, which indicated that Glenys lived in Brookton with her parents during September 1969 and up until 10 October 1969. In my view, the information in those documents as to the dates and ***places*** where Glenys was living during this period are more reliable than her memory of the events.
477 On 17 December 1969 Glenys went on a holiday placement with Mrs Mathews in Armadale.[673] Glenys confirmed that this had occurred.[674]

478 From early in January 1970, Glenys was ***placed*** with Mrs Price in Gosnells.[675] Glenys also confirmed that this was so. She recollected that Beverley and Eva were living with Mrs Price at the same time.[676]

479 In February 1970, Glenys was ***placed*** at Mofflyn Homes because her former cottage mother from Sister Kate's, Mrs Cross, with whom she had formed a close attachment, was living there.[677] Glenys confirmed that this had occurred.[678]
480 In May 1970, Glenys was transferred, at her request, to Sister Kate's, as Mrs Cross was returning there as a cottage mother.[679] Glenys accepted that she followed Mrs Cross to Sister Kate's.[680]

481 On 21 December 1970, Don collected Glenys from Sister Kate's to spend Christmas with her family in Kondinin.[681] (That Christmas ***visit*** is discussed elsewhere in these reasons.) In the course of that ***visit***, Glenys, Beverley and Eva (who were also staying in Brookton at the time) ran away and returned to Perth, Glenys then stayed with Mrs McIntyre's mother, Mrs Bennell, in Forrestfield.[682]

482 At the end of January 1971, Glenys returned to Sister Kate's.[683] She ran away on 30 March 1971, and following a brief return, ran away again on 12 April 1971.[684] At that point Glenys refused to return to Sister Kate's and was ***placed*** with her aunt, Mrs Jean Collard (Don's sisterinlaw) who lived in Hilton.[685]

483 In August 1971, Glenys ran away.[686] Although she returned to the home of Mrs Jean Collard, that placement soon broke down and Glenys ran away again.[687] On 9 September 1971, she was ***placed*** in the Child Welfare Receiving Home.

484 On 21 September 1971, Glenys was ***placed*** in a group foster home with Mrs Hoare in Wanneroo but within days ran away and refused to return, so she was admitted to the Child Welfare Receiving Home.[688] Glenys was ***placed*** in Longmore in November 1971.[689]
485 At that point, arrangements were made for Glenys to return to live with her parents in Brookton,[690] but within a short period she ran away from there also.[691] A Child Welfare Department file note[692] suggested that Glenys ran away from her parents and went to live with her aunt, Mrs Narkle, in Armadale.
486 Don accepted that at the end of 1971, when Glenys was about 12 years old, she returned to live with him and Sylvia. (Don thought they were living in Kweda, half way between Brookton and Corrigin, at the time.[693]) Don could not recall whether Glenys ran away at that stage.[694]
487 Don recalled that he saw Glenys on the odd occasion in a park on Beaufort Street in Perth, with other Nyoongahs where they congregated.[695]

488 Glenys agreed that at around this time she ran away from her placements on many occasions, stayed in a park on some occasions, and was recommitted to the care of the Child Welfare Department on some occasions. She agreed she lived with Jean Collard but denied being ***placed*** with Don and Sylvia.[696] I do not accept the latter aspect of Glenys' evidence. Given the number of placements during this period, it is not entirely surprising that Glenys did not recall that she had actually been ***placed*** with her parents.

489 In April 1972, for reasons which are not presently relevant, the Children's Court recommitted Glenys to the care of the Child Welfare Department until she reached 18 years of age, and she was ***placed*** at Longmore, but in June 1972, Glenys was ***placed*** at Nyandi.[697]

490 Glenys ran away from Nyandi on 29 January 1973. On 31 January 1973, the Perth Children's Court recommitted Glenys to the care of the Child Welfare Department,[698] and she was returned to Nyandi.[699]
491 On 11 April 1973, the Bunbury Children's Court recommitted Glenys to the care of the Department of Community Welfare for three months.[700] She returned to Nyandi but again ran away and was returned to Nyandi on 14 June 1973.[701]
492 There followed a period of a few months during which Glenys briefly and intermittently lived at Nyandi, or with various relatives, or with Don and Sylvia. During this period there were a number of incidents when Glenys engaged in heavy drinking.[702] A file note on the Child Welfare Department's files indicates that on 13 October 1973, Don signed committal papers[703] authorising Glenys' admission to hospital for treatment for her heavy drinking and she was subsequently treated and admitted.[704]
493 On 14 November 1973, 25 January 1974, 1 February 1974, 12 February 1974, 22 April 1974 and 21 May 1974, for reasons which are not presently relevant, the Perth Children's Court recommitted Glenys to the care of the Department of Community Welfare.[705]

494 On 5 June 1974 Glenys left Nyandi and was ***placed*** with Mrs Jones in Kelmscott.[706]
495 From shortly after that time, Glenys lived with her sister Beverley and Kevin Hill, or with Don and Sylvia in Kondinin.[707] Don denied the suggestion that Glenys moved from Beverley's house to his house in December 1974, although he suggested that she may have moved there to see him and Sylvia, rather than to stay with them.[708]
496 Glenys gave birth to a child in January 1975, by which time she was 16 years of age, and had commenced a relationship with Albert Eades.[709]
497 Glenys' period of wardship ended on 15 December 1976.
Wesley

498 Wesley was eight months old when he was made a ward. He has ***no*** memory of his life with his parents before that time, or of being taken from their care. He is unable to recall much about his life at Sister Kate's other than to say that '(l)ife was as it was there', and he thought of Sister Kate's as his home.[710]

499 Wesley was ***placed*** in a foster placement with Mrs Stephenson of Yokine on 24 August 1968.[711] Wesley recollected that he was eight years old at the time,[712] although in fact he was seven years old. He recalled that the placement happened after he, Glenys, Beverley and Eva, and later he and Glenys, had had holiday placements with the Stephensons. Wesley was happy at the Stephensons so he stayed on permanently. He got to know their children as his brother and sister, and he got on particularly well with their son. Wesley's evidence was that the Stephensons treated him very well. While living with the Stephensons, he attended primary school, and then Mount Lawley High School, and completed his schooling to half way through year 9. His evidence was that he enjoyed some aspects of school, although he was not academically talented.[713] He especially enjoyed sport, which he was good at, and for which he received many athletics awards.[714]
500 Wesley remembered playing football at an exhibition match at Subiaco Oval one day when he saw his sister Glenys in the crowd and she called out to him. He recalls that that brief encounter made him realise that he missed his brothers and sisters.[715]
501 Wesley remained with the Stephensons until September 1975, when his relationship with Mr and Mrs Stephenson broke down.[716] He complained to a welfare officer from the Department of Native Welfare about the relationship break down, and he was transferred to the Mount Lawley Reception Home for a short time.[717] It appears that he may have returned, briefly, to the Stephensons' home.[718]
502 In October 1975, Don collected Wesley from school and took him home to Kondinin where Don and Sylvia were then living.[719]
503 In 2002, Wesley recalled what had occurred for a publication entitled Echoes of the Past: I started running away and sleeping away. It had all been building up. Then my real father came along and I was ready to be off. ... [T]here he was at the school with my sister Glenys. Just turned up out of the blue. ... Then he took me back to my adopted parent's house. They weren't home. I packed my clothes and away we went and that was it.[720]
504 Wesley's evidenceinchief was in very similar terms. He said that after they had packed up his clothes from the Stephensons' home, they went to the 'Welfare Office' in Perth and spoke to his welfare officer, before they drove back to Kondinin.[721]

505 Don accepted that he collected Wesley from high school on 28 September 1975, and that Glenys was with Don on that occasion.[722] Glenys also confirmed that she went with Don to collect Wesley from school.[723]
506 Welfare officers from the Child Welfare Department then decided that Wesley should be permitted to live with his parents at Kondinin.[724]
507 Wesley said that when he returned home to live with his parents they were living in Kondinin, in a duplex there. Wesley said he left school shortly after he got back to Kondinin, and started working with his father on farms in the area.
508 From that point until 1978, Wesley lived intermittently with his parents in Kondinin, and in Perth.[725]
509 In 1978 or early 1979, when he was 17 year old Wesley commenced a relationship with a woman named Brenda and they lived together for a time, initially with Don and Sylvia, and then in Hyden and in Wave Rock.
510 Wesley's wardship expired on 12 March 1979 when he reached 18 years of age.[726]
Eva
511 Eva was 21 months old when she was made a ward. She lived at Sister Kate's until June 1969.
512 On about 11 June 1969, Eva and Glenys were collected from Sister Kate's by Don and Sylvia and taken back to Brookton. A file note which was in evidence indicates that officers of the Child Welfare Department allowed Eva and Glenys to remain with Don and Sylvia at that stage.[727] Eva's evidence was that she didn't recall leaving Sister Kate's with Don, but she did recall Beverley coming and telling her 'we're taking you home', and Eva went with her.[728] Eva recollected that Glenys was at home in Brookton at the time, and Beverley too. Eva also recollected going to school in Brookton at the time.[729]
513 Beverley recollected that a couple of months after March 1969 she drove to Sister Kate's with her parents, that she went in to collect Glenys, and that she tried to carry Eva out but had to leave her behind.[730] Beverley could not remember Eva coming home in 1969.[731] It is more likely than not that Beverley's recollection of leaving Eva behind is inaccurate. I find that Eva was collected from Sister Kate's by Don and Beverley on 11 June 1969, and that she returned to Brookton with them.

514 As I have already found, on about 7 October 1969, Eva (together with Glenys and Beverley, who were still living in Brookton with Don and Sylvia at the time) was left with Ms Jones by Don and Sylvia.[732] Sylvia denied having left the girls with Ms Jones.[733] Eva's evidence was that her parents had not left her with Ms Jones, but rather that Beverley and Glenys did so,[734] although Beverley and Glenys were subsequently located in Brookton by the Department of Native Welfare. On 10 October 1969, all three girls were driven to Perth by Constable Brennan and Ms Jones.[735] Eva and Glenys were ***placed*** in emergency foster care with Mrs Gethin in Dianella.[736] Eva accepted that she and Glenys (and on her recollection, Beverley) were ***placed*** with Mrs Gethin.[737] However, Eva's evidence was that she couldn't recall how she got to Mrs Gethin's house.[738] As I have already found, only Eva and Glenys were ***placed*** in an emergency placement with Mrs Gethin, while Beverley was ***placed*** with Mrs Piercy.

515 I do not accept Eva's evidence that it was Beverley and Glenys, and not Don and Sylvia, who left her with Ms Jones, for two reasons. First, it is not immediately clear how or why Beverley and Glenys would have taken Eva to Ms Jones, rather than leave her at home with Don and Sylvia, if they wished to run away. Secondly, Eva's recollection of these events was not detailed, and was inaccurate in other respects for example, in relation to how she came to be at Mrs Gethin's house, and in relation to whether Beverley was also ***placed*** at Mrs Gethin's house. In addition, Eva was unable to recall how long she stayed with Don and Sylvia, whether she went straight to Mrs Gethin after living with Don and Sylvia in 1969, or whether she first went to Sister Kate's before being ***placed*** with Mrs Gethin. Eva was unable to recall Mrs Gethin herself, but she did remember her home.[739] Given Eva was only nine years old at the time, and the many years that have passed since then, it is not surprising that her recollection of these events is not entirely accurate.
516 In addition, for the reasons I have already given I do not accept Sylvia's denial that she and Don left the girls with Ms Jones, and I prefer the documentary evidence to the contrary.

517 Eva and Glenys subsequently ran away from Mrs Gethin's home, and were later ***placed*** in St Joseph's in Subiaco.[740] Eva confirmed that this had occurred.[741]

518 On 15 December 1969, Eva and Beverley were ***placed*** in foster care with Mrs Price in Gosnells.[742] Eva confirmed this placement.[743]

519 On 31 July 1970, Eva was ***placed*** in foster care with Mrs Mathews in Armadale.[744] Eva recollected this placement.[745]
520 As I have already noted, following their return to Don and Sylvia for Christmas in 1970 (which is discussed elsewhere in these reasons), Eva, Beverley and Glenys ran away and returned to Perth, and on 15 January 1971 they went to the home of their cousin, Mrs McIntyre, in Hamilton Hill.[746] Eva confirmed that she went to stay with Mrs McIntyre around this time, but she was unable to recall how she came to be there.[747] Beverley and Eva remained with Mrs McIntyre for the remainder of the school holidays[748] although Eva's recollection was that she had in fact stayed with Mrs McIntyre's mother, Mrs Bennell, in Forrestfield. She then lived with her Uncle Fred and Auntie Jean (Don's brother and sister in law).[749]

521 Eva was returned to Sister Kate's in February 1971.[750] Eva remained at Sister Kate's until September 1974 when she was ***placed*** with her sister Beverley, who by that stage was married.[751] Eva recalled that she began living with Beverley at this time.[752] Eva's evidence was that she then tried to make her way back to her parents,[753] and in December 1974 she went to live with Don and Sylvia who were at that time living and working in Kondinin.[754]
522 Beverley thought that Eva commenced living with her in 1975.[755] The documents in evidence suggest that officers of the Child Welfare Department were unsure of Eva's whereabouts for much of 1975, and the information noted in those documents suggested that the Department's officers received information to suggest that Eva moved between her parents' home and the home of her sister Beverley during that period.
523 Having regard to the documentary evidence, I find that Eva commenced living with Beverley in September 1974, briefly returned to her parents in December 1974, and for some of the time during 1975 she also lived with Beverley.
524 Eva's evidence was that she ran away from Beverley's house in 1975. Beverley also confirmed that Eva ran away.[756] Eva's evidence was that she didn't know what she was trying to do other than to find her family, and that she was scared because she was 'under the welfare and they could put me here, there'.[757]
525 By October 1975, the Child Welfare Department received information that Eva was living in Northam with her then partner, Vernon Lawrence.[758]
526 In a statement she later made in support of an application to Redress WA, Eva said that at this time she was living with her husband in the bush.[759] In her evidence, Eva said that she had it in mind that 'if the State caught me they could put me somewhere ... so I tried to keep quiet and hide out'.[760]
527 A report prepared by an officer of the Child Welfare Department in October 1977 noted that the Department had lost track of Eva for lengthy periods and she eventually was located living in Narembeen, where she had commenced living in a de facto relationship with Mark Jetta.[761]
528 Eva gave evidence about where else she had lived between 1974 and 1977 (apart from the placements organised by the Child Welfare Department to which I have referred). Eva's evidence was that at various times during this period, she lived with Francis and Fred Little (Bonnie's parentsinlaw) in Pingelly, Mrs Mary Williams, Beverley, Vernon Lawrence, May Narkle, at the Ave Maria Hostel, with Don and Sylvia in Kondinin, and with Mark Jetta (her husband).
529 On 29 May 1977 Eva gave birth to her first child.[762] She was then 17 years of age.
530 Eva's wardship expired on 1 March 1978 when she reached 18 years of age.
Summary: When did the Siblings return to live with Don and Sylvia; and otherwise
531 As is apparent from the factual outline above, by June 1969 William, Bonnie, Darryl, Beverley, Glenys and Eva were living with Don and Sylvia, with the authority of the Child Welfare Department. Donald had returned to live with his parents, with the authority of the Child Welfare Department, some two years earlier, in 1967. Only Ellen and Wesley remained in foster care in June 1969. They were living with the Dwyers, and the Stephensons, respectively.
532 It was put to Don that by June of 1969, William, Bonnie, Darryl, Beverley, Glenys and Eva were living back with him and Sylvia. His evidence was that 'I honestly can never remember my kids coming back home'.[763]

533 He was also asked about a file note made by Mr Moulton's file note[764] which indicated that in July 1969, Mr Moulton had ***visited*** Don and Sylvia on a farm west of Pingelly, and at that time, Bonnie and William were with

them, or with Don's parents, and that the other three children were staying with relatives and attending school in Brookton. Don's evidence again was that 'I cannot remember my kids being with me'[765] but he later acknowledged that 'they may have wandered back there, but I can't recall anything'.[766]

534 Don was also crossexamined about a file note prepared by Mr Moulton[767] after a ***visit*** to Sylvia and Don on 30 September 1969, at which point he noted that Bonnie, Glenys, Beverley, Darryl and William were living with their parents. Again, Don's evidence was that 'they weren't living with me, not to my knowledge.[768]
535 For the reasons I have already given I do not accept this aspect of Don's evidence. It was clear from his evidence that he was concerned to maintain the position that he had not removed the children without authority because he would otherwise have been breaking the law. In contrast, Don's evidence was that he remembered Darryl working with him when he was over 18, because I would have been uncomfortable with still being under the wards, and as you can see, my record shows that I would have been would have been another conviction.[769]

536 Don also accepted in crossexamination that by late 1969 Bonnie was living with Basil Little on the Pingelly Reserve.[770] Don was also crossexamined about a file note[771] made by Mr Moulton following a ***visit*** to Brookton on 10 October 1969, in which Mr Moulton indicated that Darryl and William were working in Boyup Brook with Don. Don accepted that Darryl and William had been working with him around this time.[772]
537 It was put to Don that by September 1975 none of his children were living in state institutions or foster care. He denied any knowledge of this.[773]
538 Wesley's evidence was that by the time that he returned home to live with his parents in Kondinin, Glenys, Eva, Bonnie, Joseph, Philip and Ashley were all living in Kondinin but only Wesley and his brothers actually lived with Don and Sylvia. Darryl was also living independently in a home of his own by that stage.
539 Having regard to the evidence given by the Siblings and to the documentary evidence, I find that by September 1975, none of the children were living in institutions or in foster care.
540 Counsel for the plaintiffs acknowledged that his case in relation to the State's alleged breaches of fiduciary duties was focused on the period between 1962 and 1970. Accordingly the evidence at the trial, and the findings set out below, focused primarily (although not exclusively) on that period.
(g) Don and Sylvia's family and living situation between 1962 and 1970
541 In this section I deal with the following matters:
(i) consideration of Don and Sylvia's living conditions by the Child Welfare Department after the Siblings were removed;
(ii) evidence as to Don and Sylvia's living conditions after the Siblings were removed from their care;
(iii) evidence as to Don and Sylvia's consumption of alcohol;
(iv) evidence of gambling by Don and Sylvia;
(v) evidence of domestic violence;
(vi) evidence as to Don and Sylvia's care for their other children;
(vii) other evidence as to Don and Sylvia's ability to provide for the Children between 1962 and 1970.
(i) Consideration of Don and Sylvia's living conditions by the Child Welfare Department after the Siblings were removed

542 There was evidence that officers of the Child Welfare Department and Department of Native Welfare ***visited*** Don and Sylvia on a number of occasions between 1961 and 1970 and recorded their observations about their living conditions. On a number of these occasions, the officers made recommendations as to whether those living conditions were suitable for the return of the Children.
543 In approximately August 1962, Mr WrightWebster inspected Don and Sylvia's living arrangements for the purposes of advising the Commissioner of Don's suitability for a State Housing Commission house. Mr Wright-Webster advised: An inspection of this applicant's living conditions and standards at the present time leaves much to be desired before any consideration could be given in support of a State Housing project.

The applicant lives in a camp constructed of iron and timber with ***no*** furniture other than a bed.

The applicant is a seasonal worker with a not very impressive record.

The applicant and his wife are addicted to liquor.[774]

544 I note that Mr WrightWebster made a report to the Commissioner in relation to Ellen on 29 May 1959[775] in which he noted that Don 'and his wife who were both inveterate drinkers have, I believe, turned over a new leaf and have ceased drinking'.

545 In December 1966, Constable Wall became aware that Donald had returned to Brookton. As I have already noted, Constable Wall recommended to the Child Welfare Department that Donald be permitted to stay with his parents over Christmas that year, but noted that Don and Sylvia 'are addicted to drink, and their ***place*** of dwelling is very poor indeed'.[776]

546 On 10 April 1967, Mr Hill prepared a file note of a ***visit*** he made to Don on 15 March 1967. He reported that Don had told him he had only managed to get a week's work since just prior to Christmas 1966.[777] Mr Hill noted that one of Don's main concerns was housing, which was a 'rather acute' problem, as he 'was living in a rough iron hut on the edge of the Native Reserve' at Brookton.[778] (That appears to be a reference to the humpy on Bessie Ninyette's block.)

547 On 7 September 1967, Mr Tilbrook, the Superintendent for the Southern Division of the Department of Native Welfare, prepared a file note in which he observed:[779] There has recently been some marital trouble in this family when the wife, Sylvia Collard, was severely assaulted by her husband. Separation and maintenance action was contemplated by Mrs Collard and actually commenced but it is now understood that Mrs Collard wishes to withdraw from legal action.

...

The living accommodation consists of a one roomed wood and iron shack, approximately [12 foot by 12 foot] adjacent to the Native Reserve in Brookton.

Due to the living conditions and the marital relations at present it could not be recommended that these children be returned to their parents.[780]

548 It thus appears that in 1967, Don and Sylvia were still living in the humpy on Bessie Ninyette's block.

549 On 11 January 1968, Mr Hill prepared a file note in which he made the following observations: Whenever he [ie Don] can get it, he uses his money to buy liquor, belts up his wife whenever he gets drunk, is frequently out of work, and is not keen on it when some falls into his lap.

Inferior Housing

For quite a long time this man has made a shocking crude shack just outside of the Native Reserve his 'home' and he and his family have used the Dept. of [Native Welfare] showers and toilets.

...

Ill-treatment of his wife

On the 8168 I saw Mrs Sylvia Rachael Collard in Narrogin. She told me that a few days before her husband had given her a severe thrashing, and had beaten her up so much that she had spent three days in the Pingelly Hospital. She stated that this sort of thing had now been going on for 20 years or so, and the time had now come when she was scared to go back to him, but what was concerning her was that their six children were all in his care now. She stated that she wanted custody and control of them and Maint[enance].

...

Visit Neglect

When I went with Miss D. Saggers of the Department of Native Welfare to inspect the home, and see the children Miss Saggers had already ascertained that [Don] was away at Boddington ... . A thorough examination was not made as the Father was not present. From what I saw however, I am satisfied that these children are 'Neglected' if for ***no*** other reason than the shack they live in. Now that their Mother has left the home, of course it is far worse.

...Don Collard had the three boys Darryl ... (who had absconded from Sister Kate's at the end of last year), Joseph ... and Philip ... away with him. The latest baby, Arthur Ashley Collard ... was there in the care of old Mrs Bessie Ninyette, who is really far too old to have the care of a very young baby. When I arrived the baby was crying in his pram and in obvious need of his Mother's care. According to Mrs Ninyette, she had fed the child. Whilst it was not good, I did not feel that I should remove the child forthwith.

...

I ... asked [Bessie] to tell the Father that he must make better arrangements for his children ... .

Later next week I will ***visit*** Brookton again with Miss Saggers and will make an application to have these children 'Declared Neglected' if they are still not being properly cared for.[781]

550 On 19 January 1968, Mrs Hayden of Brookton submitted a 'Return required to be filled in by licensed foster mother with particulars of child in her care'.[782] In that document, Mrs Hayden noted that Arthur Ashley Collard had been left in her care by Don on 18 January 1968 because Sylvia 'left her husband about three months [ago]' and that the reason given for ***placing*** Arthur Ashley with Mrs Hayden was 'Mother has left her children because of husband's ill treatment of her'.[783]

551 A file note prepared by Mr Hill, on 26 January 1968, noted that Mrs Hayden had ***visited*** his office that day and advised him that Sylvia had returned to live with Don, but that they had continued to leave Arthur Ashley in her care.[784]

552 On 15 February 1968, Mr Hill wrote a memorandum to the Director of Child Welfare in relation to Arthur Ashley.[785] He advised: ... Mrs Janet Hayden ***no*** longer has the baby in her care, as his Mother has now returned, and some sort of a reconciliation has been effected.

Even although the Mother has returned I feel that these children will not be properly looked after, because the parents still continue to live in most unsatisfactory shacks, with little furniture. This coupled with the husband's only occasional work, and insatiable thirst, and subsequent illtreatment of and bashing up of his wife, makes the lot of the children that of 'Neglected' children.

Because of this it is my intention to write a letter to Donald Collard, urging him to make every effort to find himself somewhere decent to live in the future.

...

I will ask my relief Officer to watch this case as closely as possible, and let you know of any deterioration.
553 On 15 February 1968, Mr Hill also wrote to Don in the following terms: As you know the Native Welfare Officers and myself were at the point of taking action to have your children brought before the court as 'Neglected Children'. ...

For years now since I have been in this district, you have allowed your wife and family to live in extremely substandard shacks, and you still do not appear to have found anywhere decent for them to live in.

Your infrequent employment, and lack of permanent jobs, drinking, and domestic upheavals, are making conditions for your children that cannot be tolerated any longer. It is imperative that you intensify your efforts to make conditions satisfactory for your wife and children, or definite action will have to be taken.

This matter is now ***placed*** in writing, as I have not been able to catch up with you although I have ***visited*** your home several times. Another Officer of this Dept. is shortly taking over, and I sincerely hope that you will improve conditions so that Court action will not have to be taken.[786]

554 A handwritten file note on the bottom of the Department's file copy of that letter appears to have been written by Mr Hill to the Director. Mr Hill noted: For your information.

I doubt whether this man will take any action to improve conditions, but I hope he might try.[787]

555 On 30 September 1969, Mr Moulton ***visited*** the Collard family in Brookton. In his report of this ***visit*** he noted: home conditions are deplorable. Parents show ***no*** interest at all in children's welfare. Both were rolling drunk at time of my ***visit***. Police report both are continually drunk. Recommend placement of Beverley and Glenys in f/homes in Perth.[788]

556 From late August 1970, Don and Sylvia lived in a State Housing Commission house in Kondinin.[789]

557 According to a file note prepared by a social worker in the Child Welfare Department on 6 January 1972, Don and Sylvia approached the Department in December 1971 about the return of Wesley. They informed the social worker that they now had a house in Brookton and had somewhere where the Children could live.[790] Don and Sylvia's request for the return of Wesley was denied following the receipt of information from the District Officer at Narrogin who reported that 'home conditions were not suitable for the return of the children'.[791]

558 The documents to which I have referred support three findings. First, Don and Sylvia's living conditions, and their home environment relevant to the care of their children, were being monitored by officers of the Child Welfare Department in the years after the Siblings were removed from their care. Secondly, the observations made by those officers, or information provided to those officers, was to the effect that until approximately mid1970, Don and Sylvia continued to live in the humpy in circumstances which were largely unchanged (as compared with when the Siblings became wards) that they engaged in heavy drinking and that their relationship was marred by domestic violence. Thirdly, that information was relied upon by officers of the Child Welfare Department in considering whether the Children should be permitted to return to live with Don and Sylvia.

559 Don and Sylvia disputed the accuracy of the observations set out in the documents to which I have referred. Accordingly, I turn to consider the other evidence in relation to Don and Sylvia's living conditions, and in relation to their home environment, in order to make findings as to whether the descriptions of Don and Sylvia's living conditions in the documents are reliable, and should be accepted as an accurate description.

(ii) Evidence as to Don and Sylvia's living conditions after the Siblings were removed from their care

560 The evidence given by the plaintiffs supports the finding that between 1961 and mid1970, Don and Sylvia continued to live at the humpy for a substantial period of time each year, and that it was their home. The evidence also supports the finding that the living conditions at the humpy remained largely unchanged during that period. I refer to relevant parts of the evidence below.

561 Don confirmed that the amount of time he and Sylvia spent at the humpy was the same between 1961 and 1965.[792] Don was also crossexamined about the observations made by Mr Hill in his file note of 11 January 1968, and in responding to those observations, Don continued to deny that the humpy was ever his home.[793] There was ***no*** dispute that through this period, Don continued to work on farms doing seasonal work at various times during the year, and would often stay in accommodation on those farms, but for the reasons set out above at [69] to [75], and also in view of Don's confirmation that he and Sylvia lived at the humpy for the same amount of time each year between 1961 and 1965, I do not accept Don's denial that the humpy was his home as at January 1968.

562 Don's evidence in crossexamination also supports the conclusion that the living conditions at the humpy remained, broadly speaking, unchanged between 1961 and 1968. Don accepted that the 'shack' referred to in Mr Hill's file note of 11 January 1968 was the humpy at Bessie Ninyette's block, and he confirmed that it was the case that he and his family used the Brookton Reserve toilets and showers, and got their water from the Reserve.[794]
563 Sylvia's evidence was that the observations made by Mr Hill in his file note of 11 January 1968 were 'for the most part ... completely untrue'.[795]
564 Further, Sylvia's evidence about where she and Don lived in the late 1960s was vague. For example, Sylvia's evidence was that she couldn't remember where she was living in September 1969.[796] Sylvia was also unable to recall that by that time, Bonnie, Glenys, Beverley, Darryl, William and Eva had all been living with their parents for some months and the younger children had been attending Brookton Primary School, although Sylvia accepted that it would have been significant to have some of the Children return to live with her.[797] For the reasons I have already given, I find that Sylvia was deliberately evasive about where she and Don were living.
565 The evidence given by some of the Siblings as to when they returned to live with Don and Sylvia also supports the conclusion that Don and Sylvia continued to live at the humpy, and that the living conditions there remained largely unchanged, between 1961 and 1969.
566 Darryl's evidence was that when he returned to stay with Don and Sylvia during 1967 and 1968 the conditions had not changed from when the Siblings left. Darryl confirmed that it was the same camp, and there were the same number of rooms in the humpy.[798]
567 Glenys recalled returning to Brookton, and staying with her parents in Brookton for a few weeks at a time, and otherwise living with her relatives at the camp, including in a humpy with Bessie Ninyette.[799]
568 On the other hand, Beverley recollected that when she went home with her parents in 1969 she was living on the Brookton Reserve. She described a tin shed with gaps between the floors and the walls.[800] Eva and Glenys also recollected living for a short time in a 'house' on the Brookton Reserve, which they described as having tin walls and a cement floor.[801] Neither Don nor Sylvia gave evidence that they lived on the Brookton Reserve during this period. Even if Beverley, Glenys and Eva lived on the Brookton Reserve at this time, the other evidence suggests that this must have been for a very short period only.
569 I find that Don and Sylvia lived at the humpy, and that it was their home between 1961 and 1970, notwithstanding that they also spent some time living on the farms where they worked during the year.
(iii) Evidence as to the information available to the State in relation to Don and Sylvia's consumption of alcohol
570 The documents to which I referred at [543] to [555] contained numerous reports of officer of the Child Welfare Department and Department of Native Welfare to the effect that Don and Sylvia consumed alcohol excessively. In addition, there was evidence that information was provided to welfare authorities by other persons which suggested Don had been engaged in heavy drinking during this period.
571 A report dated 31 October 1969 was prepared by Inspector Gray of the Child Welfare Department in relation to an application by Mrs Jean Collard for assistance to care for Joseph, Philip and Ashley. (This document is considered further at [644] below.) In that report, Mr Gray noted that Mrs Jean Collard had advised that Don was living in Brookton, but Sylvia's whereabouts were unknown.[802] Mr Gray also noted that Mrs Collard had discovered that Joseph, Philip and Ashley were being cared for by their grandmother, and that Mrs Collard had removed the children from the camp. According to Mr Gray: Mrs Collard advised that prior to removing the children from this camp, she located their father, who incidentally was in a drunken stupor, and his permission was also obtained for the children to be taken into custody by Mrs Collard.[803]
572 Don was crossexamined in relation to the contents of this document. He confirmed that the boys had been left with Bessie Ninyette.[804] He also confirmed that the three boys were entitled to go and live with Mrs Jean Collard and his brother Fred. Although he could not recall how he came to give permission for that to occur, but he denied that Mrs Jean Collard had found him in a drunken stupor.[805] Given that the other aspects of Mrs Jean Collard's report were true, it is difficult to envisage any reason why she would have made a false report about Don's sobriety to Inspector Gray.
573 There was also evidence that in September 1973, Sylvia made an application for financial relief for herself, Joseph, Phillip and Arthur. According to the notes made by the Relief Officer of the grounds for Sylvia's application, those grounds were: Husband deserted 6.9.73. Applicant states he is an alcoholic and just left to go drinking. He may possibly be located in the Brookton, Hyden area where he normally works.[806]

574 Some of the Children also gave evidence in relation to their parents' consumption of alcohol. In her evidence, Ellen recollected that Don came to ***visit*** her when she was about 14 years old (that is, in 1971 or 1972), while she was living with Mr and Mrs Dwyer, and she recalled smelling alcohol on his breath.[807]
575 In crossexamination, Darryl accepted that he could remember his parents being drunk once or twice, but otherwise he did not remember them drinking heavily.[808]
576 Beverley said that she did not recall her parents ever being 'rolling drunk'[809] and that she had never known Don and Sylvia to drink.[810] However, in a statement she provided to the ALS in 1995, Beverley said [w]e were all together in the camp on the top reserve at Brookton. There was funny times, there was drinking and fighting, but it didn't seem a reason to be taken away because everyone did the same.[811]
577 In crossexamination, Beverley sought to qualify this statement, and suggested that she was speaking about other families who lived nearby or in the camp.[812] However, it is nevertheless apparent that Beverley was referring to her family (and implicitly Don and Sylvia) engaging in 'drinking and fighting' because the unfairness to which Beverley referred arose in Beverley's view because only the children from her family were removed when other families were also engaging in behaviour of that kind.[813]
578 Bonnie also provided a statement to the ALS in 1995, and a copy of that statement was in evidence. Bonnie accepted that the signature on the document was hers and that some of the statements in the document were true, but her evidence was that other statements in the document were not true. One of those statements was that: My parents did have a drinking problem. However, my parents have told me that at the time we were removed they did not have a drinking problem. It was only after we were removed that my parents started to drink heavy. It was the trauma and upset of our removal that caused them to start drinking.[814]
579 In crossexamination, Bonnie said that she did not know that her parents had a drinking problem, that she had never held the view that they did, and that she wasn't around at the time. She said her parents had never spoken to her about any drinking problems. When asked whether she had a view that her parents were drinking heavily, she answered 'not really'.[815] Her evidence was that some of the things in the statement were not things that she had said to the ALS.[816] In the absence of any feasible explanation for why inaccurate statements would be included in a witness statement provided to the ALS by Bonnie, and which she signed, the likely conclusion is that Bonnie sought to minimise evidence which she thought may be damaging to her parents, by denying that she had ever said that she thought they had a drinking problem.
580 In addition to this evidence, there was evidence that Don was convicted on 13 occasions between 1955 and 1973 for offences involving the excessive consumption of alcohol. I have summarised the evidence of those convictions, and the information in relation to them which was in evidence, below.
581 On 21 November 1955 Don was convicted in the Brookton Police Court of the offence of being drunk, after being arrested by Constable Wall.[817]
582 On 16 January 1959, Don was convicted in the Brookton Police Court of the offence of drunkenness.[818]
583 On 15 February 1963 Don was convicted in the Kulin Police Court of assault.[819] According to the Apprehension Information prepared by the arresting officer, Constable Jenkins, Don had been drinking with four men in a house at Hyden when a fight broke out between Don and another man, which was stopped by the other people who were present. Later the other man returned to the house and Don who was standing in the kitchen believed that he was in danger of being attacked again and he threw an empty beer bottle which struck a wall, smashed and a portion struck [another man] above the left eye ... . Inquiries by police revealed that a considerable amount of liquor was consumed on this occasion by all parties.[820]
584 On 17 September 1964, Don was convicted in the Brookton Police Court of the offence of being drunk. According to the Apprehension Information prepared by the arresting officer, Constable Wall, Don was drunk at the Brookton Agricultural Show.[821]
585 On 26 October 1964, Don was convicted in the Police Court at Kondinin of the offence of being drunk. According to the Apprehension Information prepared by Constable Daff, Don was 'found in a drunken condition in Rankin Street, Kondinin. He had been troublesome during the evening and ignored warnings given by Police to go home.'[822]

586 On 6 January 1968 Don was convicted in the Police Court at York for the offence of drunkenness. The Apprehension Information prepared by Constable Booth indicated that 'a complaint was received that natives were fighting. When the Police ***visited*** the scene the accused was found to be drunk.'[823]

587 On 12 July 1968, Don was convicted in the Brookton Police Court of the offences of drunken driving, dangerous driving and driving while unlicensed. According to the Apprehension Information prepared by Traffic Inspector Smeding, Don 'was seen by the Traffic Inspector driving his motor car, swaying from one side of the road to the other, when stopped by the Traffic Inspector it was found that the driver was drunk'.[824]
588 On 2 November 1968, Don was convicted in the Wagin Police Court for the offences of drunken driving and driving while under suspension. According to the Apprehension Information prepared by Constable Harper, Don was driving a car in Wagin in an erratic manner, and when stopped was found to be obviously under the influence of alcohol.[825]
589 On 15 September 1969 Don was convicted in the Brookton Police Court for the offences of disorderly conduct creating a disturbance and excessive drinking. According to the Apprehension Information prepared by Constable Brennan, Don 'was fighting with his wife and yelling and screaming'.[826]
590 On 26 December 1970 Don was convicted in the Brookton Police Court for the offence of being drunk. According to the Apprehension Information which was prepared by Constable Brennan, on 24 December 1970 Don was found drunk in the street in Lennard Street in Brookton.[827]
591 On 28 August 1971 Don was convicted in the Brookton Police Court for the offence of drunkenness.[828]
592 On 30 April 1973 Don was convicted in the Brookton Police Court for the offence of drunkenness. According to the Apprehension Information prepared by the arresting officer, Senior Constable Fearon, Don was found to be drunk in Robinson Street Brookton.[829]
593 On 7 July 1973, Don was convicted in the Brookton Police Court for the offence of drunkenness. According to the Apprehension Information prepared by the arresting officer, Sergeant Fearon, Don was observed by the police in the street in Brookton 'in a drunken condition and unable to take care of himself'.[830]
594 (For completeness, I note that there was also evidence that Don was convicted of a number of other offences between 1961 and 1973. He was convicted on 3 July 1963 at Brookton, for the offences of disorderly conduct and resisting arrest.[831] On 8 January 1964, Don was convicted in the Boddington Police Court for the offence of stealing and receiving.[832] On 15 April 1970 Don was convicted in the Brookton Police Court of the offence of driving a motor vehicle while under suspension.[833])
595 The tenor of Don's evidence in relation to these offences was that Constable Wall and Constable Brennan threw him in gaol 'many times' for being drunk and disorderly when in fact he was sober.[834]
596 There was also evidence that Sylvia had been convicted on three occasions at the Brookton Magistrates Court. Two of these convictions were unrelated to drinking and not presently relevant.[835] However, on 26 December 1970, Sylvia was convicted of the offence of being drunk. According to the Apprehension Information which was prepared by Constable Brennan, on 24 December 1970 Sylvia was found drunk in the street in Lennard Street in Brookton.[836] Sylvia denied that she was drunk on this occasion.
597 Don's evidence was that he probably drank more after the Children went away, but that he never drank to excess.[837] He also accepted that after the children were taken he may have drunk more, but he said he never lost control while he was drinking.[838]
598 Sylvia denied that either she or Don had ever been 'addicted to liquor' as indicated by Mr WrightWebster in his letter of August 1962.[839]
599 Sylvia's evidence was: I do not say that Don and I never drank. In fact, it is fair to say that Don and I 'gave up' on some level after all the children were removed and we had drank a little more than we had previously. But to say that we drank heavily is an absolute exaggeration and is untrue. The farmers treated us to beer when a job was done to their satisfaction and as a celebration. You didn't get to drink to excess because you had to get up and work hard from dawn the next day.

To start with, aboriginal people couldn't simply go to the local pub and buy a lot of alcohol. It was not permitted and it was in fact illegal to sell alcohol to an aboriginal person. Don was able to buy some alcohol because he was classified as a 'quadroon' but even then he was only ever able to buy 2 bottles of beer. We shared what he bought and that was all that was available, one couldn't just go out and buy more.

Also we weren't allowed to drink on the Reserve. Therefore, I do not believe I was drunk on any occasion and I have definitely never been so drunk I couldn't stand up. A lot to drink in those days was two bottles of beer or a bottle of wine. And that would be shared between a whole group of aboriginal people.

I mostly recall drinking or having access to beer at the farms and not at my mother Bessie's house. Sometimes at my mother's house, my sisters would come and they brought beer, they were good shearers, and I would drink some with them, but again that happened very rarely. And my mother didn't like having alcohol at her house – she never drank. ...

Apart from the fact that we wouldn't be able to buy much alcohol, we never had enough money anyway to buy a lot of alcohol. Alcohol was expensive and hard to come by for aboriginal people and we shared whatever we had with other aboriginal people. The other aboriginal people asked Don to buy liquor for them because they knew he had money and could afford to buy it. This was the only time Don ever bought lots of alcohol and it may have given a false impression that he was buying lots of alcohol for himself when in fact it was for others to share.[840]

600 Sylvia said she had her last drink on 16 January 1970 just before her son Donald died. She said she recalled the date because that was the last occasion on which she saw Donald, and the last time she had a drink with him.[841] Sylvia also said that Don had had very little alcohol in the past thirty years.[842]

601 In relation to Mr WrightWebster's report in 1959, which indicated that Don and Sylvia had been inveterate drinkers, Don's evidence was that Mr WrightWebster was wrong.[843]

602 As for Constable Wall's observation, in January 1967, that Don and Sylvia were 'addicted to drink,'[844] Don's evidence was that Constable Wall was 'absolutely' wrong in that observation.[845]

603 Similarly, in relation to Mr Moulton's report about his ***visit*** on 30 September 1969, and his observation that 'both [parents] were rolling drunk at time of my ***visit***',[846] Don denied being drunk on one occasion when Mr Moulton ***visited***, although he later said that he could not recall the occasion.[847]

604 Sylvia was crossexamined about her application for financial assistance in 1973. She specifically that she ever told anyone that Don was an alcoholic or that he had left to go drinking.[848] It is, however, very difficult to envisage any reason why the officer concerned would fabricate information and claim that it had been provided by Sylvia. Accordingly, I do not accept Sylvia's denial that she made the statement attributed to her. Don was crossexamined as to whether it was accurate that he was an alcoholic at this time, and his response was 'not really, ***no***'.[849]

605 Don was asked about Ellen's evidence. He denied that he had ***visited*** Ellen at all when she was around 14 years of age,[850] and he denied ever having ***visited*** Ellen at the Dwyer's home when he was drunk.[851]

606 When crossexamined about the offences of which he had been convicted, which were associated with drinking, Don accepted in relation to at least some of them that drinking, or a large amount of drinking, had been involved.[852] However, in respect of his conviction on 26 October 1964, Don denied that he had been drunk. His evidence was that he had been with other people who were drunk, yet he was the one arrested.[853] In respect of his conviction on 2 November 1968, Don admitted that he had 'had a drink' but claimed that he had passed a sobriety test administered by the arresting officer.[854] And in respect of his conviction on 26 December 1970 for being drunk in the street, Don's evidence was that neither he nor Sylvia were drunk and that they had not been consuming beer.[855]

607 It is not necessary for present purposes to make a finding as to whether Don and Sylvia drank alcohol excessively, or were drunk on any, or how many, occasions during the period between 1961 and 1970.

608 For present purposes it seems to me that the question is whether the State had or received information that Don and Sylvia drank excessively, or were drunk, and whether the source or nature of that information was such as to raise any question about its reliability so that it should not be taken into account by the State's officers in any decisions which were made in relation to the care of the children.

609 The evidence to which I have referred clearly establishes that the State received information from a variety of sources, and on numerous occasions, between 1961 and 1970 which indicated that Don in particular, and less frequently, Sylvia, had engaged in excessive drinking or was drunk.

610 That information came to the State from numerous sources – from officers of the Child Welfare Department and the Department of Native Welfare, from police officers and from Don and Sylvia's convictions for alcoholrelated

offences, from Don's sisterinlaw Mrs Jean Collard, and from a report made by Sylvia herself in support of an application for financial relief.

611 The fact that this information came from numerous sources supports the conclusion that the State (through its officers) was entitled to treat the information as reliable. Although Don and Sylvia clearly held the view that they had been victimised by certain individuals – especially Constable Wall – many other persons had recorded observations that Don and Sylvia had been drinking excessively. (By way of example, eight different arresting officers from six different towns arrested Don for drinkingrelated offences during this period.) I do not accept that there is any basis for concluding that the information received by the State should have been, or should now be viewed, as unreliable.

(iv) Evidence of gambling by Don and Sylvia

612 In a letter from the Commissioner to the District Officer at Narrogin dated 12 November 1959, the Commissioner noted that Ms Jones had advised that Sylvia was 'gambling heavily'.[856] That information was relied upon as a reason for the Commissioner's determination that Ellen's return to her family should be deferred while her family situation was further evaluated. I have dealt further with this issue below.

613 There was ***no*** evidence to substantiate the report made by Mrs Jones or otherwise to support the conclusion that Sylvia was 'gambling heavily', either in 1959, or at any stage until 1970.

614 Furthermore, both Sylvia and Don denied that Sylvia had ever gambled heavily. Sylvia's evidence was that she played cards with other aboriginal people on the Reserve, and that she and Don, and other members of their families, went to the horse races a few times a year, and would ***place*** some small wagers.[857] (This was hardly surprising. Sylvia's family had been involved in the horse racing industry and her father trained and raced racehorses and was a jockey.[858]) In addition, Sylvia recalled that once or twice she went to the betting shop in Brookton to ***place*** some modest bets for Don.

615 Beverley said that she had seen her parents playing cards, but not for money (or for much money) and that they did not go to the horse races very often.[859]

616 Bonnie's evidence was that she had never been in a betting shop and hadn't been to a betting shop with Don and Sylvia.[860]

617 Eva recalled that her parents would go to the TAB in Narembeen 'a lot', and she went with them on two occasions.[861] However, this appears to have been when Eva was in her midteens, and thus in around 1975 or 1976, and this evidence thus does not support the conclusion that Sylvia was gambling heavily at all, or at any relevant time prior to 1970.

618 Again, it is not necessary to make a finding as to whether Sylvia was gambling, or 'gambling heavily' at any stage between 1959 and 1970. It suffices to find that the information available to the State came from one source, on one occasion, and as I explain further below at [959] it was not subsequently substantiated. Those considerations support the conclusion that the report received in 1959 as to Sylvia's gambling should have been viewed as potentially unreliable.

(v) Evidence of domestic violence

619 The file notes prepared by Mr Tilbrook and Mr Hill in 1967 and 1968, to which I referred in [547] to [552] above, indicate that those officers had received information including from Sylvia herself that Don had physically assaulted her, and that Sylvia had left Don and commenced separation and maintenance action in 1967.

620 Don was crossexamined about the contents of these file notes. He admitted that he had physically assaulted Sylvia during the course of their marriage,[862] and that he 'did not have to be drunk' to physically assault her.[863]Don admitted to having assaulted Sylvia on 8 to 10 occasions, and accepted that he had probably caused bruising, may have caused cuts or broken her skin, but that he didn't think he had caused any broken bones.[864]

621 Sylvia also gave evidence that Don had assaulted her. However, her evidence was that Don had hit her 'a few times, but never very badly, definitely not so badly as to put me in hospital'.[865] She said that after the Children were removed from their care, they 'had more rows than we ever had before. Around that time Don hit me one or two times. Once he blackened my eye when he hit me.'[866]

622 Sylvia was crossexamined about the information in Mr Tilbrook's file note dated September 1967. Her evidence was that she didn't remember Mr Tilbrook. However, while Sylvia admitted that she and Don would fight, she sought

to blame herself for those fights, and to minimise Don's culpability for them. She said that she had hit Don, and said that the arguments sometimes involved Don hitting her 'a scratch and a crack and squabble' . She said that Don 'might have' slapped her to stop her from fighting him, but that it didn't involve hitting her hard.[867]

623 Sylvia was crossexamined about Mr Hill's file note of 11 January 1968, and to Mr Hill's note that Sylvia had told him that Don had given her a 'severe thrashing' which resulted in her ending up in hospital. Sylvia's evidence was that she did not recall speaking with Mr Hill in Narrogin, or with any native welfare officer in Narrogin, and denied having told him that Don had given her a 'severe thrashing'.[868] She denied having told any welfare officer that Don had beaten her up so much she had ended up in Pingelly hospital.[869] However, Sylvia did admit that she told Mr Hill that she was too scared to go back to Don. It appears that she did so because she wanted a home and somewhere to live,[870] and thought that if she reported abuse by Don, welfare authorities would find her a home.[871] Also in evidence was an application for Legal Aid dated 30 May 1968, which appeared to bear Sylvia's signature. The application was made in Sylvia's name and sought legal aid for proceedings for separation and maintenance for Sylvia and her three children on the grounds of Don's cruelty towards her (the Legal Aid application). The Legal Aid application was accompanied by a document entitled 'Basic Information for Investigating Proposed Actions' and which is marked 'To be used in conjunction with Legal Aid application form' (the accompanying form). The accompanying form noted that Sylvia left Don on 27 May 1968 after he physically assaulted her and threatened to kill her.

624 In her evidenceinchief, Sylvia said that she did not recall filling in any Legal Aid application forms but agreed that she did make an application for legal aid. Her explanation for that application was as follows:[872] The only reason that I ever signed the forms that were given to me by Legal Aid was because I thought that was what I had to do to get a house. None of the handwriting on the forms is mine except for the signatures. Therefore, I did not fill out any of the information on the forms, the Legal Aid officer did. I just signed the forms because they told me that would help me get a house and I believed that that was all that the forms were for. I did not read what was in the forms before I signed them.

...

It looks like my plea for help turned into Legal Aid saying that I wanted to leave Don but this was never the case. I do not remember travelling to Perth after a fight with Don at any time or asking anyone to try to leave Don or to file a Violence Restraining Order against him. If I had gotten a house, I would have made sure Don was living in it with me.

625 In crossexamination, Sylvia was very evasive in her answers to questions about the Legal Aid application, refusing to accept that the signature on the document was hers, notwithstanding that she accepted the accuracy of many details in the document in relation to her family.[873] However, she did eventually accept that she had asked for help from Legal Aid, although she said didn't remember signing a form for that purpose.[874]

626 Don was also crossexamined about legal aid applications made by Sylvia in May 1968. Don denied any recollection that he had assaulted Sylvia, or threatened to kill her, at that time.[875]

627 Having regard to the nature of the documents, to Sylvia's signature on the document, to Don and Sylvia's evidence as to the domestic violence in their relationship, I find that the Legal Aid application was prepared at Sylvia's request, and that the information contained in the Legal Aid application and in the accompanying form was provided by Sylvia. It is extremely unlikely that an officer working for Legal Aid would have fabricated the grounds of Sylvia's application.

628 Other documents in evidence indicate that Sylvia was undecided about whether to pursue legal action against Don.[876] Ultimately, it appears that Sylvia did not pursue legal proceedings.[877]

629 Having regard to the number and sources of these reports and to Don's acceptance that on at least eight to ten occasions throughout their marriage, including during 1967 and 1968, he physically assaulted Sylvia, leaving her with not insignificant physical injuries, there is ***no*** basis on which the State should have considered the information the State received during this period as to domestic violence in Don and Sylvia's relationship to be unreliable.

630 Some of the other documentary evidence indicated that the State received information that Sylvia left Don for a period of time in approximately September or October 1967, or January 1968, as a result of domestic violence. Sylvia was asked whether she had commenced any action to separate from Don in September 1967 (as Mr Tilbrook had indicated). Sylvia implicitly appeared to accept that she had commenced such action. In her answer she offered a reason for why she had done so: she said that she had been told that if she was not with Don that she could live on the Brookton Reserve.[878]

631 Information contained in a document entitled 'Return required to be filled in by licensed foster mother with particulars of child in her care' which was completed by Mrs Hayden of Brookton on 19 January 1968,[879] also supports a finding that Sylvia left Don in about September 1967. In that document, Mrs Hayden stated that Arthur Ashley Collard had been left in her care by Don on 18 January 1968 because Sylvia 'left her husband about three months [ago]' and that the reason given for ***placing*** Arthur Ashley with Mrs Hayden was 'Mother has left her children because of husband's ill treatment of her'. A file note prepared by Mr Hill, on 26 January 1968, indicated that Mrs Hayden had ***visited*** his office that day and advised him that Sylvia had returned to live with Don, although they had continued to leave Arthur Ashley in her care.[880]

632 Don was crossexamined about the Return submitted by Mrs Hayden. He denied emphatically the report that Sylvia had left him about three months prior to the date of the report.[881] As for the suggestion in that report that Sylvia left because of his ill treatment of her, Don's evidence was that 'Sylvia went for two to three weeks ... . It happened quite often when we had a bit of an argument or going through our traumatic conditions that were ***placed*** upon us, but here it's all false.'[882] He denied that anything that could have been called cruelty was going on at that time.[883]

633 Don was also crossexamined as to whether Sylvia left him for a period in around January 1968. He accepted that Sylvia left him for two or three weeks, that he had the care of Joseph, Philip and Ashley at that time, and that he left them in the care of Bessie Ninyette while he worked.[884] Sylvia's evidence, on the other hand, was that she never left Don with the three youngest boys.[885]

634 On 24 October 1969, Mrs Jean Collard made an application for assistance for the care of Joseph, Philip and Ashley as foster children in her care. The reason given for why the children had been left in her care was that the 'children were left with their father who is unable to look after them' and Sylvia's address was said to be 'unknown'.[886] Sylvia denied that this was correct.[887] She said that she and Don hadn't really separated at around this time.[888]

635 There was some documentary evidence which indicated that the State received information that Don deserted Sylvia in September 1973, namely Sylvia's application for financial relief in September 1973, to which I referred at [573].

636 In crossexamination, Don accepted that he had left Sylvia around this time to go and work in Hyden. He confirmed that Sylvia was living in Kelmscott with her sister at that time.[889]

637 Having regard to the fact that reports of Don and Sylvia's separations came from third parties, and having regard to Don's evidence at the trial, I am not persuaded that there was any basis on which the State's officers should have regarded the information the State received as to Don and Sylvia's separations in 1967, 1968, 1969 and 1973 as unreliable.

(vi) Evidence as to Don and Sylvia's care for their other children

638 Don and Sylvia's three youngest surviving children, Joseph, Philip and Ashley were born in 1963, 1966 and 1967 respectively. There was evidence that in the period between early 1968 through to 1970, the State received information to suggest that Don and Sylvia had experienced some difficulty in providing care for these children.

639 As I have already mentioned, Mrs Janet Hayden submitted a 'Return required to be filled in by licensed foster mother with particulars of child in her care' dated 18 January 1968. In that form, Mrs Hayden indicated that Don delivered Ashley into her care because 'Mother has left her children because of husband's illtreatment of her'.[890](A file note made at this time by Mr Hill indicated that he understood that Don had taken Joseph and Philip with him to Hyden where he and Darryl were then working.[891])

640 In a file note dated 26 January 1968 Mr Hill noted that Mrs Hayden had called at his office to advise that Sylvia had returned to live with Don, but that they had left Ashley in her care.[892]

641 On 15 February 1968, Mr Hill wrote a memorandum to the Director in relation to Arthur Ashley.[893] He advised: ... Mrs Janet Hayden ***no*** longer has the baby in her care, as his Mother has now returned, and some sort of a reconciliation has been effected.

Even although the Mother has returned I feel that these children will not be properly looked after, because the parents still continue to live in most unsatisfactory shacks, with little furniture. This coupled with the husband's only occasional work, and insatiable thirst, and subsequent illtreatment of and bashing up of his wife, makes the lot of the children that of 'Neglected' children.

Because of this it is my intention to write a letter to Donald Collard, urging him to make every effort to find himself somewhere decent to live in the future.

...

I will ask my relief Officer to watch this case as closely as possible, and let you know of any deterioration.

642 Sylvia denied ever having left Ashley in Mrs Hayden's care (although she did accept that Mrs Hayden may have been a relative of Don's).[894] Don also denied that Ashley had been in Mrs Hayden's care.[895]

643 On 24 October 1969, Mrs Jean Collard (Don's sister in law) made an application for assistance for the care of Joseph, Philip and Ashley as foster children in her care. The reason given for why the children had been left in her care was that the 'children were left with their father who is unable to look after them' and Sylvia's address was said to be 'unknown'.[896]

644 A report by Inspector Gray dated 31 October 1969 (to which I have already referred) indicated that Mrs Jean Collard had advised that 'the father of the children is residing in Brookton, with the whereabouts of the mother being unknown'.[897] Inspector Gray also noted that Mrs Collard advised that she was appalled by the condition and appearance of the three children, who were apparently being cared for by their grandmother, and as a consequence she approached the Native Missionary in Brookton, namely, Ms Jones, who later telephoned this Department's district officers at Narrogin, where permission was granted for Mrs Collard to take the children to the Metropolitan area.[898]

645 As I have already noted, in crossexamination, Don confirmed that the boys had been left with Bessie Ninyette.[899] He also accepted that the three youngest children had been cared for by his sisterinlaw, Mrs Jean Collard, in October 1969 when Sylvia left him,[900] and that this was done with his permission, although he could not recall when or how he came to give permission for that to occur.[901]

646 Sylvia accepted that the three youngest children had been left with Mrs Jean Collard, but not in October 1969.[902] She did, however, accept that the boys stayed with her for a couple of years.[903] Having regard to the other evidence, it is more likely than not that Sylvia's memory of the dates when the boys lived with Mrs Jean Collard is inaccurate.

647 Joseph, Philip and Ashley remained with Mrs Jean Collard until approximately October 1975 when they returned to their parents who were at that stage living at Kondinin.[904]

648 Having regard to the fact that information as to the care of Joseph, Philip and Ashley was provided by third parties, and having regard to Don and Sylvia's evidence, there is ***no*** basis on which it can be said that the State's officers should have regarded the information received in relation to the care of the boys as potentially unreliable.

(vii) Other evidence as to Don and Sylvia's ability to provide for the Children between 1962 and 1969

649 There was some evidence as to Don's employment and income during the period between 1961 and 1970. Don's evidence was that from the late 1950s through to the mid1960s (and, for some years after that[905]), he did seasonal labouring and farming work in regional Western Australia. From around July to midOctober each year he

would shear in the Brookton, Beverley and Pingelly area. From midOctober he would move to Boyup Brook for about six weeks for shearing work. Then from December to March, Don would clear land around Corrigin, Hyden, Narembeen and Kondinin. In the autumn, he would pick mallee root and work on farms around Brookton, Beverley and Pingelly crutching sheep, and then would return to shearing by July.[906]

650 The documentary evidence to which I have already referred (including Mr Hill's file note of 11 January 1968) indicated the State received information that Don was out of work at times, and even frequently. His evidence, on the other hand, was that that he loved working, that he had worked 'just about every day of his life', and that he could only remember being out of work for about three or four months in his life.[907] Sylvia's evidence was that Mr Hill's statement that Don was frequently out of work was not accurate. Her evidence was that Don was never out of work.[908]

651 Information the State received that Don was out of work was not inherently unlikely or unreliable in view of the fact that Don casually was employed on farming properties at various times throughout the year.

652 As for his income, Don's evidence was that he earned about $80 $90 dollars per week when he was shearing,[909] and that for the remainder of the year he earned about $50 per week.[910] However, he accepted that this recollection could not have pertained to the 1960s (prior to the introduction of decimal currency).[911] He accepted, however, that when he was shearing he was earning 'reasonable money'.[912] Sylvia's evidence was that Don was paid a 'good price' for shearing although she did not know how much he was paid.[913]

653 As for their expenses, as there was ***no*** water or electricity at the humpy, Don and Sylvia did not have expenses of that kind. Sylvia said that she and Don helped to pay for the rates on Bessie Ninyette's block, but other family members who lived on the block also contributed to paying the rates.[914] Both Don and Sylvia said they spent money on food and clothing,[915] although as I have already observed, and as Sylvia herself accepted, they obtained some of their food without charge from the farms where Don worked.[916]

654 The import of Don and Sylvia's evidence suggests that Don earned 'good money' when he was working, that he worked consistently throughout the year, and they had minimal expenses other than food and clothing, yet in the period from 1958 until 1970, they lived in extremely impoverished conditions at the humpy, or stayed in accommodation provided for them at the farms where they were working. It was put to Don that his income was spent on alcohol, but he denied that that was so.[917] An alternative explanation is that Don was out of work for longer periods each year than he was willing to admit in his evidence. Another possibility is that Don and Sylvia shared their income with other family members. However, there was insufficient evidence to make a finding about the cause of the family's impoverishment.

(h) The events of Christmas 1970

655 One series of events which featured prominently in the evidence were those which occurred when Beverley, Glenys and Eva were permitted to spend Christmas with Don and Sylvia in 1970.

656 At the outset, I note that there was a dispute on the evidence as to when these events occurred. For the reasons set out below, I find that the events in question occurred in December 1970 through to January 1971.

657 At Don and Sylvia's request, officers of the Child Welfare Department agreed that Beverley, Glenys and Eva could spend the Christmas period of 1970 with them. At that stage, Don and Sylvia were renting a State Housing Commission house at 9 Rankin Street in Kondinin.[918]

658 In evidence was a letter dated November 1970 from the Victoria Park Division of the Child Welfare Department to District Officer White in Katanning.[919] In that letter, District Officer White was asked to ***visit*** Don and Sylvia to ascertain whether it would be possible for the Siblings to spend Christmas at home.

659 A file note indicated that following an inspection of their home, the District Officer from Katanning, Mr White, recommended that Beverley, Glenys and Eva be allowed to spend the holidays with their parents.[920] Don said that he had not been ***visited*** at the Kondinin House by a welfare officer at around that time.[921] Given that Don worked away from home for periods throughout the year, it is entirely possible that he was not home when the inspection occurred. I accept that District Officer White ***visited*** Don and Sylvia's home in Kondinin in November or December 1970 for the purpose of determining whether to recommend that the girls be permitted to go home for Christmas.

660 The ***visit*** was approved, and Don and Sylvia were advised of the approved arrangements in a letter from Ms Hobcroft.[922] The arrangements were that Beverley, Glenys and Eva would be collected by their parents on 21 December 1970, and that at the end of January 1971 Beverley and Eva would return to live with Mrs Mathews, and Glenys would return to live at Sister Kate's.[923]

661 Sylvia's evidence was that she and Don, through Mrs Jones, arranged for the girls to come home for Christmas. She said that she had not received any letter from Mrs Hobcroft indicating that Glenys, Beverley and Eva could spend Christmas with them.[924] It is more likely than not that a letter approving the arrangements was sent.

662 There was evidence that Don collected Beverley and Eva from Mrs Matthews' house[925] and Glenys from Sister Kate's.[926] Don was unable to recall collecting Beverley, Eva and Glenys and taking them from Perth to Kondinin on 21 December 1970,[927] but I find that he did so. That conclusion is supported by the documentary evidence, and there is ***no*** other alternative explanation open on the evidence as to how the girls were collected from Mrs Matthews' house and Sister Kate's.

663 There was ***no*** dispute that the family were staying at a house owned by a family member in Brookton.[928]There was also ***no*** dispute that Don, Sylvia and the girls ended up in Brookton some time before 24 December 1970. However, the evidence given by Don and Sylvia as to how and when the girls arrived in Brookton was inconsistent. Initially Don said that he and Sylvia took the girls to the Brookton Reserve at Brookton, but he later said that he couldn't recall whether he had taken the girls to Brookton.[929] Earlier in crossexamination he said that the girls weren't with them by the morning of Christmas Eve but were coming by then.[930] Sylvia's evidence, on the other hand, was that on the morning of Christmas Eve, the Siblings were at the house with other family members getting ready for Christmas.[931] I find that Don and Sylvia took Beverley, Glenys and Eva to Brookton some time between 21 and 24 December 1970. There is ***no*** other alternative explanation open on the evidence as to how the girls reached Brookton.

664 Although Beverley, Glenys and Eva were to have stayed in Brookton until the end of January 1971, a file note which was in evidence indicated that they had returned to Perth by 18 January 1971. On 18 January 1971, a Departmental welfare officer was contacted by Mrs McIntyre of Hamilton Hill who advised that Beverley and Eva were then staying with her.[932] The officer ***visited*** Mrs McIntyre and made the following file note as a result of that ***visit***: It appears Eva, Beverley and Glenys were not taken to Kondinin by parents, but instead to Brookton Native Reserve where they drank and brawled until 15.1.71 when girls decided to run away to Perth. Went to Mrs McIntyre.

665 I infer that that the information was given to the Departmental welfare officer either by Beverley and Eva themselves, or by Mrs McIntyre who had received that information from the girls.

666 Don's evidence was that he did not recall the matters set out in this file note, and that he thought it was wrong.[933] Sylvia denied any knowledge of her and Don drinking and fighting or that the three girls ran away on about 15 January 1971.[934]

667 As I have already noted, in evidence were copies of court records from the Brookton Police Court which indicate that on 26 December 1970, both Don and Sylvia were convicted for the offence of being drunk. According to the Apprehension Information which was prepared by Senior Constable Brennan in respect of each charge, on 24 December 1970 Don and Sylvia were found drunk in the street in Lennard Street in Brookton.[935]

668 Don and Sylvia each gave evidence that on the morning of 24 December they walked into Brookton to collect some bread from the bakery for Christmas.[936] Don's evidence was that they had just arrived outside the bakery when Constable Brennan and his wife drove up in a police car and arrested them for being drunk and disorderly or creating a disturbance. Don said that they had not had any alcohol to drink, they were not drunk, and they were not creating any disturbance. Don's evidence was that someone had telephoned the police and told them that two aboriginal people had been arguing on the street, and that by the time Constable Brennan arrived, only Don and Sylvia were in the street and they were arrested instead.

669 Don's evidence was that he and Sylvia were taken to the Brookton police station where they were kept in custody for three nights, including Christmas day. However, when he was shown the record of his conviction he accepted that he was in custody for two nights instead.

670 Don accepted that when the charge was brought before the Court on 26 December 1970 he pleaded guilty. His evidence was that although he had not been drunk he wanted to get out of gaol as soon as possible to get home to his children.

671 However, his evidence was that when they arrived home, the children weren't there. Initially Don denied any possibility that the children remained with them until midJanuary 1971. Later, he accepted that they 'might have done', and then he said he couldn't give an answer as to whether the children were with them until midJanuary 1971.

672 Sylvia's evidence was that as she and Don walked along the street towards the bakery, a group of people ran past them, and she thought there may have been a fight going on at the pub.[937] She said that Constable Brennan and his wife then pulled up in a car and arrested her and Don. Sylvia said that she and Don had not been drinking and were not drunk. Sylvia's evidence was that she and Don were taken back to the police station and kept locked up for four days.[938] She said that they were charged with drunk and disorderly conduct.[939]

673 Sylvia's evidence was that when the charge was heard in court, she initially pleaded not guilty, but was told that the matter would be stood down for 8 days without bail.[940] At that point, she changed her plea to guilty.[941]

674 Sylvia's evidence was that by the time she got home, the children had gone.[942] She said her mother told her that 'welfare went there and took them, picked them up'.[943]

675 Don and Sylvia's recollections of the events of Christmas 1970 were vague, or obviously inaccurate, in a number of respects. By way of example, Don and Sylvia both gave evidence that the ***visit*** took ***place*** over Christmas 1969. However, in crossexamination, Don accepted that he could have been wrong in relation to the date. The overwhelming body of the evidence, including the evidence as to Don and Sylvia's arrest and conviction, supports the conclusion that the events set out above occurred during December 1970 and into January 1971. (For completeness, I note that Glenys recalled having gone home to Brookton with Beverley and Eva to stay with their parents for Christmas, and she agreed that she and her sisters stayed with their parents until the girls ran away to Mrs Bennell and Mrs McIntyre. However, Glenys did not agree that these events occurred in December 1970 to January.[944] To the extent that Glenys disputed that these events occurred in December 1970 to January 1971, I am unable to accept her evidence, and prefer the documentary evidence instead.)

676 Further, Don and Sylvia each gave evidence that they were allowed to have Donald, Darryl, William and Bonnie home for this Christmas, as well as Beverley, Glenys and Eva.[945] However, as I have noted above, by December 1970, Donald had died, Darryl and William had been living at home with their parents for some time, and Bonnie had been living in Pingelly with Basil Little and his family for some time. In those circumstances, it is not surprising that there was ***no*** documentary evidence to suggest that the Child Welfare Department permitted any of the Siblings other than Beverley, Glenys and Eva to return home.

677 In addition, both Don and Sylvia recollected that they had spent more time in custody after being arrested than was in fact the case.

678 Sylvia also recollected that she was fined 10 pounds for this offence, and she confirmed that evidence in crossexamination. Yet this cannot have been the case, given that decimal currency commenced in Australia in 1966. The court records in evidence suggested that Sylvia was in fact fined $5 for the offence.

679 There remained two matters on which there was a difference between Don and Sylvia's recollection of the events of Christmas 1970, and the contents of the documents in relation to these events. The first concerns whether Don and Sylvia had been drinking at the time of their arrest. Again, I do not think it is necessary for present purposes to make a finding as to whether they had been. It suffices to say that given Don and Sylvia's guilty pleas, and their conviction for being drunk, constituted reliable information that Don and Sylvia were drunk on this occasion.

680 The second issue on which Don and Sylvia's evidence was inconsistent with the documents concerned whether Beverley, Glenys and Eva were still in Brookton when their parents were released from custody. Having

regard to Glenys' evidence that the girls ran away to Mrs Bennell and Mrs McIntyre, which corresponds with the information given to the welfare officer who ***visited*** Mrs McIntyre on 18 January 1971, I have concluded that it is more likely than not that Beverley, Glenys and Eva were still in Brookton when Don and Sylvia were released from custody.

(i) Don and Sylvia's care for other children

681 There was evidence that Don and Sylvia have looked after children, apart from their own, with the approval of the Child Welfare Department.

682 For a brief period in around October 1972 Don's 15yearold nephew lived with them.[946] In addition, Don said that he and Sylvia had fostered another child in the period 1975 to 1977. There was ***no*** documentary evidence suggesting that these were formal fostering placements arranged by the Child Welfare Department, and Don acknowledged that he had ***no*** documents in relation to these arrangements, and that he and Sylvia hadn't received any subsidy for providing this care.[947] I find that these were informal arrangements, most likely arranged between family or friends.

683 In August 1977, however, Mr Moulton reported that Don and Sylvia had been looking after Bonnie's three children for the previous 12 months. He reported that 'the grandparents are sincere and genuine in their desire to care for the children, which they are doing ... in a very satisfactory manner'.[948] As a consequence, Don and Sylvia were paid private foster rates by the Department of Community Welfare for the care of these children.[949]

684 There is also evidence that Don and Sylvia cared for another child from late 1978 through till the end of 1979, and received a Departmental subsidy for that foster placement.[950]

685 Sylvia accepted that she and Don began fostering children on or after 1977.[951] Don accepted that by this time, all of his children other than Wesley were older than 18 years of age.[952]

686 I find that Don and Sylvia fostered children, in formal placements arranged by the Child Welfare Department, on or after 1977. By that time, all of the Children, with the exception of Wesley, were older than 18 years of age, and by that time, Wesley had returned to live with Don and Sylvia, with the permission of the Child Welfare Department.

(j) Aspects of the Children's experiences during their wardships, including supervision of the Children by the Child Welfare Department

687 There was evidence about the Children's experiences while they were wards. I have dealt with some aspects of those experiences below. In this part of my reasons, however, I deal with three matters. First, I make some general observations about the evidence of the Children's experiences. Secondly, I address evidence about sexual assaults on Beverley. Thirdly, I address evidence about sexual assaults on Glenys, during the period when Beverley and Glenys were living at Sister Kate's.

General observations about the Children's experiences

688 It is fair to say that at Sister Kate's, and at Burnbrae, the Siblings' physical and educational needs were met. They were fed, bathed, had play time and attended school.

689 All of the Siblings, apart from the youngest ones, were expected to carry out chores during the week at Sister Kate's and Burnbrae. At Sister Kate's, these were by and large ordinary household chores in the cottages, while at Burnbrae, they also included some farm chores (like collecting eggs, chopping wood or milking cows). Mrs Patullo described the approach in her cottage at Sister Kate's as being that she: had a roster of all the children's jobs and a roster of little kids' jobs, so they each had a little job to do that was within their capacity. The older ones had more to do.[953]

690 Initially the plaintiffs' case encompassed an allegation that the Siblings were required to carry out manual labour to an excessive extent. However, the evidence did not support any such finding, and counsel for the plaintiffs abandoned any reliance on that claim.[954]

691 There was also evidence that while the Siblings lived at Sister Kate's or at Burnbrae, if they misbehaved they would be physically disciplined. Some of them reported being given a smack, or hit with a flyswat or a stick or a strap. Initially, the plaintiffs' case encompassed an allegation that the Siblings were subjected to excessive physical discipline. However, counsel for the plaintiffs abandoned any reliance on that claim.[955]

692 Although their separation from their parents was clearly a traumatic and emotionally damaging experience for all of the Siblings, and although it is apparent that as they grew older, and developed the capacity to run away, some of the Siblings did so, not all of their experiences while at Sister Kate's or at Burnbrae were unhappy ones. In 'Echoes of the Past', Wesley is quoted as saying: They had a fete every year and that was good. ... Plus we used to go to Point Peron for two weeks holiday every year. It was good down on the beach. Sometimes we went to Fremantle to ***visit*** the big aircraft carriers and the Zoo was another good ***place*** for happiness.[956]

693 Wesley also gave evidence that he was sent on a few holiday placements with families when he was at Sister Kate's he sometimes went alone, and on other occasions he went with other children, including Eva and Glenys[957] and he enjoyed those holidays.[958]

Sexual assaults of Beverley

694 Both Beverley and Glenys gave evidence that while they lived at Sister Kate's they were the victims of sexual abuse on numerous occasions. It is unnecessary and inappropriate in the circumstances to describe in detail the particular conduct involved. Rather, it suffices to make the following findings.

695 Beverley's evidence was that while she lived at Sister Kate's she was sexually abused by two males, whom she identified by name. Beverley had referred to this sexual abuse on her application form in relation to the Redress scheme, but in doing so, she identified only one male as having sexually abused her.[959] However, a handwritten statement Beverley provided to the ALS in 1995 referred to the sexual abuse in a manner broadly consistent with her witness statement in these proceedings.[960] Furthermore, in the course of crossexamination, Beverley confirmed that two males had sexually abused her during this period.[961] I accept Beverley's evidence that she was sexually abused by the two males. Beverley's evidence, which I accept, was that these incidents of sexual abuse were carried out on numerous occasions, as frequently as several times a week over the course of approximately two years.[962]

696 Beverley also gave evidence that she was sexually abused in the course of weekend placements, or outings organised through Sister Kate's. This abuse was of two kinds.

697 First, Beverley gave evidence that occasionally the children at Sister Kate's would be sent on a weekend placement with a family or an individual. Beverley recalled going on weekend placements, along with Glenys and Eva, to the home of a couple with a baby boy. Beverley recollected that they went to this home on more than one occasion, including once on a long weekend where they stayed for more than one night.[963] Beverley's evidence, which I accept, was that she was sexually abused by the baby's father during these placements. One instance of this sexual abuse occurred when the three girls slept on a mattress on the lawn outside the man's house, and he came outside to where the girls were sleeping and sexually abused Beverley.

698 In the course of her application as part of the Redress scheme[964] Beverley referred to sexual abuse during a weekend placement at the home of this couple, but referred only to the abuse happening while the girls were sleeping inside the house. Beverley was crossexamined about this apparent inconsistency with her evidenceinchief. Beverley's evidence was that on another night during the ***visit*** to the man's house on the long weekend, the girls were sleeping inside the house, and in the same room as the baby, and the man came into the room and sexually abused her.[965]

699 Beverley recalled that when the man came into their room, she, Glenys or Eva would pinch the baby in the hope that the baby's mother would come in response to the baby's cry, and that the abuse would then stop.[966]Beverley also said that when she heard the man coming she lay on top of her younger sisters to protect them from him.[967] I accept Beverley's evidence that this sexual abuse occurred.

700 Beverley was also crossexamined about a publication prepared by the ALS called 'Telling our Story'. (There was ***no*** mention of Beverley by name in that publication, as all the people in it were referred to by pseudonyms. However, Beverley's experiences and those of her family, bear many similarities to the stories told in that publication. There was ***no*** mention in that story of the sexual abuse experienced by Beverley during her weekend placements.) Beverley's evidence was that she could not remember whether she had told the ALS about the abuse during her weekend placements for the purposes of the 'Telling Our Story' publication.[968] However, I do not ***place*** any weight on the 'Telling our Story' document, for two reasons. First, the document itself makes clear that the histories of four families ... are told to complement the discussion on the treatment of aboriginal children who were

removed from their families and the effects of these removals. Their histories are not told completely but parts of each individual's history is reported to reflect the past policies and practices of removing aboriginal children from their families and culture. ... The histories have not been altered, although they have been edited.[969]

701 In addition, a statement given by Beverley to the ALS was in evidence.[970] It is apparent that the story set out in 'Telling our Story' does not reproduce in full the details in that statement.

702 The second kind of sexual abuse which Beverley experienced occurred during weekend outings with men from car clubs in Perth. Her evidence was that men and women from car clubs in Perth would sometimes volunteer to take children from Sister Kate's out for lunch or a picnic on the weekend. Beverley said that she was sexually abused on occasion by some of these men, although she was not specific as to when, or how often, these incidents occurred.

703 Beverley gave evidence that the children at Sister Kate's were made to line up so that the adults could choose which children they wished to take out for the day. After she had been assaulted on one such outing, Beverley tried to push Glenys and Eva into the dirt before they had to line up on the next occasion, so that they would not be chosen to go out for the day.[971]

704 In her application to the Redress scheme, Beverley did not make any mention of sexual abuse by members of these car clubs. In crossexamination, her explanation about this omission was that the application forms 'never asked for everything. It was what I could remember at the time.'[972]

705 Beverley was also crossexamined about the fact that in an application to become a foster carer in 2002, Beverley did not mention all of the sexual abuse which she had experienced while a ward, but only referred to the sexual abuse carried out by the father of the baby. Beverley's evidence was that who she told about the sexual abuse depended upon that the person to whom she was talking to, and that in the foster carer application, she simply answered the questions on the form.[973]

706 The fact that Beverley did not mention the sexual abuse at the hands of the car club members in the course of her Redress application or her foster carer application does not lead me to doubt her evidence that she was abused in the course of these ***visits***. It is not at all surprising that a victim of sexual abuse may be reluctant to disclose details of such a traumatic events to complete strangers if there is ***no*** pressing need to do so.

707 I accept Beverley's evidence that she was sexually abused during weekend outings with car club members. However, her evidence in relation to the abuse was not sufficiently specific to permit any specific findings to be made about this abuse.

Sexual assaults of Glenys

708 Glenys also gave evidence that she was sexually assaulted by two males, who she also identified by name, who lived at Sister Kate's. She said the sexual abuse started soon after she arrived, when she was three years old, and continued until she was about five years old. Glenys gave accounts of these assaults on several occasions in the witness statement which constituted her evidenceinchief in these proceedings, in crossexamination, in her Redress scheme application, and in a statement provided to the ALS in 1995. There were some differences in these accounts as to the nature and frequency of the sexual abuse which Glenys recounted. Nevertheless, I am satisfied as to the truthfulness of her evidence that the sexual abuse occurred. Furthermore, Beverley also gave evidence that she witnessed Glenys being sexually abused by the same two males (separately) on several occasions.[974] I accept that Glenys sexually abused by the two males on numerous occasions over approximately a twoyear period.[975]

709 Glenys also gave evidence that she was sexually abused by a man during a school holiday placement when she was about six or seven years of age. Glenys said that she had initially forgotten this placement until reminded of it by another couple with whom she had also had a holiday placement, and who were neighbours of the man in question. However, Glenys recalled details of the man involved, his age and his appearance, and she had a vivid memory of the furniture in the man's house where the sexual abuse occurred. Although Glenys' evidence was that she had contact with the man on several occasions, including when she stayed with the couple who were neighbours of this man, it was not clear that the man sexually abused her on more than one occasion. Accordingly, I accept Glenys' evidence that this man sexually abused her on one occasion.

710 Glenys also gave evidence that she was sexually abused by the father of the baby, at whose home she, Beverley and Eva had had a holiday placement. She recalled three ***visits*** to this man's house. On the second ***visit***, Glenys recalled that she and her sisters slept on mattresses in his back yard, and during the night, the man sexually abused her.[976] Glenys evidence was that she and Beverley ensured that Eva was not left alone with the man, and they ensured that they slept between Eva and the man, so that nothing would happen to her.

711 Glenys also said that on another evening at the home of the same man, he engaged in similar conduct, and I find that the man sexually abused Glenys on this occasion also. Glenys said that on this occasion, she and Beverley decided that they had to do something to make the abuse stop, so they pinched the man's baby in the hope that if the baby cried, the man's wife would come to check on him and the man's abuse might stop.

712 Glenys also gave evidence that the girls ***visited*** the man's house on another occasion. However, on this ***visit***, the girls decided that in order to avoid any abuse by the man, they would hide in the toilet at his house and scream until they were taken back to Sister Kate's.[977]

713 Eva also recalled an occasion during a weekend placement where the girls had hid in the toilet and screamed until they were taken back to Sister Kate's. ***No*** abuse occurred on this occasion.

714 Glenys also gave evidence that in about 1970, during a period when she had run away from one of her placements, she was living at Beaufort Park, which is a park on the corner of Newcastle and Stirling Streets in Northbridge where a number of aboriginal people lived at the time. Glenys' evidence, which I accept, was that on one occasion, she was sexually assaulted by two young white men. Glenys' evidence was that she felt guilty and ashamed, and that this assault was the start of a period in her life where she engaged in heavy drinking.

715 Glenys also gave evidence that while she was staying at the home of her Auntie Jean and Uncle Fred in Hamilton Hill, a male member of her Auntie Jean's family, who is now deceased, tried to sexually assault her. It appears that this attempt was not successful as Glenys' brother William, who was also staying at Auntie Jean's at the same time, protected her from this attempted abuse.

716 Both Beverley and Glenys gave evidence that they decided not to tell anyone about the sexual abuse they experienced. Beverley's evidence was that the girls decided not to tell anyone about the abuse on the weekend placement at the man's house 'because we knew nobody would believe us. It was already happening to us at Sister Kate's and ***no*** one cared in there so why would they care about this.'[978] Glenys also gave evidence that she did not report the sexual abuse she had experienced.

717 I find that during their wardships neither Beverley nor Glenys reported the sexual abuse they experienced while at Sister Kate's.

(k) The extent of supervision or monitoring of the Children's welfare by officers of the Child Welfare Department

In this section of my reasons, I deal with the following matters:

(i) evidence in relation to the staff resources, workload and operations of the Department of Native Welfare, and Child Welfare Department, in the period prior to, and during, the Children's wardships;

(ii) evidence in relation to the Child Welfare Department's requirements for inspecting institutions, including Sister Kate's, and for monitoring the welfare of wards in institutions or foster care;

(iii) evidence in relation to checks on the welfare of the Children which were conducted during their wardships;

(iv) evidence in relation to inspections of Sister Kate's and Burnbrae while the Siblings lived there;

(v) evidence in relation to systems for reporting and dealing with complaints about the treatment of wards; and

(vi) evidence in relation to checks for permanent and occasional foster carers and the staff of institutions such as Sister Kate's.

(i) Evidence in relation to the staff resources, workload and operations of the Department of Native Welfare, and Child Welfare Department, in the period prior to, and during, the Children's wardships

718 There was very limited evidence in relation to the resources and operations of the Department of Native Welfare which were directed to the welfare of aboriginal people, and aboriginal children in particular, in the period prior to, and during, the Children's wardships.

719 Mr Terence Long was a patrol officer for the Southern District of the State from March 1959, and was stationed at the Narrogin office of the Department of Native Welfare from March 1959 until March 1960. In a witness statement, Mr Long deposed that the Department of Native Welfare divided the State into seven districts, and that deposed that he was the only patrol officer for the Southern District in 1959 1960. Also based in the Narrogin office at the time were Mr WrightWebster, a clerical officer and a typist.[979] Mr Long deposed that his duties as a patrol officer included patrolling the district, ***visiting*** aboriginal communities to locate and identify aboriginal persons, and assisting aboriginal persons such as by securing work or arranging school attendance.[980] He would provide his patrol notes to the District Officer, who would then communicate with the Commissioner in respect of any action which was required.[981]

720 Even without any evidence as to the number of aboriginal people living in the Southern District, it is immediately striking that the resources of one patrol officer and one District Officer, to carry out the work of the Department of Native Welfare within the district, appears to be a very limited resource.

721 The evidence to which I have already referred established that during the period of the Children's wardships officers of the Department of Native Welfare, and of the Child Welfare Department, drew on the resources of police officers, and on occasion, on the resources of members of the local community (such as those engaged in charitable works), in carrying out their duties. Police officers and members of the local communities provided information about individuals and families, and police officers were sometimes called upon to assist in the apprehension of children who were wards. Evidence to this effect was also contained in a witness statement prepared by Mr Cornish, a patrol officer and later the Acting District Superintendent (also known as District Officer) based at the Narrogin office of the Department of Native Welfare between 1956 and 1963). In his statement, Mr Cornish referred to Ms Jones: I recall that I often dealt with a lady missionary in Brookton during both my stints at the Narrogin office whose surname I think was Jones. I ... would see her each time I ***visited*** Brookton in the course of my duties, which I think was roughly monthly. Because Brookton was quite close to Narrogin it was easy to ***visit*** Brookton when the need arose.

When I ***visited*** Brookton I would make contact with the missionary, and we would discuss local families with whom she had contact. She would tell me what she had heard about how children were faring, whether the children were going to school, and everything that affected the welfare of children. She was a very useful point of contact.

She would also contact the Department in the case of a person requiring assistance when she was unable to provide that assistance herself.

I knew the missionary both personally and professionally and I held her in the highest regard.[982]

722 There was also some evidence in relation to staff resources in the Child Welfare Department during the period of the Children's wardships. According to the Department's Annual Report for the financial year ending 30 June 1959, the number of children controlled and supervised throughout the financial year, within the various areas of the Department's responsibility, was 5982, including 430 wards of the Department in institutions, 452 boarded out on subsidies, and 244 wards under the supervision of probation officers.[983] Within the same period, the Department had two psychologists, thirteen probation officers, five welfare officers and five district officers (the latter were stationed in country areas).[984] It is apparent that workload was a matter of concern to the Department's staff at that time. The Report noted that it is important that case loads be kept to a workable size and constant review must be made to ensure that officers are able to cope with their allotted tasks. An effective load is considered to be 80 cases as a maximum. The case load per officer is far in excess of this as a general rule.[985]

723 The 1959 Annual Report also noted that the five welfare officers in the metropolitan area conducted 2204 ***visits*** to wards, 354 ***visits*** to foster children, and 1700 inspections and investigations (including those for neglected children) within the financial year. The five district officers in country areas conducted 1382 ***visits*** to wards, 77 ***visits*** to foster children, and 2863 inspections and investigations (including those for neglected children) within the financial year.

724 According to the Department's Annual Report for the financial year ending 30 June 1962, the number of children controlled and supervised throughout the financial year, within the various areas of the Department's responsibility, was 7,451, including 423 wards in institutions, 551 boarded out, and 263 wards under the supervision of probation officers.[986] It appears that there were 6 welfare officers employed in the Department during this financial year, who between them were responsible for 1049 cases (or, on average, 174 cases each), while there were eight district officers responsible for a total of 1921 cases (or, on average, 240 cases each).

725 The same report noted that the welfare officers in the metropolitan area conducted 3344 ***visits*** to wards, 442 ***visits*** to foster children, and 2280 inspections and investigations (including those for neglected children) within the financial year. The five district officers in country areas conducted 2406 ***visits*** to wards, 188 ***visits*** to foster children, and 3469 inspections and investigations (including those for neglected children) within the financial year.

726 According to the Department's Annual Report for the financial year ending 30 June 1965, the number of children controlled and supervised throughout the financial year, within the various areas of the Department's responsibility, was 7,041, including 732 wards of the Department in institutions, 725 boarded out, and 349 wards under the supervision of probation officers.[987] In this financial year there were 711 aboriginal wards, including 329 aboriginal wards in institutions, and 69 boarded out with foster parents. There were 12 welfare officers employed in the Department during this financial year, who between them were responsible for 1982 cases (or, on average, 165 cases each), while there were seven district officers responsible for a total of 1368 cases (or, on average, 195 cases each).

727 The same report noted that the 12 welfare officers in the metropolitan area conducted 4387 ***visits*** to wards, 663 ***visits*** to foster children, and 3355 inspections and investigations (including those for neglected children) within the financial year. The seven district officers in country areas conducted 2707 ***visits*** to wards, 163 ***visits*** to foster children, and 3067 inspections and investigations (including those for neglected children) within the financial year.

728 These figures suggest that throughout the years of the Children's wardships, welfare officers within the Child Welfare Department had a very significant workload. Those statistics were confirmed in the evidence of welfare officers at the trial, although it was also apparent from that evidence that caseloads varied (sometimes very significantly) between officers. The reasons for those variations were not explored in the evidence, although one would expect some variations in case loads depending upon the complexity of the cases, and the experience of the welfare officers responsible for them.

729 Ms Lynette Boag was a case worker in the Child Welfare Department between August 1968 and January 1973. She deposed that 'I had a large caseload, and it was common knowledge that we had huge caseloads at that time.'[988]

730 Ms Jean Hamory, a welfare officer and later social worker and social work supervisor, with the Child Welfare Department from 1960 until 1991, deposed that I considered that a welfare officer's caseload was extremely heavy. The size of the caseload meant it was occasionally difficult to manage all of the competing priorities. Investigations of reports from the public about possible danger to a child were required to be given precedence over all other work, including the ***visiting*** of wards and the ***visiting*** of families receiving welfare monies.[989]

731 Ms Stephanie Keating, a welfare officer with the Child Welfare Department from February 1969, said that at that time the metropolitan region was divided into four geographical subregions, and there was an office within each region comprising approximately 15 staff, the majority of whom were welfare officers. Ms Keating's evidence was that there were very few social workers or psychologists employed by the Department at that time, in part because the Bachelor of Social Work course was not introduced in a Western Australian university until the mid1960s.[990]

732 Mr Kenneth Monson, a social worker with the Child Welfare Department from July 1969, deposed that in 1970 he carried a case load of approximately 45 children in care, although his evidence was that he carried a larger case load of children than other staff members, and dealt with more complex cases.[991]

733 Mr Terence Mulroney, a social worker with the Department from 1971, deposed that his case load was roughly 30 cases, and his cases would be reviewed with a supervisor.[992]

734 In contrast, Ms Caroline Brazier, a social worker with the Child Welfare Department from 1967, deposed that as a social worker in metropolitan Perth at that time, she was responsible for a significant case load of about 100 cases.[993]

735 Mr Desmond Semple, who was a social worker with the Child Welfare Department from 1970, and later Director General of the Department, recalled a heavy case load during his time as a social worker. His evidence was that in his experience most social workers had a case load of about 100 cases, although in 1971 when he worked at the Morley divisional office, he had about 150 cases.[994] However, from 1973 1976, the case load for individual staff had decreased to about 70 80 cases each.[995]

736 The available evidence supports the conclusion that during the period of the Children's wardships, welfare officers employed in the Child Welfare Department carried a significant case load. In addition, the evidence supports the conclusion that during the same period, there were very few psychologists and social workers employed by the Department.

(ii) Evidence in relation to the Child Welfare Department's requirements for inspecting institutions, including Sister Kate's, and for monitoring the welfare of wards in institutions or foster care

737 As I observed at [190], during the period of the Children's wardships, the Child Welfare Act required that the Director cause all wards to be ***visited*** once every six months by an officer of the Department, to ensure that their treatment, education, and care was satisfactory.[996] There was evidence in relation to the supervision of institutions and foster placements, and of the wards ***placed*** in institutions and foster placements, by the Child Welfare Department during the years that the Children were in care.

738 Mr Maine's evidence was that in 1961 (and thereafter) the Child Welfare Department had the statutory responsibility of licensing institutions for children and it would have been interested in Sister Kate's to confirm that it met the basic requirements for satisfactory care of the children who lived there.[997] Mr Maine said that there was an institutions officer within the Department who had to ***visit*** all of the institutions licensed by the Department. Mr Maine said that there was ***no*** formal arrangement for staff at an institution to make contact with the Department, but this could happen informally, such as if a cottage mother took advantage of the presence of a field officer who was there to discuss some problem or issue they were dealing with.[998]

739 Mr Maine also gave evidence that there were individual field officers who were responsible for the children who were in care in those institutions. His evidence was that those officers would have ***visited*** the children personally from time to time and he thought that would have been at about threemonthly intervals, depending on staff availability.[999] Mr Maine had ***no*** personal recollection of the extent to the obligation to ***visit*** wards was complied with. He observed that there were staff shortages and these requirements couldn't always be complied with.[1000]

740 The tenor of Mr Maine's evidence both as to the requirements for supervision of institutions and wards, and as to the extent to which resources impacted upon compliance with these requirements was borne out by evidence from officers of the Child Welfare Department at the time.

741 Ms Mary Walsh (nee Argyle) was a field officer with the Child Welfare Department between 1964 and 1965. She deposed that in that role she was occasionally required to ***visit*** children's institutions, and that she ***visited*** Sister Kate's two or three times during her time at the Department. Ms Walsh deposed that my duty when ***visiting*** wards and foster parents, which I followed as a matter of practice when ***visiting*** Sister Kate's, was to look for any problems there might be for the child I was ***visiting*** or for the foster parent. ... [I]t was more a question of observation and general conversation.[1001]

742 Ms Caroline Brazier recalled that during the period when she was a social worker, an instruction was issued within the Child Welfare Department that all wards should be ***visited*** on a certain number of occasions each year.[1002]

743 Mr Kenneth Monson recalled that in approximately 1973 a requirement for 'quarterly reports' was introduced, which meant that at a minimum an officer was required to conduct a physical ***visit*** to a child in care once a quarter.[1003]

744 Ms Stephanie Keating deposed that she ***visited*** wards of the State and their caregivers every three months, which she understood to have been a requirement under the Child Welfare Act.[1004]

745 Mr Desmond Semple deposed that even if a child was in a stable environment, the prevailing guideline was that the child should be seen face to face at least once every three months. However, he deposed that the reality, in my experience, was that heavy case loads invariably meant that you were often caught responding to crises, and as a result, you were not necessarily able to ***visit*** every 3 months.[1005]

746 He also deposed that although he recalled that there was a requirement for the completion of quarterly reports by field workers in relation to children under their supervision, some officers were more capable of meeting this requirement than others, and that if an officer had to respond to crises this would affect their ability to complete the required ***visits*** and reports.[1006] Mr Semple's evidence was that: In my experience, both as a social worker and a Supervisor, the provision of services by officers within the Department, and the quality of those services, was influenced more by the capabilities and diligence of the individual officer, and their approach to case work practice, rather than any wide spread discrimination on the basis of a child or family's background.[1007]

747 Mr Terence Mulroney deposed that the frequency of his ***visits*** to a ward ***placed*** in foster care would depend on the specific circumstances. He could recall ***visiting*** a foster child once a week in difficult cases, but that if the circumstances were suitable, the supervision would be less frequent (for example face to face contact once a month). His evidence was that he could not recall going for a period of three months without seeing a foster child face to face.[1008]

748 Mr Maine also gave evidence that when he was a psychologist with the Child Welfare Department, he attended at Sister Kate's on a weekly basis for about a year, to work with some of the older girls in the older girls' cottage there, and he therefore had regular contact with the children in that cottage during that period.[1009]

749 The evidence therefore established that if a ward or wards had a particular need, a welfare officer might see that ward on a more regular basis.

750 I find that during the period of the Children's wardships, and either as an administrative requirement within the Child Welfare Department or in order to comply with the Child Welfare Act, welfare officers within the Department were expected to ***visit*** wards on a regular basis, and at least every six months. However, the need to give priority to urgent or crisis cases meant that it was not always possible for Departmental welfare officers to conduct checks on wards as regularly as this. On the other hand, if a ward had a particular need which required the attention of an officer of the Department (such as a psychologist), that officer might see the ward on a more regular basis.

(iii) Evidence in relation to checks on the welfare of the Children which were conducted during their wardships.

751 As I have explained elsewhere in these reasons, there was virtually ***no*** documentary evidence in relation to the Siblings while they lived at Sister Kate's prior to July 1964. After that period, and while they continued to reside at Sister Kate's or Burnbrae, there was evidence that the Siblings were each given regular medical checkups, and that they were ***visited*** by welfare officers, on a relatively regular basis. There was evidence that while some of the Siblings were in foster care, their foster homes were ***visited*** by child welfare officers on a relatively regular basis.

752 I find that the Siblings (other than Donald and William, about whom it is not necessary to make findings on this issue) were seen on the following occasions.

Darryl

753 Whilst he was at Sister Kate's or Burnbrae, Darryl was seen by a doctor on 31 July 1964, 19 November 1965, 28 April 1966, 24 November 1966, 4 April 1967, and 13 October 1967.[1010]

754 A later medical report indicates that Darryl had a medical examination on 28 October 1965,[1011] but there was ***no*** report from that examination in evidence. However, I am satisfied that it is more likely than not that Darryl had a medical examination on this occasion.

755 In addition, the documents in evidence indicate that welfare officers ***visited*** locations where they expected Darryl to be found, but did not find him there, on the following occasions: 7 January 1970 (at Brookton, reported to

be away working), 24 February 1970 (at Brookton, reported that he was believed to be away working) and 21 May 1970 (at Brookton, reported that he had left Brookton and was living in Doodlakine where he had secured employment).[1012]

Bonnie

756 Copies of medical or welfare reports which were in evidence indicate that Bonnie was seen by either a doctor, or a welfare officer, on the following dates: 31 July 1964, 19 November 1965, 28 April 1966, 24 November 1966, 4 April 1967, 14 November 1967, 3 January 1968, 21 October 1968, 10 October 1969, 10 December 1969, 24 February 1970, 22 May 1970, 7 July 1970, 28 July 1970 and 11 June 1971.[1013]

757 In addition, the documents in evidence indicate that welfare officers ***visited*** locations at which they expected Bonnie to be, but did not find her there, on the following occasions: 30 September 1969 (Brookton), 24 March 1970 (Pingelly Native Reserve) and 28 March 1972 (Pingelly Native Reserve).[1014]

758 Other documents also refer to welfare reports that had been submitted in relation to Bonnie on 18 March 1971 and 3 December 1971.[1015] Although those welfare reports were not in evidence, I am satisfied that it is more likely than not that Bonnie was the subject of a welfare report on those occasions also.

Beverley

759 Copies of medical or welfare reports which were in evidence indicate that Beverley was seen by a doctor, or a welfare officer, on the following dates: 31 July 1964, 12 August 1964, 16 March 1965, 19 November 1965, 7 December 1965, 27 April 1966, 23 May 1966, 21 November 1966, 20 March 1967, 3 April 1967, 13 November 1967, 22 April 1968, 30 September 1969, 30 June 1970, 1 July 1970, 30 September 1970, 20 November 1970, 2 December 1970, 21 December 1970, 1 September 1971, 15 March 1972, 22 March 1972, 19 April 1972, 23 August 1972 and 30 August 1972.[1016]

760 Later medical reports which were in evidence refer to medical examinations of Beverley that took ***place*** on 19 February 1962 and 26 October 1965.[1017] Although there were ***no*** medical reports from those examinations in evidence, I am satisfied that it is more likely than not that Beverley also had a medical examination on those occasions also.

761 Welfare officers ***visited*** locations at which they expected Beverley to be, but did not find her there, on 5 December 1968 (Mr and Mrs Stephenson's home, Beverley reported to be at school) and 15 April 1970 (Mrs Price's house in Gosnells, Beverley reported to be out at the time).[1018]

Ellen

762 The documents in evidence established that on 30 September 1958, 31 March 1959, 30 September 1959, 31 March 1960 and 30 September 1960, Ellen was the subject of a 'half yearly report on committal case'.[1019] The observations made by officers of the Department of Native Welfare in these reports indicated that Ellen had been seen prior to the preparation of the report, but the reports do not specify the exact dates on which she was seen.

763 Documents in evidence also established that Ellen was seen by a doctor, or a welfare officer, on the following dates: 15 September 1964, 26 January 1965, 26 May 1965, 27 January 1966, 25 May 1966, 7 December 1966, 15 May 1967, 19 January 1968, 27 February 1968, 10 May 1968, 14 May 1968, 29 July 1968, 10 January 1969, 10 April 1969, 2 July 1969, 20 December 1970, 4 February 1971, 8 February 1971 and 15 June 1972.[1020]

764 Documents described as 'Quarterly case reports' dated 13 March 1974 and 27 September 1974 were also in evidence.[1021] The observations in these reports indicated that Ellen had been seen prior to the preparation of the report, but the reports do not specify the exact dates on which she was seen.[1022]

765 Other documents indicated that Ellen was seen by a doctor on 23 August 1966 and 23 May 1967.

766 Finally, a document in evidence indicated that a welfare officer ***visited*** the Dwyer's home on 5 December 1969, but that Ellen was not able to be seen on that occasion as she was at school at the time.[1023]

Glenys

767 Copies of medical or welfare reports which were in evidence indicated that Glenys was seen by a doctor, or a welfare officer, on the following dates: 31 July 1964, 12 August 1964, 16 March 1965, 19 November 1965, 7

December 1965, 27 April 1966, 23 May 1966, 21 November 1966, 20 March 1967, 3 April 1967, 13 July 1967, 13 November 1967, 22 April 1968, 21 October 1968, 17 May 1969, 26 May 1970 and 23 November 1970.[1024]

768 Other medical reports which were in evidence refer to medical examinations of Glenys that took ***place*** on 8 March 1962 and 19 July 1965.[1025] Although there were ***no*** medical reports from those examinations in evidence, I am satisfied that it is more likely than not that Glenys had a medical examination on those occasions also.

769 On 30 September 1969, a welfare officer also ***visited*** Brookton, hoping to see Glenys, but found that she was not present, but was reported to be at school.[1026]

Eva

770 Copies of medical or welfare reports which were in evidence indicated that Eva was seen by either a doctor, or a welfare officer, on the following dates: 31 July 1964, 12 August 1964, 16 March 1965, 19 November 1965, 7 December 1965, 27 April 1966, 21 November 1966, 20 March 1967, 3 April 1967, 13 November 1967, 22 April 1968, 21 October 1968, 6 May 1969, 15 April 1970, 20 May 1970, 30 September 1970, 2 December 1970, 21 December 1970, 4 May 1971, 3 August 1971, 2 December 1971, 2 May 1972, 2 February 1973, 12 June 1973, 3 December 1973, 23 April 1974, 10 October 1974.[1027]

771 Other medical reports referred to medical examinations of Eva that took ***place*** on 9 December 1963, 26 October 1965, 3 December 1971 and 14 November 1972.[1028] Although there were ***no*** medical reports from those examinations in evidence, I am satisfied that it is more likely than not that Eva had a medical examination on those occasions also.

772 In addition, welfare reports in relation to Eva dated 13 April 1973 and 19 October 1977 were in evidence, although those reports did not, on their face, indicate whether or not the welfare officer saw Eva prior to making the report.[1029]

Wesley

773 Copies of medical or welfare reports which were in evidence indicated that Wesley was seen by either a doctor, or a welfare officer, on the following dates: 29 July 1964, 12 August 1964, 16 March 1965, 19 November 1965, 26 April 1966, 21 November 1966, 5 April 1967, 24 May 1967, 16 November 1967, 22 April 1968, 18 October 1968, 12 March 1969, 6 May 1969, 8 January 1970, 29 January 1970, 25 June 1970, 24 June 1971, 6 June 1972, 12 March 1973, 4 May 1973, 26 June 1973, 11 October 1973, 8 October 1975 and January 1976.[1030]

774 Other medical reports referred to medical examinations of Wesley that took ***place*** on 19 July 1965, 27 October 1965 and 15 October 1970.[1031] Although there were ***no*** medical reports from those examinations in evidence, I am satisfied that it is more likely than not that Wesley had a medical examination on those occasions also.

775 Welfare officers ***visited*** locations where they expected Wesley to be, but did not find him there, on the following occasions: 5 December 1968 (Mr and Mrs Stephenson's home, Wesley reported to be at school), 21 June 1977 (Collard home in Kondinin, Wesley reported to be ***visiting*** the metropolitan area) and 2 August 1978 (Collard residence in Kondinin).[1032]

776 Other documents in evidence referred to welfare reports that were submitted in relation to Wesley on 13 February 1972 and 9 May 1977.[1033] Those welfare reports were not in evidence. Nevertheless, I am satisfied that it is more likely than not that welfare reports in relation to Wesley were made on those occasions also.

777 In evidence was a document[1034] relating to a complaint made by Wesley's foster mother, Mrs Stephenson, in 1971, to the effect that a welfare officer had not been to see Wesley for 18 months. Mr Maine was crossexamined about the nature of this complaint, and he accepted that from time to time staff shortages meant that ***visits*** to wards were not as frequent as would have been desirable.[1035]

778 However, the problem to which Mrs Stephenson referred in this letter does not appear to have been a protracted one, because Wesley recalled that while he was living with the Stephensons, welfare officers from the Department of Native Welfare came and saw him many times. He also said that the Department of Native Welfare officer always told me I could go see him at his office in town if I had any questions or wanted to talk to him. I did go

and see him once when I was around 14. My relationship with the Stephensons was deteriorating and I complained to the officer about this.[1036]

779 Having regard to all of the evidence to which I have referred I find that from mid1964, and during the periods in which they were living in institutions or in foster homes during their wardships, the Siblings were seen on a regular basis either by a doctor, or by a child welfare officer. Those examinations were not always conducted every six months, and I infer that that was because sometimes workload pressures on welfare officers meant that they could not ***visit*** wards as frequently as every six months.

780 In so far as the position prior to 1964 is concerned, for the reasons I have already set out, the absence of any evidence for this period suggests that the evidence before the Court did not comprise a complete documentary picture, and in those circumstances, it cannot be inferred from the absence of documents that ***no*** inspections or checks were carried out on the Siblings during that period.

(iv) Evidence in relation to inspections of Sister Kate's and Burnbrae while the Siblings lived there

781 There was very little evidence that inspections were conducted of Sister Kate's, or any other institution where the Siblings lived, to monitor the adequacy of the care provided to wards. The only evidence of such an inspection was a report prepared by an 'Institution Officer' of the Child Welfare Department who conducted an inspection of Sister Kate's in May 1963. The officer reviewed the accommodation and facilities at Sister Kate's and also commented on the children residing there, as follows: Children in residence:

At the time of my ***visit*** there were 71 children at Sister Kate's Home, including 13 under the jurisdiction of this Department, 25 under the Department of Native Welfare and the remainder being private cases. All the children were seen during the midday meal and their appearance without exception was satisfactory.

Education:

There is a kindergarten on the premises, which caters for children from the Home and some children from outside. The primary school children attend the Queen's Park State School, while the high school children are divided between Bentley, Armadale and Kalamunda High Schools.

...

Health:

Satisfactory arrangements are made to follow up the medical, dental and optical treatment required by the children, and suitable records are maintained.

Visiting Leave and Outside Contact:

Weekend leave and ***visits*** are allowed once a month. As several other Homes are extending their ***visiting*** arrangements, I feel it would be desirable if Sister Kate's Home followed suit.

General Comments:

It is apparent that in recent years there has been a vast improvement in Sister Kate's Home, particularly with the replacing of old buildings with new ones. Generally, all equipment and utensils are in good condition and I am

satisfied that the children are well cared for. There appears to be an excellent relationship between Mr and Mrs Daniel and the children and it is obvious that they take a personal interest in each and every child in the Home.

782 For the reasons I have already given, I am not persuaded that the absence of any other reports of similar inspections of Sister Kate's or Burnbrae, in particular, permits the inference to be drawn that ***no*** other inspections of those institutions was carried out. However, the dearth of evidence means that it is not possible to make any finding as to when such inspections were carried out, save for the inspection in May 1963.

(v) Evidence in relation to systems for reporting and dealing with complaints about the treatment of wards

783 Mr Maine gave evidence as to how complaints in relation to the treatment of wards were dealt with. His evidence as to the position in about 1966 was that if a complaint was received in relation to the treatment or care of a ward, the role of the Child Welfare Department was to investigate that complaint to see whether it was substantiated and then steps could be taken to correct the situation.[1037]

784 Mr Maine's attention was drawn to a document indicating that a concern had been raised by a cottage mother at Sister Kate's in 1966 to the effect that the children in her cottage (who did not include the Siblings) had been engaging in play of a sexual nature. Mr Maine was asked about whether particular officers in the Child Welfare Department were assigned to deal with complaints or concerns of this kind. Mr Maine's evidence was that at that time there was one parttime psychologist and one fulltime psychologist in the Department, and that 'it would be normal to refer such a problem to them but whether they were there then or available or what, I can't tell'.[1038]

785 However, at least up until 1968, the staff members at Sister Kate's had ***no*** formal training in child care.[1039] Mr Maine's evidence was that there was '***no*** specific training for foster parents, ***no*** particular qualification for cottage parents, and people were generally selected on the basis of their life experience'[1040]

(vi) Evidence in relation to checks for permanent and occasional foster carers and the staff of institutions such as Sister Kate's

786 There was very little evidence in relation to whether there was any system for checking the suitability of permanent or occasional foster carers and the staff of institutions such as Sister Kate's, during the period of the Children's wardships.

787 Mr Maine's evidence was that the Child Welfare Department had ***no*** role to play in the selection of staff at institutions like Sister Kate's.[1041]

788 There was also a dearth of evidence in relation to whether any checks were carried out by Sister Kate's in relation to persons who volunteered to be weekend carers, or to take children for holiday placements. Mrs Patullo gave some evidence about the process of selecting weekend or holiday carers. Her evidence was that as a result of speaking with Mrs Daniel, she was aware that Mrs Daniel would interview applicants, assess them and maybe suggest a child for a placement.[1042] She would then tell the cottage parent that a child from their cottage was to have a weekend placement. Mrs Patullo's evidence was that when the child came back it was a matter of assessing whether it had been successful or not. If the child didn't want to go, they didn't have to go next time, as far as I'm aware. I never found any difficulty there.[1043]

789 However, while I accept Mrs Patullo's evidence for what it was, I do not think it can be relied upon to draw conclusions as to what checks (if any) were conducted in respect of prospective weekend or holiday foster carers for the children at Sister Kate's. Mrs Patullo was not involved in the administration of Sister Kate's. Her evidence was confined to her understanding about the process, as a result of a conversation with Mrs Daniel.

790 As for the checks carried out by the Child Welfare Department in relation to persons seeking to become foster parents, in evidence were copies of a number of applications by persons to be foster carers in relation to the Siblings. However, there was ***no*** evidence as to what (if any) checks were undertaken, during the period of the Children's wardships, to determine whether an applicant was suitable to be a foster carer.

791 The final observation which can be made about this evidence, however, is that there was ***no*** evidence as to what checks could have been made in respect of the suitability of weekend or occasional carers at that time. There

was, for example, ***no*** evidence as to whether criminal record checks could be done in the 1960s in the same way in which they are now commonly done.

(l) Contact between Don and Sylvia and the Children during the course of their wardships

792 In this section of my reasons, I deal with the following matters:

(i) evidence as to the policy at Sister Kate's in the 1960s in relation to ***visits*** to wards by their families;

(ii) evidence as to the policy of the Child Welfare Department during the late 1950s and the 1960s in relation to ***visits*** to wards in foster care by their families; and

(iii) evidence as to the Children's contact with their family during the period of their wardships when they lived in institutional care or in foster care.

(i) Evidence as to the policy at Sister Kate's in the 1960s in relation to ***visits*** to wards by their families

793 The report prepared in May 1963 by the 'Institution Officer' of the Child Welfare Department to which I referred at [781] above addressed, amongst other things, family ***visits*** to the children of Sister Kate's. The officer noted: ***Visiting*** Leave and Outside Contact:

> Weekend leave and ***visits*** are allowed once a month. As several other Homes are extending their ***visiting*** arrangements, I feel it would be desirable if Sister Kate's Home followed suit.[1044]

794 I accept that that document sets out the position at Sister Kate's in 1963. The document also suggests that this was not out of the ordinary for institutions of this kind at the time, although clearly the position was changing, and there was an appreciation that it would be desirable if ***visiting*** arrangements at Sister Kate's were extended in the same way as they had been at other institutions.

(ii) Evidence as to the policy of the Child Welfare Department during the late 1950s and the 1960s in relation to ***visits*** to wards in foster care by their families

795 Mr Maine was crossexamined about the knowledge possessed by officers in the Child Welfare Department during the 1950s and 1960s about the work of the child psychologist, John Bowlby, who had emphasised the importance of maintaining the relationship between a child in foster care, and the child's biological parents, and the importance of encouraging ***visits*** by parents to promote parentchild relations.

796 Mr Maine's evidence, which I accept, was that these views were generally known to officers in the Child Welfare Department in the 1950s, but not with the same 'strength' that they became known in time, and that field officers at the time would vary in the extent to which they implemented those kinds of principles.[1045]

797 For completeness, I note that Ms Kathleen BrentonCoward, a social worker and later Superintendent of Hostels, with the Child Welfare Department in the 1970s, provided a witness statement in which she deposed: In my experience, in the case of white children, attempts were made for supervised contact with the natural parents.

> I was not aware, from my case load as a Social Worker, that attempts were made for Aboriginal Children to have supervised contact with their natural parents.[1046]

798 I do not ***place*** any weight on this evidence. It is too vague, and suggests that Ms BrentonCoward was unaware what the position was with respect to ***visits*** to aboriginal children.

(iii) Evidence as to the Children's contact with their family during the period of their wardships when they lived in institutional care or in foster care.

799 In this section of my reasons, I address the evidence in relation to Ellen's contact with Don and Sylvia and her siblings, the Siblings' contact with Don and Sylvia, and the Siblings' contact with each other during their wardships. As I have already mentioned, all of the Siblings ran away and returned to Don and Sylvia at various points in time during their wardships. I do not address that contact between the Siblings and Don and Sylvia in this section of my

reasons. Rather, I have confined the examination to contact which occurred while the Siblings remained at Sister Kate's and Burnbrae, or in foster care.

Contact between Don and Sylvia, and Ellen

800 The evidence suggests that Ellen had little contact with Don and Sylvia during the years in which she lived with the Dwyers. Sylvia's evidence was that after Ellen was taken into care, they came to Perth to try to ascertain what had happened to her. An officer of the Department of Native Welfare told them that they could only see Ellen at arranged times. Eventually Don was told by a case officer at the Department of Native Welfare that they could not ***visit*** Ellen at her foster home but could meet her in a park.[1047]

801 Sylvia's evidence was that they had only a few ***visits*** with Ellen when she was young. The first time they saw her was around two or three months after she was taken into care. On that occasion, a case worker from the Department of Native Welfare brought Ellen to a park to meet Don and Sylvia, and then took her back to the Dwyers afterwards.[1048]

802 According to Sylvia, from then on Don and Sylvia had to telephone the Department of Native Welfare a day in advance of when they wanted to see Ellen, so that arrangements could be made for them to see her in the park. Sylvia's evidence was that they always saw Ellen in a park, and that they saw her on around four or five occasions before she was four years old.[1049]

803 Sylvia also said that when Ellen was about four years old, a new employee at the Department of Native Welfare told them that Ellen was living with the Dwyers, and gave Don and Sylvia the Dwyers' address. Sylvia said that once they had this information they ***visited*** Ellen at the Dwyers' home a few times.

804 Sylvia said that Mrs Dwyer did not seem hostile to the ***visits***, but asked that Don and Sylvia only ***visit*** Ellen when Ellen wanted to see them. Sylvia's evidence was that Ellen did not want to see them very often, and they hardly saw her as she grew older. Sylvia's evidence was that: Once Ellen was in her teens, it seemed that she was rejecting us and the idea of us as her parents. This hurt Don and me very much but what could we do. We wanted Ellen to be happy but we also wanted her to know about us and her siblings. But because of this and because it became harder and harder for us to see Ellen, we actually only saw Ellen a handful of times when she was a teenager.[1050]

805 Sylvia also gave evidence that Mrs Dwyer and Ellen ***visited*** her and Don in Kondinin when Ellen was around 21 years old, and that on that occasion Mrs Dwyer told her that she wanted Don and Sylvia to keep in contact with her and Ellen from then on. However Sylvia's evidence was that it was only after Mrs Dwyer died in 1991 that Ellen first began to make contact with Don and Sylvia.

806 In the publication Echoes of the Past, Don is quoted as saying: We kept in touch with Ellen because we made it our business to. But the Welfare of the day wasn't any good you understand. They put up barriers. They wouldn't tell us where they took her. I used to pay somebody to track me down information. ... I wasn't allowed to see the girl anywhere unless I contacted the Welfare and they would ring up this person, the home where Ellen was and Sylvia and I would travel all the way from the bush and we didn't know much about Perth in those days.[1051]

807 Ms Wendy Manchester, the daughter of Mr and Mrs Dwyer, Ellen's foster parents, provided a witness statement in these proceedings. Ms Manchester recalled being present when Ellen was about nine or 10 years old and was told by Mr and Mrs Dwyer that she was a foster child, and that she had other family. Ms Manchester said that 'during my upbringing, I can recall my parents telling my siblings that they should be proud of their aboriginal heritage'.[1052]

808 Ellen could not remember much of Don and Sylvia before she reached about 14 years of age, other than for a vague recollection of a few ***visits*** from them at the Dwyer's home when she was a child.

809 The first ***visit*** from Don and Sylvia which Ellen could clearly remember took ***place*** when Ellen was 14 years old. Ellen recollected that she felt embarrassed, and she recalled that Don smelled of alcohol. Don denied having ever ***visited*** Ellen when she was about 14 years of age,[1053] and Sylvia said that she was never drunk when she

went to the Dwyers' house.[1054] Ellen also recollected that on one ***visit***, her two grandmothers ***visited*** along with Don and Sylvia, although she didn't know who they were at the time.

810 There was some documentary evidence from the files of the Department of Native Welfare and the Child Welfare Department in relation to the contact between Ellen and Don and Sylvia. A file note from the Department of Native Welfare's files dated 24 August 1964 indicated that Don and Sylvia had ***visited*** Ellen at the Dwyer's home on several occasions.[1055]

811 A file note prepared by Ms Hobcroft following her ***visit*** or ***visits*** to the Dwyer's home on 27 January 1966 noted that 'Mr and Mrs Collard, with several relatives in tow, ***visited*** before Christmas. Mrs Dwyer does not mind and Helen (ie Ellen) seems quite unaffected.'[1056]

812 A file note prepared by Ms Hobcroft following a ***visit*** to the Dwyers on 27 February 1968 indicated that Don and William 'phoned when in Perth before Christmas. Date was set for a ***visit*** but family did not turn up. Helen (ie Ellen) not particularly interested.'[1057]

813 A file note prepared by Ms Marchant of the Child Welfare Department following a ***visit*** or ***visits*** to the Dwyers on 10 and 14 May 1968 noted that Ellen 'doesn't associate with aboriginals ... [Foster Mother] encourages her to identify with her race and to be proud of it'.[1058]

814 Finally, an inspection report prepared by a Child Welfare Department Welfare Officer following a ***visit*** to Ellen on 15 June 1972 noted that 'Father calls at home quite often. Drinks and puts up tales for money ... . Helen (ie Ellen) has ***no*** desire to leave this family.'[1059]

815 Having regard to the evidence, I find that until Ellen was about four years old, Don and Sylvia were able to ***visit*** her by arrangement with the Department of Native Welfare, whenever they wished to do so, but provided that the Department was given some prior notice to arrange the ***visit***.

816 I find that once Don and Sylvia made contact with the Dwyers, they were able to ***visit*** Ellen was often as they and Ellen wished, without any resistance from Mr and Mrs Dwyer, and that Mrs Dwyer, in particular, encouraged Ellen to be proud of her aboriginal heritage. I find that neither the Department of Native Welfare, nor the Child Welfare Department prevented or impeded contact between Ellen and her biological family. Despite all of this, I find that Ellen's contact with her family was quite infrequent, particularly once she became a teenager. However, it appears that this resulted from the nature of the relationship between Ellen and Don and Sylvia, rather than from any impediment created by any third party.

The Siblings' contact with Don and Sylvia, and with other extended family members

817 Sylvia's evidence was that after the Siblings were taken, she and Don would try and make regular ***visits*** to Sister Kate's to see them. They would ***visit*** every two to three weeks. Sylvia said that they did not telephone before they went to ***visit*** the children, but would just turn up. She said that the Siblings would run from school to see us and then Sister Kate's would call the police. In fact every time we went to see the kids the staff there would call the police just in case. ...

We were never allowed to take the children out but there was a little shop across the road and we were allowed to take them there. Our ***visits*** lasted about two hours.

The children loved our ***visits***, their eyes would light up when we arrived, but they would be so sad when we had to go. ...

I suppose in all, we got on reasonably well with the people from Sister Kate's. But things were never made easy for us to see our kids. They expressed that they didn't like it when we turned up to see the kids without calling first. ...

Sometimes we would arrive to see them, and would be told that they were out and were told off for not ringing before we arrived. They wanted us to ring first so that they could bring the children in for our ***visit***.[1060]

818 Sylvia's evidence was that when the older Siblings were transferred to Burnbrae it became harder to see them.[1061]

819 In approximately 2002, when Don recounted his story for the publication 'Echoes of the Past Sister Kate's Revisited', he described his and Sylvia's ***visits*** to see the Siblings at Sister Kate's in the following way: We still had to follow the work, because seasonal work was all you could do then but we made sure we went and ***visited*** them as much as we could. ... we made sure we went and ***visited*** them as much as we could. When it was time to leave, they had big tears like marbles, they knew what was going to happen but we had to go. That Mr Daniel was a bit fiery, but I was a bit the same too. Sometimes they tried to lock us out of the gates. Not let us in the Home. He reckoned we were creating a disturbance, that we upset the kids all the time, all that rubbish. I became a bit arrogant when he said that sort of stuff to me.[1062]

820 The Siblings had different recollections of the extent to which they saw their parents. Bonnie recalled seeing her parents once or twice while she lived at Sister Kate's.[1063] She also recalled asking her cottage parents at Sister Kate's if she could see Don and Sylvia for the holidays but this was always refused.[1064]

821 Darryl recalled ***visits*** from Don and Sylvia when he was at Sister Kate's. He recollected that they would ***visit*** about once a month and sometimes a few times a month, and that sometimes they would come to watch him play football. He said: It was so good when they did come, but it was also very sad when they left. I always wanted to go home with Mum and Dad, but I was not allowed to and I was so angry about that. When they left I can remember it always gave me a very empty feeling inside of me.[1065]

822 Darryl recalled seeing Don and Sylvia only about four or five times during the whole time he was at Burnbrae, although he was told that they had come to see him on three or four other occasions but he had been out when they came, and he had not seen them.[1066]

823 Beverley recalled that she saw her parents at least 4 times a year while she was at Sister Kate's. She also recalled that sometimes her grandmothers would come with them, and that her grandmothers attended the fête at Sister Kate's each year. Beverley also said: I saw them turned away from the gate many times over the years and even turned away from our school if they tried to ***visit*** us there. I saw their car and would know they were at school or Sister Kate's but never got to see them.

Sometimes I'd get back from a weekend or holiday foster placement and be told by other kids that I'd missed my mum and dad's ***visit*** while I was gone which upset me. They didn't always see all of us kids together; it was whoever was at Sister Kate's at the time when and if they were allowed in to ***visit***. If we were away or on foster placements we missed them.[1067]

824 Glenys' evidence was that she loved it when Don and Sylvia ***visited*** her at Sister Kate's: I thought I was lucky because my Mum and Dad came quite often and brought my cousins and aunties and uncles with them. My Nanna Bessie and her sisters would save up to come once a year at the Fete. Pop Collard would come occasionally with Mum and Dad. Sometimes we were allowed out with them. Mum and Dad brought my new baby brothers with them and I loved meeting the new babies. I loved to tell the other kids about my family.

I often cried for my Mum and Dad when they weren't there. I really missed them. One school day ... I saw my Dad and I ran really fast to get to him. I didn't want him to be sent away without me seeing him. I hadn't seen him for a little while and he told me that he had come but that I was gone. ...[1068]

825 Glenys also said that her grandmother ***visited*** her every year at Sister Kate's, along with her two sisters.[1069]

826 Wesley's first memory of seeing Don and Sylvia was when he was around four years old.[1070] His evidence was that he remembered his parents coming to see him a lot at Sister Kate's once or twice a month[1071] and that the last time he saw them while he was at Sister Kate's was when he was about six years old.[1072]

827 Eva also recalled that Don and Sylvia came to see her at Sister Kate's, although her recollection was that they did not come regularly, and she did not recall them coming to see her after she reached about eight years old.[1073]

828 There was also some documentary evidence which indicated that some of the Siblings were ***visited*** by their grandmother. A note on the Department's file indicates that in early November 1970, Glenys received a ***visit*** from her maternal grandmother.[1074]

829 The evidence thus varied as to the frequency with which Don and Sylvia ***visited*** the Siblings at Sister Kate's. Having regard to the broad consistency in the evidence of Don and Sylvia, Darryl and Glenys, I find that while all of the Siblings were living at Sister Kate's, Don and Sylvia ***visited*** regularly, sometimes as often as every few weeks, but otherwise at least once every month or two. I do not overlook the fact that Don and Sylvia were engaged in seasonal, casual farm work, which may have made it more difficult to travel away from Brookton, and that each ***visit*** to the Siblings involved a drive from Brookton to Perth. I accept Don's recollection that they tried to ***visit*** the Siblings at Sister Kate's as often as they were able to. Sometimes other relatives (such as the Siblings' grandparents) also ***visited***. I find that the staff of Sister Kate's generally permitted these ***visits*** to occur.

830 Although the evidence given by Don and Sylvia suggested that they believed that it was not made easy for them to see the Siblings, that belief appears to have derived from the fact that the staff of Sister Kate's preferred that Don and Sylvia telephone in advance of a ***visit***. There was ***no*** direct evidence as to whether this was an approach which was applied generally to all ***visiting*** parents, or whether it was applied solely to Don and Sylvia, or as to the rationale for that requirement. However, having regard to Sylvia's evidence, I infer that this requirement was made of all parents and was intended to enable the staff to ensure that their children would be at Sister Kate's (rather than on an outing, or out playing sport, for example) at the time when their parents ***visited***. In any event, there was ***no*** evidence to suggest that the staff of Sister Kate's, or any officer of the Child Welfare Department, or the Department of Native Welfare, sought to make it more difficult for Don and Sylvia, in particular, to ***visit*** the Siblings, or to discourage their ***visits***.

831 In so far as Sylvia suggested that the staff of Sister Kate's called the police 'every time' they ***visited*** 'just in case', I do not accept that evidence. There was ***no*** suggestion in the evidence given by any of the other plaintiffs that the police were called, or often called, during ***visits*** by Don and Sylvia. On the contrary, the evidence given by the Siblings suggests that their ***visits*** were happy occasions, and there is ***no*** suggestion that the ***visits*** were marred by the arrival of the police.

832 Don's evidence does suggest that on some occasions, the staff of Sister Kate's refused to permit Don and Sylvia to see the Siblings. There was ***no*** direct evidence in relation to why this occurred, but the implication from the version of events Don gave in 2002 suggests that they were refused entry because they were creating a disturbance. That would also explain why the police may have been called on occasion.

833 The evidence suggests that once Donald, Darryl and Bonnie moved to Burnbrae, the frequency of Don and Sylvia's ***visits*** to the Siblings declined. This may simply have been due to the fact that with the Children then living in three different ***places***, it may have been more difficult to ***visit*** them all with the same frequency as Don and Sylvia had previously managed. However, it is not necessary to make a finding about that matter. For present purposes it suffices to say that there was nothing to suggest that the declining frequency of Don and Sylvia's ***visits*** was the result of any requirement or impediment imposed by the staff of Burnbrae, or Sister Kate's, or of the Child Welfare Department or the Department of Native Welfare.

834 I turn to consider the evidence in relation to contact between Don and Sylvia and the Siblings who lived in foster care. There was very little evidence of that kind. Beverley recalled seeing Don twice, and Sylvia once, while she lived in foster care with Mrs Mathews.[1075] Sylvia acknowledged that she and Don were allowed to see Beverley when she lived in foster care.[1076] Wesley's recollection was that Don and Sylvia never ***visited*** him at the Stephensons and he didn't knew if they even knew where he was. Although he missed them, he eventually stopped thinking about them over time.[1077]

835 The evidence thus suggested that once some of the Siblings moved into foster care, they saw Don and Sylvia quite infrequently. However, I do not overlook the fact that as the Siblings grew older, they took it upon themselves to run away and see Don and Sylvia themselves. The evidence does not permit any conclusion to be drawn as to why Don and Sylvia's ***visits*** to the Siblings became less frequent once some of the Siblings were in foster care. In particular, there is ***no*** evidence to support a finding that the infrequency of the ***visits*** was the result of any requirement or impediment imposed by the staff of the Child Welfare Department, or the Department of Native Welfare, or of any institution where any of the Siblings lived, or of the attitude of any foster parent.

The Children's contact with each other

836 The evidence in relation to the extent to which the Children saw each other during the terms of their wardships was of three kinds. Each of the Children gave evidence about the extent to which they saw each other. Mrs Patullo also gave some evidence about the extent to which the Siblings were permitted to have contact with each other during their time at Sister Kate's. Finally, there was also some documentary evidence in relation to contact between the Children.

837 Bonnie recollected that when they first went to Sister Kate's, she, Darryl and Donald were in the same cottage, Eva and Wesley were in the nursery cottage, Glenys and Beverley were in the Kookaburra cottage, and William was in Myalla cottage. Bonnie's evidence was that when she went to Sister Kate's she did not see her brothers and sisters, other than Donald and Darryl, because all of the other Siblings lived in different cottages. She said that the children at Sister Kate's only interacted with the children in their own cottages. However, Bonnie acknowledged that the Siblings who were of school age all went to school together at Queens Park Primary School, while the younger Siblings who were old enough to do so went to kindy together at Sister Kate's. Bonnie also accepted that she saw the rest of her Siblings when Don and Sylvia ***visited*** Sister Kate's.[1078] Bonnie also recalled attending school with Donald and Darryl when they lived at Burnbrae.[1079]

838 Darryl's evidence was broadly consistent with Bonnie's evidence in terms of the limited contact he had with the younger Siblings when they were at Sister Kate's. He remembered going to school Queens Park Primary School with Donald and Bonnie.[1080] Once he, Bonnie and Donald went to Burnbrae, they were separated from the younger Siblings and did not see them.[1081] However, he went to school with Bonnie and Donald while they lived at Burnbrae.[1082]

839 Darryl also recalled that on one occasion he went with Don to ***visit*** Ellen at the Dwyer's home, but that the Dwyers would not let them in.

840 Beverley's evidenceinchief was that she had only a little contact with the Siblings when they first went to Sister Kate's. However, in crossexamination, she accepted that for some of the time when she was at Sister Kate's she had contact with Glenys and Eva as they lived in the same cottage. She also had contact with Bonnie who lived in the same cottage before Bonnie was sent to Burnbrae.[1083]

841 Beverley recalled that Glenys came to see her on one occasion while Beverley lived with Mrs Mathews. Beverley also recalled that while she was living with Mrs Mathews, she would ***visit*** Eva at Sister Kate's from time to time.[1084]

842 In her evidenceinchief, Glenys indicated that she rarely saw her brothers and sisters while she was at Sister Kate's because she spent most of her time with the children who lived in her cottage. However, in crossexamination, Glenys accepted that she saw Eva and Wesley every morning in the first couple of years for kindy, because she could see them while they were playing. Glenys also accepted that Beverley lived in the Kookaburra cottage from the time Glenys lived there, and that Eva joined them there after about 18 months or two years.[1085] Glenys recalled Beverley and William going to Queens Park Primary School when she was there.[1086]

843 Glenys also recollected that on one occasion Don took her for a ***visit*** to see Ellen at the Dwyer's house, and that Don and Sylvia took her to see Donald, Darryl and Bonnie at Burnbrae on a few occasions.

844 Wesley's evidence was that he initially lived in the same cottage at Sister Kate's as Eva, whom he knew to be his sister. He said he knew who his other brothers and sisters were, but did not have much contact with them at

Sister Kate's. He was able to socialise with them while they were at school,[1087] during lunchtimes and walking to and from school,[1088] and during ***visits*** from Don and Sylva.[1089]

845 Wesley's evidence was that between leaving Sister Kate's and reaching 14 years of age he only ever saw one other member of his family. He recalled that when he was eight or nine years old he went with Mr Stephenson and Mr Stephenson's son Michael to see Beverley, who was then living at Mrs Price's house.[1090]

846 Eva's evidence was that while she was living at Sister Kate's she only saw the Siblings occasionally.

847 Mrs Patullo also gave some evidence about the contact between the children in the various cottages at Sister Kate's. She said that there was not a great deal of interaction between children in different cottages during the day, because they had to do their chores and attend school. However, after school they were able to go outside to play and at that point the children from different cottages were able to play outside together on the grass.[1091]Mrs Patullo confirmed that although the children did not tend to go into each other's cottages, there was ***no*** restriction on the children from different cottages playing together outside.

848 Having regard to all of this evidence, I find that while the Siblings lived at Sister Kate's they did not all live in the one cottage. Instead, they lived in cottages with children of the same age group, including some of their Siblings. Eventually, Donald, Darryl and Bonnie moved to Burnbrae, and the remaining Siblings, possibly with the exception of William, lived in cottages with at least one other Sibling. Although as the Siblings moved into foster care, that position changed over time, until eventually only Eva remained at Sister Kate's. There were, however, opportunities for the Siblings to have some contact with each other while they lived at Sister Kate's: during play time at Sister Kate's, and at school, and when Don and Sylvia ***visited***.

849 There was ***no*** evidence to suggest that the staff of Sister Kate's sought to prevent the Siblings having contact with each other during these times. There was also ***no*** evidence that any officers of the Child Welfare Department or the Department of Native Welfare were able to, or did, determine whether and how much contact there should be between the Siblings.

850 On the other hand, there was some limited evidence to support the conclusion that at least by the late 1960s, officers of the Child Welfare Department considered it desirable for the Siblings to have contact with each other. A note from the Child Welfare Department's files in relation to Wesley contains a record of comments apparently made by Wesley's foster mother, Mrs Stephenson, who stated that 'when we first took the boy, we were told that his 'siblings' were of great importance and I must arrange for him to see them from time to time'. Mrs Stephenson reported that she had done so until 1969 when Wesley met some of his siblings while ***visiting*** the Royal Show with her, but that that contact did not end happily for reasons which she did not explain.[1092] There was also a file note of the Child Welfare Department from November 1972, in which it was noted that Beverley had expressed a wish to make contact with Ellen. A welfare officer from the Department sought to facilitate this by suggesting that the girls first write to each other (given that they had never met), following which a meeting could be considered.[1093]

(m) The process followed, and factors considered, by officers of the Child Welfare Department and the Department of Native Welfare during the late 1950s and early 1960s by which an application would be made for an order that a child be made a ward

851 There was some evidence about the way in which officers of the Child Welfare Department and Department of Native Welfare carried out their duties relevant to the welfare of children and more specifically as to the enquiries and investigations which were made by officers of those Departments for the purpose of determining whether an application should be made for a child to be declared a ward.

852 As I have already noted, Mr Long's evidence was that as a patrol officer for the Department of Native Welfare, his duties included patrolling the district, ***visiting*** aboriginal communities to locate and identify aboriginal people, and assisting aboriginal people, such as by securing work or arranging school attendance.[1094] He would provide his patrol notes to the District Officer, who would then communicate with the Commissioner in respect of any action which was required.[1095]

853 Mr Humphries (who prepared the 1961 Informative Report which formed the basis for the application to the Children's Court for the Siblings to be made wards) provided a witness statement in which he deposed that ... it was our usual practice to ***visit*** the home of a suspected neglect case at least once before giving evidence in court.[1096]

854 Mr Humphries also deposed that it was not my practice to simply rely upon the reports of others when giving evidence in court. The normal practice was that Mr Wright-Webster would receive a report from a Police officer or another person about a possible neglect case, and then I or another officer of the Department would then be instructed to ***visit*** the house to investigate.

...

When we ***visited*** a house to investigate a possible neglect case we checked such things as the condition of the child, whether there was food in the house, and whether the parents were drunk. ... The parents being drunk was the most common factor in applications for committal orders as I recall.[1097]

855 The evidence provided by Ms Jean Hamory was consistent with Mr Humphries' recollection about the Department's practice at the time. Ms Hamory's evidence was: It was the practice of the Department that, where there was evidence about danger to a child, a decision would have to be made as to whether the Department would apply to the Court to request that the child be made a ward of the State.

A Welfare Officer was authorised to investigate, collect evidence, and to decide, in consultation with their Supervisor, whether there was enough evidence of the danger to the child's welfare for an application to proceed.

By evidence, I mean physical evidence, such as ... evidence from someone who could act as a witness ... .

In some cases, parents presented their children to the Department requesting the Department to take care of their children.

I tried to avoid the court process wherever possible as such applications were often distressing to the parents and the children.

However, in some cases of neglect, the child's welfare required that an application be made to authorise the Department to manage a child's welfare, where the parents were not capable of doing so.

When a Welfare Officer, in consultation with their Supervisor, decided to apprehend a child, it was the Welfare Officer's job to take the child to a receiving home and to ***place*** an application before the Children 's Court within two days.

...

It was my preference to communicate with the parents of children who had become wards of the State. Where a parent wished for the return of his or her child, I would occasionally encourage that parent to write to the Department asking for the return of his or her child.

This would instigate an administrative process to enable some consideration of whether a child could be returned to the parent and where I considered that there was merit in returning a child to his or her parents, I would write a report supporting such a move.

However, I often found that parents did not utilise this process.[1098]

856 Ms Stephanie Keating deposed that to investigate allegations of harm to children, she would ***visit*** families in their homes and assess the child. If she formed the view that removal of the child was warranted, she would provide that information to the Department's solicitor and that solicitor would make an application to the Children's Court for the removal of the child. If the Court made an order for the removal of the child, the child would be ***placed*** with foster parents.[1099]

857 Since the 1970s, however, there has been a gradual change in the practices of officers of the Department, including more detailed investigations into a child's circumstances before a decision would be made to make an application to the Children's Court for a child to be made a ward, and more limited orders concerning wardships. That gradual change in approach appears to have coincided with a greater knowledge and understanding on the part of welfare officers in the Department of the implications of the removal of children from their families, which I discuss below.

858 The evidence of this change can be seen in the witness statements provided by Mr Kenneth Monson, Mr Terence Mulroney (who was involved in the apprehension of children who appeared to be abandoned or neglected during his time as a social worker in the early 1970s) and Mr Desmond Semple. Mr Monson deposed that the process of a child being apprehended and ***placed*** in care was complex and involved thorough case planning, involved the collection of information about the child's circumstances from various sources, ***visits*** to the child's home to ascertain the circumstances of the family and to determine if a child was at risk and the severity of the risk, and a consideration of any alternatives to the removal of the child.[1100]

859 Mr Mulroney observed that as time progressed, the inquiry into the background of a child has become more and more extensive, and as such, matters are not brought on in court as quickly as they were in the early 1970s when I started as a social worker.[1101]

860 Mr Mulroney's evidence was that: During the apprehension of a child ... my primary legal responsibility was the wellbeing of the child.

I understood that this could not be looked at in isolation, and needed to include an examination of the child's context, including their family situation.

The main question I would pose is how we could maintain the child within their home setting, and this would require examination of the family's resources and their capabilities, and whether attempts could be made to try and build the skills and capabilities of the family if they were deficient.

In some cases, the skills and behaviour of parents of a child were so deficient there was a need to remove the child from their home setting. This was always a difficult, lifechanging decision.[1102]

861 Mr Mulroney also deposed that the parents of the child were required to attend Court hearings at the Children's Court, and many would attend and would put their view forward.[1103] He also deposed that in the early 1970s, wardship was generally ordered for a period of years, or until a child turned 18. As time progressed, orders committing a child to the care of the State became far more specific, with shorter periods ordered, and more specific, special objectives attached to the order.[1104]

862 Mr Semple recollected that during his time as a social worker between 1970 and 1973, he made only two applications for the removal of a child from his or her family.[1105] In other cases, he was able to identify a solution other than the removal of the child.[1106] He deposed that the investigation of a child's circumstances would include obtaining information from a variety of community resources familiar with the child including government departments, nongovernment community based agencies, aboriginal organisations and the child's school. Then aim of such an investigation was to identify the relevant circumstances of the child, and to determine what would be the best and least disruptive course for the future care and protection of the child.[1107]

863 Mr Semple deposed that when he was a social worker within the Department in the early 1970s, it was well understood by people within the Department although not strictly enshrined in written policy, that there was an

emphasis on fully investigating a child's background, attempting to develop a course of action which involved minimal disruption to the child (but adequate care and protection) and ensuring siblings were ***placed*** together wherever possible.[1108] He also recalled that as a Supervisor in the Kimberley in 1975, there was an emphasis on community development, and the number of children removed from home was significantly decreased as a result.[1109]

864 The change in approach can also be seen in the evidence given by Mr Maine, who was asked about whether applications for wardship, during the period when the Children were made wards, were contested. It was put to Mr Maine that in the late 1950s and early 1960s those court proceedings were 'onesided' in the sense that the Department's officers attended, but a parent would be unrepresented.[1110] Mr Maine's evidence was: That view [as to contested applications] wasn't held then. It's a view that has occurred in more recent years. The court was presumed to be focused on the best interests of the child and the evidence given by departmental officers was in relation to the circumstances in which the child was living at the time and recommending the child's removal. The parents were usually, but not always, present in the court and it wasn't the custom or requirement, either legislatively or otherwise, for there to be anyone representing the parents as such. Also a legal officer, usually from the department, attended the courts in some cases, but that legal officer's function wasn't so much to represent the child, but just to make sure the legalities of the department's presentation were correct.

865 Mr Maine acknowledged that a challenge to the view the Department's officers put to the Court was 'unlikely' in those days:[1111] There would be questions asked by the Children's Court bench and the department had to satisfy the magistrate or Children's Court members that their circumstances were correct and that the evidence provided by the department was satisfactory.

866 Having regard to all of this evidence, I make the following findings. In the late 1950s and the early 1960s, the process by which an application would be made for a child to be taken into care involved information coming to the attention of an officer of the Department of Native Welfare or the Child Welfare Department to suggest that a child was neglected. An officer of that Department would then ***visit*** the child's home at least once to inspect the child's circumstances, including living conditions at the home, the child's physical condition and other matters such as whether the parents were drinking. The welfare officer would then discuss the case with his or her supervisor. If it was determined that the child was being 'neglected' within the meaning of that term in the Child Welfare Act, an application would be made to the Children's Court. An officer of the Department would give evidence at the hearing before the Court based on the investigation which had been made. The child's parents were not usually legally represented at those hearings. If the Court made an order that a child be made a ward, that order would usually be in the form that the child be a ward for a period of years, or until the child reached 18 years of age.

867 From about the 1970s, however, the investigations undertaken by officers of the Child Welfare Department into the circumstances of a child suspected of being neglected became more thorough, there was an increasing emphasis on identifying the best course for the future care and protection of the child which involved minimal disruption to the child's life, applications for children to be made wards became less common, and when those applications were made, the orders sought and made by the Court became more specific, with shorter periods of wardship ordered, and more specific, special objectives attached to the order.

868 Having regard to the findings I have made in relation to when the Children were made wards, I find that the approach of the officers of the Department of Native Welfare and the Child Welfare Department who were involved in those applications reflected departmental practices at the time, and that the orders sought and made that each of the Children be made a ward until he or she reached 18 years of age also reflected the approach which was generally taken at the time.

(n) Was the removal of the Children undertaken pursuant to a policy of assimilation of aboriginal children?

869 At this point, it is appropriate to address an issue which was occasionally raised in the course of the hearing, although not vigorously pursued by counsel for the plaintiffs, namely whether the removal of the Children was undertaken pursuant to a policy whereby aboriginal children were sought to be assimilated into the 'white' community.

870 There was very little evidence of a policy of assimilation within the Department of Native Welfare or the Child Welfare Department during the period of the wardships of the Children. The only evidence which made any

reference to a policy of assimilation was a letter from a bishop in the Kimberley to the Minister for Native Welfare in 1962 in which the bishop noted that the current official policy of the Native Welfare Department is the policy of assimilation. We regard this as a sound policy because the Natives in the Kimberleys ... have been detribalised.[1112]

871 However, the bishop went on to express his concern about the implementation and application of this policy. He suggested that the Minister should 'proceed with caution rather than precipitate the process of assimilation'.[1113] A briefing note prepared for the Minister by the Deputy Commissioner of Native Welfare on 19 September 1962 indicated, in relation to this latter point, that 'this, I think, is what the various Governments have been doing'.[1114] The Deputy Commissioner went on to say that 'much advance has been made in the past ten years but there is still much to be done. The speed at which the advancement of natives is going on is governed by the finance and staff (both government and private) available and, above all, the knowledge of those directing the destiny of the natives.'[1115]

872 There was some evidence that within the Child Welfare Department, raising aboriginal children at Sister Kate's was thought to facilitate their assimilation into white society. The Director provided a briefing note to the Minister for Child Welfare prior to a ***visit*** by the Minister to Sister Kate's in July 1961. In that briefing note, the Director noted that the Home is a haven for partcoloured children and probably one of the greatest agencies for the assimilation of coloured children in the State. Children go to State School nearby where assimilation in their age groups is complete and unquestioned.[1116]

873 The references to 'assimilation' in the evidence I have set out above are not sufficient to support a finding on the balance of probabilities that at the time of the wardships there was, within the Department of Native Welfare or the Child Welfare Department, the pursuit of a policy of assimilation of aboriginal people into white Australian society which through the wardship of aboriginal children.

874 More particularly, there was ***no*** evidence that the decisions to apply for each of the Children to be made wards were made in the pursuit of a policy of assimilation of aboriginal people into white Australian society. Rather, the evidence supports the finding that the decisions to apply for the Children to be made wards, and subsequent decisions at various times not to return them to the care of Don and Sylvia, were all made having regard to the welfare – albeit primarily the physical welfare of the Children.

875 At the same time, other evidence (to which I will refer in a moment) indicated that in the late 1950s and early 1960s there was very little awareness or appreciation within the Department of Native Welfare or the Child Welfare Department of the emotional implications of the removal of children from their families. The emphasis at the time appears to have been on the physical wellbeing of children, as opposed to their emotional wellbeing.

876 In addition, other evidence (to which I will refer in a moment) indicated that in the late 1950s and early 1960s there was very little awareness or appreciation within the Department of Native Welfare or the Child Welfare Department of the importance to aboriginal people of their family relationships and their culture.

877 Before turning to address that evidence, it is appropriate to mention one further matter. One striking aspect of the evidence in relation to the conditions in which Don and Sylvia and their family lived in 1959, in 1961, and through to 1970, was that those living conditions were not materially different from the living conditions of aboriginal people living on reserves, including on the Brookton Reserve. (In fact, in one respect, namely the construction of the humpy, the evidence suggested that the humpy was superior to the accommodation provided on the Brookton Reserve, where the walls of the humpies on the Reserve did not meet the floor.) It was clear from the evidence of Don and Sylvia, in particular, that they did not understand why the Children were made wards when their living conditions were ***no*** worse than conditions at the Brookton Reserve. Four points can be made about the relevance of the living conditions of aboriginal people on the Brookton Reserve to the issues in dispute in this action.

878 First, there was ***no*** evidence as to whether, at the relevant time, applications were made to the Children's Court in relation to any aboriginal children from the Brookton Reserve, on the basis that those were neglected because of their living conditions. Secondly, even if ***no*** such applications were made it is far from clear how that would be relevant to whether the State breached fiduciary duties it is said to have owed to the plaintiffs in this case. Thirdly, the evidence of Mr Maine was that the same approach was taken in relation to all children suspected of being

neglected whether or not they lived on an aboriginal reserve. I set out the relevant portion of his evidence on this issue at [371] to [372] above:

879 Fourthly, Mr Maine's evidence was that the living conditions of aboriginal people on reserves would have been a central factor taken into account by the Child Welfare Department in any case of the neglect of a child living on a reserve because the impoverished conditions on the reserve may have contributed to the child being considered a neglected child. The import of Mr Maine's evidence was that the accommodation and living conditions of aboriginal children living on reserves (or living in similar circumstances, as the Children were) figured prominently in consideration of whether those children were neglected for the purposes of the Child Welfare Act, by virtue of the very impoverished nature of that accommodation and conditions.

880 I turn, next, to consider the evidence as to the knowledge or awareness, possessed by officers of the Department of Native Welfare and the Child Welfare Department, in the 1950s and 1960s, about the psychological implications for children of their removal from their families.

(o) The knowledge possessed by officers in the Department of Native Welfare and the Child Welfare Department of the potential adverse psychological implications for children removed from their families

881 In this section of my reasons I deal with:

(i) the extent to which officers in the Department of Native Welfare and the Child Welfare Department were aware of the possible adverse emotional or psychological consequences for children separated from their families;

(ii) whether such knowledge impacted on decisions by departmental officers as to whether children should be taken into care; and

(iii) whether such knowledge impacted on decisions by departmental officers as to the kind of care into which children should be ***placed*** after being made wards.

(i) The extent to which officers in the Department of Native Welfare and the Child Welfare Department were aware of the possible adverse emotional or psychological consequences for children separated from their families

882 Mr Maine was asked about his knowledge of an influential paper published in 1951 and written by John Bowlby on the effects on young children of separation from their mothers.[1117] Mr Maine explained that Mr Bowlby's paper was the product of an extensive study in the postwar years that examined the after effects of separating children from their primary carer who is usually the mother, and it made clear that in nearly all cases this is a traumatic experience for the child and the child is likely to suffer some longterm effects of it.[1118]

883 As I have already observed, Mr Maine was asked whether the implications for children separated from their families were known by the staff of the Child Welfare Department in the 1950s. Mr Maine's evidence was that knowledge of the impact of separation was 'generally known [at that time] but not with the same strength that it became [known]'.[1119]

884 There was also some evidence to suggest that staff of the Department of Native Welfare had a general awareness of the potential adverse impacts on children as a result of separation from their parents. Mr Long deposed that he did not have any anthropological training, nor did he receive any specific training from the Department.[1120] However, he deposed that the Commissioner issued each departmental officer with a copy of a publication which Mr Long said was entitled 'Child Care and the Growth of Mother Love' by John Beilby. (This appears very likely to have been a reference to a book in fact written by John Bowlby and published in 1953 entitled 'Child Care and the Growth of Love'. Counsel for the plaintiffs referred to the 1953 work as a republication of Bowlby's 1951 paper.) Mr Long deposed that this book was provided to departmental officers 'as a general guide to the principles of avoiding institutional placement of neglected children'.[1121]

885 Also in evidence was a memorandum dated 20 November 1959 from the District Officer for the Central District of the Department of Native Welfare to the Director, on the topic of 'juvenile delinquency'.[1122] In the memorandum, the District Officer noted: The obvious physical advantages of having the children raised and educated in the Missions, instead of the squalor and neglect of the camps, has, I am afraid, tended to overshadow the tremendous psychological disadvantage to the individual children of denying them the emotional security of family love and acceptance.

886 Mr Maine confirmed that he agreed with this general statement and that he would have agreed with the sentiment in 1959 as well.[1123]

887 There was evidence to indicate that over time there was an increase in the awareness of departmental officers of the possible adverse emotional impact on children as a result of separation from their parents increased over time. Mr Maine was asked about when and how this increase in knowledge came about and he said: Well, it didn't happen in a particular year. It was something that happened as knowledge about the traumatic effects of separation was gained by staff as a result of training sessions with staff, as a result of policy directions in the department. A lot of influences would have gradually firmed up and strengthened the expectation that ... the child's connections with his parents should be retained as much as possible unless there was something adverse about them. That would have been, I think, a viewpoint that grew in strength over quite a number of years.[1124]

888 As Mr Maine explained, part of this increase in knowledge within the Child Welfare Department can be attributed to an increase in the number of psychologists and social workers employed in the Department. Mr Maine explained that in 1958 there was ***no*** tertiary training in social work available in Western Australia[1125] so consequently, when he started with the Department: [T]here was ... only one social worker in the department and it took some time for that to change as a result of trained social workers and others, psychologists, coming out from universities and also as a result of our recruitment programs to recruit staff from other states and other countries and as a result of our internal training program that took experienced staff and sent them to university for the necessary qualification in social work and by the end by the time I retired, the great majority of field staff would have been professionally trained.[1126]

889 The limited training for staff in child welfare institutions in Western Australia in the 1960s was confirmed by some correspondence which was in evidence concerning the establishment of the Longmore Remand Centre. In a letter to a colleague in South Australia in late 1964, Mr Maine (who at that stage was a clinical psychological with the Child Welfare Department) noted that there were several ideas incorporated into Longmore which were not usually found in Australian detention homes, including the ability to undertake assessment and treatment of psychological and behavioural issues within the institution itself. Group workers were expected to contribute in the assessment and treatment of the children, particularly in so far as their judgments and opinions would be taken into account, and the staff were to undertake training at technical college or university to enable them to contribute in this way.[1127]

890 Having regard to all of this evidence, I find that in the late 1950s and through the 1960s, officers of the Department of Native Welfare, and of the Child Welfare Department, had a general awareness that removing children from their families could have adverse emotional and psychological impacts on those children. I also find that the extent of this knowledge within the Departments, and the knowledge possessed by individual officers of the significance of those potential adverse consequences, increased gradually over the years as a result of an increase in the number of trained psychologists and social workers being employed in those Departments, and as a result of greater staff training in these matters.

(ii) Whether such knowledge impacted on decisions by departmental officers as to whether children should be taken into care

891 The evidence established that in the late 1950s and the 1960s, it was accepted within the Child Welfare Department, and within the Department of Native Welfare, that in some cases it would be necessary to remove neglected children from their home environment, notwithstanding the potentially adverse emotional consequences for those children of doing so. That point was made very clearly by Mr Maine in his evidence. He said: There are some circumstances in which in spite of that principle it is necessary to remove a child. This can be necessary if you cannot bring to bear supportive services that might assist the mother, or whoever is caring for the child, to care for it in a proper and sufficient way. That would be the circumstance in most of the cases that the department would get involved in. There were not general services available in the community that could be brought in to assist a parent in those circumstances, assuming your parent would have accepted them. In many cases parents in that situation won't acknowledge that their care is insufficient and would resent somebody coming in, so there needs to be available people who are properly trained to handle the complexities of that situation. And that's a reality the department has to work with. If there are ***no*** support services available, as there generally wasn't during those

years, they have developed since, then the department had to accept that it might be necessary to remove the child from the parents' care. The alternative way, if the child was left there, it was likely that the child would suffer further harm and in some cases perish.[1128]

892 The memorandum from the District Officer in the Department of Native Welfare to the Director dated 20 November 1959, to which I referred at [845], made the same point. Having acknowledged the psychological disadvantages for children in removing them from their families, the officer noted: I am convinced that the answer does not lie in removing native children from their home environments, bad as they sometimes are, but in raising the general social standards of the complete native families.

The first, most obvious steps (and those most difficult to accomplish) are to break the vicious circle of restricted seasonal rural employment, and stabilise the families by raising their economic standards and providing them with adequate housing. At the same time it is desirable to augment the already effective programme of child education being conducted by the Education Department with education of the adults in social usages and responsibilities. ...

Despite these measures, however, it is distressingly frequently necessary due to urgency to remove native children from the environment which gives rise to their neglect and supplant their care and custody by their parents with care, custody, and control by State authority.

...

Where possible the facilities of this Department are used and the present emphasis is to use selected foster homes, particularly with single children (as opposed to family groups) in preference to institutions, to promote the development of individual personality.[1129]

(iii) Whether such knowledge impacted on decisions by departmental officers as to the kind of care into which children should be ***placed*** after being made wards

893 As the latter memorandum suggests, the recognition that a child's removal from his or her family would sometimes be necessary notwithstanding the adverse psychological consequences in doing so, resulted in a change in thinking within the Department of Native Welfare and the Child Welfare Department, over time, about how best to provide care for wards in a way which secured and promoted their emotional and psychological wellbeing, as well as their physical wellbeing.

894 Mr Maine confirmed that this change in thinking did not happen at a particular point in time. His evidence as to the way that this change in thinking came about was as follows: The changes that we have been talking about are changes that occurred gradually as knowledge of the broader field of child placement became more widespread, as there was a deeper understanding of the effects upon a child's development in its growth and development according to where it was ***placed***, whether an institution or a family home. As that kind of knowledge widened, then people's focus in making a placement became more influenced by the desirability of placement that met the requirements of possible contact with a parent, maintaining family connections and so on. If you went back 50 or 60 years, it would have been people whose first choice would have been an institution because they believe that in an institution you will find certain things the children would need by way of discipline, regular meals or care and so on and they would have been less mindful of the emotional sides of children's development. It has only been in the years since the influence of psychology and social work and research that the importance of the emotional attachment is a primary one, and as that viewpoint has become more dominant, then when making a placement that's the first thing that people think of.[1130]

895 I find that from the late 1950s through to the late 1970s, there was a gradual shift within the Department of Native Welfare and the Child Welfare Department in relation to the merits of institutional care versus foster care for wards. I find that this change in thinking manifested, over time, in a preference for foster care rather than institutional care, and in the context of institutional care manifested in a preference for smaller, community based hostels, rather than large scale institutional care.

896 That this shift in thinking took ***place*** over a lengthy period can be discerned from the memorandum from the District Officer dated 20 November 1959 referred to at [845], and was confirmed in Mr Maine's evidence. He was asked about the position in 1968, and observed that by then there had been a 'longstanding policy' within the Child Welfare Department that 'where a child can be ***placed*** out in the care of a relative or related person and that person is suitable, then that placement should be used'.[1131] He made clear that that change in policy was not confined to foster care by family members, but pertained to the use of foster arrangements as opposed to institutional care.[1132] I accept Mr Maine's evidence.

897 However, the use of foster care was not always possible, as Mr Maine noted in his evidence: When it became necessary to ***place*** a child in foster care, the officer making the ***place*** would have looked at what is available and the placement of preference would have been a placement with people who were relatives if that was feasible.

... In some cases relatives have bad relations with one another and it's impractical to do that.

... So if that was not possible, the placement with relatives, then they would have looked at other alternative placements.[1133]

898 Quite apart from the practical difficulties associated with ***placing*** wards in foster care with family members, there was also a shortage of foster care ***places***. Mr Terence Mulroney deposed that as a social worker in the Child Welfare Department in the early 1970s he was involved in the selection of foster families. His evidence was that: I can recall there was always a shortage of foster parents. It was a large responsibility, and not financially attractive. We tended to select people who had demonstrated success in raising and caring for their own family.[1134]

899 I find that during the period of the wardships, despite an increasing recognition that foster care was the preferable form of care for wards, it was not always possible to ***place*** all wards in foster care (not least because of a shortage of foster carers) and consequently, there remained a need for alternative forms of residential care for wards.

900 The change in thinking about the desirability of smaller, community based institutional care, rather than large scale institutional care was evident by the early 1970s. In a memorandum written in early 1972 by Mr Maine, then the Director of the Child Welfare Department, to the Commissioner, Mr Maine discussed plans by the Board of Sister Kate's to replace the existing facilities at Sister Kate's with modern cottage homes and to add a kindergarten, cultural centre and other facilities. Mr Maine observed: As one cottage is already completed, the Board appears to be committed to the project. This is unfortunate because current thinking on child care does not favour the concept of cottage homes grouped together to form a large institution for long term residential care, other than in special instances where the care of children with certain handicaps is involved. Young children require living conditions as near as possible to a normal home and community environment. We have never considered that a hostel provides a complete substitute for family home life. However, hostels located in the community approximate this. The children are then easily able to use the local facilities available to normal families and they are able to more naturally intermingle and interact with the general population with whom they have the opportunity to identify. The greatest advantage is that they are enabled to see themselves as part of the larger, total community rather than members of a segregated group.

When hostels are clustered together, they form ***no*** less than an institution, with all the undesirable factors than emanate from institutional life.

Nowadays the only circumstances under which such a plan would be justified is when the occupants of the hostels require a degree of protection or control that is not available to them in the community.

... It is our intention to progressively ***place*** out from institutions all those children whose social and develop mental needs can be better met by alternative arrangements. Such a policy will have regard to all of the factors affecting a child's total welfare and the capacity of existing and new facilities in the community to absorb children.

Other child care organisations in this State are expanding and modernising their facilities by building scattered homes in the community. The Native Welfare Department's own hostels are disbursed throughout the metropolitan area. ...[1135]

901 Mr Maine's understanding was that at that time (that is, 1972) the Salvation Army, Methodist Church and the Anglican Church in Western Australia also proposed to establish decentralised cottages in the community when further child care facilities were required.[1136]

902 Following on from that correspondence, in June 1972 Mr Maine sent the superintendent of Sister Kate's some extracts from journal articles and text books in relation to the 'desirable policy of decentralising institutional facilities so that the majority of children requiring substitute home care are ***placed*** in the community'.[1137] The tenor of the publications extracted was to highlight the physical, mental and social disadvantage of children in large institutions, and the need for accommodation that resembled, as closely as possible, normal family living in the community, whether in foster homes or in cottage homes located in the community.[1138]

903 There was also evidence that a related factor considered in relation to the placement of wards was the desirability of keeping siblings together. Another aspect of John Bowlby's work was his view that in the context of group care for children it was important that siblings be kept together to give each other comfort and support, and that separating siblings and dividing children into care groups by age and sex could be destructive for their mental health. Mr Maine confirmed that he agreed with this general sentiment.[1139] He was also asked whether this was known in the 1950s, and he said: I don't know that it would have been known in the sense of the way you have just read it out but most people would have known that you should seek to give the child what comfort you can ... .[1140]

904 The evidence suggested that even by the 1970s, there was ***no*** formal policy within the Child Welfare Department that wards who were siblings should be kept together in whatever care arrangement was made for them. However, there was, by that stage, a general acceptance within the Child Welfare Department that efforts should be made to ensure siblings were kept together. Mr Monson provided a witness statement in which he deposed that he could not recall a formal policy document being in ***place*** in 1969 1970 that articulated an emphasis on siblings being ***placed*** together. However, his evidence was that he would try and ensure siblings remained together on placements where possible, although this was often difficult to achieve.[1141] Mr Desmond Semple deposed in his witness statement that 'during his time as a social worker [the] prevailing thought [was] that siblings should be kept together wherever possible'.[1142] Similarly, Mr Terence Mulroney, recalled 'a general philosophy in the Department that siblings should be kept together where possible'[1143] although he could not recall any written policy that dictated siblings should be kept together.[1144]

905 However, it was not always possible to ***place*** siblings together in either foster care placements, or in institutional care. Mr Maine was asked about the feasibility, in 1961, of finding a ***place*** where eight siblings might live together. He said that the challenges in doing so: would have been extreme. It would be well, it obviously was. The fact [was] that there were ***no*** placements available that could take eight children ***no*** foster placements available. The only placements available would have been an institution and then you would have had to acknowledge that the children might be separated to some extent by the institution's policies on placement.[1145]

906 The fact that institutions such as Sister Kate's did permit siblings to be kept together was acknowledged by Mr Mulroney in his witness statement, where he said: In the early 1960s, group homes, including 'cottages' such as those at Sister Kate's were beginning to open up, and a cottage mother and father would be able to take a number of children and care for them on a residential basis.

There were also department owned residences which employed livein carers on a contractual basis.

These group facilities were somewhat helpful in my experience as a social worker in the early 1970s in trying to keep siblings groups together.[1146]

907 However, in his evidence, Mr Maine said that his understanding was that Sister Kate's did not ***place*** children in cottages by reference to their family relationships: ... I think the policy on placement of children within the individual cottages was governed more by the ages of the children than it was by their family relationships ... but most of the children siblings would have been on the same campus, so there would have been adequate opportunity for children siblings to have contact relations with one another, but I gather that the policy of ***placing*** children more according to age was as much as anything due to the skills and abilities of the cottage mothers. Some cottage mothers are good at managing little children, others are good are managing adolescents and it makes it easier for overall management if given that there are usually eight to 12 or more children in each cottage, if the placements are done according to that practice, but I don't I'm not an expert on the placement policies of children Sister Kate's placement of children.[1147]

908 Mr Maine acknowledged that the Child Welfare Department did not become involved in the placement of children within an institution such as Sister Kate's: That was a matter for the manager of the institution to decide on their practices as far as the placement of children was concerned. Generally, I don't think the department interfered with that, but staff in these institutions would have been, like everybody else, developing a new awareness of the main important things to sustain when children are moved out of their own homes and there would always, I think in most cases, be a bit of a conflict between whether you ***place*** them according to broad age bands or whether you ***place*** them according to their existing relationships and in an institution like Sister Kate's, I would believe it would be possible to achieve the desired outcome, given that the institution in one way or another catered for both those things.[1148]

909 By 1974, the Child Welfare Department had adopted a policy that foster care was the preferred form of placement, but if that was not open, cottage homes located in the community, rather than in large institutional settings, were the preferable placement option. The development of this policy position, and the rationale for it, was discussed by Ms Susan Booth, a social worker and later social work supervisor with the Child Welfare Department in the 1970s, in the witness statement she prepared in these proceedings. Ms Booth said: Until 1973 when the Child Placement Service was established, there was limited formal policy or advice to departmental officers on the placement of children who had been committed to the care of the State, or were otherwise under the supervision of the Department. Foster care was a major form of outofhome placement of wards and other nonward children unable to live with their own families. There was also a low level of supply of foster carers relative to the level of demand for placements of children considered as requiring fostering.

... Foster placement breakdown was a common occurrence, and many children required multiple foster placements, or a sequence of foster and institutional placements. ...

Sister Kate's and other residential child care institutions such as Mofflyn and Parkerville provided group homes with approximately eight to ten children in a household, called a 'cottage', under the care of a married couple, called 'cottage parents' and usually located on a single campus site. This style of care had a more structured, institutional features than foster care, but, most commonly, provided a more stable form of care with less risk of placement breakdown. It also allowed for siblings to be more readily ***placed*** together than foster placements.[1149]

910 Ms Booth went on to depose: In December 1974 the corporate executive of the Department approved a policy, which I had prepared in consultation with others, for the development of agencyoperated group homes and additional funding for 'scatter cottages' operated by the nongovernment residential child care agencies. These group homes were to be located in the community and staffed by paid 'houseparents' receiving support from social workers and psychologists. This policy was aimed at providing:(a) The benefits of personalised, communitybased and familystyle care;

(b) More stability and less risk of placement breakdown than traditional foster care;

(c) More capacity for employed houseparents to cope with the adjustment difficulties faced by the children in care;

(d) Increased opportunity for siblings to remain together in outofhome placement;

(e) More opportunity for family contact between children and their parents and other relatives, and increased potential for the child/children's return to the care of their family without the exclusion factor commonly associated with foster care; and

(f) More culturally sensitive and appropriate care for aboriginal children and families.[1150]

(p) Knowledge of cultural implications of removing aboriginal children from their families

911 The evidence established that in the 1950s and 1960s, there was very little training for the staff of the Department of Native Welfare and the Child Welfare Department in relation to aboriginal culture. Mr Cornish provided a witness statement in which he deposed that when he joined the Department in 1956 there were ***no*** training courses available in Australia for anyone working with aboriginal people. Other than a basic induction to Departmental procedures my initial training came from my earlier experience at Mogumber [the Mogumber Native Mission], the District Officer, and selfarranged interactions with health, education, legal and other relevant personal contracts such as a few universitybased anthropologists resident in the Eastern States.[1151]

912 Mr Long also deposed that he did not have any anthropological training, nor did he receiving any specific training from the Department.[1152]

913 Mr Maine confirmed that within the Child Welfare Department at the time, there was little understanding of aboriginal culture: I don't know that many staff would have been knowledgeable about traditional ways of aboriginal care. It depends what their experience might have been and how sensitive they were to that as a factor in the raising of the child. It improved as time went by and staff were better trained and there were professional officers and there was an improved awareness in the community overall, as well as staff, about the relevance of the child's cultural background to how it was growing up and how it was going to fit into the general community. I think that was that wasn't a piece of instant knowledge. It was something that just took a long time to develop.

914 According to Mr Maine, even from the late 1950s, there was some degree of awareness within the Department of the desirability of maintaining connections between aboriginal wards and their families, by ***placing*** aboriginal wards with members of their family or with members of the aboriginal community, in preference to ***placing*** them with nonaboriginal carers, and of the desirability of maintaining contact between aboriginal wards and their families. It was Mr Maine's evidence that from as early as 1958, when he started work in the Child Welfare Department: there was probably always in the minds of the placement officers the field officers, the hope that they would be able to ***place*** aboriginal wards with their aboriginal families, but given the general shortage of housing of aboriginal families and the rarity of families that had empty beds that other children could be ***placed*** in, realistically those possibilities weren't very high. Therefore, the department would try to ***place*** alternatively children with relatives or others who may have some connection to the aboriginal family. If not, then we used general foster parent services of the department and did what we could to maintain connections between the child and his family. That varied and it seemed ... was successful depending on the family and its stability and the extent to which it was able to follow some plan or organisation to see the children on particular occasions and varied with their attitude towards the wardship.

... most welfare staff would have followed [this approach], that they should try to unless there was something really unhealthy about the whole family situation and you didn't want to retain connections, they would generally try to ***place*** the child in a situation where parental contact was possible and you would have the expectation that hopefully the child could be moved back to the parents' care, and usually some plan would be developed to provide the necessary services and support for that to happen.[1153]

915 Mr Maine's evidence was that although this approach would have been applied from as early as 1958, it 'would have been intensified as we obtained more professional staff and as knowledge of the harmful effects of separation from the parents became more widespread'.[1154] However, he acknowledged that this approach was not set out in a formal policy in the same way that formal policies exist within the Department of Community Welfare today.[1155]

916 That accords with the evidence given by Ms Stephanie Keating. She deposed that at that time, if the Children's Court made an order for the removal of a child from his or her family there was ***no*** policy to try to ***place*** indigenous children with an indigenous family.[1156]

917 Similarly, Ms Susan Booth said in her witness statement that Until 1973 when the Child Placement Service was established, there was limited formal policy or advice to departmental officers on the placement of children who had been committed to the care of the State, or were otherwise under the supervision of the Department. ...

... As I recall, there was ***no*** particular policy of ***placing*** aboriginal children with aboriginal foster families.[1157]

918 Despite there being some awareness on the part of officers within the Department of Native Welfare and the Child Welfare Department in the late 1950s and 1960s that it was desirable to ***place*** aboriginal children in foster care with members of their extended families or with members of the aboriginal community, this was often not possible, in part because many aboriginal people at the time lived in impoverished conditions. Mr Maine noted that: as housing for aboriginal people improved more possibilities were opened up with relatives or others that might take the care of the children, but most aboriginal families who had space available would extend their family help to others as well as children.[1158]

919 Mr Maine acknowledged that the increase in the availability of placements with aboriginal families was a very gradual one.

920 If aboriginal wards were not able to be ***placed*** with extended family or members of the aboriginal community, then alternative placement arrangements had to be made. The evidence established that there was limited availability of foster care for aboriginal children at the time when the Children were wards. Mr Strover, a Social Work Supervisor with the Child Welfare Department from 1967 to 1975, alluded to this problem in his witness statement, where he said: it was very difficult to find people who were willing to be foster carers of aboriginal children. As a result many aboriginal children remained in institutions after they were made wards. It was common for aboriginal children from large families to become scattered, with some in foster homes, where available, and others in institutions.[1159]

921 Ms Kathleen BrentonCoward provided a witness statement in which she deposed: For the most part in the metropolitan region, advertisements for foster parents did not specifically ask for aboriginal persons to take care of aboriginal children.

Persons were selected on the basis of being financially viable and motivated to providing a long term home for a child in a warm family environment.

aboriginal children who could not fit into such an environment could be difficult to manage and it was not uncommon for foster parents to request removal of the child, in which case the child was moved to another foster home.[1160]

922 By the late 1970s, this gradual increase in the understanding of the potential adverse implications of the removal of aboriginal children from their families, and of their placement in institutional or foster care, manifested itself in policies adopted by governments at the Commonwealth and State levels to deal with child welfare issues in relation to aboriginal children.

923 In early 1977, the then Commonwealth Minister for aboriginal Affairs, Ian Viner, circulated to Commonwealth, State and Territory Ministers with responsibility for child or aboriginal welfare a draft paper on aboriginal adoption and fostering.[1161] The paper had been prepared following discussions at a meeting of the Council of Social Welfare Ministers of Australia in 1976. Although 'Ministers generally supported the philosophy contained in the draft

guidelines [they] noted that they did not sufficiently take into account the specific legal and administrative circumstances of particular States'.[1162] Accordingly, a revised paper was prepared by the Department for aboriginal Affairs for further consideration at the Interim Conference of Social Welfare Administrators in November 1977. That revised paper reflected a number of principles on which there was 'general agreement amongst welfare Ministers'.[1163] Those principles were described as being: (a) emphasis on prevention; provision of family support services to minimise need for alternative care;

(b) children should only be removed from their families as a last resort;

(c) aboriginal children should be fostered or adopted with aboriginal families wherever possible; aboriginal community fostering practices should be recognised and supported wherever possible;

(d) Advice should be sought on a regular basis from aboriginal advisory bodies on adoptions and fostering procedures as well as on specific placements;

(e) Employment of aboriginal child welfare officers and appropriate training for nonaboriginal officers dealing with aboriginals.

924 By January 1978 the Commonwealth Department of aboriginal Affairs had published a set of guidelines on aboriginal adoption and fostering policy, and sought the agreement of relevant State agencies to those guidelines (the proposed Commonwealth guidelines).[1164] The proposed Commonwealth guidelines noted: The first and most important principle governing aboriginal adoption and fostering policy should be the maintenance of the aboriginal child with his or her family and community environment. Removal of the child should be a last resort.

The disproportionately high incidence of aboriginal children in nonparental care or custody is probably related to the social, economic and environmental disadvantages suffered by aboriginal families and their typical isolation from community and legal services, nevertheless, it is viewed with concern. There is ***no*** reason to believe that aboriginal children will necessarily benefit from being removed from parents despite the living conditions; they could be ultimately penalised by it.[1165]

925 The proposed Commonwealth guidelines advocated a preventive focus for policy in relation to the welfare of aboriginal children: A preventative policy is also associated with a positive approach to aboriginal child care and development. In this connection welfare authorities should support the development of family services and benefits for aboriginals in such a way as to: Retain each aboriginal child in environments which are consistent with his/her racial and community identity; ... Encourage the growth of aboriginal family support organisations and service delivery personnel.[1166]

926 In those cases where it was necessary to commit an aboriginal child to State care, the proposed Commonwealth guidelines proposed: Where action to commit and aboriginal child to care appears necessary, State Government Departments and voluntary welfare organisations concerned with fostering programs will attempt to follow these procedures: Attempt to develop adequate care by the parents by attempting to develop adequate support services; or Foster the child with aboriginal relatives or with other aboriginal foster parents preferably in the same aboriginal community.Where such placement is not possible or not in the best interests of the child then other alternatives should be developed that will enable the best possible retention of the child's relationship with his parents and community, where these are conducive to his welfare.

927 It appears that although the proposed Commonwealth guidelines were not formally applied across the Commonwealth, there was development at the State level of policies aimed at maintaining aboriginal children within their extended families and communities, and involving aboriginal communities or agencies in decision making. In his evidence, Mr Semple recalled that in 1978 he participated in a National Working Party for aboriginal Child Placement. Mr Semple noted that: The Working Party focused on the principles that should apply whenever an officer was assessing whether an aboriginal child needed to be removed from their home.

The principles formulated and discussed by the Working Party were eventually enshrined in legislation and formal policy in Western Australia. ...

In essence, the principles arrived at by the Working Party were that before a child was to be removed, every other possible avenue of support should first be identified and investigated.

This would involve a thorough search for all relatives of the child, or anyone who knew or understood the culture of the child and their community, and the family dynamics.

The principles were reasonably comprehensive.

The principles also stipulated that longer term placement of an Indigenous child with a nonIndigenous family ought to be as a last resort; after all other enquiries into Indigenous placement options had been exhausted.

This was designed to effectively force practitioners to work as hard as possible to find Indigenous persons interested in acting as foster carers for Indigenous children.

It was also designed to ensure all attempts were made by officers to assist another family member, for example a grandparent, perhaps with additional supports, who was capable and willing of caring for the child if the parents were unable (sic).[1167]

928 An indication of the development that was taking ***place*** in understanding the implications of the removal of children can be seen in a submission which appears to have been made in early 1979 on behalf of the ALS and the aboriginal Medical Service to the Department of Community Welfare in relation to the Department's approach to the fostering and adoption of aboriginal children.[1168] That submission noted that: It has been the experience of aboriginal Legal Service Field Officers representing aboriginal children in Court that the majority of children appearing have a background of being in nonaboriginal care; that is, in institutionalization (sic), repeated fostering or adoption by white families. (In Community Welfare institutions the child is isolated because all the staff and the majority of the children are nonaboriginal.)

Extended family ties are vital, and aboriginal children in nonaboriginal placements will run away to look for their families. It is most often the case that it is during this period of absconding that the offences occur: for example, the child steals a car to travel to the family's ***place*** of residence or he/she breaks into a house and steals food and money to provide the necessaries for the travel.[1169]

929 The submission also identified the importance of maintaining aboriginal cultural identity: On a community level, the Government's policy of selfdetermination has given impetus to the development of a strong aboriginal identity. aboriginal people are trying now to retain their cultural differences and rebuild a cohesive aboriginal society within the dominant white society. An important factor in this cultural development is seen to be the need for aboriginal children to grow proud of their identity as aboriginal, and to pass on their cultural heritage to future generations.[1170]

930 The submission advocated that the paramount goal of any placement programme involving aboriginal children should be 'the maintenance of the aboriginal child with the immediate or extended family, or at least with aboriginal caretakers of the same cultural grouping as the child's family'.[1171]

931 In June 1983 the Standing Committee of Social Welfare Administrators (which appears to have comprised the heads of State and Territory social welfare departments) convened a working party to review State and Territory principles, policies and practices in relation to the fostering and adoption of aboriginal children. That report was endorsed by the Standing Committee in October 1983, with a view to its presentation to the Council of Social Welfare Ministers at their meeting in 1984. The report of the working party noted: Community awareness of aboriginal culture, values and heritage has accelerated in recent years. This awareness, heightened by an

increasingly vocal and articulate aboriginal lobby and complemented by consistent research findings on the inequalities of equal treatment has led to A questioning of past and present practices in relation to aboriginal people. A recognition of the role, value and importance of aboriginal cultural heritage and social, family, tribal and community relationships in the life of aboriginal people. A sense of shame and embarrassment over the historical treatment of aboriginals. A determination to recognise, respect and reflect aboriginal culture, customs and opinions in Commonwealth, State and Territory legislation and practices.The issue of the fostering and adoption of aboriginal children is one of the more public and visible issues.

There is ***no*** denying that historically aboriginal children have been (and still are) over represented in government and nongovernment welfare services and programmes.

Past practice frequently reflected and assumption that removal of an aboriginal child to white foster or adoptive parents would be in the child's best interest. Little recognition was given to the opinions of the aboriginal community.

In recent years all Australian States and Territories have attempted to redress past practices through developing principle and policies for the fostering and adoption of aboriginal children.

The majority of these principles and policies emphasised the importance of:

Retaining and supporting wherever possible an aboriginal child in his or her extended family or accepted community.

932 Consulting with the child's community or an aboriginal agency before any decision to ***place*** an aboriginal child.[1172]

933 Among the recommendations made by the working party were recommendations in relation to the fostering of aboriginal children, and in relation to the training for welfare agency staff: That in the foster placement of an aboriginal child a preference be given, in the absence of good cause to the contrary, to a placement with:

A member of the child's extended family;

Other members of the child's aboriginal community who have the correct relationship with the child in accordance with Aboriginal customary law;

Other aboriginal families living in close proximity.

... That each State and Territory welfare department:(a) provide training and discussion programmes for all staff working with aboriginal children on the principles, policies and procedures of aboriginal child placement;

(b) provide training and discussion programmes for staff involved in these matters on aboriginal culture, family networks and customary law.[1173]

934 The working party's report also summarised the policies applied in across the States. In relation to Western Australia, the report noted: The Department of Community Welfare practice in recent years has affirmed an understood principle that aboriginal children should wherever possible, be ***placed*** with aboriginal families or communities. This has resulted in a reduction in the number of aboriginal child in nonaboriginal placements.

In order to ensure a strict adherence to the principles the Department is current formulating a statement of policy which after consultation with appropriate aboriginal organisations and groups, will be implemented.[1174]

935 On 6 April 1984, the Council of Social Welfare Ministers endorsed a recommendation that each State develop its own aboriginal Child Placement Principles and that this be done through further consultation with aboriginal communities and agencies.[1175]

936 By 1985, the Department of Community Welfare was in the process of formally implementing principles, procedures and guidelines on aboriginal child placement.[1176] In a memorandum to staff, Mr Semple, by then the Director General of the Department, noted that 'the objective of formalizing the policy is to standardize placement practices in respect of aboriginal children so that they are consistent with policy.' Attached to Mr Semple's memorandum were copies of the Principles, Procedures and Guidelines to be applied in the placement of aboriginal children. A covering note in relation to the Principles explained that: In 1984 State and Commonwealth Ministers made an agreement to implement and support a policy regarding the placement of aboriginal children. The main theme of this policy was that placements were to ensure cultural consistency.

The Minister for this department concurred with the other State and Federal Ministers on implementation of such a policy. Consequently this department has undertaken the task to implement the aboriginal Child Placement Principles.

... It is a massive task, which is compounded by the fact that it is a radical move away from present placement practices.

937 The guidelines subsequently adopted by the Department of Community Welfare provided: As a general policy, these guidelines should be strictly adhered to by all persons arranging placement for welfare purposes of all aboriginal children, be they under the guardianship of the Department or not. The Child and the Natural Family.

1.1 The maintenance of aboriginal children with their own family and community environments is to be the first priority.

...

1.3 Should removal of child/ren be unavoidable, services to the natural family should continue with the intention of returning the children at the earliest possible time.

... aboriginal Children Requiring Placement.

2.1 Cultural consistency and family linkage are considered more important than material standards.

2.2 Where possible aboriginal children should be ***placed*** within the extended family, with other aboriginal families, or in another form of culturally consistent care.

...

2.4 [T]he following principles should be considered in placement selection:

(a) The placement should contribute to the best possible retention of the child's relationship with his parents and community, including regular contact.

(b) Siblings should be ***placed*** together, but where this is not possible, regular sibling contact is to be maintained.

...

2.5 Following an initial case conference, each child, his sibling group and his natural family shall be formally reviewed on a minimum six monthly basis.[1177]

938 Quite apart from issues specific to aboriginal children who were made wards, changes were being seen in the approach of welfare authorities to related issues, particularly accommodation for aboriginal people. In a discussion paper prepared for the Director in July 1981, it was noted that accommodation had been identified as a special area of need for aboriginal people, and the Department of Community Welfare had pursued several programs including upgrading reserve accommodation (such as by upgrading electricity and hot water supplies, and constructing ablution and laundry facilities) or closing reserves and rehousing families in conventional housing (a process which was eventually managed by the State Housing Commission).[1178]

939 Having regard to all of the evidence, I find that in the late 1950s and 1960s, there was some awareness on the part of officers of the Department of Native Welfare and the Child Welfare Department of the desirability of maintaining contact between aboriginal wards and their families, by ***placing*** those children with extended family or members of the aboriginal community, and by maintaining contact between the children and their families.

However, it is not possible to quantify the extent of that knowledge, and it should not be overstated, given the lack of any training for departmental staff at the time in relation to aboriginal culture. However, very gradually, an increase in qualified staff and in training for staff, resulted in increased knowledge of the potential adverse implications of removing aboriginal children from their families. By the late 1970s and into the early 1980s, this knowledge was manifested in the development of formal departmental policies.

940 Furthermore, I find that although departmental officers were aware of the desirability of ***placing*** aboriginal children in foster care with aboriginal carers, this was frequently not possible, given the very limited availability of aboriginal foster carers, and the impoverished conditions in which many aboriginal people lived at the time. Again, very gradually, as the living conditions of aboriginal people improved, aboriginal foster care opportunities increased.

941 I find that at the time when the Children were made wards, there were limited foster care placements available with nonaboriginal people willing to foster aboriginal children, and that that remained the position during their wardships.

942 I find that in 1958 and 1961 when the Children were made wards, and during their wardships, it was not possible to ***place*** all of the Children, or all of the Siblings, into one foster placement, as none were available to cater for nine or eight children.

943 As I have already found, from the late 1960s, some of the Siblings were ***placed*** in foster care from the late 1960s. At that point, however, the Siblings were, for the most, part individually fostered.

(q) Was the return of the Children to Don and Sylvia considered by the Child Welfare Department, and why were the Children not returned?

944 All of the Siblings were eventually permitted to return to live with Don and Sylvia, prior to the conclusion of their wardships. The return of the Siblings was considered on a number of occasions during their wardships, but officers of the Department of Native Welfare, or the Child Welfare Department, formed the view that the Siblings should not be returned on those occasions.

945 In addition, there was evidence that Ellen's return to Don and Sylvia was considered in 1959 but it was decided that she should not be returned to their care. It is convenient to start by considering the evidence in relation to that decision.

(i) Consideration of Ellen's return

946 In accordance with the recommendation of the Children's Court when Ellen was made a ward, the Department of Native Welfare took steps to review Ellen's wardship in late May 1959.[1179]

947 Mr WrightWebster made a report to the Commissioner in relation to Ellen on 29 May 1959[1180] in which he noted: Collard and his wife who were both inveterate drinkers have, I believe, turned over a new leaf and have ceased drinking according to Ms Jones. I have told her that I intend to recommend the return of the baby to its parents if Collard would make a few small improvements to his accommodation. She is to arrange this, and in due course, I will report again.

948 Sylvia denied that she and Don were long time drinkers at around the time of the Report[1181] and she had ***no*** recollection that she and Don made any change to their around the time of the report and she had ***no*** recollection that she and Don made any change to their lifestyle around this time.[1182] Sylvia also had ***no*** recollection of Ms Jones telling her that Mr WrightWebster intended to recommend Ellen's return if they made a few improvements to their accommodation.[1183] It is unnecessary to make any findings in relation to the accuracy of Mr WrightWebster's observations. Rather, it suffices to find that in May 1959 the Department's District Officer was favourably disposed to the return of Ellen.

949 Mr Long made a report to Mr WrightWebster dated 14 July 1959.[1184] In it, he noted that he had ***visited*** Don and Sylvia's home and that he spoke to them, and that he had also spoken to Ms Jones, about Ellen's return. He went on: Both the Collards and Miss Jones of the Brookton Mission Church made strong representations to me to assist in having this child returned to them from its foster home ... .

During the last few months the social behaviour of the Collards has undergone a most welcome improvement and this young couple do seem to have pulled themselves together and started life anew. Whether the change is a permanent one, of course, remains to be seen. Both attend chapel very regularly, and have not touched alcohol in weeks. They appear pleasant and well mannered, and Const Wall of Brookton reports favourably on them.

Collard has a permanent job with Mr T. Yeo, and occupies an asbestos cottage which is clean and tidy, and adequately furnished. A good meal was in the process of cooking when I called, and the six other children look healthy and well nourished. There are three bedrooms and a kitchen, plus verandah, for their use and, as the case was due to be reviewed at the expiration of the committal order, on 13/3/59, I would, with your approval, recommend that Ellen be returned to the Collards with the proviso that this Department check her living conditions from time to time.

950 Prior to his death, Mr Long made a witness statement for these proceedings in which he deposed that he had ***no*** recollection of this report but had ***no*** reason to doubt the accuracy of the information contained in that document.[1185]

951 I find that the contents of the report are an accurate reflection of what Mr Long had observed and what he had been told by Constable Wall, Ms Jones and Don and Sylvia, for three reasons. First, in his statement, Mr Long did not express any doubt about the accuracy of the information in the report. Secondly, although Sylvia had ***no*** recollection of Mr Long[1186] and also said that she did not recall anyone coming to inspect their accommodation at Brookton in around June of 1959, she did appear to accept that sometimes officers from the Department of Native Welfare would come up to Bessie's block.[1187] Thirdly, Sylvia also accepted that some aspects of Mr Long's report were accurate, such as the fact that at around this time, the family was living in accommodation at Mr Yeo's farm while Don worked for Mr Yeo.[1188] It is difficult to envisage any reason why Mr Long would include inaccurate information, as well as accurate information in his report.

952 In his statement, Mr Long deposed that it was the usual practice for a report such as the one he had prepared to be forwarded by the District Officer to the Commissioner, for the Commissioner to consult the District Officer, and for the Commissioner then to make a decision as to whether or not the child in question ought be returned to their parents.[1189] The evidence establishing that process was followed in this case.

953 Mr WrightWebster wrote to the Commissioner on 14 July 1959 endorsing Mr Long's recommendation that Ellen be returned to Don and Sylvia.[1190] ***No*** response appears to have been received to that correspondence and Mr WrightWebster wrote to the Commissioner again on 10 September 1959 in which he observed:[1191] ... I have been receiving enquiries from the parents and from Miss Jones of Brookton which I am unable to answer, as I am unaware of the reason why the child has not been returned even after the good report provided from this office. I feel very strongly that this is a case in which this infant should be returned to its parents, and request that the matter be taken up with the Child Welfare Departments for early finalisation.

Kindly advise what transpires, as the mother called at my office today and I promised to let her know the position. She appeared most anxious and upset at the lack of decision in the matter.

954 On 5 October 1959 the Commissioner approved Mr WrightWebster's recommendation that Ellen be returned to Don and Sylvia and made a submission to that effect to the Director.[1192] On 22 October 1959, the Acting Director advised that he agreed with that recommendation.[1193]

955 However, a file note which was in evidence indicated that in the interim, the Commissioner was contacted by Ms Jones,[1194] who provided him with information which caused the Commissioner to reverse his decision about Ellen's return. On 12 November 1959 the Commissioner wrote to Mr WrightWebster[1195] and advised the following: As previously advised your recommendation concerning the return of the abovenamed child to its parent was referred to the Director of Child Welfare who now states that he is in agreement with your recommendation.

However, in the meantime Ms Jones of the Brookton Mission has discussed this matter with the Commissioner and advised that Mrs Collard is gambling heavily.

It has therefore been decided that ***no*** action will be taken in respect to the return of Ellen to her parents until further advice is received from Ms Jones.

956 On 14 December 1959 an Investigation Officer (whose identity was not apparent from the document) wrote a memorandum to the Commissioner in relation to the question of Ellen's return.[1196] The officer reported: Miss Jones advised that since her last report to this office on the 15th October, 1959 that Mrs Collard was gambling heavily, she is unable to give any further information re the behaviour of the Collards, as Don and Sylvia Collard have not been living regularly in Brookton. Up until a month ago they were travelling between Brookton and Boddington where Don Collard has been working on and off. During this period the children of school age were left with her mother so that they may attend school.

For the last month the whole family has been living in Narembeen where Collard is now working. Miss Jones does not know who he is working for or the conditions under which he has housed his family.

Under the circumstances it is suggested that ***no*** further action be taken in the matter until such time as a further request is made by Sylvia Collard for custody of the child, when the District Officer could be requested to report again.

957 There was ***no*** other evidence to suggest that Ellen's return received further consideration at any later stage, and in all of the circumstances I infer that the Investigation Officer's Recommendation was accepted.

958 I make the following findings. First, the only information the Department of Native Welfare received to the effect that Sylvia was gambling heavily, was one oral report provided by Ms Jones to the Commissioner between 5 October 1959 and 12 November 1959.

959 Secondly, Ms Jones did not provide any further evidence to substantiate that information.

960 Thirdly, there was ***no*** evidence that at any stage officers of the Department of Native Welfare made their own enquiries to ascertain whether Sylvia had been gambling, or (more to the point) whether she and Don were in a position to properly care for Ellen.

961 The conclusion that Ellen should not be returned to her parents if Sylvia was gambling appears to have been a moral judgment rather than the result of any appraisal of what the implications of gambling might be on Don and Sylvia's ability to properly care for Ellen.

962 Finally, I note that in her evidence in these proceedings Sylvia denied that she had ever gambled,[1197] and as I have already found, there was ***no*** other evidence, apart from this one reference to information from Ms Jones, to suggest that Sylvia had been gambling heavily.

963 The approach taken by the officers of the Department of Native Welfare in relation to Ellen's return was very odd, to say the least. If alleged gambling on the part of a parent was such a serious consideration as to warrant a decision not to return Ellen to Don and Sylvia's care, it is difficult to see why the Departmental officers did not consider it necessary to make enquiries about the welfare of Don and Sylvia's other children, of whom they were well aware. In addition, it is far from clear why the Department's Investigation Officer recommended that ***no*** further action be taken unless Sylvia again requested Ellen's return.

964 On the other hand, the information in the Investigation Officer's Report of 14 December 1959 was significant. That document indicated that Don and Sylvia were ***no*** longer living on the Yeo's farm, and that Don was engaged in casual farm work (as I have found was the pattern of his working life more generally in the 1950s and 1960s). In so far as the family's accommodation and Don's employment were concerned, the position in December 1959 therefore appears to be not materially different from that which existed in March 1958, when Ellen was taken into care. The improvements in Don and Sylvia's accommodation and the fact that Don was in permanent employment,

were important considerations in Mr WrightWebster's initial recommendation that Ellen be returned to Don and Sylvia.

965 The Investigation Officer's Recommendation that ***no*** action be taken to return Ellen appears to have resulted from the fact that in December 1959, the Department did not have any information as to where Don and Sylvia were living or in what conditions and whether Don was employed.

(ii) Consideration of the return of the Siblings to Don and Sylvia

966 The return of the Siblings to Don and Sylvia was considered by officers of the Child Welfare Department in two different contexts. First, there was some evidence that the Siblings, or some of them, were permitted to ***visit*** Don and Sylvia for Christmas on occasion. There was also some evidence as to the circumstances which officers of the Child Welfare Department would have been expected to take into account in determining whether wards should be permitted to have a short term ***visit*** with their parents. Secondly, there was evidence that officers of the Child Welfare Department considered the return of individual Siblings to Don and Sylvia on a number of occasions, and recommended the return of some of the Siblings.

Christmas ***visits*** to Don and Sylvia

967 Sylvia gave evidence that she and Don 'frequently' requested that the Children be permitted to come home for Christmas. She said their requests were usually refused on the basis of their living conditions or on the basis of reports that they were drinking excessively.[1198] There was evidence that Don and Sylvia requested that the Siblings be permitted to spend Christmas with them on two occasions, and that this request was granted on one occasion and refused on the other. I will deal with the circumstances of these requests in a moment.

968 I accept that Don and Sylvia requested the return of the Siblings on these two occasions. It is, however, not possible to make any finding as to whether or not Don and Sylvia requested the return of the Siblings for Christmas on other occasions, or 'frequently', for the following reasons. First, the absence of any evidence that Don and Sylvia made other requests for the return of the Siblings or that such requests were refused, does not permit an inference to be drawn that they did not make such requests. As I have already explained, the documents in evidence are clearly not complete, and this is particularly evident in relation to the years during which the Siblings lived at Sister Kate's and Burnbrae. In addition, there was ***no*** evidence as to whom Sylvia and Don made their requests. Had they made oral, informal requests to inspectors of the Department of Native Welfare or the Child Welfare Department, written records may not have been kept of those requests. Secondly, Sylvia's evidence that they made frequent requests for the return of the Siblings for Christmas was vague, and it was not clarified in the course of her oral evidence.

969 I turn to deal with the evidence in relation to Don and Sylvia's requests that the Siblings be permitted to spend Christmas with them.

970 In evidence was a copy of a letter dated 14 December 1965, from the Child Welfare Department to Don in which he was advised that his request that the Children spend the Christmas holidays with him and Sylvia had been refused on the basis of the accommodation in which Don and Sylvia were then living.[1199] A file note from the Department's file indicated that this refusal was based on information provided to a departmental officer by the Brookton Police, namely that the ***visit*** was not recommended because Don and Sylvia were 'living in a shed'.[1200] I find that Don requested that the Children be permitted to ***visit*** for Christmas in 1965, and that this request was refused on the basis of the accommodation in which Don and Sylvia were living at the time.

971 I have already referred at [658] to [660] to the evidence that in November 1970, District Officer White of the Child Welfare Department ***visited*** Don and Sylvia where they were then staying in Kondinin, to ascertain whether Beverley, Glenys and Eva should be permitted to spend Christmas with their parents. Officer White inspected where they were living, recommended that the girls be permitted to ***visit***, and the ***visit*** was approved.

972 In each case, it is apparent that the decision whether to permit the Siblings to return home was made by reference to the conditions in which Don and Sylvia were then living.

973 For completeness, I note that as I found at [383] to [384], in late 1966, after Don had collected Donald and taken him back to Brookton, Constable Wall spoke to Donald, and subsequently suggested to officers of the Child Welfare Department that Donald be permitted to remain with his parents over Christmas. Approval was given for Donald to remain in Brookton with Don and Sylvia over Christmas.

974 There was also evidence in relation to the Department's process for considering requests from parents for home ***visits*** by their children. In his evidence, Mr Maine said that in ascertaining whether a home ***visit*** by a ward should be permitted, a number of checks would be made, including with the police. He indicated that if an officer of the Child Welfare Department was based in a town then that person would be contacted, but in many country towns there was ***no*** departmental office, and in those cases other sources of information would be pursued.[1201]In 1965 and 1966, the Child Welfare Department received information from the local police about Don and Sylvia's living conditions and, in 1970, Mr White inspected Don and Sylvia's home. I find that the approach taken in determining whether the Siblings should be permitted to ***visit*** their parents on each of these occasions was consistent with the general practice adopted within the Department for considering applications for home ***visits*** by wards.

Applications that the Siblings be permitted to return to live with Don and Sylvia

975 The evidence established that officers of the Child Welfare Department gave consideration, on several occasions, to whether individual Siblings should be permitted to return to live permanently with Don and Sylvia.

976 As I found at [383] to [384], in April 1967, Mr Hill recommended that Donald be permitted to remain with Don and Sylvia at Brookton. Although he concluded that 'this home is not a suitable ***place*** for this boy to stay in' he acknowledged that there was little point trying to force Donald to return to his apprenticeship in Perth when he was not prepared to do so, and when he insisted that he wanted to stay at home with his parents. In those circumstances, approval was given for Donald to return to live with Don and Sylvia.

977 As I found at [392] to [401], in August 1967, Don and Sylvia collected Darryl and Bonnie from Burnbrae for a ***visit*** and did not return them. That prompted the Director to request that an officer of the Department of Native Welfare investigate, and 'if the conditions are satisfactory' for the Commissioner to consider whether he would be prepared to supervise the children if they were released to their parents. Although Darryl and Bonnie were returned to Burnbrae before that investigation could begin, Darryl continued to run away, or to leave with his father on other occasions. As I found at [402], by late 1967, officers of the Child Welfare Department had concluded that there was little point trying to prevent Darryl from remaining with his family, and decided that the better course was to permit him to remain, but for his welfare to be monitored by officers of the Child Welfare Department and the Department of Native Welfare.

978 As I found at [417] in March 1969, Don collected Bonnie from Mrs Farmer's house where she was then living, and returned with her to Brookton. Officers of the Child Welfare Department then decided to release Bonnie into the care of her parents in Brookton, and this was confirmed in a letter sent to Sylvia by Ms Hobcroft.

979 As I found at [430], after running away from Sister Kate's and other institutions on several occasions, and after having been collected by Don on 18 March 1969 (along with Bonnie), William was released to the care of his parents on 18 March 1969. That was confirmed in the letter sent to Sylvia by Ms Hobcroft of the Child Welfare Department in April 1969.

980 As I found at [446] to [447], Beverley ran away from Sister Kate's in March 1969 and returned to live with Don and Sylvia in Brookton. A file note made by Ms Hobcroft of the Child Welfare Department on 10 April 1969 indicated that she had concluded that it was 'pointless to insist on this child's return to Sister Kate's as she will most likely abscond again'. Beverley was then permitted to remain with Don and Sylvia.

981 As I found at [466], in June 1969, Don and Sylvia collected Glenys and Eva from Sister Kate's and took them back to Brookton. Ms Hobcroft recommended that in the circumstances, Glenys and Eva should be released to Don and Sylvia, and they were permitted to remain with their parents at that stage. This was despite the fact that in Ms Hobcroft's letter of 4 April 1969,[1202] in which she agreed that Bonnie and William should return to Brookton, she had advised that as Sylvia did not have an adequate home at the time, her younger children should remain at Sister Kate's. (Sylvia denied having seen a letter to that effect,[1203] but given the time which has passed it is clearly possible that Sylvia did receive that letter and had simply forgotten about it.

982 As I found at [450], following a ***visit*** to the humpy in September 1969, Mr Moulton recommended that the younger girls be ***placed*** in foster care in Perth, and as I found at [514], by October 1969, Beverley, Glenys and Eva had been ***placed*** in emergency placements in Perth.

983 As I found at [486] arrangements were made by officers of the Child Welfare Department for Glenys to return to live with Don and Sylvia in Brookton at the end of 1971, and she did so briefly, before running away.

984 In December 1971, Don and Sylvia approached the Child Welfare Department and requested that Wesley be permitted to return to live with them. However, following an inspection by the District Officer at Narrogin, who reported that 'home conditions were not suitable for the return of the Children', that request was refused in January 1972. A memorandum dated 6 January 1972 by Miss Page, a Social Worker within the Child Welfare Department, to her supervisor, and to the District Officer at Narrogin, explained the background to Don and Sylvia's application as follows: Mr and Mrs Collard, parents of Wesley, called at this office on 13th December 1971 to enquire as to the return of Wesley to their care.

They informed me that they now have a house at Brookton and have somewhere where the children can live. They said that Glenys (13) had been returned to them recently. They were very vague about the other children, at first implying that they were all with them, but on further questioning they admitted that the other children are still in their respective foster homes or Sister Kate's.

...

Mr and Mrs Collard told me that the reason the children were taken away from them was because they didn't have a house and now they do. Apparently they have been living in their present accommodation for the past six weeks and intend to remain there.

ACTION The District Officer at Narrogin was contacted re the home situation of the Collards and he reported that home conditions were not suitable for the return of the children.[1204]

985 A handwritten file note at the bottom of this memorandum, which appears to have been made by Miss Page, indicated that the District Officer at Narrogin was to forward a written report on the parents' situation. However, ***no*** such document was in evidence.

986 ***No*** evidence was given by Don and Sylvia in relation to the matters referred to in this document. There was also ***no*** evidence as to where, and in what conditions, Don and Sylvia were living in Brookton in December 1971. However, as I explain below, Don and Sylvia rented a Homeswest house in Kondinin in 1970, they were living in Kondinin when Wesley was finally permitted to return to live with them in 1975, and (as I note below) they purchased a home in Kondinin in 1978. Within that context, it is far from clear how Don and Sylvia came to be living in a house in Brookton in 1971, as is indicated in Miss Page's memorandum.

987 I note, however, the evidence to which I have already referred, suggests that by the end of 1971, it is more likely than not that none of Don and Sylvia's children were living at home on a permanent basis. The three youngest children, Joseph, Philip and Ashley, were living with Jean Collard at that time, Eva was at Sister Kate's, Glenys had briefly returned to her parents but was living an itinerant life at that time, Beverley was in foster care, Bonnie had had her first child and was living in Pingelly, William was working and does not appear to have been living with his parents, at least on a full time basis, Darryl's wardship had finished and he had been working for some time and living out of home for some of the time, and Donald was deceased.

988 I am left in the position where Miss Page's memorandum suggests that information was provided to her by the District Officer to suggest that conditions at Don and Sylvia's home were not suitable for the return of their children. There is ***no*** evidence to suggest that that report was not reliable, or that Miss Page or other officers of the Department should not have relied upon the information provided by the District Officer.

989 For completeness, I note that Mr Maine was cross-examined, by reference to Miss Page's memorandum, about the matters which would have been considered by officers within the Child Welfare Department for the purpose of determining whether a child should be permitted to return to his or her family to live, as at 1972.[1205]Mr Maine's evidence was that he would not have regarded the fact that the parents had accommodation as a sufficient assessment to determine whether a child should return to live with his or her parents. His evidence was that: The officer would have to assess whether or not the family situation was satisfactory for the child to be returned or to have a short stay, and that would mean that the officer needed to assess the available space for the child, the state of the family at the time, what other children were being cared for, what the quality of that care was like.[1206]

990 Mr Maine's evidence makes clear that the fact that Don and Sylvia had a house would not have been sufficient, of itself, to warrant the return of Wesley. The District Officer's assessment was that 'home conditions' were not suitable for the return of Don and Sylvia's children. That general description leaves open the possibility that other considerations apart from Don and Sylvia's accommodation were in contemplation but it is simply not clear on the evidence.

991 As I found at [502], in September 1975, Don collected Wesley from school in Perth and took him home to Brookton. Officers of the Child Welfare Department then decided that Wesley should be permitted to live with his parents at Kondinin.

992 I find that the decisions by officers of the Child Welfare Department to permit Donald, Darryl, Bonnie, William and Beverley to return to live with Don and Sylvia, prior to, or during, 1969, were based on two considerations. First, on each occasion, the child in question refused to remain in foster or institutional case, and insisted on returning to Don and Sylvia. Secondly, each of the children had reached the age where they were able to, and had, run away from where they were living and returned to Brookton, or alternatively, had been collected by Don and returned to Brookton. In each case, the Department's officers concluded that there was little point trying to force the child to return to Perth, notwithstanding the officers' apparent continued misgivings about the conditions in which Don and Sylvia lived.

993 I find that in the case of Glenys and Eva, the Department's decision to permit them to return to Don and Sylvia in 1969 was based on two considerations. First, the girls had been taken by Don back to Brookton, and secondly, all of the remaining Siblings (except for Wesley) were by then living in Brookton with Don and Sylvia.

994 However, officers of the Child Welfare Department continued to have concerns about Don and Sylvia's living conditions, and those concerns were reflected in the fact that the Siblings' living conditions continued to be monitored after their return to Don and Sylvia, through inspections by welfare officers. As I have already found, the younger Siblings Beverley, Glenys and Eva were returned to foster care, or Sister Kate's, after their initial return to Don and Sylvia in 1969.

995 I find that following Don and Sylvia's request for Wesley's return in 1972, officers of the Child Welfare Department made enquiries to ascertain whether the conditions in Don and Sylvia's home were suitable for his return. That was consistent with the practice within the Department at the time for considering the return of wards to their parents. The outcome of that enquiry was that Don and Sylvia's 'home conditions' were not suitable for Wesley's return, and there is ***no*** evidence to suggest that that information was not reliable.

996 I find that the decision to permit Wesley to return to live with Don and Sylvia in 1975 was based on three considerations: he had also been taken by Don to live with him and Sylvia in Kondinin, Wesley ***no*** longer wished to live with the Stephensons and was of an age where there was little point trying to force him to do so, and by the time of Wesley's return, Don and Sylvia were living in a house in Kondinin.

(r) Attempts by State authorities to obtain housing assistance for Don and Sylvia

997 As is apparent from the findings I have already made, one of the most significant contributing factors to the Children being taken into care, and the decisions made by the Department of Native Welfare and Child Welfare Department as to whether they should be returned to Don and Sylvia's care, was Don and Sylvia's living conditions. One of the main reasons for their inadequate living conditions was the fact that they lived in the humpy with ***no*** electricity, gas or water supply, and ***no*** sanitation facilities.

998 In this section of my reasons, I deal with the following matters:

(i) when Don and Sylvia obtained a house;

(ii) Don and Sylvia's difficulties in obtaining satisfactory accommodation;

(iii) the difficulties experienced by aboriginal people in Western Australia in obtaining housing during this period.

(i) When Don and Sylvia obtained a house

999 As I have already found, although they spent some time each year living in farm accommodation during periods when Don was working on farms away from the Brookton area, Don and Sylvia's permanent home until August 1970 was the humpy on Bessie's block. Don and Sylvia obtained a State Housing Commission (SHC) house at 9 Rankin Street Kondinin at the end of August 1970.[1207] Sylvia confirmed that they rented a house in Kondinin in the early 1970s, although she could not recall for how long they lived there.[1208]

1000 Don and Sylvia were able to purchase their first home, at 20 Rankin Street Kondinin, in April 1978. They sold that property in August 1980.[1209]

1001 Don then purchased a house at 56 Graham Street Kondinin in July 1980. He sold that property in June 1988 to his son Darryl and his wife Linda.[1210]

1002 In April 1988, Don and Sylvia purchased a house at 18 Rankin Street Kondinin. They sold that property on or about 25 January 2006.[1211]

1003 Don, Sylvia and Rachel Collard (who I gather is their granddaughter) purchased a house at 22 Howlett St Kondinin in October 1993. In September 2001 they gifted that property to Darryl and his wife Linda.[1212]

1004 Don and Sylvia continue to live in Kondinin.

(ii) Don and Sylvia's difficulties in obtaining satisfactory accommodation

1005 Sylvia's evidence was that after the Siblings were made wards, she and Don tried to get State housing, but ***no*** matter how many times we applied and ***no*** matter how much we were earning, we were never offered a state home by the authorities.

...

Don also made lots of housing applications on the family's behalf. While the children were in care, we always had some form of housing and accommodation and we continuously applied for state housing as a permanent base as well, but we were always rejected.

1006 I accept Sylvia's evidence that Don applied for state housing on a number of occasions (how many does not matter) but were unable to obtain state housing. There was little evidence in relation to such applications, but such evidence as there was gives some insight as to the reasons why Don and Sylvia were unable to obtain an SHC house.

1007 On 18 May 1962, a Manager at the SHC wrote to the Commissioner in relation to an application by Don for housing assistance from the SHC. The SHC requested the Department investigate Don's suitability as a rental tenant, and advise the SHC as to Don's prospects of receiving a transit property from the Department.[1213]Inquiries were made by Mr Wright-Webster. By memorandum dated 7 August 1962, Mr Wright-Webster advised that having regard to Don's circumstances he would be unsuitable for consideration for SHC accommodation.[1214]That conclusion was reached by reference to the following circumstances: An inspection of this applicant's living conditions and standards at the present time leaves much to be desired before any consideration could be given in support of a State Housing project.

The applicant lives in a camp constructed of iron and timber with ***no*** furniture other than a bed.

The applicant is a seasonal worker with a not very impressive record.

The applicant and his wife are addicted to liquor.

On 8.12.61 the applicant's eight children were made wards of the State.

1008 (The reference to the camp appears to be a reference to the humpy at Bessie Ninyette's block.) This advice was relayed to the SHC, which subsequently advised Don that the SHC would not be able to assist him with a house.[1215]

1009 I find that this correspondence indicates the basis on which Don's application for state housing assistance was refused on one occasion.

1010 Why the standard of Don and Sylvia's accommodation at the time of their application was considered a factor adverse to whether they should be considered for SHC assistance is not immediately apparent. However, the fact that it was taken into account reveals the 'catch 22' that Don and Sylvia found themselves in. They were unable to obtain SHC assistance at least in part because of the impoverished accommodation in which they lived at the time, yet until they obtained State assistance to find a house they were unlikely to be able to improve the accommodation in which they were living.

1011 This difficulty was compounded by the classifications to which Don, Sylvia and the Children were subject under the Native Welfare Act. I have already alluded to the fact that one of the difficulties caused by the classification of aboriginal people as 'natives' or 'quadroons' was the impact that this classification had on their entitlement to enter onto aboriginal reserves. This created a very real problem for Don and Sylvia. Because Sylvia and the Children were classified as 'natives', they were entitled to live on the Brookton Reserve, but because Don was classified a 'quadroon' he was not permitted to live on the Reserve. This state of affairs continued until well into the 1960s. In a file note dated 10 April 1967, the Child Welfare Department's District Officer at Narrogin, Mr Hill, noted that housing remained an acute problem for Don. Mr Hill noted that Don: was living in a rough iron hut on the edge of the Native Reserve where (on the reserve) several new Native Welfare Dept aluminium houses were almost completed. It was suggested that he see the [Native Welfare] officers on the next occasion they ***visited*** the Reserve and see if they would give him one of the [Native Welfare] houses in Brookton or on the Reserve. I promised that I would see Mr H.I Tilbrook and speak with Mr D.H. Roberts, and put in a good word for him. This I did, but both officers told me that they had not been asked for a house, but in any case had none to give to this man and his family.

...Actually this man is a quadroon, and his wife and his children are looked upon as Natives. For this reason, he being the breadwinner can get our [Maintenance Assistance] but not [Native Welfare] housing.[1216]

1012 In a file note dated 11 January 1968, Mr Hill noted: One of the biggest troubles in this case is that Mrs Collard, and all her children are classed as Native whilst her husband is deemed to be a quadroon. Because of this the Department of Native Welfare will not give the husband a house on a Native Reserve, whilst he is not in the race to get a State Rental, because he would not be classed as a good enough risk, and in any case could not the deposit even if a house was allocated to him.[1217]

1013 I find that by virtue of their classifications under the Native Welfare Act, Don and Sylvia were, until at least 1968, ineligible to obtain a house on the Brookton Reserve.

1014 In Mr WrightWebster's memorandum of 7 August 1962, he noted that Don and Sylvia's children were wards of the State. There was ***no*** reference to, nor apparently any appreciation of, the fact that Don and Sylvia's living conditions and accommodation were key factors in the decisions to make the Children wards, and would be key factors in any decision as to whether the Children should be permitted to return to their parents. That there was ***no*** such appreciation is particularly regrettable given that it was the advice of Mr WrightWebster a person ***no*** doubt acutely aware of the difficulties faced by aboriginal people generally, and by the Collards in particular which very clearly was the basis for the decision by the SHC to refuse Don's application for housing assistance.

1015 It is difficult to resist the conclusion that had Don and Sylvia been able to obtain a conventional house much earlier than they did, their lives in general, and their prospects of securing the early return of the Children, may have been very different. However, there was ***no*** evidence as to whether the availability of public housing in Western

Australia at the time was such that Don and Sylvia would necessarily have been able to secure an SHC property even if their application had had the support of the Department of Native Welfare or the Child Welfare Department.

(iii) The difficulties experienced by aboriginal people in Western Australia in obtaining housing during this period

1016 During the period of the Children's wardships, neither the Department of Native Welfare, nor the Child Welfare Department, had statutory responsibility for providing housing for aboriginal people.[1218] Instead, the SHC had responsibility for the provision of state housing generally.[1219]

1017 Mr Maine's evidence, which I accept, was that the Child Welfare Department liaised with the SHC to try to ensure that aboriginal clients had suitable housing. However, Mr Maine's evidence indicates that the problems experienced by Don and Sylvia in obtaining SHC assistance were similar to those experienced by many aboriginal people at the time. His evidence was: many of the [aboriginal] clients had an unsatisfactory record with the housing commission for rental payment and property maintenance and things like that, so there continued for a long time to be a number of families in the main country towns who were accommodated, continued to be accommodated on the reserves where there was a fairly primitive form of housing. Those families remained there. Some of them were tried again in state housing accommodation, but there were a number who the State Housing Commission wasn't prepared to try with any more because of their past record ... .[1220]

1018 In 1969, Mr Terence Long, a Community Liaison Officer for the Department of Native Welfare, and previously been a Patrol Officer for the Southern District, published a paper entitled 'The Role of the Department of Native Welfare for Western Australia'.[1221] In his paper, Mr Long discussed housing for aboriginal people in Western Australia, and provided a useful summary of the position in the mid to late 1950s through to the late 1960s. He said: Housing, of course, remains one of the greatest single problems.

In the mid1950s the Government, through the State Housing Commission, inaugurated a scheme of specially designed housing for Aborigines in Western Australia. The house was a compromise design with a central kitchencumliving room, with verandah sleepouts surrounding this area. They were unlined, and cold and uncomfortable in winter. The families ***placed*** in these houses were those that were quite unready to make the move from corrugatediron and hessianbag shanties to life in an unfamiliar town environment. About 100 of these homes were built, but the people either failed to comply with the tenancy agreement, or were evicted because of neglect and damage to the property, overcrowded and antisocial behaviour, or nonpayment of rent. About 30 per cent of the tenants, however, remained. The houses were improved and are lived in today, so the scheme could be called a partial success. Following the lessons learnt from this somewhat abortive, though wellintentioned, attempt at aboriginal housing, a threestage transitional scheme was launched by the Department of Native Welfare in 1959.

Stage 1: This is called the primary transitional stage. It provides basic shelter in twoand threeroomed dwellings on camping reserves, with communal toilet and laundry facilities. Approximately 500 of these units have been built, and this stage has now been completed. ... The intention here was to eliminate the unsightly, unhygienic humpies in which so many Aborigines lived ten years or so ago.

Stage 2: This is termed the standard transitional stage because the designs comply in all respects with the Standard Building ByLaws. The houses are built on town lots and are selfcontained with their own toilet and laundry facilities ... . They are slightly smaller than a conventional home and are of a fairly robust construction. Nevertheless, they do have a pleasing appearance, and the main advantage to the Department is the fact that they are a little cheaper than conventional housing and can be built from the Revenue Vote. ... Today, 280 of these homes have been built or authorised, but growing opposition from local authorities to the presence in their towns of this type of housing is inhibiting this stage of the scheme.

The Department believes that construction will now taper away in favour of conventional housing, which is:

Stage 3: These are conventional homes, either obtained through the State Housing Commission or provided by this Department. It is estimated that some 130 families already occupy State homes, with an undetermined number

privately rented and owned. Another 35 live in Native Welfare Department builtandowned conventional homes, and a further 21 of these are authorized for 1968. It is in this field that the Commonwealth Government can render immediate effective assistance, should it decide to make funds available on a realistic scale ... .[1222]

1019 There was evidence that officers within the Child Welfare Department in the 1950s and 1960s were aware of the need for special measures to be taken to obtain housing for aboriginal people. Mr Maine's view was that an improvement in the wellbeing of aboriginal people depended on their being able to obtain suitable housing, and that life on native reserves was damaging for them.[1223] He explained that in response to the difficulties aboriginal people faced in obtaining SHC housing, the Child Welfare Department: sought funds from the Commonwealth government to provide housing ourselves, and we then worked with those families intensively over several years, involving them in the actual construction of the homes, the fitting out of the homes and the preparation of the grounds. That was done mainly through the use of homemaker services, some of who were aboriginal people themselves. Those families then were moved into what I think were about 30 homes scattered throughout the southwest, and the department then continued to work with them for 12 months and then, because we did not have a statutory obligation to provide housing, we negotiated with the housing commission to hand those homes over to the State Housing Commission. As far as I'm aware, those families continued with the good record that they had by the end of the 12 months during their tenancy with the housing commission.[1224]

1020 However, he made clear that this programme resulted from the injection of significant Commonwealth funding during the period of the Whitlam government in the early 1970s, which enabled the construction of the 30 transportable homes to which he referred in his evidence.[1225]

1021 The evidence clearly established in the 1950s and 1960s that there was a significant need for state housing assistance for aboriginal people and limited resources to meet that need.

(s) Maintenance orders made in relation to the care of the Children

1022 On 13 March 1958, the Children's Court at Beverley made an order that Don pay maintenance in the sum of 1 pound per week for Ellen.[1226] Initially the order required that Don pay the maintenance to the Director.[1227]However, as the Department of Native Welfare had responsibility for Ellen (and later the Siblings) until 1964, the Department of Native Welfare applied for the transfer of the maintenance order to it, and an order to that effect was made on 19 November 1958.[1228]

1023 When the Children's Court at Brookton ordered that the Siblings be made wards, Don was not present in Court, and an order for the payment of maintenance could not be obtained.[1229] Instead, a separate application for an order for the payment of maintenance was made by officers of the Department of Native Welfare.[1230] On 1 March 1962, that application was heard by the Magistrate at Brookton, and from 2 March 1962, Don was ordered to pay the Department of Native Welfare the total sum of 5 pounds per week for the maintenance of the Siblings.[1231]In other words, from 2 March 1962, Don was obliged to pay 6 pounds per week for maintenance for the Children. (After the introduction of decimal currency in 1966, that equated to an obligation to pay $12 per week in maintenance.)

1024 Although Don made maintenance payments, he did not always keep up to date and he quickly accumulated a large sum in arrears.[1232] There were in evidence a number of documents which indicated that Court action was taken to enforce the maintenance orders,[1233] and on a number of occasions, Don served time in custody in lieu of payment of outstanding maintenance.[1234]

(t) Injuries and causation

1025 It is appropriate to record my findings in relation to the injuries suffered by the plaintiffs and as to the causation of those injuries, so that if it were necessary to assess the equitable compensation payable to the plaintiffs, that could be done without the need for further evidence, or at least with minimal further evidence.

1026 I find that each of the plaintiffs suffers from a psychiatric injury, and that that injury was caused by the separation of the Children from Don and Sylvia (by virtue of the Children being ***placed*** in institutional or foster care, away from their parents). The psychiatric evidence in this case clearly established that that was so, and the State did not dispute it.[1235] In the case of Beverley and Glenys, the evidence established (and it was not disputed) that their psychiatric injuries were also caused by the sexual assaults to which they were subjected, and I make that finding.

1027 It is appropriate to briefly set out my findings in relation to the psychiatric injury suffered by each of the plaintiffs, by reference to the expert evidence. Each of the plaintiffs was examined by psychiatrists called by the plaintiffs and the State. Those experts then conferred and in the case of each plaintiff, a joint report was tendered, which set out the matters on which the expert witnesses agreed. My findings are drawn from those joint expert reports in relation to each plaintiff.

Don

1028 Having regard to the joint report prepared by Dr Tanney and Dr Smith, I find that Don is suffering from a mental disorder, with symptoms of unresolved feelings of shame and guilt, which meets most but not all of the criteria for a 'Disorder of Extreme Stress'.[1236] For the first six years after the Children lived in care, this disorder would have been likely to meet the criteria of PostTraumatic Stress Disorder.[1237] The disorder remains a substantial and sustained mental disorder.[1238] Having regard to the joint report of Dr Tanney and Dr Smith, I find that Don's mental disorder impairs his capacity to fully function and find enjoyment in his marital and parental roles, and makes him feel 'ineffective'.[1239] Having regard to the joint report prepared by Dr Tanney and Dr Smith, I find that while Don's injury can be treated, a return to full emotional health is unlikely.[1240] I accept their evidence that Don's symptoms should be treated by culturally appropriate counselling and support services, followed by family therapy.[1241]

Sylvia

1029 Having regard to the joint report prepared by Dr Davison and Dr Fitch, I find that Sylvia suffers from a Generalised Anxiety Disorder or mixed anxiety and depression.[1242] I accept the evidence of Dr Davison and Dr Fitch that Sylvia has suffered repeated adjustment disorders in the past, which have now developed into a chronic mental illness.[1243] I find that the effects of the mental illness from which Mrs Collard suffers include considerable distress, sadness, anxiety and hypervigilance.[1244]

1030 Having regard to the joint report prepared by Dr Davison and Dr Fitch, I find that Sylvia is likely to suffer symptoms for the foreseeable future and possibly for the rest of her life, and will be vulnerable to exacerbations of the symptoms in the event of suffering any future losses (such as a death of a family member).[1245] I accept the evidence of Dr Davison and Dr Fitch that Sylvia's symptoms would benefit from culturally appropriate counselling, either individually or with her family.[1246]

Darryl

1031 Having regard to the joint report prepared by Dr Tanney and Dr Smith I find that Darryl does not currently have a mental illness, but does suffer from psychological impairment which meets most of the criteria for a 'Disorder of Extreme Stress'.[1247] That impairment is clinically significant in that it is substantial and sustained,[1248] and it manifests in difficulties with trust and intimacy, that strongly impact upon Darryl's capacity to fulfil filial, family and parental roles.[1249] I accept the evidence of Dr Tanney and Dr Smith that Darryl will continue to suffer symptoms for the foreseeable future.[1250]

1032 Having regard to the evidence of Dr Tanney and Dr Smith, I accept that Darryl could benefit from individual supportive psychotherapy and family systems therapy.[1251]

Bonnie

1033 Having regard to the joint report prepared by Dr Fitch and Dr Davidson, I find that Bonnie suffers a psychiatric injury, namely Generalised Anxiety Disorder and Major Depressive Disorder[1252] which causes her considerable distress, reduces her enjoyment of life, and has had a negative impact on her relationships, including her relationships with her children.[1253]

1034 I accept the evidence of Dr Fitch and Dr Davidson that Bonnie is likely to suffer symptoms for the foreseeable future and that her symptoms may worsen in the event that she suffers any future losses (such as a death of a family member).[1254] I also accept their evidence that Bonnie would benefit from both antidepressant treatment and individual cognitive behaviour therapy with a psychologist,[1255] and that she may need indefinite access to treatment.[1256]

Beverley

1035 Having regard to the joint report prepared by Dr Smith and Dr Fitch I find that Beverley suffers from a Major Depressive Disorder which is recurrent and moderately severe,[1257] and which manifests in persistent and

significant symptoms of anxiety and distress. Dr Fitch characterised Beverley's disorder as a PostTraumatic Stress Disorder, whilst Dr Smith characterised her disorder as dysthymia.[1258] I accept their evidence that Beverley's disorder has had a profound effect on her enjoyment of life.[1259]

1036 Having regard to the evidence of Dr Smith and Dr Fitch I find that although Beverley's condition is not curable, she may benefit from antidepressant medication and cognitive behaviour therapy or dialectical behaviour therapy with a psychologist,[1260] and that she would need indefinite access to such treatment.[1261]

Ellen

1037 Having regard to the joint report prepared by Dr Smith and Dr Fitch, I find that Ellen is suffering from an 'emotionally unstable personality disorder',[1262] and that she has an affective (mood) disorder. Dr Fitch says this fits the diagnosis of Major Depressive Disorder, whilst Dr Davidson says it is best characterised as dysthymia.[1263]Having regard to the joint report prepared by Dr Smith and Dr Fitch, I find that Ellen's mental health disorders have a continuing significant and disabling effect upon her daily life.[1264] She has a poor sense of self, considerable emotional pain, social dislocation, isolation, and tends to endure unhealthy relationships rather than being alone.[1265]

1038 Dr Smith and Dr Fitch agreed that Ellen's disorders were not curable but were amenable to treatment.[1266] I accept their evidence that Ellen will require antidepressant medication indefinitely,[1267] and that she would benefit from culturally appropriate psychiatric treatment and psychological counselling[1268] which may be required for many years.[1269]

Glenys

1039 Having regard to the joint report prepared by Dr Davison and Dr Fitch, I find that Glenys is suffering from serious psychological damage, which has in turn affected her personality development.[1270] Dr Fitch described her condition as 'complex posttraumatic stress disorder' whilst Dr Davidson called it 'enduring personality change after catastrophic experience', but they agreed that they were describing the same set of symptoms.[1271] I also accept their evidence that Glenys suffers from an affective (mood) disorder. Dr Fitch characterised this as a major depressive disorder, whilst Dr Davidson said it best fitted the diagnosis of generalised anxiety disorder.[1272]Having regard to the joint report prepared by Dr Davison and Dr Fitch, I find that the sexual abuse Glenys endured has also contributed to the development of a chronic pain disorder,[1273] and that she depends on prescription drugs to help her manage the pain.[1274]

1040 Having regard to the joint report prepared by Dr Davison and Dr Fitch, I find that the accumulated effect of these psychiatric conditions upon Glenys' daily life is profound and disabling,[1275] affecting her ability to work, and to bond with her children. I accept their evidence that Glenys is likely to suffer symptoms for many years and will be vulnerable to exacerbations of those symptoms in the event of suffering any future losses (such as a death of a family member).[1276]

1041 Having regard to the joint report prepared by Dr Davison and Dr Fitch, I accept that Glenys' injuries would benefit from culturally appropriate psychological treatment. In the view of Dr Davison and Dr Fitch, Glenys may be assisted by the intervention of a third party to coordinate the many medical services she requires, and to liaise with medical staff in the future, so that she receives the treatment she requires.[1277] However, this aspect of treatment would need to be explored further before any assessment of its financial implications could be made.

Eva

1042 Having regard to the joint report prepared by Dr Fitch and Dr Davidson, I find that Eva has suffered from a Major Depressive Disorder (which is currently in remission), and that she suffers from Panic Disorder, and personality problems[1278] which Dr Fitch described as 'enduring personality change after catastrophic experiences' and Dr Davidson described as 'mixed personality disorder with features of anxious personality disorder and emotionally unstable personality disorder'.[1279]

1043 Having regard to the joint report prepared by Dr Fitch and Dr Davidson, I find that Eva's mental disorders have had a significant and considerable impact on her life over time[1280] and that she has had difficulties in trusting others and in dependence on others, ***no*** sense of identity, feelings of anger and not belonging, and difficulties in relation to parenting[1281] her own children as a consequence of not having fully attached to her parents prior to her separation from them.[1282]

1044 While I accept the evidence of Dr Fitch and Dr Davidson that at present Eva's disorders do not seriously impact upon her quality, and reasonable enjoyment, of life[1283] I also accept their evidence that Eva is likely to have symptoms in the foreseeable future, and that she will remain vulnerable to exacerbations of her depression during times of stress and loss. I also accept their evidence that Eva would benefit from psychological treatment in either an individual setting or with her family,[1284] and that such treatment may be required for many years.[1285]

Wesley

1045 Having regard to the joint report prepared by Dr Tanney and Dr Smith I find that Wesley suffers from a chronic, persistent and severe mental disorder,[1286] which Dr Smith characterised as 'emotionally unstable personality disorder',[1287] and which Dr Tanney characterised as Dysthymia.[1288] Both agreed that the disorder had an early onset and continued chronic presentation.

1046 I accept the evidence of Dr Tanney and Dr Smith that Wesley's mental disorder markedly impacts upon his life, as it results in difficulties in establishing and maintaining relationships, and difficulties with regulating his moods and controlling his impulses.[1289] His symptoms include low selfesteem, pessimism and chronic fatigue, which distort and damage all of his relationships with other people,[1290] including his relationships with his children which have been particularly affected.[1291]

1047 Having regard to the joint report prepared by Dr Tanney and Dr Smith I find that Wesley's mental disorder is unlikely to be cured, and his condition is likely to deteriorate.[1292] I accept their evidence that it is possible that Wesley may benefit from supportive counselling aimed at healing family bonds, but with the qualification that Wesley's motivation to participate, willingness to accept help, capacity to establish a therapeutic relationship, and alcohol and substance abuse, may be limiting factors in the success of any treatment.[1293]

(u) Actions taken by the plaintiffs in pursuit of their claims

1048 It is appropriate to record my findings in relation to the evidence adduced in support of the State's defence of laches. I do so despite my decision, explained below, to refrain from making a determination on the legal issues presented by the defence.

1049 A large number of documents were tendered by consent in relation to the laches defence. Those documents disclosed the actions taken by or on behalf of the plaintiffs from July 1993. I make the following factual findings, drawn from the content of those documents.

1050 In or shortly before July 1993, Don and Sylvia appear to have contacted the ALS seeking that the ALS investigate the circumstances in which Ellen was removed from them.[1294] In July 1993, draft statements were taken from Don and Sylvia and Ellen. Enquiries were then made to obtain access to all relevant documents in the possession of the Department for Community Development,[1295] and at least some of those appear to have been provided by November 1993.[1296]

1051 By late 1994 or early 1995, Glenys, Wesley, Beverley, Bonnie and Darryl had indicated that they also wanted an investigation of what had happened to them, and consented to relevant information being obtained about them.[1297]

1052 It was agreed between the parties that during 1994 and 1995, the ALS was provided with copies of a large number of documents by the Department for Community Development.[1298] It was also agreed between the parties that while those documents did not include every document which was tendered in evidence in these proceedings, nevertheless all of the significant documents necessary to understand what happened to the plaintiffs, including documents from the files of the Child Welfare Department and the Department of Native Welfare, were provided to the plaintiffs' solicitors in 1994 and 1995.[1299]

1053 Following the receipt of those documents, solicitors from the ALS then commenced an analysis of the statutory and factual history.[1300]

1054 In April 1995, the ALS published 'Telling our Story' which set out some details of the stories of aboriginal people who had been removed from their families in various circumstances. As I noted at [700] one of the families referred to in that document (albeit under pseudonym) appears to have been the Collard family.

1055 By June 1995, investigations into the facts were sufficiently far advanced (including the preparation of proofs of evidence from each of the plaintiffs[1301]) that the ALS was in a position to brief Ms Christine Wheeler QC to provide advice.[1302]

1056 I should mention at this point that solicitors from the ALS were also acting on behalf of other aboriginal people who had been removed from their families. They appear to have been considering the Collards' case along with a number of others as part of a project the ALS referred to as the 'Removal of Children' project.[1303] A later document suggests that the ALS was representing over 700 clients in relation to this project.[1304]

1057 On 21 December 1995 Ms Wheeler QC provided a comprehensive opinion in relation to the various causes of action that might be pursued by aboriginal people who, as children, had been removed from their families up until the 1960s, and by aboriginal people whose children were taken from their care. Relevantly for present purposes, her opinion addressed the bases for a possible action for a breach of fiduciary duty by the State, the application of the Crown Suits Act 1947 (WA), and the need for evidence of compensable damage which had been suffered by any plaintiffs.

1058 In May 1996, the ALS made a submission to the National Inquiry into the Separation of Aboriginal Children from their Families (the Stolen Generation Inquiry).[1305] For present purposes, that document is significant because it contained a discussion of the causes of action children removed from their families might be able to bring against the State, including an action for a breach of fiduciary duty. The submission also made recommendations that the State government introduce legislation to amend the Limitation Act 1935 and the Crown Suits Act to permit actions to be commenced by aboriginal people to provide legal redress for the injuries, pain and suffering caused to them by their removal. I infer that the solicitors in the ALS who were working on the Removal of Children Project were aware of the potential difficulties in bringing any action as a result of limitations periods, and the requirements of the Crown Suits Act.

1059 In 1996 and 1997, the solicitors from the ALS turned their attention to attempting to secure funding for a test case on the removal of children from their families.[1306] Applications for funding or financial assistance were made to a number of bodies,[1307] including the Aboriginal and Torres Strait Islander Commission,[1308] and to a number of prominent Australians and business people.[1309] Attempts were also made to establish a working group of prominent individuals from business, media, sporting and entertainment areas, to increase public awareness of the issue of the removal of aboriginal children from their families, and to act as a focus for fund raising to finance a number of test cases.[1310] It appears that attempts to secure funding were unsuccessful.

1060 By this time, Ms Wheeler QC had been appointed a judge of this Court, and the ALS then briefed Mr Nicholas Mullany, a barrister, to provide advice as to the suitability of a number of the ALS' clients to be included as plaintiffs in a test case in relation to their removal from their families as children.[1311] By January 1997, Glenys had given her consent to the use of her case as a test case in any such litigation.[1312]

1061 By March 1997, it appears that proceedings had been commenced for one client against the Minister for Community Welfare.[1313]

1062 At the same time, the ALS took steps to engage psychiatrists to provide expert evidence in relation to the psychiatric injury suffered by potential participants in a test case.[1314]

1063 On 18 June 1997, Mr Mullany provided advice in which he confirmed a list of suitable plaintiffs for inclusion in a test case. Those potential plaintiffs included Don and Sylvia, Glenys, Eva and Ellen. He also addressed some potential difficulties in relation to their claims.[1315] An internal ALS memorandum dated 18 June 1997 indicated that as a result of Mr Mullany's advice, 13 possible plaintiffs, and potentially four additional plaintiffs, had been identified, and that the legal officers within the ALS 'hope to file the action in the Supreme Court within the next three weeks'.[1316]

1064 On 1 July 1997, Mr Mullany was instructed to draft a statement of claim for that litigation.[1317] By 1 August 1997, he had further refined the list of plaintiffs for that intended action. He also provided advice that steps should be taken to obtain psychiatric evidence in respect of each of those persons. In addition, Mr Mullany noted that notice would be required to be given pursuant to the Crown Suits Act, and that this should be done once the Statement of Claim was finalised.[1318]

1065 By 25 August 1997, the absence of funding for a test case had resulted in a decision to defer filing a statement of claim 'until adequate funding has been obtained to finance the entire litigation'.[1319] Mr Mullany provided further advice at that time in which he enclosed a draft statement of claim (which was incomplete in relation to some factual matters) and which included Ellen, Glenys and Eva (amongst others) as plaintiffs,[1320]

and in which he emphasised that 'efforts to obtain adequate funding must be made immediately given the limitation of action difficulties which we already face'.[1321]

1066 In September 1997, Mr Mullany provided further advice in which he reiterated that 'funding must be obtained as a matter of urgency in the light of the limitation of action difficulties which we already face. Proceedings must be instituted as soon as possible. Success on the limitation of action arguments must not be compromised by avoidable delay in relation to decisions on funding'.[1322]

1067 The lack of funding for a test case meant that by December 1997, the ALS was ***no*** longer in a position to retain counsel to act.[1323]

1068 By January 1998, attempts were being made to obtain the assistance of Slater and Gordon to act pro bono in a test case[1324] and information was provided to that firm (including in relation to Glenys, Eva and Ellen) to enable it to assess the possible action.[1325]

1069 By May 1998, the ALS had received a modest grant from ATSIC to pursue work on the test cases.[1326] In view of that grant, Mr Ross Lonnie, a barrister, was engaged to undertake some work in relation to those matters, particularly in relation to the matter which had been commenced in the Supreme Court (which did not involve any of the plaintiffs).[1327] Amongst other things, Mr Lonnie was briefed to advise on the suitability of particular persons as plaintiffs in a test case (including the plaintiffs in this action), to advise on causes of action which were open, to advise on psychological evidence which was required, and to prepare a statement of claim.[1328]

1070 Mr Robert Pringle QC was also briefed to work on the matters. At that stage, Mr Pringle QC offered to work on the matter pro bono if the ALS ran out of funding.[1329]

1071 Mr Pringle QC and Mr Lonnie provided detailed advice and five draft statements of claim (including one in relation to Glenys) on 26 June 1998.[1330]

1072 In February 1999, Mr Lonnie wrote to the ALS and noted that he had not received any response to the advice and draft statements of claim which he and Mr Pringle QC had provided in June of the previous year.[1331]

1073 In May 1999, Mr Robert Richardson provided advice to the ALS in respect of a test case or cases, in light of the decision in Cubillo v Commonwealth of Australia.[1332]

1074 ***No*** further substantive work appears to have been done in relation to a possible test case involving the plaintiffs between then and December 2007.

1075 In evidence were letters from the ALS to Beverley, and to Glenys, dated 12 December 2007, in which they were advised that the ALS was not in a position to commence any litigation and we note that we do not represent to you that we will commence litigation on your behalf. If you are not satisfied with this position, then you may wish to seek independent legal advice from another law firm.[1333]

1076 By April 2008, Lavan Legal had agreed to review the ALS' client files to determine whether civil action was viable.[1334]

1077 In mid2008, the ALS assisted some of the plaintiffs to make an application to the Redress WA scheme,[1335]and those applications were submitted during the first half of 2009.[1336]

1078 I find that by the end of December 1995, the plaintiffs had knowledge of the facts sufficient to commence their action. I find that by August 1997, having received detailed advice from Ms Wheeler and from Mr Mullany, and a draft statement of claim from Mr Mullany, which dealt specifically with the claims of Glenys, Eva and Ellen, the plaintiffs were in a position to commence their action. The actual knowledge that the plaintiffs had as to their causes of action against the State was confirmed in June 1998 when further advice was provided by Mr Pringle QC and Mr Lonnie, including a draft statement of claim in relation to Glenys' claim.

1079 The present action was commenced on 26 May 2010.

1080 There was therefore a delay of over 14 years between the time when the plaintiffs had knowledge of the facts sufficient to commence their action, and when they actually commenced their action.

Facts relevant to the State's claim of prejudice

1081 The wardships commenced in 1958 and 1961, that is, between 55 and 52 years ago. The wardship of the eldest of the surviving Children, Darryl, concluded 43 years ago, in September 1970. The wardship of the youngest of the Children, Wesley, concluded 34 years ago, in March 1979.

1082 I find that the persons referred to in Annexure A, who are noted as being deceased, all died before the plaintiffs' action was commenced, save for Mr Long, who died after the action was commenced. Those persons included some persons with a significant involvement in the events the subject of this action, including Miss Jones, Mr Tilbrook, Mr Waghorne, Mr Wright-Webster, Constable Wall, Constable Brennan, Mrs Jean Collard, and Mr and Mrs Daniel.

1083 I find that the persons referred to in Annexure A, who are there noted as being unable to give evidence due to physical or mental infirmity, were unable to give evidence in these proceedings for that reason. Those two persons, namely Mrs Victoria Lewis (nee Hobcroft) and Mr Moulton, had a significant involvement in the events the subject of this action.

1084 A number of the persons who provided witness statements in these proceedings indicated in their witness statements that they had ***no*** independent recollection of the plaintiffs or of events relevant to the action. I accept that evidence. I infer that their inability to recollect those events has either been the result of, or was significantly attributable to, the lengthy period of time between the events in question, and the commencement of this action. Those persons included Mr Humphries and Constable Whitney, both of whom had a significant role in the events the subject of this action.

1085 Finally, in respect of the persons listed in Annexure A who are noted as unable to be located, having regard to the affidavits of Mr Pudovskis[1337] and Ms Young.[1338] I find that reasonable efforts have been made to locate those persons but that they have been unable to be found. Some of those persons, such as Mrs McIntyre, had a significant involvement in the events the subject of this action.

1086 Annexure A is not intended to be a complete list of all of those persons involved in these proceedings. Other persons not included in that list have either died, or are unable to be located despite the State's enquiries. However, it is unnecessary to list all of those persons for present purposes.

1087 Finally, I have already made findings in relation to the incomplete documentary record at [46] to [55] above. I infer that those documents which cannot be located have either been lost or destroyed, and that it is more likely than not that that incomplete documentary record has resulted from, or is significantly attributable to, the lengthy period of time between the events to which those documents pertained and the commencement of this action.

4. WAS THE STATE UNDER A FIDUCIARY DUTY TO THE CHILDREN DURING THEIR WARDSHIPS?

1088 The core of the plaintiffs' case is that the State owed them fiduciary duties. Two kinds of fiduciary duties were alleged against the State: duties owed to the plaintiffs while the Children were wards (the primary fiduciary duties) and secondary fiduciary duties which were said to continue to apply to the State. In this section of my reasons, I deal with the question whether a fiduciary relationship existed between the plaintiffs and the State, and then address the reasons why I am not persuaded that the State owed the primary fiduciary duties alleged by the plaintiffs. Later in my reasons I explain why the State also did not owe the secondary fiduciary duties alleged by the plaintiffs.

1089 The fiduciary duties the State is alleged to have owed the plaintiffs were said to have arisen by virtue of the existence of a relationship of guardian and ward between the State and the Children, or by virtue of the relationship which existed between the State and the aboriginal people of Western Australia following European settlement.

1090 Having carefully considered the legislative framework, the facts in relation to the Children's wardships, and the authorities, I have reached the conclusion that the plaintiffs' claims of the existence of fiduciary duties on the part of the State must fail, for four reasons. I explain those reasons in detail below, but in summary they are as follows.

1091 First, the application of the established principles in relation to the existence of fiduciary duties does not support the conclusion that the State owed or owes a fiduciary duty to all aboriginal people in Western Australia. The recognition of fiduciary duties by the executive government to indigenous peoples in other jurisdictions provides ***no*** support for finding a fiduciary duty in this case.

1092 Secondly, having regard to the statutory framework governing the Children's wardships, it cannot be said that the State itself occupied the position of a trustee or a guardian with respect to the Children during their wardships, nor can it be said that the maintenance payments Don made for the maintenance of the Children were impressed with a trust, requiring that money to be used in the care and maintenance of the Children.

1093 Thirdly, the authorities in relation to fiduciary duties do not support the conclusion that the role of the Director of the Child Welfare Department as the guardian of the Children during their wardships gave rise to any fiduciary duty to the plaintiffs.

1094 Fourthly, the nature and content of the duties the plaintiffs claim were owed to them by the State militates against the conclusion that those duties can properly be said to be fiduciary in nature, having regard to the existing state of the law in relation to fiduciary duties.

1095 Accordingly, in this section of my reasons, I deal with the following matters:

(a) the pleaded bases for the fiduciary duties the State is alleged to have owed to the plaintiffs;

(b) whether the State owed fiduciary duties to the plaintiffs arising from a fiduciary duty owed to all aboriginal people;

(c) whether the State occupied the position of a trustee or a guardian with respect to the Children;

(d) whether the role of the Director of the Child Welfare Department as guardian of the Children gave rise to a fiduciary duty to the Children on the part of the State; and

(e) whether the duties said to be owed to the plaintiffs are duties of the kind owed by a fiduciary.

(a) The pleaded bases for the fiduciary duties the State is alleged to have owed to the plaintiffs

1096 In the Amended Statement of Claim, the plaintiffs alleged that the State owed the Children duties as a trustee, or as a guardian, which gave rise to a fiduciary duty to safeguard the interests and welfare of the Children. Further, or in the alternative, the plaintiffs alleged that the State owed fiduciary duties to Don and Sylvia in their dealings with the Children, and owed fiduciary duties to the Children in exercising the powers of a guardian, not to fail to act in the best interests of the Children with respect to their custody, maintenance and education, and in particular not to disregard the best interests of the Children in the benefits of an upbringing within the family unit of their natural parents and siblings.

1097 The source of the fiduciary duties was pleaded, in the alternative, as arising from the existence of a relationship of trust and confidence, a relationship of guardian and child, or a fiduciary relationship more generally. In the course of his submissions counsel for the plaintiffs submitted that the plaintiffs' case against the State was based solely on the existence of a fiduciary relationship which in turn was founded on guardianship.[1339] However, the plaintiffs' case in relation to the fiduciary duty said to be owed to Don and Sylvia was based primarily on the existence of a fiduciary relationship between the State and aboriginal people since European settlement of the colony of Western Australia. The existence of a guardianship relationship between the State and the Children was relied upon as a secondary basis for the existence of a duty to Don and Sylvia.[1340]

1098 Although counsel for the plaintiffs did not seek to amend the Statement of Claim, nor did he formally abandon the alternative bases pleaded as giving rise to the fiduciary duty, the plaintiffs' case at trial was run on the more confined bases outlined by counsel for the plaintiffs. In these circumstances, it is not necessary to deal with the alternative bases relied upon by the plaintiffs as giving rise to a fiduciary duty.

1099 The fiduciary duty allegedly owed by the State to the plaintiffs was said to have two bases.[1341]

1100 First, the plaintiffs pleaded that upon the acquisition of British sovereignty in the Colony of Western Australia, the Crown assumed duties and powers in relation to the aboriginal inhabitants of Western Australia and that that gave rise to a fiduciary duty to the aboriginal inhabitants with respect to their welfare. The plaintiffs pleaded that the assumption of that fiduciary duty was manifested in the enactment of the Aborigines Protection Act 1886 (WA), the Aborigines Act 1897 (WA), the Aborigines Act 1905, the NW Acts, and the aboriginal Affairs Planning Authority Act 1972 (WA). Each of these Acts was said to have established boards, departments or offices charged with the duty of protecting or maintaining the aboriginal people, or promoting their welfare, and in the case of the NW Act, providing that the Commissioner on behalf of the State was the legal guardian of every aboriginal person and halfcaste.[1342]

1101 In the case of the Department of Native Welfare, the plaintiffs pleaded that it was the duty of the Department on behalf of the State to provide for the custody, maintenance and education of the children of aboriginal persons, and to exercise such general supervision and care in respect of all matters affecting the interests and welfare of aboriginal persons as the Minister considered fit, to assist their economic and social assimilation, and to protect them against injustice, imposition and fraud.[1343]

1102 The plaintiffs pleaded that by virtue of the provisions of the NW Act the State was the guardian at law of the Children at all relevant times, the Commissioner (on behalf of the State) was the statutory legal guardian of the Children at all times from their birth, and the application to have the Children committed to the care of the Child Welfare Department was made pursuant to the powers of the State, and of the Commissioner on behalf of the State, pursuant to that guardianship relationship with the Children.[1344]

1103 Secondly, the plaintiffs relied on the fact that the Children were committed to the care of the Child Welfare Department pursuant to the Child Welfare Act.[1345] The plaintiffs also relied on various provisions of the Child Welfare Act (namely those which vested the care, management and control of the person and property of wards in the Director, permitted neglected or destitute children to be detained and taken into care, permitted the Children's Court to make orders committing a child to the care of the Child Welfare Department, and gave the Child Welfare Department a general supervision over all wards detained in any institution) and the Community Welfare Act (which provided that the functions of the Department of Community Welfare were to coordinate and assist and encourage the provisions of social welfare services to the community).[1346]

1104 The plaintiffs pleaded that by virtue of all of these matters, the State owed fiduciary duties to Don and Sylvia in their dealings with the Children, and owed fiduciary duties to the Children in exercising the powers of a guardian, not to fail to act in the best interests of the Children with respect to their custody, maintenance and education, in particular by disregarding the best interests of the Children, in the benefits of an upbringing within the family unit of their natural parents and siblings.[1347]

1105 The State denied that it owed fiduciary duties to the plaintiffs.[1348] In so far as the factual bases for these fiduciary duties are concerned, the State denied that the Department of Native Welfare, or the Commissioner, acted on behalf of the State.[1349] Further, although the State admitted that the Commissioner was the guardian of each of the Children at all times from their birth until they were committed to the care of the CW Department, the State pleaded that any person could make an application to have a child declared neglected,[1350] and in Ellen's case, the application for her committal was made by an officer of the CW Department.[1351]

(i) Formulation of the fiduciary duties

1106 In the Amended Statement of Claim, the fiduciary duties said to arise from a relationship of trust and confidence, and from the guardianship relationship between the State and the Children, were described slightly differently a duty to safeguard the interests and welfare of the Children, or a duty to act in the best interests and for the proper custody, maintenance and education of the Children, or alternatively not to disregard their best interests. However, counsel for the plaintiffs submitted that there was not intended to be any difference in the content of the fiduciary duties pleaded on these alternative bases.[1352]

1107 Accordingly, I have proceeded on the basis that the primary fiduciary duties the plaintiffs claim were owed by the State were the duties described in par [105] of the Amended Statement of Claim, namely a duty 'not to fail to act in the best interests of the Children with respect to their custody, maintenance and education, in particular by disregarding the best interests of the Children, in the benefits of an upbringing within the family unit of their natural parents and siblings'.[1353] Paragraph [105] is set out in Annexure B to these reasons.

1108 Those primary fiduciary duties were elaborated upon in par [106] of the Amended Statement of Claim. That paragraph of the pleading is set out in Annexure D to these reasons.

1109 In par [107] of the Amended Statement of Claim, the plaintiffs then set out further fiduciary duties which were said to have been owed by the State as fiduciary. These duties were apparently intended to be understood as more specific instances of the primary fiduciary duties pleaded in more general terms in par [105] and [106] of the Amended Statement of Claim. Paragraph [107] of the Amended Statement of Claim is set out in Annexure D to these reasons.

1110 The State denied that it was subject to the duties pleaded as a fiduciary.[1354]

(b) The State did not owe fiduciary duties to the plaintiffs arising from a fiduciary relationship between the State and all aboriginal people

(i) The plaintiffs' submissions

1111 Counsel for the plaintiffs submitted that the State's fiduciary duties to aboriginal people in Western Australia derived from its assumption of duties in the nature of fiduciary duties to aboriginal people. He submitted that on settlement of the colony of Western Australia in 1829, the Crown's representatives assumed various duties and powers with respect to aboriginal people which gave rise to a fiduciary duty with respect to their welfare. He submitted that there was a 'gradually accumulating manifestation in legislative provisions' and in conduct and in proclamations which provided the underpinning for this broader assumption of a duty of protection.[1355] Counsel for the plaintiffs submitted that the statutory provisions and executive conduct and action to which he pointed did not create, but rather reflected, the existence of the fiduciary duty.

1112 In support of that submission, counsel for the plaintiffs pointed, first, to the proclamation of the First Lieutenant Governor, Captain James Stirling, on 18 June 1829, in which he said: Whereas the protection of the Law doth of right belong to all People who come to be within the territory aforesaid, I do hereby give notice that if any person shall be convicted of behaving in a fraudulent cruel or felonious manner to the aboriginal race of inhabitants of this Country, such person shall be prosecuted and tried for the offence as if the same had been committed against any other of His Majesty's Subjects.[1356]

1113 Counsel for the plaintiffs also pointed to the attitude to aboriginal people which he submitted was reflected in legislation concerning aboriginal people. He pointed to the debate on the Aboriginal Native Offenders Bill 1883(WA), in the course of which he submitted that the then Premier, John Forrest, said that aboriginal people were 'to a great extent like children', and that rather than increasing penalties under the Bill, it would be 'kinder' and 'more efficacious' to 'chastise them ... like one would whip a bad child'.[1357] Counsel for the plaintiff also submitted that Sir Paul Hasluck observed that the effect of the Aborigines Act Amendment Act 1936 (WA) (which amended the Aborigines Act 1905 (WA) and was to be read as one with that Act[1358]) was that it confined Western Australian aboriginal people within a 'legal status that has more in common with that of a born idiot than any other class of British subject'.[1359] The import of counsel's submission was that the enactment of this legislation reflected a recognition by the Parliament that aboriginal people were vulnerable and dependent on the intervention of the State, and that the State had assumed a duty to act on their behalf.

1114 Counsel for the plaintiffs also submitted that confirmation that the State had assumed duties in the nature of fiduciary duties to aboriginal people could be seen in the passage of legislation which imposed what he described as duties of a fiduciary nature on agencies of the State. He pointed to a number of examples of such legislation. First, counsel for the plaintiffs submitted that colonial legislation in relation to 'aboriginal natives' was first enacted in Western Australia in the 1840s, and related to restrictions on the presence of aboriginal people in towns and their access to alcohol, while colonial legislation in the 1870s provided for 'protection' in employment, and for special procedures for aboriginal accused persons in criminal cases.[1360] ***No*** specific references to the legislation in question were provided.

1115 Secondly, counsel for the plaintiffs pointed to the Aborigines Protection Act 1886 (WA) which, according to its long title, was 'An Act to provide for the better protection and management of the aboriginal Natives of Western Australia'. The duties of the Board included the distribution of moneys granted by the Legislative Council for the benefit of the Aborigines, the distribution of blankets, clothes and other relief to aboriginal people, and for the supply of medicines, medical attendance rations and shelter to sick, aged and infirm aboriginal people, to manage and regulate the use of reserves set aside for aboriginal people and 'to exercise a general supervision and care over all matters affecting the interests and welfare of the Aborigines and to protect them against illtreatment, imposition and fraud'.[1361]

1116 Thirdly, counsel for the plaintiffs pointed to s 70 of the Constitution Act 1889 (WA) which provided that five thousand pounds per year (and later 1% of the colony's gross revenue per year) was to be appropriated from the consolidated revenue fund for the welfare of the aboriginal people, and expended in providing them with food and clothing, in promoting the education of aboriginal children, and in assisting generally to promote the preservation and wellbeing of aboriginal people.

1117 Fourthly, counsel for the plaintiffs pointed to the Aborigines Act 1897 (WA) which provided for the repeal of s 70 of the Constitution Act 1889 (WA) and established an Aborigines Department with duties to distribute relief and medical care to needy aboriginal people, to manage aboriginal reserves, to provide for the education and maintenance of aboriginal children, to protect aboriginal people from injustice and fraud, and to exercise a general supervision over all matters affecting aboriginal people in the State.

1118 Fifthly, counsel for the plaintiffs pointed to the Aborigines Act 1905 (WA) which provided that it was the duty of the Aborigines Department to exercise a general supervision and care over all matters affecting the interests and welfare of Aborigines, and to protect them against injustice, imposition and fraud,[1362] and which provided for the making of regulations for the control, care and education of Aborigines in institutions.[1363] The provisions of this Act were described as being necessary 'to provide for the full measure of protection of the natives'.[1364]Counsel for the plaintiffs submitted that the Aborigines Act 1905 (WA) was a manifestation of an assumption by the State of a fiduciary duty of promoting the welfare of aborigines, because s 4 of the Act established a department, called the Aborigines Department, with a special duty (which he characterised as a fiduciary duty) to provide for the custody, maintenance and education of the children of aboriginal people.[1365]

1119 Counsel for the plaintiff submitted that the nature of the duty assumed by the State in enacting the Aborigines Act 1905 (WA) was a duty of guardianship in respect of the children of aboriginal people, which was not delegable but which could be carried out by the agents of the State.[1366] He submitted that the State had (pursuant to s 8 of that Act) assigned to the Chief Protector of Aborigines the duty of acting as the legal guardian of aboriginal children, and that duty was, under the NW Act, assigned to the Commissioner save in respect of aboriginal children who were made wards, in respect of whom the duty was assigned to the Director, in accordance with the provisions of the Child Welfare Act.

1120 Counsel for the plaintiffs submitted that the way the fiduciary duty arose in this case was as follows: There was always ... an inchoate responsibility in the State which might crystallise into trusteeship arising out of that legislative history ... and it's only when the State identifies a situation where it ought to come in and exercise the power of a guardian that the responsibility arises. So it always had that power to be the guardian of all aboriginal people in the sense that the statute appears to have given it that power. The actual choice of exercising it really crystallises the nature of that relationship.[1367]

1121 In summary, the plaintiffs' case was that since the colony of Western Australia was established, the State had assumed various duties and powers with respect to aboriginal people which were in the nature of fiduciary duties. The assumption of these duties was reflected in the attitudes and actions of the executive government which viewed aboriginal people as in need of protection, and was manifested in various statutes containing provisions directed to the protection and welfare of aboriginal people. The assumption of such duties and powers by the State was said to have given rise to a fiduciary relationship because the State was able to exercise powers capable of affecting the legal position of aboriginal people, and because aboriginal people were in a disadvantageous or vulnerable position with respect to the State.

1122 Counsel for the plaintiff submitted that in the United States, Canada and New Zealand, a fiduciary relationship akin to the relationship of guardian and ward has been held to exist between the government of those countries and the indigenous people of those countries. Counsel for the plaintiffs pointed to the decision in The Cherokee Nation v The State of Georgia[1368] as representing 'the genesis of the concept of the fiduciary relationship of government with indigenous peoples'.[1369]

1123 Counsel for the plaintiffs submitted that although the Courts in the United States, Canada and New Zealand do seem to have gone off in a somewhat different direction on fiduciary duty from the direction in which Australia is yet seeming to go ... certainly the genesis of the concept does come from those sources and we say at least in this limited fact situation, the general duties are applicable.[1370]

1124 He submitted that it was not necessary for the Court to come to a view about whether the full notion of the fiduciary relationship of government to indigenous peoples which has been accepted in the United States, Canada and New Zealand necessarily applies here in Australia, because all the Court needed to do was to conclude that when it comes to the issue of guardianship, given the statutory history in Western Australia relating to the assumption of responsibility by the state for aboriginal people and aboriginal children in particular, that at least the

notion of guardianship is one which is well based in the law, even though it may be a relatively narrow part of the notion of the broader fiduciary relationship.[1371]

(ii) Why the plaintiffs' submissions must be rejected

1125 Counsel for the plaintiffs made merely a fleeting reference to the position in the United States, Canada and New Zealand. There was ***no*** reference to any authority, save for The Cherokee Nation v The State of Georgia.[1372]He made ***no*** attempt to offer any explanation of how the courts in those jurisdictions had discerned the existence of a fiduciary relationship, or how the cases to which he alluded (but did not identify) otherwise provided support for the existence of a fiduciary relationship in this case. I have set out the totality of the oral and written submissions of counsel for the plaintiffs in relation to this aspect of the plaintiffs' case.

1126 In the end it was not entirely clear whether the fleeting references by counsel for the plaintiff to the position in the United States, Canada and New Zealand amounted to anything more than a submission the Court could take comfort in the fact that fiduciary relationships had been found to exist between the state, or executive government, of other nations and indigenous peoples.

1127 It is not the Court's role to attempt to guess what a party's case is, or to envisage the arguments which might have been advanced by that party's counsel had the argument been developed. From that perspective, one response to the submission by counsel for the plaintiffs, in so far as it relies upon developments in the United States, Canada and New Zealand, is to say that the submission is simply not made out. However, given the significance of this submission to the existence of the alleged fiduciary duty on the part of the State to Don and Sylvia, I have attempted to deal more substantively with it.

1128 I have therefore proceeded on the basis that the plaintiffs' case is, first, that in the United States, Canada and New Zealand it has been accepted that the state is in a fiduciary relationship with the indigenous peoples of those countries, and that that fiduciary relationship relies on a characterisation of the relationship between the state (or the executive government) and indigenous people, as analogous to that of guardian and ward. The next aspect of this part of the plaintiffs' case appears to be that the relationship between the State and aboriginal people in Western Australia since the colony of Western Australia was established has been of a similar kind, so that the decisions in the United States, Canada and New Zealand provide general support for the conclusion that in this case the State was in the position of a fiduciary in relation to aboriginal people in Western Australia, including the plaintiffs, and subject to fiduciary duties to them of the kind pleaded here.

1129 I have endeavoured to test this aspect of the plaintiffs' case by considering some of the leading cases identified by counsel for the State in their helpful outline of submissions, and as a result of my own research. Given the volume of case law, a comprehensive review of all of the authorities has not been practicable, nor, in the circumstances, necessary. I have confined my consideration to leading cases from the United States Supreme Court, from the Supreme Court of Canada, and to a leading New Zealand decision.

1130 I have reached the conclusion that this aspect of the plaintiffs' case cannot be accepted, for three reasons:

(A) the bases on which a fiduciary relationship has been found to exist in the United States, Canada and New Zealand do not exist, or are not directly applicable in the Australian context;

(B) in so far as the developments in the United States, Canada and New Zealand have been considered in the Australian courts, the principles applied in those jurisdictions have not been applied in Australia;

(C) the plaintiff has not established a basis for the existence of a fiduciary relationship between the State and aboriginal people generally, which could found the existence of fiduciary duties to aboriginal people.

(A) The bases on which a fiduciary relationship has been found to exist in the United States, Canada and New Zealand do not exist, or are not directly applicable in the Australian context

The case law in the United States

1131 It is something of an understatement to say that there have been numerous cases in the United States which deal with the nature of the relationship between the Indian people and the federal government, and the powers and obligations of the latter to the former. There have been a number of cases in which the relationship between the federal government and Indian people has been likened to that of a guardian and ward. But observations to that effect cannot be considered in isolation. When context is considered, it is apparent that to the extent that the

analogy of guardian and ward has been used, the relationship so described (that is, between the federal government and the Indian people) has not, of itself, been the foundation for the recognition or imposition of fiduciary obligations of the kind asserted in this case.

1132 By way of example, some of the early cases explored the basis on which the United States entered into treaty obligations with Indian tribes. From 1871, Congress began to exercise legislative power with respect to the Indian people. Prior to that time, however, the United States government primarily dealt with the Indian people through treaties. Those treaties were entered into on the basis that Indian tribes had sufficient 'sovereignty' to enter into treaties with the United States government. A number of cases explored the 'sovereignty' of the Indian tribes, and it is in that context that observations were made likening the relationship of the United States and Indian people as akin to that of guardian and ward. In The Cherokee Nation v The State of Georgia[1373], Marshall CJ observed that the people of the Cherokee Nation were in a state of pupillage. Their relation to the United States resembles that of a ward to his guardian.

They look to our government for protection; rely on its kindness and its power; appeal to it for relief to their wants; and address the president as their great father.[1374]

1133 However, the case concerned whether the Cherokee Nation were a 'foreign state' so that a dispute between the Cherokee and the United States fell within the original jurisdiction of the Supreme Court under the Constitution of the United States. In referring to the analogy to the relationship of guardian and ward, Marshall CJ was discussing how it was that the Indian people enjoyed limited sovereignty to enter into treaties with the United States, while nevertheless being under its sovereignty.[1375]

1134 Other cases have considered Congress' power to make laws with respect to the Indian people, despite the sovereignty of the Indian tribes recognised in earlier cases. In this context, reference was made to the vulnerable and dependent position of the Indian people for the purpose of explaining the basis for federal legislative power with respect to them.[1376]

1135 Further cases have dealt with the question whether the United States government is able to interfere with the property rights of the Indian people. It has been established that the United States cannot simply take land in which the Indian people have title, without the payment of just compensation.[1377] Observations in those cases that such a taking would not be an exercise of guardianship but of confiscation[1378] do not support the existence of the fiduciary duty said to exist in this case.

1136 In these cases the relationship between the United States and Indian peoples, was likened to the relationship of guardian and ward, in order to explain the source of, and some limits on, federal legislative and executive power with respect to the Indian people. However, although it appears that these cases have been viewed as recognising a relationship akin to a 'fiduciary' relationship between the United States and the Indian people, none of these cases actually involved the express recognition of a fiduciary duty of any kind (much less of the kind asserted in this case), or of a duty analogous to any of the fiduciary duties asserted in this case. Furthermore, even to the extent that these cases use the analogy of guardian and ward, the basis for that description of the relationship lies in the particular historical position of the Indian tribes in the United States, and cannot readily be translated to the Australian landscape.

1137 In United States v Mitchell,[1379] a 'fiduciary relationship' between the United States and the Quinault Indian people, in relation to the management of forests on a Quinault reserve, was expressly recognised and it was accepted that the breach of such a duty may be actionable in a claim against the United States for damages. However, although the relationship analogous to guardian and ward between the federal government and Indian peoples was relied upon to 'reinforce'[1380] the existence of this fiduciary relationship, it was not determinative of the existence of this relationship. That fiduciary relationship, and the duties it gave rise to, were held to be established and defined by extensive statutory provisions which prescribed comprehensive responsibilities of the federal government in managing the harvesting of Indian timber.[1381]

1138 In so far as decisions in the United States have referred to the relationship between the federal government and the Indian people as akin to the relationship between a guardian and ward, the different historical and legal position of the ***American*** Indian tribes means that those decisions cannot readily be translated into the Australian

legal context. Even in so far as a fiduciary relationship was held to exist in Mitchell, that relationship and the duties to which it gave rise were referable to the extensive statutory provisions which had been enacted. That particular factual context means that Mitchell does not provide direct support for the plaintiffs' case.

The Canadian cases

1139 A fiduciary duty has been held to exist between the Crown and the Indian people in Canada.

1140 In Guerin v The Queen[1382] the Canadian Supreme Court held that the Crown was subject to a fiduciary duty to deal with land, in which the Canadian Indians held aboriginal title, for their benefit. Dickson CJ (with whom Beetz, Chouinard and Lamer JJ agreed) held that this fiduciary duty had its roots in the concept of native or Indian title, but that interest in land did not give rise to the fiduciary duty. Instead, the fiduciary duty was referable to an assumption by the Crown of the role of an intermediary between Indian people and prospective purchasers and lessees of their land, so as to prevent them from being exploited.[1383] The Crown's assumption of that role could be traced to a Royal Proclamation in 1763, and had more recently been manifested in the Indian Act RSC 1985 (Indian Act) which prohibited the transfer of Indian land to a third party without its first being surrendered to the Crown, after which time the Crown, pursuant to s 18 of the Indian Act, acted on behalf of the Indian people to determine whether the proposed use of the land would be for their benefit.[1384]

1141 Wilson J (with whom Ritchie and McIntyre JJ agreed) held that while s 18(1) of the Indian Act did not of itself create a fiduciary obligation in the Crown with respect to Indian reserves, it recognised the existence of such an obligation.[1385] Her Honour held that s 18 reflected the historic reality that the Indian people had a beneficial interest in their reserves and the Crown had a responsibility to protect that interest and make sure that any purpose to which reserve land was put would not interfere with it. Accordingly, she held that while the Crown did not hold reserve land under s 18 of the Indian Act in trust for the Indian people, it held the land subject to a fiduciary obligation to protect and preserve the bands' interests from invasion or destruction.[1386]

1142 A broader fiduciary relationship was held to exist in R v Sparrow.[1387] That case considered the meaning and effect of s 35(1) of the Constitution Act 1982[1388] which provided that 'the existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognised and affirmed'. The case concerned whether a fisheries offence provision was invalid because it purported to limit an aboriginal right to fish for food, which was said to be a right recognised by s 35(1).

1143 The Court held that the decision in Guerin (amongst others) provided a general guiding principle for s 35(1) which was that the government has the responsibility to act in a fiduciary capacity with respect to aboriginal peoples. The relationship between the government and aboriginals is trustlike, rather than adversarial, and contemporary recognition and affirmation of aboriginal rights must be defined in light of this historic relationship.[1389]

1144 However, that relationship, manifested in the duty in s 35(1), had to be reconciled with the existence of federal legislative power with respect to the Indian people. The Court held that the best way to achieve that reconciliation was to demand the justification of any government regulation that infringed upon or denied aboriginal rights, as such scrutiny would be consistent with the concept of holding the Crown to a 'high standard of honourable dealing with respect to the aboriginal peoples of Canada as suggested by Guerin v The Queen.'[1390]This test of justification requires an assessment of whether the infringement 'is consistent with the special fiduciary relationship between the Crown and the aboriginal peoples'.[1391]

1145 The Canadian jurisprudence does not assist the plaintiffs to make out their case that the State owes a fiduciary duty to aboriginal people in Western Australia, and thus the plaintiffs, for at least two reasons. First, and most importantly, the existence of the fiduciary duty in Canada is referable to the Canadian historical and constitutional context and to the particular statutory provisions involved (namely s 18 of the Indian Act and s 35 of the Constitution Act), the content of which is not reflected in the statutory framework relied upon by the plaintiffs in this case.

1146 Secondly, the fiduciary duty has been found to exist in very different contexts to that in which it is asserted in this case. In Guerin the fiduciary duty was found to exist in relation to the Crown's use of property in which the Indian people had an interest. In Sparrow the fiduciary relationship was relied upon as the basis for limiting federal legislative power by virtue of the operation of s35 of the Constitution Act. In neither case did the recognition of the

fiduciary relationship, or fiduciary duty, result in the imposition of a fiduciary duty of a kind similar to the duty asserted in the present case.

The New Zealand position

1147 In New Zealand, the relationship between the Maori people and the Crown has been held to give rise to responsibilities which are 'analogous to fiduciary duties'.[1392] In New Zealand Maori Council v Attorney General,[1393] the New Zealand Court of Appeal considered the question whether the StateOwned Enterprises Act 1986 permitted the Crown to transfer land (which was subject to land claims brought by Maori tribes) to State enterprises established under the Act. (That transfer would mean that that land could not be returned to the Maoris if a recommendation was made to do so to resolve their land claim.) Section 9 of the StateOwned Enterprises Act 1986 provided that nothing in that Act permitted the Crown to act in a manner that was inconsistent with the principles of the Treaty of Waitangi. The Court granted a declaration that the transfer of assets, without any consideration of whether such transfer would be inconsistent with the provisions of the Treaty, would be unlawful.

1148 Cooke P held that the Treaty signified 'a partnership between races' and that 'the relationship between the Treaty partners creates responsibilities analogous to fiduciary duties. ... [T]he duty of the Crown is not merely passive but extends to the active protection of Maori people in the use of their lands and waters to the fullest extent practicable'.[1394] Accordingly he held that s 9 of the StateOwned Enterprises Act required that the Crown, as a partner acting towards the Maori partner, [should act] with the utmost good faith which is the characteristic obligation of partnership, to ensure that the powers in the StateOwned Enterprises Actare not used inconsistently with the principles of the Treaty.[1395]

1149 The other members of the Court each expressed similar views.[1396]

1150 For present purposes, it suffices to note that the relationship between the Crown and the Maori people which gave rise to duties analogous to fiduciary duties derived from the Treaty of Waitangi. Secondly, the nature of the relationship found to exist was analogous to a partnership. Thirdly, the State was subject to the duty because of the obligation on the Crown in s 9 of the StateOwned Enterprises Act. These legal and factual differences mean that the approach taken in New Zealand does not assist the plaintiffs to establish the fiduciary duties they assert in this case.

1151 In Fejo v Northern Territory Kirby J cautioned about the use of authorities from other jurisdictions because of the peculiarities which exist in each of them arising out of historical and constitutional developments, the organisation of the indigenous people concerned and applicable geographical and social considerations.[1397]

1152 The same observations are apt here. Further, quite apart from the factual and statutory features of those cases which distinguish them from the present case, the law in relation to fiduciary duties in Australia has developed differently from the law on fiduciary duties in the United States and Canada.[1398] Courts in those jurisdictions have adopted a more expansive approach to the when fiduciary duties will arise, and have been prepared to find fiduciary duties exist in contexts where such duties have not been found to exist in Australia such as in cases which do not involve economic interests.[1399] Accordingly, a degree of caution must be observed in relying upon Canadian and United States authorities concerning the expansion of per se fiduciary relationships or factual circumstances in other relationships that are said to combine to impose fiduciary obligations.[1400]

1153 The differences to which I have referred mean that the authorities from the United States, Canada and New Zealand do not assist the plaintiffs in this case.

(B) Consideration by the High Court of the United States and Canadian authorities

1154 The approach taken to the imposition of fiduciary duties by the State to indigenous peoples in the United States and Canada (in particular) has not attracted the support of a majority of the High Court.[1401] Such consideration as there has been of a fiduciary relationship between the Crown and indigenous peoples has mostly occurred within the native title context, in dealing with questions concerning interests in land.

1155 In Mabo v Queensland (***No*** 2) the plaintiffs sought a declaration that the State of Queensland was under a fiduciary duty to the Meriam people, including the plaintiffs, to recognise and protect their rights and interests in the Murray Islands. They argued that such a duty arose by reason of annexation, the relative positions of power of the Meriam people and the Crown in right of Queensland with respect to their interests in the Islands, and the course of dealings by the Crown with the Meriam people and the Islands since annexation.[1402] Toohey J found a fiduciary

relationship existed, Dawson J found that ***no*** such relationship existed, and the remaining members of the Court either did not deal with the issue at all or did not decide it.

1156 Toohey J held that if the Crown in right of Queensland had the power to alienate land the subject of the Meriam people's traditional rights and interests, and the result of that alienation was the loss of their traditional title, and if the Meriam people's power to deal with their title was restricted in so far as it was inalienable, except to the Crown, then the Crown's power and the corresponding vulnerability of the Meriam people gave rise to a fiduciary obligation on the part of the Crown. His Honour found that the fiduciary relationship arose 'out of the power of the Crown to extinguish traditional title by alienating the land or otherwise'.[1403]

1157 Dawson J also considered the question of fiduciary duties. However, his Honour concluded that because aboriginal title did not survive the annexation of the Murray Islands, there was ***no*** room for the application of any fiduciary or trust obligation, drawing on the approach in Guerin, or of a broader nature. That was because a fiduciary obligation of that kind was dependent upon the existence of an aboriginal interest existing in or over the land.[1404]

1158 Brennan J (with whom Mason CJ and McHugh J agreed) acknowledged the possibility that if native title were surrendered to the Crown in expectation of a grant of tenure to the indigenous title holders, the Crown may be subject to a fiduciary duty to exercise its discretionary power to grant a tenure to satisfy that expectation.[1405]However, his Honour concluded that it was unnecessary to consider the existence or extent of such a fiduciary duty in that case.

1159 Deane and Gaudron JJ did not discuss the fiduciary duty, although they noted that actual or threatened interference with the enjoyment of native title could in appropriate circumstances attract the protection of equitable remedies.[1406]

1160 In Wik Peoples v State of Queensland Brennan CJ rejected a claim that a fiduciary duty could be owed by the Crown to the holders of native title in the exercise of a statutory power to alienate land, whereby their native title in or over that land was liable to be extinguished without their consent and contrary to their interests.[1407] In that case the fiduciary duty was said to arise by virtue of the vulnerability of native title, the Crown's power to extinguish it, and the position occupied for many years by the indigenous inhabitants vis a vis the Government of the State. Brennan CJ held that these factors did not, by themselves, create a freestanding fiduciary duty. He noted that the exercise of statutory powers (in that case, to alienate land) 'characteristically affects the rights or interests of individuals for better or worse' and in that case, it was 'impossible to suppose that the repository of the power shall so act that the beneficiary might expect that the power will be exercised in his or her interests', because 'the imposition on the repository of a fiduciary duty to individuals who will be adversely affected by the exercise of the power would preclude its exercise'.[1408]

1161 For completeness, I note that broader claims to the existence of a fiduciary duty owed by the executive government (of either the Commonwealth or a State) to aboriginal parties, drawing on the jurisprudence in other jurisdictions, have been struck out.[1409]

1162 Accordingly, the case law from the United States, Canada and New Zealand, to which I have referred, does not assist to support the conclusion that the State is subject to a fiduciary duty or duties, of the kind asserted in the present case, to aboriginal people in Western Australia, including the plaintiffs.

(iii) The plaintiff has not established a basis for a fiduciary duty by the State to aboriginal people generally

1163 In Australia, fiduciary duties are identified as a result of a twostage test. The first is to identify whether the nature of the relationship between two parties is one characterised by a duty, and corresponding expectation, of loyalty from one party (the fiduciary) towards the other (the beneficiary). Once a relationship of that kind is identified, the second stage of the enquiry is to ascertain which duties – of all of those duties which may be owed by the fiduciary to the beneficiary as incidents of their relationship – are integral to preserving the loyalty on which the relationship is based. Those duties are fiduciary duties. The breach of those duties will be amenable to equitable remedies.

1164 In Australia, fiduciary obligations have been held to exist in the context of certain relationships, including as between partners, principal and agent, director and company, employer and employee, solicitor and client, and guardian and ward (to which I will return in a moment).[1410] The relationship between a state and its indigenous

people is not one of those well recognised categories of relationship in which fiduciary obligations have been held to exist. However, the categories of relationships within which fiduciary obligations will be held to exist are not closed.[1411]

Indicia of a fiduciary relationship: Australian position

1165 Outside these wellestablished categories of relationship determining whether fiduciary obligations arise will depend on the application of the principles identified in the case law as indicative of the existence of a fiduciary relationship. The law on fiduciary duties in Australia is not yet settled so that there is ***no*** precise or comprehensive set of circumstances or criteria by reference to which fiduciary obligations will be imposed.[1412]

1166 The circumstances which may point towards a fiduciary relationship include: the existence of a relationship of confidence, inequality of bargaining power, the scope for one party to unilaterally exercise a discretion or power which may affect the rights or interests of another, and a dependence or vulnerability on the part of one party that causes that party to rely on another.[1413] None of these circumstances or criteria is individually determinative of the existence of a fiduciary duty.[1414]

1167 However, a critical feature which must be present is that the fiduciary undertakes or agrees to act for or on behalf of another person, in the interests of that other person, in the exercise of a power or discretion which will affect the interests of that other person in a legal or practical sense, and to the exclusion of the fiduciary's own interest.[1415] Professor Finn (as he then was) described the circumstances of the relationship between the parties as being such that one is entitled to expect that the other will act in his interests in and for the purposes of the relationship. The fiduciary's role in this relationship 'must so implicate that party in the other's affairs or so align him with the protection or advance of that other's interests that foundation exists for the 'fiduciary expectation'.'[1416]

1168 This was confirmed in the decision of the Full Federal Court in Grimaldi v Chameleon Mining NL (***No*** 2).[1417]

1169 As Beech J pointed out in Red Hill Iron Ltd v API Management Pty Ltd[1418] the indicia of a fiduciary relationship which have been identified in the cases focus both on the alleged fiduciary and on the position of the alleged beneficiary. In the former case the question is: Whether the alleged fiduciary has, in an objective sense, agreed or undertaken to act in the interests of another in the exercise of a power. The question identified in News Ltd v Australian Rugby Football League Ltd focuses on the position of the other party. It asks whether that party is entitled, in an objective sense, to expect that the other will act in his or her interest in and for the purposes of the relationship. Such an entitlement will arise from an understanding.

The facts relied upon by the plaintiffs do not establish a fiduciary relationship between the State and aboriginal people in Western Australia

1170 The submission that the State itself as opposed to a particular office holder or agency within the State is in a fiduciary relationship with all aboriginal people in the State, and apparently in a general sense (instead of within any particular context) is a novel one. However, given that the categories of fiduciary relationship are not closed, and given that a fiduciary relationship between the Crown and indigenous people has been held to exist in some circumstances in other jurisdictions, the possibility of such a relationship cannot be excluded.

1171 The matters on which the plaintiffs relied did not support the conclusion that the State undertook, or agreed, to act for or on behalf of aboriginal people in Western Australia, and in their interests, in the exercise of a particular power or discretion which would affect their interests in a legal or practical sense, and to the exclusion of the State's other interests, so as to support the conclusion that give rise to a fiduciary relationship exists between the State and aboriginal people. I have reached that conclusion for five reasons.

1172 First, I do not accept that the colonial legislative provisions to which counsel for the plaintiff referred, amount to evidence of an undertaking or agreement by the colonial government, and subsequently the State, to act on behalf of the aboriginal people, in their interests, in the exercise of particular powers or discretions. Although counsel for the plaintiffs referred to colonial legislation in relation to 'Aboriginal natives' in the 1840s and 1870s, he did not identify the legislation, or specific provisions within it. I do not give any weight to this vague and general submission.

1173 Secondly, I do not accept that the matters which the plaintiffs submitted constituted evidence of attitudes of the executive government to aboriginal people at the time of settlement and throughout the 1800s support the

conclusion that the State undertook the responsibility for acting on behalf of aboriginal people, and in their interests, in the exercise of particular powers or discretions, and to the exclusion of the State's other interests. Even if members of the colonial government considered that aboriginal people did not have the same legal capacity or legal status as members of the white population or required special protection, that is not sufficient to establish that the State undertook to act on behalf of aboriginal people, and in their interests, to the exclusion of the State's own interests.

1174 Thirdly, in so far as the plaintiffs relied upon the enactment of particular legislation which made provision for the welfare of aboriginal people, the terms of the legislation do not support the conclusion that the State undertook to act on behalf of the aboriginal people, in their interests, to the exclusion of its own interests. The creation of Boards or Departments with responsibility to distribute welfare to the aboriginal people, and to exercise supervision and care over matters affecting their interests is not, in my view, sufficient to establish that the State had assumed a responsibility of that kind. Nor did the allocation of funds from consolidated revenue for expenditure on the welfare of the aboriginal people evidence the assumption by the State of such a responsibility.

1175 The enactment of the legislation to which counsel for the plaintiffs referred certainly reflected a recognition by the Parliament that aboriginal people were in need of welfare, and that they may be vulnerable to exploitation. However, the steps taken by government to provide for the welfare and protection of aboriginal people whether through the allocation of funds from consolidated revenue, or by the provision of services offered by government departments or boards are of the same nature as steps which are commonly undertaken by governments to provide for disadvantaged members of their communities and do not support the conclusion that the State assumed an obligation to act in the interests of aboriginal people to the exclusion of its own interests.

1176 One of the features of the legislation to which the plaintiffs referred was that various officers were said to be the legal guardian of aboriginal children in Western Australia. Like the numerous other restrictions on the rights of aboriginal people as to where they lived, and who they might reside with, or marry – the underlying assumption of those provisions was that aboriginal people did not have the same legal capacity to make decisions about their own wellbeing. But that does not support the conclusion that the State undertook to act on behalf of all aboriginal people, and in their best interests, to the exclusion of the State's interests.

1177 Fourthly, the plaintiffs' contention that the State was under a general fiduciary duty to act in the best interests of aboriginal people failed to grapple with the implications of the assumption of such a general and undefined duty by a State in a pluralist society where different vulnerable groups need access to the same pool of resources financial and otherwise which the State may be able to make available. Equity requires that a fiduciary should not put himself or herself in a position where selfinterest and duty conflict or, if a conflict is unavoidable, the fiduciary should resolve that conflict in favour of his or her duty.[1419] The position of an executive government, however, is quintessentially concerned with balancing competing interests. Within that context, a conflict between various interests which the State may seek to protect is inevitable. Furthermore, the plaintiffs' contention failed to grapple with the additional potential problem that a fiduciary duty on the part of the State to act in the best interests of aboriginal people generally may result in a conflict between the State's duty to one aboriginal person and its duty to another aboriginal person. I have dealt with this issue further at [1478] below.

1178 Fifthly, a submission almost identical to the plaintiffs' submission in this case appears to have been advanced (by the same counsel), and rejected by the Court, in Bodney v Westralia Corporation Pty Ltd,[1420] for reasons which are, in my view, plainly correct. That decision also supports the conclusion that the plaintiffs' submission must fail.

1179 Sixthly, in so far as the Children are concerned, I am not persuaded that equity would intervene to impose fiduciary duties on the State in relation to the Children, on the basis of the existence of a fiduciary relationship between the State and all aboriginal people. Ordinarily equity will not intervene to impose fiduciary obligations if the law adequately protects the interests to which the fiduciary obligations would apply. In the present case, under the NW Act, the Commissioner was the legal guardian of the Children. Once they became wards pursuant to the Child Welfare Act, the care, management and control of the Children was vested in the Director, who was the guardian of the Children. In each case, the legislation gave the Commissioner and the Director respectively, powers and discretions to deal with the care of the Children. The fiduciary duties said to have been owed by the State to aboriginal people in the present case would overlap to a very considerable extent with the statutory powers and

duties of those officers under the legislation. In those circumstances, I am not persuaded that equity would intervene to impose fiduciary duties in addition to the statutory duties to which those officers were already subject.

Conclusion in relation to the existence of a fiduciary relationship between the State and aboriginal people generally

1180 The plaintiffs have not made out their case for the existence of a fiduciary relationship between the State and all aboriginal people in Western Australia, so as to found the existence of a fiduciary duty on the part of the State to act in the best interests of aboriginal people, and thus of the plaintiffs. In so far as the plaintiff's case with respect to Don and Sylvia rests on the existence of this fiduciary relationship, that part of the plaintiffs' case must fail.

(c) Whether the State occupied the position of a guardian with respect to the Children

1181 I turn, then, to the alternative basis for the fiduciary duty or duties which the plaintiffs claim the State owes to them, namely the existence of a fiduciary relationship between the State and the plaintiffs by virtue of the Children's wardships. The plaintiffs' case is that the State itself owed fiduciary duties to the Children. This is not a case where, for example, it is alleged that the State knowingly participated in a breach by the Director of the Director's fiduciary duty.[1421] Instead, the fiduciary duties were said to be owed directly by the State itself to the Children.

1182 In so far as a fiduciary relationship is said to have existed between the State on the one hand, and Don and Sylvia on the other hand, by virtue of the Children's wardships, this was said to be a secondary consequence of the State's fiduciary relationship with the Children.

1183 The relationship of guardian and ward falls within the established categories of fiduciary relationships.[1422]The fact that a guardianship relationship arises by virtue of statute poses ***no*** obstacle to that conclusion.[1423] If the State was the guardian for each of the Children under the Child Welfare Act, that would support the plaintiffs' case that the State was in a fiduciary relationship with the Children. However, the plaintiffs' contention that the State was in a fiduciary relationship with them, by virtue of the Children's wardships, must fail because the State itself was not the guardian of the Children under the Child Welfare Act.

1184 As I have already noted, when Ellen was made a ward, and later when the Siblings made wards, the Child Welfare Act provided that the Director had the 'care, management and control of the persons and property of all wards'.[1424] Whether or not the Director's responsibilities, power and authority encompassed all of the responsibilities, power and authority of a guardian need not be determined. It suffices to say that the Director's power was sufficiently analogous to that of a guardian as to ***place*** the Director in the same position as a guardian with respect to each of the children.[1425] In any event, by 1962 the Child Welfare Act had been amended to make clear that the Director was the guardian of all wards.

1185 That conclusion also derives support from the fact that the NW Act was amended in 1954 to provide that the Commissioner for Native Welfare was the guardian of an aboriginal child, except when that child became a ward under the Child Welfare Act. Clearly the Parliament contemplated that the role of guardian would, upon an aboriginal child being made a ward under the Child Welfare Act, fall to the Director under that Act.

1186 The plaintiffs' case is that the State was the guardian of the Children, and that the Director simply acted as the State's agent in carrying out the role of guardian. I am unable to accept that argument.

1187 The Child Welfare Act gave responsibility to the Director, personally, for making decisions concerning the care, management and control of the persons and property wards, although clearly it would have been open to the Director to perform that duty through other officers within the Department.[1426] The Director was not simply an employee of the State working in the Child Welfare Department and carrying out the administrative functions of the Department. Furthermore, it is not difficult to envisage the rationale for making one officer the guardian of all wards. The office of Director was a specific office established under the Child Welfare Act, and appointed by the Governor. The impact of decisions made by a guardian on the lives of the wards concerned warranted the allocation of responsibility to a particular officer charged with that responsibility.

1188 Had it been the Parliament's intention that the State itself be the guardian of all wards, there would have been ***no*** need to vest the powers of care, management and control of wards in a particular office. Rather, any employee of the State within the Child Welfare Department could have carried out such tasks as were necessary to perform the role of a guardian in relation to a ward as and when the need arose.

1189 There are two possible counterarguments to the conclusion I have reached. The first is that under the Child Welfare Act, the Director was subject to the direction of the Minister in dealing with the care, management and control of wards. That might be thought to indicate that the State (through the Minister) retained ultimate control over wards, and thus that the State occupied the role of guardian, which it exercised through the Director. Had that been the intention, however, it is difficult to see why it was necessary for the Parliament to expressly give power to the Director personally. The better explanation may be that historically the Minister had particular powers under the Child Welfare Act in relation to certain matters affecting wards. Making clear that the Director was subject to the Minister's direction removed any doubt about the Director's obligation to act in accordance with those directions.

1190 The second counter argument is that under the Child Welfare Act, the Child Welfare Department retained a general supervision over all wards detained in an institution or ***placed*** out. That might be viewed as consistent with the role of the State as guardian. However, such a power would not seem to have been necessary if the State had been the guardian of all wards, because the State (acting through its officers and agents) would necessarily have been responsible for supervising wards. However, because the Director personally stood in the position of the guardian of all wards, then in order to ensure that employees in the Child Welfare Department (in addition to the Director) had authority to exercise a supervisory role in relation to wards in institutions, or who were ***placed*** out, it was necessary for the Child Welfare Act to make that clear.

1191 The fact that the Director occupied the position of guardian of the Children under the Child Welfare Act from 1962, and stood in a position at least analogous thereto from the date when each of the Children was made a ward, means that the Director (and not the State) was in a fiduciary relationship with the Children once they were made wards.

(d) Whether the Children's wardships gave rise to a fiduciary relationship between the State and Don and Sylvia

1192 As I have noted, the plaintiffs' case was that the State stood in a fiduciary relationship to Don and Sylvia and this was said to be a secondary consequence of the State's fiduciary relationship with the Children. This argument also fails because the State was not in a fiduciary relationship with the Children.

1193 However, quite apart from that difficulty, counsel for the plaintiffs did not point to any authority for the novel proposition that a fiduciary relationship between two parties may arise solely as a consequence of the fiduciary relationship that the fiduciary has with another party.

1194 Furthermore, applying the ordinary principles concerning fiduciary relationships, as outlined above, I am unable to see how it could be said that either the State, or the Director, stood in the position of a fiduciary with respect to Don and Sylvia, by virtue of the fact that their children were made wards. I do not see any basis for concluding that upon becoming the guardian of a child pursuant to the Child Welfare Act, the Director undertook to act on behalf of the parents of that child, and in their interests, in the exercise of the Director's powers or discretions as a guardian of the child. The Director had ***no*** powers or discretions with respect to the parents of a child who was a ward. The decision to make a child a ward was vested in the Children's Court under the Child Welfare Act. The Director's powers under the Child Welfare Act pertained solely to the care, management and control of a child, and not to other persons.

1195 Furthermore, if the Director stood in a fiduciary relationship not only to a child who was a ward, but to that child's parents, it seems likely that there would arise a conflict between the Director's fiduciary obligations. The best interests of a child who is a ward may not coincide with the best interests of that child's parents. In my view, equity would not intervene to recognise a fiduciary relationship between a guardian, and the parents of a ward, in those circumstances.

(e) Whether the primary fiduciary duties said to be owed to the plaintiffs are fiduciary duties

1196 Even if I am wrong in concluding that there was ***no*** fiduciary relationship between the State and the plaintiffs, in my view, the plaintiffs' claim in relation to the primary fiduciary duties must fail for five additional reasons:

(i) fiduciary relationships usually serve to protect economic interests, but ***no*** economic interests are involved in this case;

(ii) the primary fiduciary duties the plaintiffs claim were owed by the State are not in the nature of fiduciary duties customarily imposed by equity;

(iii) similar claims based on the existence of fiduciary duties within a guardianship context have been dismissed in other cases; and

(iv) the plaintiffs' interests were adequately protected by existing legal remedies, and there is ***no*** need for equity to intervene to provide additional remedies;

(v) recognition of a fiduciary duty owed by the State to Don and Sylvia would be very likely to give rise to a conflict between that duty, and the fiduciary duties said to be owed to each of the Children.

I will consider the position with respect to the secondary fiduciary duties below.

(i) Fiduciary relationships usually serve to protect economic interests, but ***no*** economic interests are involved in this case

1197 In Australia, fiduciary obligations have traditionally been imposed to protect economic and proprietary interests.[1427] The usual fiduciary duties which will be imposed are concerned with preserving those interests, namely by ensuring a fiduciary does not make an unauthorised profit or take an unauthorised commercial advantage vis a vis a beneficiary.[1428]

1198 In this case, the primary fiduciary duties the plaintiffs claim were owed by the State were not directed to protecting the economic interests of the plaintiffs. The fact that economic interests are not involved suggests that the duties claimed by the plaintiffs should not be characterised as fiduciary duties.

1199 Counsel for the plaintiffs acknowledged this difficulty. However, he submitted that if an economic right or interest is required to found the imposition of a fiduciary obligation, then that right existed in the plaintiffs' 'chose in action giving rise to the right to take legal action'.[1429] In other words, the plaintiffs' economic right or interests lay in their entitlement to bring legal action against the State for its breach of fiduciary duty or its failure to provide them with legal advice about its possible breach of that duty. I do not accept that argument. It was circular. The alleged duty to obtain legal advice or representation for the plaintiffs (which I consider below) was said to be a continuing duty on the State, which arose out of (and necessarily was dependent upon the existence of) the primary fiduciary duties which the plaintiffs contended were owed by the State.

(ii) The primary fiduciary duties the plaintiffs claim were owed by the State are not in the nature of the fiduciary duties ordinarily imposed by equity

1200 The existence of a fiduciary relationship does not mean that a fiduciary duty will attach to every aspect of the fiduciary's conduct.[1430] Accordingly, even if I am wrong in my conclusion that ***no*** fiduciary relationship existed or exists between the State and the plaintiffs, the plaintiffs' claims in relation to the primary fiduciary duties should fail. Those alleged duties should not be characterised as fiduciary duties, for three reasons:

(A) The primary duty of a fiduciary is loyalty, and the alleged fiduciary duties do not serve to ensure the loyalty of the State, as a fiduciary, to the plaintiffs as beneficiaries;

(B) Ordinarily, equity will impose proscriptive and not prescriptive duties on a fiduciary, whereas the alleged fiduciary duties in this case are prescriptive in nature;

(C) A duty to exercise care and skill in carrying out a fiduciary's powers is not a fiduciary duty.

(A) The duties alleged do not facilitate loyalty of the State as a fiduciary

1201 The fiduciary obligations owed by a fiduciary will depend upon all of the circumstances of the case, and the duty will be moulded according to the nature of the relationship and the facts of the case. Accordingly, the obligations or duties owed by a fiduciary will vary with the nature, and foundation for, the relationship from which the fiduciary obligations are derived.[1431] By way of example, although a fiduciary relationship may coexist with other relationships, such as a contractual relationship, in the latter case the fiduciary relationship must accommodate itself to the terms of the contract so that it is consistent with, and conforms to, them.[1432] In some cases, a contractual term may be so precise in its regulation of what a party may do that there is ***no*** scope for the creation of a fiduciary duty.[1433] Similarly, if a fiduciary relationship is founded on a relationship established by statute, the

obligations of a fiduciary must accommodate themselves to the terms of the statute.[1434] A fiduciary obligation could not modify the operation or effect of statute. (A contrary conclusion would give equity supremacy over the sovereignty of the Parliament.[1435])

1202 Generally speaking, however, the key obligation that equity demands of a fiduciary is loyalty.[1436] That requirement for loyalty, applied in circumstances where the economic interests of a beneficiary require protection, will ordinarily manifest itself in two fiduciary duties: a duty not to obtain an unauthorised benefit from the relationship, and a duty not to be in a position of conflict between the fiduciary's duty (namely the functions or responsibilities the fiduciary has undertaken to perform for or on behalf of the beneficiary)[1437] and the fiduciary's personal interest.[1438] These fiduciary duties are thus concerned to maintain the fiduciary's loyalty, by avoiding the misuse of the fiduciary position, and by avoiding conflicts of duty and interest, or conflicts of duty and duty, which arise by virtue of the fiduciary's position.[1439]

1203 The primary fiduciary duties which the plaintiffs claim were owed to them by the State were, with one exception, entirely different from duties of this kind they were not concerned with obtaining an unauthorised benefit, and they were not concerned with a conflict between the State's interests and the interests of the plaintiffs. There is scope for argument about the extent to which the primary fiduciary duties alleged could be said to facilitate the loyalty demanded of a fiduciary, so that the duties might properly be described as fiduciary duties, particularly when the Director's guardianship of the Children was regulated by the Child Welfare Act 1945.

1204 The one exception is the alleged duty of the State (in par [107.9] of the Amended Statement of Claim) not to put itself into a position of conflict between its interest in housing the Children in a facility or home readily available to the State, and the Children's interest in being provided with a home environment within the family unit of their natural family or within the aboriginal community (or its duty to act in the Children's best interests by providing them with a home environment of that kind).[1440] However, even in respect of this alleged duty, other factors militate against the conclusion that the asserted duty constitutes a fiduciary duty.

(B) The alleged duties are, with one exception, prescriptive rather than proscriptive in nature

1205 The present state of the law in Australia is that prescriptive fiduciary duties will not ordinarily be imposed on a fiduciary, particularly a fiduciary duty to act in the interests of the beneficiary.[1441] As Gummow J observed in Breen v Williams.[1442] it would be to stand established principle on its head to reason that because equity considers the defendant to be a fiduciary, therefore the defendant has a legal obligation to act in the interests of the plaintiff so that failure to fulfil that positive obligation represents a breach of fiduciary duty'.

1206 The proscriptive / prescriptive dichotomy has been observed in many cases, including State of South Australia v LampardTrevorrow.[1443]

1207 Counsel for the plaintiffs submitted that there have been occasions on which duties expressed in positive terms have been characterised as fiduciary duties. He relied on Farah Constructions v SayDee Pty Ltd,[1444] in support of this proposition. In that case, the High Court held that Farah had a duty to disclose to SayDee information (which Farah had acquired in its capacity as a fiduciary) about the attitude of a Council to a proposed land development. However, as the Court made clear the duty on Farah to make that disclosure was the practical manifestation of its fiduciary duty to avoid a conflict between its own selfinterest and its duty to SayDee.[1445]There was ***no*** discussion of the proscriptive / prescriptive dichotomy.

1208 Counsel for the plaintiffs also referred to Kennon v Spry in which Gummow and Hayne JJ[1446] (with whom French CJ agreed[1447]) referred to a 'fiduciary duty' on the part of a trustee to consider whether and in what way the trustee should exercise the power conferred under a trust document. However, the reference to that duty as a 'fiduciary duty' was a passing one, and was not accompanied by any discussion which expressly suggested any departure from the proscriptive / prescriptive dichotomy.

1209 More recently, the decision in Westpac Banking Corporation v Bell Group Ltd (in liq) (***No*** 3)[1448] cast some doubt on the strict application of the dichotomy. The Court of Appeal held that the duties of a company director to act bona fide in the interests of the company, and to exercise the director's powers for proper purposes, were fiduciary duties. However, that conclusion need not be seen as inconsistent with the proscriptive / prescriptive dichotomy if it is borne in mind that at first instance Owen J had reached the conclusion that the same duties were fiduciary duties, but on the basis that they could be understood as constituting proscriptive obligations, as a duty not

to exercise the director's powers in the interests of a party other than the company or in a way that was not in the best interests of the company.[1449]

1210 In my view, despite some question marks about the application of the principle, the position in Australia remains that ordinarily, fiduciary duties will prohibit rather than prescribe conduct.

1211 Counsel for the plaintiffs submitted that the proscriptive / prescriptive dichotomy could be avoided simply by drafting prescriptive duties in a negative form, as had been done in the Amended Statement of Claim in this case. However, if the proscriptive / prescriptive dichotomy remains the law, as I think it does, then the approach advocated by counsel for the plaintiff would ultimately represent the triumph of form over substance, an approach entirely antithetical to equity.[1450] Moreover, the submission is not supported by the authority on which counsel relied.

1212 In support of his submission, counsel for the plaintiffs relied on Friend v Brooker.[1451] In that case, a duty initially formulated as a prescriptive fiduciary duty was, by the time the matter was heard in the High Court, expressed as a proscriptive duty by expressing it in a negative form. Counsel for the plaintiffs submitted that the High Court did not comment adversely on the formulation of the duty.[1452] The decision in Friend does not suggest any departure from the well established principle that fiduciary duties are limited to proscriptive obligations. In Friend the duty said to have been owed by Mr Brooker and Mr Friend to each other was described as 'a fiduciary obligation to be equally and personally liable to each other for losses flowing from personal borrowings'.[1453] In the course of outlining the argument which had been advanced, the plurality observed that the appellant had correctly emphasised that the prescriptive formulation of the fiduciary duty 'went beyond the imposition of proscriptive obligations, a limitation emphasised in decisions of this Court'.[1454] The plurality (with whom Heydon J agreed on this point[1455]) did not need to deal with the fact that the alleged duty was expressed in prescriptive terms, because they concluded that the undisturbed findings of the trial judge precluded any argument that the parties were in a partnership or engaged in dealings in the nature of a joint venture, so that ***no*** question of a fiduciary obligation arose. The parties had instead deliberately chosen to utilise a company as the vehicle for their business enterprise, and it was not appropriate for equity to intervene to outflank the consequences of that choice.[1456]

1213 In my view, the decision in Friend v Brooker provides ***no*** support for the plaintiffs' contention, and supports the conclusion that the proscriptive / prescriptive dichotomy remains the law in Australia.

1214 At first blush, observations by Owen J in Bell also appear to support the plaintiff's submission. As I have already observed, Owen J concluded that the duties said to have been owed in that case, which were expressed in prescriptive terms to act in the best interests of the company, and to exercise the director's powers only for proper purposes were properly to be understood as proscriptive in nature. That is, the asserted duties did not prescribe what a director must do, but rather indicated what a director could not do.[1457] In reaching that conclusion, however, his Honour did not simply take the view that any duty could be recast in negative terms and thus avoid the proscriptive / prescriptive dichotomy. Rather, his Honour looked to the substance of the asserted duties.[1458]

1215 I turn to the duties alleged in this case. The primary fiduciary duties are initially expressed in general terms as a duty not to fail to act in the best interests of the Children with respect to their custody, maintenance and education, in particular by disregarding the best interests of the Children in the benefits of an upbringing within the family unit of their natural parents and siblings. This general duty is then broken down into a series of more particular duties, all of which are expressed, or expressed in the alternative, in proscriptive terms.

1216 However, when the substance of the primary fiduciary duties alleged is considered, it is clear that with one exception they constitute positive duties to act for example, to provide accommodation and support to the plaintiffs,[1459] to ascertain whether members of the Children's family, or members of the extended aboriginal community, could look after the Children,[1460] and to remove the Children from any foster home which carried a risk of harm to them.[1461] The duties alleged thus do not set out the parameters of what the State, as a fiduciary was obliged not to do. Moreover, the duties alleged were not directed to ensuring that the State as a fiduciary did not act in a way inconsistent with the loyalty expected of a fiduciary.

1217 The one exception pertains to the alleged duty on the State not to put itself into a conflict between its interest (which was said to be to house the Children in a facility or home which was readily or conveniently available to the

State) and the Children's interest in being provided with a home environment within their natural family, or within the broader aboriginal community. That is a duty which, in substance, is proscriptive in that it clearly indicated that the State was obliged not to act in its own interest, in order to avoid any departure from the loyalty which would be expected of the State as a fiduciary.

(C) A duty to exercise care and skill in carrying out a fiduciary's powers is not a fiduciary duty

1218 In some contexts (such as company directors and trustees) a person acting as a fiduciary may be under a duty to exercise care and skill in carrying out his or her powers. However, the law in Australia is that a duty to exercise care and skill will not be characterised as a fiduciary duty. In the case of company directors, the Full Court of this State in Permanent Building Society (in liq) v Wheeler held that although a director is under a duty to exercise care, skill and diligence, that duty (although an equitable, as well as a legal, duty) is not a fiduciary duty.[1462] The observations in that case drew on the same principle established in relation to trustees.[1463]

1219 The principle has been cited with approval in many cases.[1464] However, questions have also been raised about the basis for, or limits of, the principle.[1465] In Bell, Lee AJA doubted the proposition that the duty of a company director to exercise care and diligence was not a fiduciary duty,[1466] but it was not necessary to resolve that issue.[1467] Carr AJA did not share that doubt,[1468] while Drummond AJA did not deal with the point. A number of commentators have also questioned the principle established in Wheeler.[1469]

1220 I am of the view that I am bound to apply the principle in Wheeler in this case, for three reasons. First, as a matter of principle, there does not appear to be any reason why the proposition stated in Wheeler should be confined solely to directors and trustees, rather than to any person in the position of a fiduciary. Secondly, counsel for the plaintiffs did not cite any Australian appellate court authority in support of the proposition that the principle in Wheeler should be confined only to directors and trustees. Thirdly, counsel for the plaintiffs did not identify any Australian authority since Wheeler was decided in which a general duty of care imposed on a fiduciary has been characterised as a fiduciary duty. Accordingly, in so far as the principle in Wheeler can be said to be one of general application to all fiduciaries, then the principle established in Wheeler remains binding on a single judge of this Court.

1221 Turning to the present case, the striking characteristic of almost all of the primary fiduciary duties whether those expressed in general terms, or those expressed with greater particularity is that they are in the nature of duties to exercise care in particular aspects of the State's exercise of power in relation to the plaintiffs. That would suggest that the duties asserted should not be characterised as fiduciary duties. In addition, as I have already observed, the nature of the duties said to be owed is not such as to further the loyalty expected of the State as a fiduciary. That is an additional reason why the duties alleged should not be characterised as fiduciary duties.

(iii) Similar claims of fiduciary duties within a guardianship context have been dismissed in other cases

1222 Having regard to the general principles discussed above, the fact that a guardian and ward are in a fiduciary relationship does not mean that everything done by the guardian is the subject of a fiduciary duty.[1470] As Blow J pointed out in Tusyn v Tasmania, a distinction needs to be drawn 'between moral duties, nonfiduciary duties imposed by law, and fiduciary duties'.[1471]

1223 There have been a number of cases in other jurisdictions in which plaintiffs have contended that guardians owe duties, amounting to duties to exercise care, and that those duties are fiduciary duties. In each case, the plaintiffs' claims have been dismissed, either at an interlocutory stage, or following trial, on the basis that the duties alleged are not fiduciary duties.

1224 In Paramasivam v Flynn the plaintiff brought an application for an extension of time to commence an action against his guardian for breach of a fiduciary duty, alleged to have occurred as a result of the sexual assault of the plaintiff by the guardian. The Court accepted that refraining from inflicting personal injury upon one's child was ***no*** doubt a fundamental aspect of the obligation of a parent and guardian, and one that should be protected by law. However, the Court did not accept that that obligation should be given the label of a fiduciary obligation, or that equitable intervention was necessary, appropriate or justified by any principled development of equity's doctrines.[1472] Accordingly, the Court concluded that the plaintiff's claim was 'most unlikely to be upheld by Australian courts'[1473] and consequently dismissed the application for an extension of time.

1225 In Williams v Minister, Aboriginal Land Rights Act 1983[1474] the plaintiff, who had been a ward of the Aborigines Welfare Board of New South Wales for virtually her entire childhood, brought an action against the Board alleging, amongst other things, negligence and a breach of fiduciary duty by the Board, arising out of the conduct of the Board in ***placing*** the plaintiff at various missions and children's homes during her childhood. Amongst other things, the plaintiff claimed that she had been denied the opportunity to form a close bond with any caring adult, suffered from maternal deprivation, and had been denied the opportunity to have contact with her family or with members of the aboriginal community. Abadee J held that the defendant did not owe a common law duty of care to the plaintiff, and there had been ***no*** breach of duty established. In addition, while he assumed that the relationship of guardian and ward gave rise to a fiduciary relationship, he held that ***no*** breach of any fiduciary duty had been established. His Honour observed that there had been ***no*** allegation in terms of good faith, omission, nor is there any loyalty question or issue of conflict between duty and interest arising. Additionally, ... there are ***no*** economic interests at stake. In such circumstances, I ... do not see why a fiduciary duty should be found to convert an unsustainable claim at common law, based on the same facts, into a sustainable one in equity.[1475]

1226 In Cubillo v Commonwealth of Australia the plaintiffs were two aboriginal people who had been removed from their families as children pursuant to welfare legislation. The Directors of Native Affairs and Welfare were the legal guardians of the plaintiffs under legislation. The plaintiffs brought proceedings against the Commonwealth for false imprisonment, breach of statutory duty, negligence and breach of fiduciary duty. The plaintiffs alleged that the Commonwealth was subject to a fiduciary duty to supervise any institution or person into whose care they were ***placed***, and to a fiduciary duty to advise them to obtain independent legal advice, and that the Commonwealth had knowingly participated in the Directors' breaches of their fiduciary duties. At first instance, the actions were dismissed.[1476]

1227 An appeal against that decision was dismissed. The Full Federal Court held that even if there was a fiduciary relationship between the Commonwealth and the plaintiffs, their case that the Commonwealth owed fiduciary duties faced 'two insurmountable obstacles'.[1477] First, the primary judge was not satisfied that Mrs Cubillo's removal was not authorised by legislation, the consequence of which was that ***no*** fiduciary duty could forbid what legislation permitted. In the case of Mr Gunner, the primary judge found that Mr Gunner's removal was at the request and with the consent of his mother, and that the Director had not participated in his removal. Consequently, there could be ***no*** breach of fiduciary duty by the Director.[1478] Secondly, the plaintiffs' claims of breach of fiduciary duty were coextensive with their claims in tort, and there was ***no*** scope for equity to superimpose fiduciary duties on common law duties.[1479]

1228 In Tusyn v Tasmania[1480] Blow J struck out that part of the plaintiff's claim based on alleged breaches of fiduciary duties, by virtue of alleged incidents of sexual abuse of the plaintiff by his guardian, on the basis that the claim could not succeed, having regard to the state of the law in Australia.

1229 In Webber v New South Wales Dunford J concluded that a parent or guardian does not act on behalf of, or exercise a power or discretion affecting the interests of, a child or ward in a legal or practical sense, except when he or she deals with assets or property on behalf of the child or ward.[1481] His Honour held that when failing to provide proper care, nurture or supervision of the child or ward, the parent or guardian was not exercising a power or discretion affecting the interests of the child or ward, and accordingly ***no*** fiduciary obligation attached to that aspect of the responsibilities of the parent or guardian.[1482] The duty of the guardian was a duty of care in tort, not a fiduciary duty, and his Honour therefore struck out so much of the plaintiff's claim as involved allegations of the breach of fiduciary duties.

1230 In SB v New South Wales, Redlich J dismissed that part of the plaintiff's claim which was based on an alleged breach of fiduciary duty by the State of New South Wales, as a result of the conduct of the Minister for Child Welfare (who was the plaintiff's statutory guardian) and the relevant government department. The plaintiff's case was that the defendant failed to take reasonable or proper care of her as a ward. His Honour held that it was not possible to characterise any of the conduct of the defendant as falling within the purview of the doctrines of equity: the defendant has not put itself in a position of either accruing a benefit from or being in conflict with the plaintiff. Intentional, negligent and/or wrongful conduct may be appropriately compensated by common law principles. It

follows that in this case, the claim for equitable compensation as a consequence of a breach of fiduciary duty must fail.[1483]

1231 Finally, in State of South Australia v LampardTrevorrow, Mr Trevorrow sued the State of South Australia for misfeasance in public office, false imprisonment, negligence and breach of fiduciary duty, said to have occurred when he was ***placed*** into foster care by the Aborigines Protection Board (APB). The trial judge appears to have found that the State owed fiduciary duties to Mr Trevorrow to act in his best interests and in good faith, to protect and assert his economic and proprietary rights and interests, and not to ***place*** itself in a position of conflict with, or stand to benefit at the expense of, the plaintiff's economic and proprietary rights and interests.[1484] However, he went on to summarise the fiduciary duty owed in far narrower terms, as a duty on the State to ensure Mr Trevorrow was provided with full information in relation to his removal, and to provide him with independent legal advice.[1485]

1232 The Full Court of South Australia upheld an appeal against the trial judge's decision.[1486] The Court accepted that by assuming the power to remove Mr Trevorrow from his family, and thus to act as his guardian in ***place*** of his parents, the APB might, in particular circumstances, be subject to a fiduciary duty to Mr Trevorrow.[1487] However, the Court held that that did not mean that wideranging fiduciary duties would be imposed on the APB. The Court held that the imposition of such duties would involve the imposition of prescriptive, rather than proscriptive duties, which were not founded in a situation or relationship which would usually attract a fiduciary duty, and which would be inconsistent with the legislation pursuant to which the APB operated.[1488] In addition, the Court held that if the APB had acted wrongly in removing Mr Trevorrow from his parents and ***placing*** him into care, that wrong did not involve a failure to observe a fiduciary relationship of loyalty, and that that wrong could be resolved by consideration of the tort of misfeasance in public office or negligence. In those circumstances, equity would not intervene to impose a fiduciary duty.[1489]

1233 ***No*** doubt the result in each of these cases depended in large part upon the particular legal and factual context. Nevertheless the consistent rejection of the characterisation of a guardian's duty of care as fiduciary duties also supports the conclusion that the plaintiffs' contentions of fiduciary duties of care in this case should not be upheld.

(iv) The plaintiffs' interests were adequately protected by existing legal remedies, and there is ***no*** need for equity to intervene to provide additional remedies

1234 Most of the primary fiduciary duties which the plaintiffs say the State owed to them such as the duty to not to ***place*** the Children in foster placements which carried a risk of harm,[1490] or the duty not to fail to take reasonable steps to protect the physical and mental health of the Children[1491] are duties which would arguably have been actionable at common law. It appears that the plaintiffs seek to advance those duties as fiduciary duties because any cause of action they may have for an action in tort is now timebarred as a result of the Limitation Act 1935 (WA).

1235 It is well established that it is not appropriate for the courts to superimpose an equitable classification on facts, simply because to do so would afford better or larger remedies to a plaintiff who appears to have suffered some wrong.[1492] The cases to which I have referred illustrate that the courts will not extend equity's intervention for this reason, and have concluded that the wide ranging duties said to be owed by guardians (even within a context of a fiduciary relationship) are not properly characterised as fiduciary duties.[1493]

1236 In the present case, it is not appropriate to characterise the primary fiduciary duties said to be owed by the State as fiduciary duties, in order that the plaintiffs might have some recourse for the wrongs which they claim were done to them. The plaintiffs' claim that the alleged duties were fiduciary duties also fails for this reason.

(v) Recognition of a fiduciary duty owed by the State to Don and Sylvia would be very likely to give rise to a conflict between that duty, and the fiduciary duties said to be owed to each of the Children

1237 In so far as the plaintiffs claim that the State owed a general primary fiduciary duty to Don and Sylvia, that duty is described in general terms as a fiduciary duty to Don and Sylvia in their dealings with the Children ... in exercising the powers of a guardian not to fail to act in the best interests of the Children ... by disregarding the best

interests of the Children, in the benefits of an upbringing within the family unit of their natural parents and siblings.[1494]

1238 Most of the particularised primary fiduciary duties are expressed as duties owed directly to the Children. However, two of them appear to pertain equally to Don and Sylvia, and to the Children.

1239 First, the plaintiffs plead that the Defendant was obliged not to fail to promote the interests of the plaintiffs in the preservation and wellbeing of the family unit of the plaintiffs including the provision of accommodation and support to assist in the preservation of the family unit, alternatively not to disregard the importance to the interests of the plaintiffs of the preservation and wellbeing of the family unit of the plaintiffs.[1495]

1240 Secondly, the plaintiffs plead that the Defendant was obliged not to fail to take adequate steps to facilitate contact between the Children and the Children's parents, Don and Sylvia, alternatively not to fail to facilitate contact between the Children and Don and Sylvia.[1496]

1241 It is not at all difficult to envisage that a conflict could have arisen between meeting these duties to Don and Sylvia, on the one hand, and to the Children on the other hand, or between meeting these duties to Don and Sylvia, and meeting the range of other primary fiduciary duties the State is said to have owed to the Children. For example, if Don and Sylvia were unable to provide care for the Children sufficient to sustain the Children's physical health and wellbeing, then the State's duty to act in the best interests of the Children by ensuring their physical health and wellbeing (for example, by ***placing*** the children in care where those needs could be met) may have conflicted with the State's duty to Don and Sylvia in maintaining their family unit.

1242 As I have already observed, fundamental to the fiduciary relationship is the loyalty owed by the fiduciary to the beneficiary. That loyalty ordinarily results in the imposition of a fiduciary duty to avoid a conflict between the fiduciary's duty to the beneficiary, and the fiduciary's selfinterest or any other duty. The imposition of fiduciary duties on the State of the kind asserted in this case would be to accept an inherent potential conflict in the State's duty to Don and Sylvia, and to the Children, which the State could not avoid. That prospect strongly militates against the conclusion that the State owed the primary fiduciary duties to Don and Sylvia, as well as to the Children.

Conclusion in relation to the imposition of the primary fiduciary duties

1243 For these reasons, in my view, the State was not in a fiduciary relationship with the plaintiffs, but even if it was, the primary fiduciary duties alleged by the plaintiffs were not, in my view, fiduciary duties at all. The plaintiffs' claim must fail for this reason.

5. DID THE STATE BREACH ALLEGED FIDUCIARY DUTIES OWED TO THE PLAINTIFFS?

(a) The standard

1244 In view of my conclusion that the State was not in a fiduciary relationship with the plaintiffs and that the duties asserted by the plaintiffs did not constitute fiduciary duties, it is not necessary to go on and consider whether (had I reached a contrary view) the plaintiffs would have established their case of a breach or breaches of those fiduciary duties. However, such a large volume of the evidence at the trial, and of the submissions of counsel, were devoted to this question, that it is, I think, incumbent on me to make findings as to whether any breach of duty would have been established.

1245 However, I have to admit to some considerable reservations about embarking on this course. As I explain below, those reservations are attributable to the fact that the plaintiffs' case involves such a significant departure from the established principles in relation to fiduciary duties that there are ***no*** guiding principles as to how a breach of duty should be assessed in a case of this kind.

1246 As I have noted above, the defining feature of fiduciary relationships is the undivided loyalty the fiduciary owes to the beneficiary. Ordinarily, that obligation of loyalty is reflected in two fiduciary duties: a duty not to use the fiduciary's position to his own or a third party's possible advantage, and a duty to avoid any conflict between the fiduciary's personal interest, and his or her duty to the beneficiary, unless the beneficiary gives informed consent to the fiduciary's conduct, or that conduct is authorised by law.

1247 These duties are expressed in proscriptive and absolute terms, and they are capable of being, and generally speaking are,[1497] applied strictly. Consequently, establishing a breach of fiduciary duty does not require proof of fraud, or of an absence of good faith on the part of the fiduciary.[1498] The purposes of the strict application of the

duties include ensuring that fiduciaries generally conduct themselves 'at a level higher than that trodden by the crowd'.[1499] The strictness with which these fiduciary duties are applied may sometimes have results which appear to be unfair, such as that an errant fiduciary will be required to account for profits which the beneficiary could never have obtained.[1500]

1248 Given the prescriptive nature, and ambiguous content, of the fiduciary duties alleged in this case, most of those duties are simply not capable of being applied in the same way as traditional fiduciary duties. That consideration gives rise to two issues. The first concerns whether the State should be held to the same strict standard as would apply in the application of orthodox fiduciary duties, or whether a different standard should be applied in determining whether the State has breached the alleged primary fiduciary duties, and if so, what that standard should be. The second concerns whether the acts or omissions of the State should be assessed by reference to contemporary attitudes to the care of children, and to standards of living in 2013, or by references to attitudes and standards in the late 1950s and the 1960s.

1249 In this section of my reasons, I deal with the following issues:

(i) possible rationales for the application of a different standard in relation to the performance of the fiduciary duties in this case;

(ii) the parties' submissions as to the standard which should be applied;

(iii) three points of reference for an alternative standard in relation to the performance of the fiduciary duties in this case;

(iv) are community standards in the 1950s and 1960s, or contemporary community standards, relevant?

(v) what standard should be applied in assessing whether there has been a breach of the fiduciary duties in this case?

(i) Possible rationales for the application of a different standard in relation to the performance of the fiduciary duties in this case

1250 Four considerations suggest that in assessing a breach of the fiduciary duties in this case, the standard applied should accommodate scope for the fiduciary to make a judgment as to what would be in the child's best interests having regard to all of the circumstances of the case.

1251 First, the content of many of the alleged fiduciary duties is highly nebulous. By way of example, in par [107.6] of the Amended Statement of Claim, the plaintiffs plead that the State was obliged 'not to fail to take adequate steps to facilitate contact' between the Children and Don and Sylvia, and at par [108.6] they plead that the State 'failed to take any or any adequate steps to facilitate contact' between the Children and Don and Sylvia. ***No*** particular kind, or frequency, of contact was specified by the plaintiffs. The pleading assumes that unrestricted contact between a parent and a ward is necessarily in the ward's best interests. But it is not difficult to envisage cases (and the present is not one of them) where any contact between a ward and his or her parents would not be in the ward's best interests. Clearly what is in the child's best interests, in relation to the frequency of contact with a parent, and the circumstances in which that contact will be permitted, will be a conclusion which must be reached having regard to all of the circumstances of the case.

1252 Secondly, the specific duties in [106] and [107] of the Amended Statement of Claim are, in effect, conclusions as to what was in the best interests of the Children in the circumstances of this case. By way of example, the fiduciary duties owed by the State are said to encompass a duty 'not to disregard the best interests of the Children in the benefits of an upbringing within the family unit of their natural parents and siblings'. The expression of the duty in that manner carries with it the assumption that it is always in a child's best interests to be raised within the family unit of their natural parents and siblings. Expressed in such absolute terms, the flaw in that contention is apparent. To use an extreme example (which is not drawn from this case) it could not be said that if a child was being physically abused by a parent to such an extent as to ***place*** the child's life in danger that it would be in the child's best interests to be raised within the family unit comprising that parent.

1253 Thirdly, whether there has been a breach of the primary fiduciary duty 'not to fail to act in the best interests of the Children with respect to their custody, maintenance and education'[1501] or 'not to fail to promote the interests of the plaintiffs in the preservation and wellbeing of the family unit of the plaintiffs'[1502] or 'not to fail to take

adequate steps to facilitate contact between the Children and the Children's parents',[1503] for example, will be questions over which reasonable minds may differ. The fact that there are very diverse parenting styles in our society illustrates that this is so.

1254 Fourthly, the nature of the fiduciary should be taken into account. The Director under the Child Welfare Actwas the guardian of all wards in the State during the period of the Children's wardships. Addressing the best interests of one ward cannot be done in isolation when the same person is responsible for addressing the best interests of all wards. This is particularly so having regard to the finite resources available to meet all of those interests.

1255 These considerations suggest that in assessing a breach of the fiduciary duties in this case, the test applied should accommodate scope for the fiduciary to make a judgment as to what would be in the child's best interests having regard to all of the circumstances of the case.

(ii) The parties' submissions as to the standard which should be applied

1256 In the course of the hearing, I invited submissions from counsel for the parties about the standard by which the conduct of the State in relation to the alleged breaches of the fiduciary duties in this case should be assessed. Counsel for the plaintiffs submitted that the State's position as a guardian with respect to the Children should be treated as analogous to the position of a parent with respect to his or her child. Accordingly, he submitted that the Court would 'not permit that to be done with a child which a wise, affectionate and careful parent wouldn't do'.[1504] He also submitted that in the present context that approach would be applied as a test of what a 'reasonable person acting as a guardian in a fiduciary relationship' would do.[1505] In support of that proposition, counsel relied upon authorities in relation to the fiduciary duties of trustees and company directors,[1506] and submitted that 'while the requirement imposed on a trustee is strict, it is neither absolute nor a counsel of perfection. Rather it is an objective standard which recognises the importance of the position'.[1507]

1257 Later, counsel for the plaintiffs submitted that the plaintiffs' case was that the test to be applied was what he described as an 'objectively reasonable standard'.[1508] However, he then explained what he meant in the following way: ... when I say 'objectively reasonable' we're effectively applying the Wednesbury test of reasonableness, so that's the test by which we suggested ... your Honour can judge the conduct, and it's of course to be judged in the circumstances at the time.[1509]

1258 I understood counsel's reference to the Wednesbury test of reasonableness as drawing on the statement by Lord Greene MR in Associated Provincial Picture Houses Ltd v Wednesbury Corp[1510] where his Lordship, in discussing judicial review of a discretionary decision, said that 'if a decision on a competent matter is so unreasonable that ***no*** reasonable authority could ever have come to it, then the courts can interfere.' TheWednesbury standard is quite different from the standard of what a reasonable person in the same circumstances would have done.

1259 Ultimately, however, the position adopted by counsel for the plaintiffs was that whichever of these tests was applied, the same outcome would be reached in this case.[1511] Counsel for the plaintiffs submitted that if there was a tension between meeting a child's physical needs on the one hand, and his or her emotional needs on the other hand, a weighing process would need to be carried out to determine what a reasonable person acting as a guardian would do.[1512] However, he submitted that in this case, there was ***no*** evidence that a weighing exercise was carried out.[1513] It appears that this is why counsel submitted that the same result would be reached, whichever test were applied.

1260 Counsel for the State submitted that that the test which should be applied to the conduct of a guardian said to have breached a fiduciary duty was a subjective test, but with a 'reasonableness' qualification. That is, he submitted that the test is whether the guardian acted in what the guardian considered to be the best interests of the child, subject to a qualification that even had the guardian done so, if his or her conduct was so unreasonable that ***no*** reasonable guardian would have acted in that way, that would constitute a breach of the guardian's fiduciary duty.[1514]

1261 Counsel submitted that this test should be adopted for three reasons. First, counsel for the State submitted that the imposition of a solely objective test what a reasonable guardian in the same position would have done

would impose an impossible task on a guardian because in many situations the question 'what is in the best interests of a child' will be one over which reasonable minds will differ. Accordingly, he submitted, an objective test would give rise to too much uncertainty over a guardian's potential liability for a breach of fiduciary duty. He submitted that that would be particularly so in the child welfare context where alternative choices of conduct open to a guardian may each carry with them the potential for adverse consequences for a ward.[1515]

1262 Secondly, counsel for the State submitted that a number of the specific fiduciary duties to which the State was said to subject in this case were expressed in absolute terms, and it would impose an unreasonable obligation on a guardian to impose duties of that kind by reference to an objective standard.[1516]

1263 Thirdly, counsel for the State sought to draw some support from the approach developed by the courts in relation to the duties of company directors, particularly in relation to the exercise by a director of his or her powers for an improper purpose.[1517] He submitted that in the present factual context, the motivating purpose of the guardian should be the determining factor in assessing an alleged breach of the guardian's fiduciary duty.[1518]

(iii) Three points of reference for an alternative standard in relation to the performance of the fiduciary duties in this case

1264 If a different standard were to be applied to a fiduciary in the position of a guardian performing a fiduciary duty to act in the best interests of a ward, the question is what should that standard be. There appear to be three points of reference which could inform the answer to that question. First, the Director (and the employees and agents of the State involved in making decisions in relation to the Children in this case) exercised powers under the Child Welfare Act. As a fiduciary duty imposed within a statutory framework must conform to that statutory framework, the manner in which those statutory powers were required to be exercised must be taken into account. Secondly, some of the fiduciary duties owed by company directors are expressed in terms which are not dissimilar to the primary fiduciary duties said to have been owed by the State in this case. Consideration of the standard to which company directors are held in the performance of these duties may also assist in discerning the standard in the present context. Thirdly, the primary fiduciary duties are in many respects closely analogous to the duty of care owed by a guardian to a ward. Reference to the standard of that duty of care may also assist in discerning the standard applicable in this case. I deal with each of these in turn.

(A) The statutory framework for the conduct of the Director or officers or agents of the State in this case

1265 As I have already explained, the fiduciary duty in this case is not said to derive from the Child Welfare Act. The duty, as I have observed, is said to derive from the relationship between the State and aboriginal people historically, or from the relationship of guardian and child which existed once each of the Children was made a ward under the Child Welfare Act. However, the powers exercised by the Director, or officers or agents of the State in relation to the Children during the wardships derived from the Child Welfare Act.

1266 Some of the acts or omissions said to give rise to breaches of the primary fiduciary duties were acts or omissions of the Commissioner or officers of the Department of Native Welfare. To the extent that acts or omissions of those officers prior to the commencement of the wardships were relied upon, the source of the power of the officers may have derived from the NW Act. After the wardships commenced, decisions made and action taken with respect to the Children relied on the powers of the Child Welfare Act. For the reasons which follow, it does not make any practical difference to the outcome of this case whether the acts or omissions of the Commissioner or officers of the Department of Native Welfare relied upon the powers they had under the NW Act, or powers granted under the Child Welfare Act.

1267 Whether or not the fiduciary duty existed by virtue of the existence of a relationship of guardian and ward, or by virtue of the State's relationship with aboriginal people, the content of the fiduciary duty in this case must conform with the requirements of the Child Welfare Act because a fiduciary obligation cannot modify the terms of a statute.[1519]

1268 Accordingly, the starting point in assessing the alleged conduct said to be in breach of the fiduciary duties in this case is that that conduct was governed by the provisions of the Child Welfare Act. I outlined the powers given to the officers of the Child Welfare Department and the Director under the Child Welfare Act at [172] to [173]. It is unnecessary to repeat that discussion here, save to recall three matters. First, one of the objectives of the Act was to make provision for the care of destitute and neglected children. Secondly, the Director had the 'care,

management and control of the persons and property of all wards', and from 1962, the Director was also described as the guardian of all wards, although the Department retained a general supervision over all wards detained in an institution or ***placed*** out. Amongst other things, the Director had power to ***place*** a ward in a range of institutions or accommodation, for such period as the Director thought fit, and wards could be transferred from one institution to another. Thirdly, the only specific, prescriptive requirement imposed on the Director under theChild Welfare Act, which is of present relevance, was that the Director was required to cause all wards ***placed*** out to be ***visited*** once every six months by an officer of the Department, to ensure that their treatment, education and care was satisfactory.

1269 Apart from the latter requirement to ***visit*** all wards every six months, the other powers of the Director to which I have already referred conferred a very wide discretion on the Director or officers of the CW Department. None of those powers was expressly conditioned on the formation of an opinion by the Director that the exercise of power was necessary or desirable in the best interests of the ward in question.[1520] However, having said that, the provisions of the Child Welfare Act which conferred powers on the Director should be construed in a manner which is consistent with the objects of the Child Welfare Act as a whole,[1521] save in so far as the words in the provisions themselves suggest a clear contrary meaning.[1522] The objects of the Child Welfare Act can be discerned from its long title, which provided that it was an Act to consolidate and amend the law relating to the making of better provision for the protection, control, maintenance and reformation of neglected and destitute children.

1270 In my view, the powers of the Director under the Child Welfare Act should be understood as intended to enable the Director to protect, control, maintain or reform wards.

1271 For completeness, the same point can be made in relation to the powers of the Commissioner under the NW Act, which I outlined above at [129] to [137]. The long title to the NW Act referred to its objective of providing for the welfare of the 'native inhabitants of Western Australia'. Under the NW Act (between 1958 and 1963) the Department of Native Welfare was charged with the duty of promoting the welfare of the natives, and generally assisting in the preservation and wellbeing of the natives'[1523] and its duties included providing for the custody, maintenance and education of the children of natives.[1524] The Commissioner was responsible for the execution of the Act, and officers could be appointed with such powers and functions as were considered necessary or convenient for effectually carrying out the provisions of the Act. The Commissioner was also the legal guardian of every native child (other than children who were wards under the Child Welfare Act).[1525] The Commissioner's power to execute the Act appears to have imported a very wide measure of discretion, both because the Commissioner's power to execute the Act was not expressly limited by reference to particular criteria, and because the duties of the Department were expressed in very general terms.

1272 In so far as the Child Welfare Act and the NW Act conferred discretionary powers on the Director, or officers of the Child Welfare Department, or on other authorised persons, the Parliament is taken to have intended that those powers would be exercised reasonably.[1526] There have been many cases in which the courts have endeavoured to explain this standard of 'reasonableness', most recently discussed by members of the High Court in Minister for Immigration & Citizenship v Li.[1527] Starting with an identification of the subject matter, scope and purpose or object of the statute,[1528] a range of considerations may inform a conclusion that the exercise of discretion was unreasonable in the relevant sense. These include cases where ***no*** specific error in reasoning can be identified, but nevertheless the decision can be said to be irrational, and thus so unreasonable that ***no*** reasonable person could have arrived at it,[1529] or that the decision was one which '***no*** sensible authority acting with due appreciation of its responsibilities'[1530] would have made, or that the decision 'lacks an evident and intelligible justification'.[1531] In other cases, a specific error of reasoning may permit, or contribute to, a conclusion that the decision was unreasonable in the relevant sense, such as where the decision maker failed to give adequate weight to a relevant factor of great importance, or gave excessive weight to an irrelevant factor of ***no*** importance.[1532]

1273 What is clear, however, is that judging reasonableness in this context does not simply involve what might be described as a 'reasonable person' test – namely what a reasonable person in the position of the decision maker would have done – nor does it involve the court substituting its own view of how a discretion should have been exercised for that of the decision maker. The reasonableness standard which is implied in the context of

discretionary powers respects the fact that the Parliament has conferred a discretion on the decision maker. Accordingly: review by a court of the reasonableness of a decision made by another repository of power 'is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process' but also with 'whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law.[1533]

1274 These cases are, of course, concerned with assessing the lawfulness of a decision within a judicial review context. Nevertheless, their starting point is to discern the bounds within which the Parliament intended a statutory power should be exercised. For that reason, the analysis is of some assistance. If one were to be guided by a similar approach here, it can be said that the Parliament intended that the Director, or of officer or agents, of the State should act in a way that that officer considered necessary or desirable to protect, maintain, control or reform a ward, or was for the welfare of the ward, subject to the qualification that the Parliament could not have intended to authorise conduct which was so unreasonable that ***no*** reasonable person in that officer's position would have engaged in it (having regard to community standards at the time). Conduct within those boundaries could not constitute a breach of the duties the plaintiffs submit were owed to them.

(B) The standard applied to the fiduciary duty of company directors

1275 An additional point of reference for identifying the test or standard which should be applied to fiduciary duties of the kind asserted in this case are the expectations of company directors in relation to the performance of their fiduciary duties. Some of the fiduciary duties owed by company directors are expressed in terms which are not dissimilar to the primary fiduciary duties said to have been owed by the State in this case.

1276 A director's duty of loyalty to the company manifests itself in a number of fiduciary duties including the duty to act in good faith in the interests of the company, and the duty to act for proper corporate purposes.[1534] The duty to act in good faith in the interests of the company requires that a director act 'bona fide in what they consider – not what the court may consider is in the interests of the company'.[1535] The test involves a factual enquiry that focuses on the state of mind of the directors. Although the test is a largely subjective one, it is not entirely so. In order to ascertain the state of mind of the directors, the court may look at the surrounding circumstances and other materials which throw light on the directors' state of mind so as to show whether they were honestly acting in discharge of their powers in the interests of the company.[1536] The purpose of looking objectively at these surrounding circumstances is not to decide whether the court considers the decision to have been in the best interests of the company, but to determine whether the court should accept or discount the assertions made by the directors about their subjective beliefs.[1537] And if, on that inquiry, the conduct is plainly unreasonable or irrational, or fails to have any regard to obligations the company must meet, a breach of duty may be found.[1538]

1277 In contrast, the duty of a director not to exercise his or her powers for an improper purpose involves an objective test.[1539] It involves ascertaining the purposes for which the power may or may not be exercised (having regard, for example, to the company's memorandum and articles of association), and determining whether the purpose for which the power was exercised was within the scope of those permissible purposes.[1540] Although statements by directors about their subjective beliefs will be relevant to the enquiry, the subjective belief of a director that the conduct was carried out for a proper purpose does not prevent a finding of a breach of duty.[1541]

1278 Finally, company directors are subject to a duty to exercise care and diligence. That duty is not regarded as a fiduciary duty. However, in Westpac Banking Corporation v Bell Group (in liq) Lee AJA expressed doubt about the accuracy of the statement that a director's duty to exercise care and diligence is not a fiduciary duty.[1542] If that duty were to be regarded as a fiduciary duty, then the test for a breach of that duty may also be relevant in the present context. Lee AJA noted that the duty imposed on a director (by equity) to exercise care and diligence in the management of a corporation, the standard of care applied is reasonable care. That is not 'all possible care' but the care expected of an ordinary person exercising an ordinary degree of prudence in respect of his own affairs. Liability of a director for a breach of that duty only arises when the director commits 'gross or culpable negligence'. Put another way, it is conduct by a director that is so plainly imprudent and unreasonable in the circumstances that it is conduct not to be expected of any reasonable person exercising an ordinary degree of prudence in his or her affairs.[1543]

1279 The duty to act in good faith in the best interests of the company, and the duty to exercise care and diligence, are not dissimilar in nature from the fiduciary duties to act in the best interests of the plaintiffs which are said to

arise in this case. That similarity supports the conclusion that a similar test or standard should be applied in respect of the conduct said to give rise to a breach of the primary fiduciary duties in this case, namely a subjective belief on the part of the guardian, subject to an overriding unreasonableness qualification, or alternatively a test whether the conduct is so plainly unreasonable in the circumstances that it is conduct not to be expected of any reasonable person exercising an ordinary degree of prudence.

(C) The duty to exercise reasonable care at common law

1280 A final point of reference in identifying the standard by reference to which the conduct of the officers and agents of the State should be assessed draws on the fact that the primary fiduciary duties are in many respects closely analogous to the duty of care owed by a guardian to a ward.[1544] A guardian is required to exercise reasonable care in carrying out his or her powers of guardianship[1545] assessed by reference to what a reasonable person in the same position would have done.

1281 On one view, it would be somewhat surprising if, in the performance of a fiduciary duty, a guardian were held to a less stringent standard than would be expected of the guardian in the exercise of a common law duty of care.

(iv) Are community standards in the 1950s and 1960s, or contemporary community standards, relevant?

1282 It is well accepted that within the judicial review context the Parliament is taken to have intended that the reasonableness of the exercise of statutory discretions should be assessed by reference to community standards at the time of the exercise of the discretion. Consequently, a step taken in the purported exercise of a power will not be held to have been taken unreasonably and without authority 'if the unreasonableness appears only from a change in community standards that has occurred since the step was taken'.[1546]

1283 Counsel for the plaintiffs submitted that social mores in relation to parentchild relationships have not changed over time, and that there has always been a 'universal understanding' of the importance of the relationship between a natural parent and a child. Accordingly, he submitted that it did not matter whether the facts of this case were viewed by reference to attitudes and standards in the late 1950s and the 1960s, or 2013, because society's attitudes and standards with respect to the care that a parent should give to a child have not changed over time.[1547]

1284 In some respects it could not be doubted that the rights and entitlements of children are matters on which there could be ***no*** dispute: in order to reach their full potential as adult human beings, children need to grow up in an environment where their physical needs for proper nutrition, shelter, exercise and play, and safety are met, and where their emotional needs are met with love, care and a secure environment. Children also need education and the opportunity to develop their intellectual, social and spiritual selves. But views as to how some of these needs can best be met have changed over time. One obvious example which is ***no*** longer relevant in this case is whether children should be physically disciplined to correct inappropriate behaviour. This was quite common 30 to 40 years ago, but is far more contentious today.

1285 Many aspects of this case demonstrate that society has changed considerably since the 1950s and 1960s. To see that that is so, one need go ***no*** further than the marked change in the manner in which the rights and welfare of aboriginal people were dealt with in the NW Act and the 1963 NW Act, as compared with the position today. As O'Loughlin J observed in Cubillo v Commonwealth of Australia (***No*** 2):[1548] It is a truism that we live in changing times. What was accepted yesterday is rejected today. What would not be tolerated yesterday is accepted today. There are moral and social issues that have in the past divided, and continue today to divide, sections of the community.

1286 In assessing the conduct of officers of the State, in the exercise of their powers in the performance of the primary fiduciary duties to which the State is said to have been subject, it is necessary to do so by reference to the position in the 1950s and 1960s, rather than by reference to what might be considered 'plainly unreasonable' today.

(v) What standard should be applied in assessing whether there has been a breach of the fiduciary duties in this case?

1287 All of these considerations lead me to the view that in assessing the conduct of the Director and officers or agents of the State in the performance of the primary fiduciary duties in this case the standard should be whether

the particular officer of the State exercising power with respect to the child acted in good faith in what he or she considered to be the best interests of the child.

1288 However, given that the statutory powers of the Director and officers of the Child Welfare Department under the Child Welfare Act must be exercised reasonably, an overriding reasonableness limitation must be applied. If the conduct of the State's officers was so plainly unreasonable that ***no*** reasonable person in that position and at that time would have acted in the same way, then that would suggest a failure to perform the fiduciary duty to the standard which is to be expected of a fiduciary. I will refer to this qualification, in shorthand, simply as whether the conduct was 'plainly unreasonable'.

(b) Have the plaintiffs established that the State breached the primary fiduciary duties it is said to have owed to the plaintiffs?

1289 As I have already observed, in the Amended Statement of Claim, the primary fiduciary duties said to be owed by the State to the plaintiffs were described in general terms in par [105] and then elaborated upon in [106] and [107].

1290 Elaborated upon in that way, the primary fiduciary duties can be summarised by reference to the following themes:

(i) the preservation of the Collards' family unit;

(ii) placement with family members or members of the aboriginal community;

(iii) assessment and supervision of foster placements;

(iv) facilitate contact between the Children and Don and Sylvia, and members of their extended family or members of the aboriginal community;

(v) protect the Children's physical and mental health; and

(vi) avoid a conflict between the State's interest in housing the Children in a facility readily available to the State and the Children's interest in being provided in a home environment with their family or the aboriginal community.

1291 At par [108] of the Amended Statement of Claim the plaintiffs allege that the State breached its fiduciary duty or duties to them in various ways. Paragraph [108] is set out in Annexure D. How these breaches related to the primary fiduciary duties was not entirely clear on the face of the pleading.

1292 It was not entirely clear, on the face of the Amended Statement of Claim, whether particular alleged breaches pertained to particular alleged duties in the Amended Statement of Claim. In addition, in his closing submissions, counsel for the plaintiffs submitted that some of the allegations pleaded as breaches in the Amended Statement of Claim were not relied upon as discrete breaches of the fiduciary duty to which the State was said to be subject. A number of them were described as 'evidentiary or particular manifestations'[1549] of the damage which the plaintiffs suffered as a result of the separation of the Children from Don and Sylvia. At one point, counsel for the plaintiffs agreed that if the State did not breach its fiduciary duty when the Children were first made wards, and they were ***placed*** into care rather than ***placed*** with Don and Sylvia, then that would be the end of the matter and there would be ***no*** need to consider the other breaches which were pleaded.[1550]

1293 The written closing submissions by counsel for the plaintiff further muddied the waters because they dealt with the breaches of duty by reference to events or subjects (eg 'taking of Ellen', 'separation of Siblings from parents and admission to Sister Kate's') which were then linked to multiple paragraphs in the Amended Statement of Claim relating to the alleged duties or breaches of duty.

1294 Doing the best that I can, and using the broad themes for the primary fiduciary duties set out above, I have identified the alleged primary fiduciary duties which I understand the plaintiffs say give rise to a breach of those duties, having regard to par [108] of the Amended Statement of Claim and to the oral and written submissions of counsel for the plaintiff.

1295 Before doing so, it is convenient to mention some matters that counsel for the plaintiffs confirmed were not relied upon in relation to the alleged breaches by the State of the primary fiduciary duties it is said to have owed. In his opening submissions, counsel for the plaintiffs submitted that the role of the guardian diminishes as children mature, and that by the time the children were young adults or older teenagers and were absconding ... we don't

seek to contend that the department should have been ... trying to find them and controlling them and dragging them back. In fact, we of course would support them being back with their family.[1551]

1296 In his closing submissions, counsel for the plaintiff confirmed that the plaintiffs' case primarily focused on the period between 1958 and the late 1960s, while the Siblings were at Sister Kate's. The only alleged breach identified by counsel for the plaintiff as extending beyond this time was the allegation that the State failed to ***place*** the Children in foster care with family members, or members of the aboriginal community. Counsel submitted that 'aside from that there were ***no*** other breaches which are alleged in that period, effectively from when each of them left Sister Kate's ... around the late 60s'.[1552] For that reason, almost all of the evidence on which the plaintiffs relied in support of their allegations of breach of the primary fiduciary duties pertained to acts or omissions of the State's officers or agents in the period between either 1958 or 1961 (when the Children became wards) and 1969 (when all of the Children, with the exception of Ellen and Wesley, had returned to live with Don and Sylvia, albeit only temporarily in some cases).

1297 In addition, it appeared that the plaintiffs did not advance four aspects of the alleged duties pleaded in the Amended Statement of Claim. First, at par [108.1] it was pleaded that the State breached its fiduciary duty to the plaintiffs in that it failed to assist Don and Sylvia to obtain appropriate accommodation 'or other support' to maintain the family unit. Counsel for the plaintiffs did not advance any claim in respect of the 'other support' which should have been provided. I understood with this aspect of the plaintiffs' case to be confined to a claim that the State should have assisted Don and Sylvia to obtain accommodation.

1298 Secondly, at par [108.2] of the Amended Statement of Claim the plaintiffs plead that the State breached its fiduciary duty to them in that it failed 'to ascertain whether there were members of the plaintiffs' extended family, relatives or other members of the aboriginal community who could look after the Children'. The plaintiffs did not suggest that there was a member of the plaintiffs' extended family, or any member of the aboriginal community, who was in a position to have fostered the Children. Rather, the plaintiffs' case was that ***no*** enquiries were made to ascertain whether such persons could have fostered the Children.

1299 Thirdly, the alleged duty 'not to disregard the best interests of the Children to provide financially and in other ways for the Children' (par [106.3] of the Amended Statement of Claim) was not relied upon in relation to any conduct said to constitute a breach of the State's fiduciary duty to the plaintiffs.

1300 Fourthly, the Amended Statement of Claim contained a number of references to the maintenance payments Don was required to pay, pleaded that those payments were subject to a trust, and pleaded that the State was subject to a fiduciary duty to the plaintiffs to 'use the Maintenance Payments to promote the proper custody, maintenance, education and well-being of the Children' the plaintiffs did not pursue those aspects of the case. The plaintiffs' case in relation to the maintenance payments, as I understood it, was confined to the alleged breach of fiduciary duty in par [108.10] of the Amended Statement of Claim, namely that the State chose to seek the Maintenance Payments from Don (rather than choosing not to pursue maintenance payments at all) with the result that Don and Sylvia did not have the benefit of the use of that money, which they could have put towards obtaining better accommodation for themselves and their family.

1301 Counsel for the plaintiffs also confirmed that the plaintiffs did not contend that there was any breach of fiduciary duty by the State in relation to the sexual abuse Glenys suffered when she was living in Beaufort Park.[1553]

(i) Evidence as to good faith

1302 It is convenient at this point to set out a finding which applies to of each of the alleged breaches of fiduciary duty. The allegations of breach of fiduciary duty pertain to various decisions or actions (including decisions not to take any action) by the Director, the Commissioner and various officers and employees of the Child Welfare Department or the Department of Native Welfare, pursuant to powers under the Child Welfare Act. There was ***no*** evidence that any of those decisions or actions were made, or taken, other than in the belief by the officer or employee concerned, in good faith, that those decisions or actions were necessary in the best interests of the Children, or any one of them.

1303 In the discussion which follows, I focus on whether the evidence established that any of those decisions or actions said to constitute a breach of fiduciary duty constituted conduct which was so plainly unreasonable that ***no*** reasonable decision maker in the same position, at the same point in time, would have acted in the same way, and alternatively, whether a reasonable person in the same position would have acted in the same way.

(ii) The alleged breaches

(A) The preservation of the Collards' family unit

1304 The plaintiffs alleged that the State's fiduciary duty included: [107.1] As a trustee and a fiduciary the Defendant was obliged not to fail to promote the interests of the plaintiffs in the preservation and well-being of the family unit of the plaintiffs including the provision of accommodation and support to assist in the preservation of the family unit,

alternatively not to disregard the importance to the interests of the plaintiffs of the preservation and well-being of the family unit of the plaintiffs;

1305 The plaintiffs' primary case in relation to the breach of this fiduciary duty appeared to be their allegation in par [108.1] of the Amended Statement of Claim, which alleged that in breach of its fiduciary duty, the State

[108.1] did not assist Don and Sylvia in obtaining appropriate accommodation or other support to maintain the family unit but rather removed and detained each of the Children from the care of Don and Sylvia and applied for and obtained a Court order that Don make the Maintenance Payments from his income, which could otherwise have contributed to the maintenance of the Children in a home environment comprised of a family unit of their natural parents and siblings.

1306 However, in so far as the duty to preserve the Collard's family unit was concerned, the plaintiffs also alleged other breaches of duty arising from that conduct, including those in par [108.2], [108.5], [108.6], [108.9], [108.10].[1554]

1307 In his opening submissions, counsel for the plaintiff made clear that the alleged breaches of this duty focused on the following acts or omissions:[1555]

(A) The State's failure to assist Don and Sylvia to obtain appropriate accommodation or other support to maintain their family unit;

(B) The decision to apply for the Children to be made wards and to maintain their separation from Don and Sylvia;

(C) The State's failure to ensure the Children stayed together when they were removed from Don and Sylvia's care;

(D) The decision to apply for a maintenance order against Don in respect of the maintenance of the Children.

1308 The plaintiffs' case was that once the Children were made wards, the State should have returned the Children to live with Don and Sylvia, and in that event should have assisted Don to obtain public housing, and refrained from seeking maintenance payments so that Don could put that money towards accommodation.[1556]

(B) The State's alleged failure to assist Don and Sylvia to obtain appropriate accommodation or other support to maintain their family unit

1309 As I understood it, the plaintiff's argument in essence was that, rather than applying for the Children to be made wards, the better course of action in all of the circumstances would have been to leave the Children with Don and Sylvia, but to endeavour to obtain appropriate accommodation for them through public housing. Counsel for the plaintiffs submitted that although the Director was the guardian of the Children, and even though he did not have responsibility for State housing, the State as a whole had a responsibility to take action, particularly in circumstances where it had knowledge that Don and Sylvia were in need of assistance to obtain accommodation.[1557]

1310 Two difficulties arise in relation to this aspect of the plaintiffs' case. First, it is apparent from the evidence given to the Children's Court in 1958 and 1961, in respect of Ellen and the Siblings respectively, that officers of the Child Welfare Department believed that the Children were being neglected. In relation to Ellen, the information provided to the officers of the Child Welfare Department by the Beverley Hospital was that Ellen was suffering from malnutrition, and an inspection of the humpy revealed that Don and Sylvia and their children, including Ellen, lived in extremely impoverished circumstances. In the case of the Siblings, the information available to the officers of the Child Welfare Department in 1961 as a result of their inspections of the humpy, was that the Siblings lived in

extremely impoverished accommodation, without any basic facilities (such as a water supply, electricity, and bathroom and toilet facilities, at the humpy) and the absence of food in the humpy suggested that the Siblings may not have been getting enough to eat.

1311 The circumstances in which the Children were living when they were the subject of an application to be made wards, and the obvious implications of those circumstances for the physical health and welfare of the Children, were such that it would have been plainly unreasonable for officers of the Child Welfare Department to have left the Children in that environment (rather than to make and application to the Children's Court) either at all or for more than a very short period of time.

1312 The question, then, is whether it would have been possible to obtain other housing for Don and Sylvia and the Children, in a short period of time, as an alternative to applying to have the Children made wards. There was ***no*** direct evidence as to the availability of State housing at the time. However, such evidence as there was in relation to public housing suggests that the demand for State housing exceeded the supply of it, so that not everyone who sought accommodation could obtain it. The evidence in relation to the provision of housing for aboriginal people (particularly the report of Mr Long, in 1969, to which I referred at [1018]) confirmed that in the 1950s and 1960s there was a significant demand for State housing for aboriginal people. That evidence also suggested that in the same period the supply of State housing for aboriginal people was limited. There were attempts to provide more public housing, especially for aboriginal people, but these were slow in coming to fruition, and there was very limited housing available other than on the reserves, where the accommodation was extremely basic indeed. These inferences point to the conclusion that even had greater efforts been made to obtain State housing assistance for Don and Sylvia, there was ***no*** guarantee that such housing could have been found in the immediate future.

1313 I find that it was not plainly unreasonable for the officers and agents of the State to make an application that the Children be made wards rather than to leave the Children in Don and Sylvia's care and to try to obtain housing for them.

1314 Even if the appropriate test were what a reasonable person would have done in the same circumstances, in my view a reasonable person in the same position would have made the decision to apply to the Children's Court, in preference to leaving the Children in circumstances where they were considered to be neglected, or trying to obtain State housing for them, but without any guarantee that that could be secured at any stage in the immediate future.

(C) The decision to apply for the Children to be made wards and to maintain their separation from Don and Sylvia

The decision to apply for Ellen to be made a ward

1315 In his closing submissions, counsel for the plaintiff pointed to the following matters as aspects of this alleged breach of the fiduciary duty to act in the best interests of the plaintiffs by maintaining their family unit: The State forcibly separated Ellen from Don and Sylvia, maintained that separation, and collected maintenance payments from Don and Sylvia, in circumstances where: It had conducted an inadequate investigation of Don and Sylvia's living conditions, so that it did not rely on a reasonably based conclusion as to Ellen's accommodation and its effect upon her health;[1558] The State's decision to remove Ellen, and its maintenance of her separation from Don and Sylvia, relied on Don and Sylvia drinking alcohol excessively, yet that allegation was not based on any evidence.[1559]

1316 I do not accept these submissions for two reasons.

1317 First, the information available to the officers of the Child Welfare Department indicated that Ellen was a neglected child. The information provided by the Beverley Hospital was that Ellen was suffering from malnutrition when she was brought to the hospital by Don and Sylvia. Secondly, an inspection of the humpy by officers of the Child Welfare Department - which I have found was Don and Sylvia's home, even if they did not live there every day of the year - revealed that Don and Sylvia and their children, lived in extremely impoverished circumstances, without any basic facilities (such as a water supply, electricity, and bathroom and toilet facilities) at the humpy. That information supported the conclusion reached by the officers that Ellen was a neglected child, having regard to the meaning of that term in the Child Welfare Act.

1318 I do not accept that the investigation conducted by officers of the Child Welfare Department was 'inadequate ... so that it did not rely on a reasonably based conclusion as to Ellen's accommodation'.[1560] The basis for that

submission was that the humpy was not Ellen's home, and that at the time when she was made a ward, Don and Sylvia were in fact living on the McLean's farm, and that they lived on various other farms at other times during the year.[1561] As I have found that the humpy was Don and Sylvia's permanent home, even if they did not live there every day of the year. Although Don and Sylvia were staying at the McLean's farm when they took Ellen to the Beverley Hospital, that accommodation was of a temporary duration for as long as they were working on the McLean's farm. When Don and Sylvia went to collect Ellen from the Hospital, their work on the McLean's farm had come to an end, and they were intending to return, with Ellen, to the humpy.

1319 Secondly, as for the submission that the officers of the Child Welfare Department relied on Don and Sylvia's excessive drinking, as a basis for bringing the application in relation to Ellen, there was ***no*** evidence to suggest that this was a basis for the application made by the officers of the Child Welfare Department to the Children's Court in respect of Ellen.

1320 In his file note of 13 March 1958, Mr Waghorne indicated that I considered it would be detrimental and in fact dangerous to [Ellen's] welfare to allow [her] to be returned to such filthy conditions so I decided to make application to the Court.[1562]

1321 Having regard to that evidence, I find that Mr Waghorne's decision to make an application to the Court with respect to Ellen was not 'plainly unreasonable', having regard to the information Mr Waghorne had received that Ellen was suffering from malnutrition, and having regard to the living conditions at the humpy, which he had observed, all of which pointed to the conclusion that Ellen was a neglected child.

1322 The same conclusion follows even if an objective or reasonable person test is applied. In my view, a reasonable person in the same position in 1958 would have made the decision to apply for Ellen to be made a ward, in preference to leaving her in circumstances where it appeared that she had been neglected to such an extent that she had suffered from malnutrition.

1323 In any event, I do not see how Mr Waghorne's decision to make an application to the Children's Court in respect of Ellen could be considered a breach of any fiduciary duty owed by the State in circumstances where the Children's Court found that Ellen was a neglected child. The fact that the order was made indicates that the Court was satisfied that the application was supported by sufficient evidence to warrant the conclusion that Ellen was a neglected child.

1324 The decision reached by the Children's Court to order that Ellen be made a ward could not be said to constitute any breach of fiduciary duty by the State, at the very least because that decision was authorised by the Child Welfare Act. Given that an order of the Court could only have been made in respect of an application, it is difficult to see how any breach of fiduciary duty could be said to have arisen by virtue of that application being made in the first ***place***. However, it is unnecessary to resolve that question in view of my conclusion that there was ***no*** breach of fiduciary duty on the part of the State by virtue of Mr Waghorne's decision to bring that application, having regard to the information on which he relied in doing so.

The decision to apply for the Siblings to be made wards

1325 In his closing submissions, counsel for the plaintiff pointed to the following matters as aspects of this alleged breach of the fiduciary duty to act in the best interests of the plaintiffs by maintaining their family unit: The State forcibly separated the Siblings from Don and Sylvia, it maintained that separation, it collected maintenance payments from Don and Sylvia, and it decided to house the Siblings at Sister Kate's, in circumstances where the information available to the State was insufficiently reliable to enable the State to make an objectively reasonable decision that the Children be removed or kept from their care, in that: The State failed to take into account that the investigation into the Collards' living conditions in late 1959 had concluded that those conditions were adequate for the proper welfare of a child;[1563] The accommodation in which the Siblings lived was regarded by the State as justifying the removal of the Siblings when that accommodation was equal to, if not better than, accommodation occupied by aboriginal people on the Reserve at Brookton;[1564] The State failed to conduct a proper investigation of the living conditions of the Collard family prior to making the application to the Court that the Siblings be made wards;[1565] and The State's decision to remove the Children, and its decisions not to return the Children, relied on Don and Sylvia drinking alcohol excessively, yet that allegation was not based on any evidence.[1566]

1326 At the outset, I note that officers of the State did not in fact remove the Siblings from Don and Sylvia's custody and take them to Sister Kate's. The decision to ***place*** the Siblings at Sister Kate's was made by Don and Sylvia, and the Siblings were taken to Sister Kate's with their authority, by Ms Jones. For that reason, I have understood the plaintiffs' submissions in relation to the State's 'removal of the Siblings' to pertain to the decision made by Mr WrightWebster to make an application to the Children's Court for the Siblings to be made wards, and the decision which was, in effect, made by the Director of the Child Welfare Department on or after 8 December 1961 when the Siblings were ***placed*** in his care, custody and control, to leave the Siblings at Sister Kate's. In effect, that was a decision to refrain from exercising the power the Director had under s 10(2) of the Child Welfare Act to remove the Siblings from Sister Kate's and to ***place*** them elsewhere (such as with Don and Sylvia).

1327 The application to the Children's Court was made by Mr WrightWebster, and Mr Humphries and Constable Wall gave evidence in support of that application. I have found that Mr Humphries' evidence to the Court reflected the contents of the 1961 Informative Report, and that his evidence was based on his observations of the humpy on two or three occasions before the application was made to the Court. Mr Humphries' inspection of the humpy which I have found was Don and Sylvia's home revealed that Don and Sylvia and the Siblings, lived in extremely impoverished circumstances at the humpy, without any basic facilities (such as a water supply, electricity, and bathroom and toilet facilities). Mr Humphries had also found ***no*** food in the humpy at the time of his ***visits***, and observed that Don and Sylvia drank heavily. This information pointed to the conclusion that each of the Siblings was a neglected child, having regard to the meaning of that term in the Child Welfare Act.

1328 The inference which can be drawn from Mr WrightWebster's memorandum dated 12 December 1961 to the Director is that the decision of the Director not to remove the Siblings from Sister Kate's and to return them to Don and Sylvia's care was based on the contents of the 1961 Informative Report, together with the order made by the Children's Court. I note that the Children's Court order contained a recommendation that the Siblings be retained at Sister Kate's until their parents could afford them proper and appropriate accommodation, and so that the Siblings could be kept together in one ***place***.[1567]

1329 I do not accept the plaintiffs' contention that the State failed to conduct a proper investigation of the living conditions of the Collard family prior to make the application to the Children's Court. That contention was not supported by the evidence. Counsel for the plaintiffs submitted that the evidence of Don and Sylvia did 'not indicate any build up to the ***visits*** of Constable Wall and Ms Jones in the several days prior to 7 December 1961'. I am unable to accept that submission. I found (at [334]) that Mr Humphries ***visited*** the humpy two or three times prior to making the application to the Court in respect of the Siblings. I also found that the observations contained in the 1961 Informative Report reflected what Mr Humphries saw during his ***visits*** to the humpy and formed the basis for the evidence he gave to the Children's Court in support of the application that the Siblings be made wards.

1330 The underlying premise for this aspect of the plaintiffs' contentions was that the humpy was not Don and Sylvia's home, and that had further inquiries been made, officers of the Child Welfare Department would have ascertained that that was so. In view of my findings at [343] that the humpy was Don and Sylvia's permanent home at which they spent a substantial portion of time each year, and to which they returned in between seasonal work elsewhere, this contention must be rejected.

1331 In addition, counsel for the plaintiffs submitted that the 1961 Informative Report was superficial in many respects, and indicated that the State's investigation of the Collards' living conditions was inadequate. He submitted that 'the form was not constructed with a high expectation of detailed content', that '***no*** information [was] obtained from the parents of the [Siblings] or the Principal of the School' and reached a number of conclusions 'which it could not reasonably have come to'.[1568] He also submitted that there had clearly been ***no*** consideration given to the fact that limited food may have been stored in the humpy because the food the family ate was of a kind which was likely to be obtained and eaten immediately, and that although there was ***no*** water or sanitary facilities, the plaintiffs used those at the Reserve.

1332 I am not persuaded by these submissions to conclude that the information on which both Mr Wright-Webster, and the Director, relied was inadequate, for four reasons. First, as I have found, the evidence given by Mr Humphries at the hearing before the Children's Court reflected that which was set out in the 1961 Informative

Report. However, there was ***no*** evidence as to what was actually said by Mr Humphries. He may well have given more expansive evidence at the hearing than what is set out in the 1961 Informative Report. In addition, I note that Constable Wall also gave evidence to the Children's Court. There was ***no*** evidence before me as to what the content of his evidence was, but as Mr WrightWebster indicated in his memorandum of 12 December 1961, 'Mr Humphries and Constable Wall gave evidence of squalid conditions and drunkenness by the parents'.[1569]

1333 Secondly, the submission that the investigation was inadequate because the 1961 Informative Report did not contain information from Don and Sylvia, or from the Principal of the school, should be rejected. The enquiries actually made by Mr Humphries in preparing that Report are not specified on the face of the Report. Although Mr Humphries did not have any recollection of the Report, his unchallenged evidence was that his usual approach when ***visiting*** a home to investigate a possible neglect case was to 'check such things as the condition of the child, whether there was food in the house, and whether the parents were drunk. If the parents were present we would talk to them.'[1570] Some of the information set out in the 1961 Informative Report for example in relation to Don's income seems most likely to have been obtained by Mr Humphries as a result of speaking with Don. In view of this evidence, it cannot be concluded that Mr Humphries did not make enquiries of Don and Sylvia in conducting his investigation.

1334 A further reason why counsel's submission must be rejected is that it appears to draw on contemporary approaches to child welfare investigations. The evidence suggested that during the 1950s and 1960s, far less extensive investigations were undertaken before determining whether an application should be made for a child to be made a ward. As I found at [868] the approach taken by Mr Humphries in relation to his investigation of the Siblings' living conditions, and by Mr Wright-Webster in making the application to the Children's Court, reflected departmental practices at the time. As I found at [867] it was not until the 1970s that officers of the Child Welfare Department began undertaking more extensive investigations before consideration would be given to whether a child should be taken into care.

1335 Thirdly, I am unable to accept counsel's submission that the 1961 Informative Report was inadequate because Mr Humphries failed to give sufficient consideration to an alternative explanation for the absence of food in the humpy, and to the fact that water and sanitary facilities were available on the Brookton Reserve. As I noted at [363], even allowing for the fact that Don and Sylvia did not have electricity, did not own a refrigerator, that most of their food came from fresh supplies, and that they did not live continuously at the humpy throughout the year, the absence of any food in the humpy would clearly have been a matter of concern to welfare authorities. Furthermore, even though water and sanitary facilities were available at the Reserve, that does not detract from the fact that the humpy where the Siblings lived was not equipped with basic utilities like electricity, a water supply, and bathroom and toilet facilities. The absence of those facilities, particularly for a family with eight children, some of whom were babies or toddlers, would inevitably have created concerns for the welfare of the Siblings.

1336 Fourthly, the submission that the 1961 Informative Report reached a number of conclusions to which it could not reasonably have come (such as that Don and Sylvia had 'nil' interest in their children) must also be rejected, in view of my finding that the content of the 1961 Informative Report reflected Mr Humphries' observations in his ***visits*** to the Collards prior to 7 December 1961. In any event, the meaning of valueladen observations in that Report cannot now be clarified. For present purposes, it suffices to note that there was sufficient information before Mr WrightWebster, and in turn the Director, to support the conclusion that the Siblings were being 'neglected'.

1337 I am also unable to accept the plaintiffs' contention that the State's decision to remove the Siblings relied on an allegation, unsupported by any evidence, that Don and Sylvia were drinking alcohol excessively. Mr WrightWebster's memorandum dated 12 December 1961 indicated that in support of the application to the Children's Court in respect of the Siblings, 'Mr Humphries and Constable Wall gave evidence of squalid conditions and of drunkenness by the parents'.[1571] In addition, in the 1961 Informative Report, Mr Humphries noted that 'both parents drink heavily'.[1572] I have found that the observations in the 1961 Informative Report, and thus the evidence Mr Humphries gave at the hearing, reflected what he had seen on the two or three occasions on which he had ***visited*** the Collards at the humpy. As I explained at [357] there was nothing to suggest that that information was not reliable.

1338 As for the plaintiff's contention that the State failed to take into account that the investigation into the Collards' living conditions in late 1959 had concluded that those conditions were adequate for the proper welfare of a child, there was ***no*** direct evidence as to whether or not this fact was taken into account by Mr WrightWebster. However, Mr WrightWebster was the author of the report to the Commissioner on 29 May 1959,[1573] in which he recommended that Ellen be returned to her family if Don made some changes to their accommodation. At [949] to [951] I found that Mr Long subsequently inspected the Collards' accommodation at the Yeo's farm, where Don and Sylvia were then living, and where Mr Long understood that Don was permanently employed, and recommended that Ellen be returned to her family. I also found that Mr Wright-Webster then endorsed Mr Long's recommendation. It is highly unlikely that Mr WrightWebster, as the District Officer for the Department of Native Welfare, would have forgotten this course of events, or not taken it into account, in considering whether an application should be made to the Children's Court in respect of the children. More importantly, the information available to Mr WrightWebster supported the conclusion that Don and Sylvia's living conditions were not the same as they had been when Mr WrightWebster recommended Ellen's return in May 1959. In particular, by late 1961, when the decision was made to apply to the Children's Court for the Siblings to be made wards, the information available to Mr WrightWebster (based on the observations of Mr Humphries and Constable Wall) was that Don and Sylvia were living at the humpy in conditions which were not materially different from those when Ellen was made a ward in 1958.

1339 As I found at [890], since the 1960s there has been an increasing awareness within the Child Welfare Department of the potential adverse consequences of separating children from their parents, especially their mothers, at a very young age, and a corresponding increasing emphasis in departmental policy that the removal of a child should be a last resort when other options have failed. Accordingly, it may be arguable that a child welfare officer, acting in 2013, might not necessarily have applied to remove the Siblings from Don and Sylvia's care, particularly as there was ***no*** evidence of other signs of neglect, such as signs that the Siblings were suffering from malnutrition, or that they were not attending school. However, that serves to emphasise the fact that it is necessary to view the facts of this case within the context of all the circumstances at the time. When those circumstances are taken into account, in my view, it cannot be said that either the decision by Mr WrightWebster to apply for the Siblings to be made wards, or by the Director to leave the Siblings at Sister Kate's once they were made wards, rather than to immediately return them to their parents, was so plainly unreasonable that ***no*** reasonable person would have acted in the same way.

1340 Furthermore, the information available to the Director was that the Children's Court had found that the Siblings were neglected children. Given that that neglect had arisen from the circumstances in which they were living with Don and Sylvia, the suggestion by counsel for the plaintiffs that it was open to the Director to return the Siblings to their parents is, with respect, patently untenable. Moreover, the Children's Court had recommended that the Siblings be retained at Sister Kate's until such time as Don and Sylvia were able to afford proper and appropriate accommodation. That is all the more so given that Sylvia and Don had ***placed*** the Siblings at Sister Kate's themselves.

1341 Having regard to the content of the 1961 Informative Report, which summarises the information which was then available to Mr WrightWebster, in my view it cannot be said that his decision to make an application to the Children's Court in respect of the Siblings was so 'plainly unreasonable' that ***no*** reasonable person in the same position, and with the knowledge then available to officers of the Child Welfare Department, would have acted in that way. Similarly, in view of the information which was before the Director, it cannot be said that the decision not to remove the Siblings from Sister Kate's and return them to Don and Sylvia's care was so 'plainly unreasonable' that ***no*** reasonable person in the same position would have acted in that way.

1342 Furthermore, even if an objective or reasonable person test were applied, in my view, a reasonable person in the same position in 1961 would have made the decision to apply for an order that each of the Siblings be made a ward, in preference to leaving them in their parents' care, having regard to the information which indicated that they were being neglected. Similarly, a reasonable person in the same position as the Director in 1961 would have made the decision to leave the Siblings at Sister Kate's, at least for the time being, rather than return them to Don and Sylvia's care once they had been made wards.

1343 As I observed above at [1321] in relation to the application made to the Children's Court with respect to Ellen, I do not see how Mr Waghorne decision to make an application to the Court in respect of the Siblings could be considered a breach of any fiduciary duty owed by the State in circumstances where the Children's Court subsequently found that each of the Siblings was a neglected child. The fact that the order was made indicates that the Court was satisfied that the application was supported by sufficient evidence to warrant the conclusion that the Siblings were neglected. The same can be said of the decision made by the Director not to return the Siblings to Don and Sylvia's care.

1344 The plaintiffs also contended that the State's application for the Siblings to be made wards constituted a breach of its fiduciary duty because the accommodation in which the Siblings were living was equal to, if not better than, accommodation occupied by aboriginal people on the Reserve at Brookton. As I found at [372], the conditions on the Brookton Reserve were not markedly different from those in which Don and Sylvia lived at the humpy. Mr Maine's evidence established that officers of the Child Welfare Department regarded aboriginal reserves as unhealthy environments in which to raise children, and officers of that Department applied the same approach to determining whether a child should be ***placed*** in care, whether or not the child lived on a reserve.

1345 In my view, it cannot be said that either Mr WrightWebster's decision to make the application to the Children's Court, or the Director's decision not to immediately return the Siblings to Don and Sylvia's care, was 'plainly unreasonable' solely by virtue of the fact that aboriginal people lived on the Brookton Reserve in similar conditions to those in which the plaintiffs were living. I find that it was not plainly unreasonable for those officers to act as they did.

1346 Further, even if the appropriate test for a breach of fiduciary duty in a case of this kind were to consider what a reasonable person would have done in the same circumstances, in my view, a reasonable person would not have been deterred from making an application to the Court in respect of the Siblings, or from deciding that the Siblings should remain at Sister Kate's after they were made wards, solely by virtue of the fact that other aboriginal people had the similar misfortune to live in circumstances of dire poverty on the Brookton Reserve. That fact did not render unreasonable the actions of Mr WrightWebster, or of the Director, in relation to the Siblings.

The State's conduct in maintaining the separation of each of the Children from Don and Sylvia

1347 I have understood the plaintiffs' case to be that the State breached its fiduciary duty to the plaintiffs to maintain their family unit by failing to return the Children to Don and Sylvia's care for some time after each of them became wards (and in Ellen's case, she was not returned to the care of her parents at all during her wardship).

1348 The plaintiffs' submissions did not focus on a particular decision by any officer of the State not to return each of the Children to Don and Sylvia's care. The argument was instead approached on the basis that the State's omission to return the Children to Don and Sylvia, for so long as it occurred, constituted a breach of its fiduciary duty. However, as I have found, on a number of occasions between 1962 and 1970, officers of the Child Welfare Department or Department of Native Welfare, who inspected Don and Sylvia's living conditions, considered whether those conditions were suitable for the return of the Siblings. These are noted below. In addition, each of the Children, other than Ellen, was permitted to return to Don and Sylvia's care prior to the end of his or her wardship.

1349 In his closing submissions, counsel for the plaintiff pointed to the following matters as aspects of the State's alleged breach of the fiduciary duty to act in the best interests of the plaintiffs by maintaining their family unit by failing to return Ellen, or the Siblings, to Don and Sylvia's care: Notwithstanding departmental recommendations that Ellen should be returned, the State did not permit Ellen's return to Don and Sylvia on the basis of an allegation of gambling by Sylvia, the accuracy of which, and the impact of which on Ellen's welfare, was not investigated;[1574] The State's decision to remove the Children, and its decisions not to return the Children, relied on Don and Sylvia drinking alcohol excessively, yet that allegation was not based on any evidence,[1575] Even if Don was frequently drunk and violent towards Sylvia that was not a reasonable basis for removing, and keeping the Children from the custody of Sylvia;[1576] and There was ***no*** evidence of any conduct by Sylvia sufficient to warrant the Children being removed from her care;[1577]

1350 In addition, counsel for the plaintiffs submitted that the State's child welfare decision-making authorities had insufficient reliable information concerning Don and Sylvia's behaviour and circumstances, including their housing,

their drinking patterns, domestic violence, gambling or other behaviour which would enable them to make an objectively reasonable decision that their Children be kept from their care.[1578]

1351 Furthermore, counsel for the plaintiffs submitted that between 1961 and the late 1960s (when the Siblings began to return to live with Don and Sylvia) the State failed to make any enquiries as to Don and Sylvia's ability to look after the Children.[1579]

1352 I deal with each of these matters in turn.

Allegations of gambling

1353 At [958] to [962] I set out my factual findings in relation to the consideration given by officers of the Department in 1959 to the return of Ellen to Don and Sylvia. As I found, in July 1959 Mr WrightWebster wrote to the Commissioner endorsing Mr Long's recommendation that Ellen be returned. In making that recommendation, Mr Long noted that Don had a permanent job on the Yeo's farm, that Don and Sylvia and their family were living in a three bedroom asbestos cottage on the farm, which was clean, tidy and adequately furnished, and that the Siblings were healthy and well nourished.[1580] The Commissioner approved that recommendation on 5 October 1959 and the Acting Director of Child Welfare agreed with the recommendation on 22 October 1959. However, before Ellen could be returned to Don and Sylvia, the Commissioner reversed his decision on the basis of a report from Ms Jones that Sylvia was 'gambling heavily'.[1581] In view of that report, in November 1959 the Commissioner determined that ***no*** action should be taken to return Ellen to Don and Sylvia until further advice was received from Ms Jones.

1354 While there was nothing to suggest that that decision was not made in good faith, in my view, it was so plainly unreasonable that ***no*** reasonable decision maker in the same circumstances would have acted the same way. As I found at [959] to [961], the report to the Commissioner from Ms Jones was oral, it was not subsequently substantiated by any evidence from Ms Jones, and the concern about gambling appears to have been based on moral considerations. Further, there was ***no*** evidence of any investigation by officers of the Department of Native Welfare, or the Child Welfare Department, in relation to whether Sylvia had in fact been gambling. More importantly, there was ***no*** evidence that any officer of either Department had given consideration to whether gambling by Sylvia (even if it had occurred) had any implication for whether Sylvia and Don were in a position to care for Ellen. In November 1959, the other information in the possession of the Departments was that Don and Sylvia had permanent accommodation in a cottage on the Yeo's farm, that that accommodation was clean and comfortable, and that the Siblings were being fed and were well maintained. In other words, all of the available information, save for an unsubstantiated allegation of gambling which was, on its face, probably irrelevant to Don and Sylvia's ability to care for Ellen, pointed to the conclusion that she should be returned to her parents' care without delay.

1355 I find that it was plainly unreasonable for the Commissioner and the Director to refuse to permit Ellen's return to her parents in November 1959.

1356 However, that was not the end of the matter. Further enquiries were then made, and in December 1959, the Commissioner appears to have reached a decision that ***no*** further action should be taken to return Ellen until such time as Sylvia made a further request for her return, at which point the District Officer would be requested to report again.[1582] The Director appears to have concurred in that decision because Ellen was not returned to Don and Sylvia in 1959.

1357 The basis for that decision was set out in a memorandum dated 14 December 1959 from an investigation officer in the Department of Native Welfare to the Commissioner. The content of that memorandum is set out above at [956]. That memorandum revealed that the information available to the Commissioner in December 1959 was that Don was ***no*** longer permanently employed by Mr Yeo, and that Don and Sylvia were ***no*** longer living in the cottage on the Yeo's farm. Instead, Don and Sylvia had resumed their itinerant seasonal work in and around Brookton. The Siblings who were of school age had been living with Bessie Ninyette so that they could attend school, although during November and December, the family had been living in Narembeen. The information available to the Department (from Ms Jones) in December 1959 was that she did not know the conditions in which the family was then living.

1358 The evidence established that further information was received by the Commissioner for Native Welfare in December 1959. The key relevance of that information for present purposes was that it revealed that Don and Sylvia had resumed seasonal work in and around Brookton. Further, that information indicated that some of the Siblings had been living with Bessie Ninyette, and that in turn suggested that those Siblings were again living in the humpy on Bessie Ninyette's block. The information available to the State, as at December 1959, was either that Don and Sylvia's living conditions were unknown, or that Don and Sylvia's employment and accommodation were not materially different from what they had been in March 1958 when Ellen was made a ward. It is not entirely clear from the information before the Commissioner in December 1959 whether alleged gambling by Sylvia remained of any concern, because the focus of the information put before the Commissioner at the time was on Don and Sylvia's employment and accommodation.

1359 In view of these findings, I find that the decision by the Commissioner in December 1959 not to return Ellen to Don and Sylvia's care was not so plainly unreasonable that ***no*** reasonable decisionmaker in 1959, in the same circumstances, and with same information, would have made it. I have reached that conclusion because the information before the Commissioner indicated either that Don and Sylvia's living conditions were unknown so that to approve Ellen's return to Don and Sylvia would be to return her in circumstances in which it was not known whether her living conditions would be suitable for the care of a child. The alternative implication of the information available to the Commissioner in December 1959 was that the humpy had become Don and Sylvia's permanent home base again, in which case Ellen would have been returned to living conditions which were not materially different from those from which she had been removed in 1958.

1360 I find that it was not plainly unreasonable for the Commissioner (and, in turn, the Director) to act as he did in December 1959 in declining to return Ellen to her parents at that stage.

1361 Even applying a reasonable person test, I have concluded that a reasonable person in the same position would have reached the conclusion that because Don and Sylvia's employment and living conditions in December 1959 were either unknown, or not materially different from those in March 1958, it was not in Ellen's best interests to be returned to her parents' care at that time.

Allegation of excessive drinking by Don and Sylvia

1362 Counsel for the State submitted that the State's decision not to return the Children to Don and Sylvia relied on them drinking alcohol excessively, but that allegation was not based on any evidence.[1583]

1363 I am unable to accept that submission, for two reasons. First, as I found at [558], officers of the Department of Native Welfare and the Child Welfare Department ***visited*** Don and Sylvia on a number of occasions between 1961 and 1970, recorded their observations about Don and Sylvia's living conditions, and on a number of occasions made recommendations as to whether those living conditions were suitable for the return of the Children. In Mr Wright-Webster's report of August 1962, Constable Wall's report of December 1966, Mr Hill's reports of 11 January 1968 and 11 February 1968, and Mr Moulton's report of 30 September 1969, all officers made reference to Don (or Don and Sylvia) engaging in excessive drinking, being drunk at the time of the ***visit***, or being addicted to liquor.

1364 They were not the only reports which came to the attention of the State which suggested that Don had engaged in excessive drinking. When she applied for assistance to care for Joseph, Philip and Ashley in October 1969, Mrs Jean Collard advised the Child Welfare Department that when she took the boys into her care, Don was 'in a drunken stupor'.[1584] As I noted at [572] it is difficult to envisage any reason why Mrs Jean Collard would have made a false report about Don's drinking. Similarly, as I found at [573] in September 1973, a Relief Officer made notes in connection with an application by Sylvia for financial relief, and noted Sylvia's information that Don was an alcoholic and had left her to go drinking.[1585]

1365 As I found at [611] there was nothing in the circumstances in which any of these reports were received to suggest that the information as to Don's (or Don and Sylvia's) drinking was unreliable, so as to indicate that the State should not have relied on that information.

1366 Secondly, the information in the possession of the State throughout this period included information as to Don's convictions for alcohol-related offences. As I noted at [583] to [593], between 1961 and 1973, Don was convicted on 11 occasions for alcoholrelated offences. Counsel for the plaintiffs submitted that there was ***no***

evidence that information in relation to Don's convictions was expressly taken into account by any relevant child welfare authority, or was relevant to any decision by any child welfare authority, as to any decision in relation to the placement of the Children.[1586] That is so. However, in considering whether the State's failure to return the Siblings to Don and Sylvia's care at any stage was unreasonable it is appropriate to have regard to the information in the State's possession and that information included information as to Don's conviction for alcoholrelated offences.

Whether excessive drinking on Don's part, and violence towards Sylvia, was a reasonable basis for keeping the Children from Sylvia's custody

1367 Counsel for the plaintiffs submitted that even if Don was frequently drunk and violent towards Sylvia that was not a reasonable basis for keeping the Children from the custody of Sylvia,[1587] and that there was ***no*** evidence of any conduct by Sylvia sufficient to warrant the Children being kept from her care.[1588]

1368 This submission must fail for three reasons. First, apart from some relatively short periods of separation between 1967 and 1969, Don and Sylvia lived together for the entire time during which the Children were wards. It is not open to the plaintiffs to contend that the Children could have been returned to the care of Sylvia alone.

1369 Secondly, I do not accept the submission that even if Don was frequently drunk and violent towards Sylvia, that that was not a reasonable basis for keeping the Children from Sylvia's custody. The information the State received as to the occurrence of domestic violence in Don and Sylvia's relationship, which was so serious as to result in physical injury to Sylvia, was clearly a consideration highly relevant to the emotional or psychological welfare of the Children, simply by virtue of their being exposed to physical violence in their parents' relationship.

1370 Thirdly, the information received by the State as to Don's excessive consumption of alcohol, and his domestic violence towards Sylvia, were not the sole concerns of officers of the State who considered whether Don and Sylvia's living conditions between 1961 and 1970 were suitable for the return of the Children. Throughout that period, officers of the State observed those living conditions, and received information from third parties about other aspects of Don and Sylvia's ability to care for the Children, which cast doubt on whether their home environment was suitable for the return of the Children. I turn to deal with these considerations.

Did the State's failure to return the Children to the care of Don and Sylvia at any stage during their wardships constitute a breach of fiduciary duty?

1371 As I found at [569] Don and Sylvia continued to live at the humpy between 1961 and 1970, and the living conditions at the humpy remained largely unchanged during that period. In other words, throughout that period, Don and Sylvia continued to live in the same highly impoverished circumstances, and in accommodation without basic facilities like electricity, water or bathroom and toilet facilities. Those conditions were not materially different from the living conditions at the humpy when the Siblings were made wards.

1372 I am unable to accept the submission by counsel for the plaintiffs that between 1961 and the late 1960s (when the Siblings began to return to live with Don and Sylvia), the State failed to make proper enquiries about whether Don and Sylvia were able to look after the Children. The evidence established that officers of the State had regard to Don and Sylvia's ability to look after the Children, and to the fact that one of the key factors in the Children having been taken into care namely Don and Sylvia's accommodation and living conditions – remained unchanged throughout this period. The inadequacy of Don and Sylvia's living conditions for the return of the Children was noted in a number of reports by officers of the Child Welfare Department and Department of Native Welfare who ***visited*** Don and Sylvia during this period, particularly Mr WrightWebster's report of August 1962,[1589]Constable Wall's report of December 1966,[1590] Mr Hill's report of April 1967,[1591] Mr Tilbrook's report of September 1967,[1592] Mr Hill's report of January 1968,[1593] Mr Hill's report of February 1968,[1594] and Mr Moulton's report of September 1969.[1595]

1373 In addition, during this period, the State also had information in relation to other matters which did not support the return of the Children to Don and Sylvia. Between 1968 and 1969, the State received information which suggested that Don and Sylvia were not able to care for their three youngest sons, as a result of the deterioration in their relationship. As I found at [639], in January 1968 Mrs Janet Hayden advised the Child Welfare Department that Don had left Ashley in her care after Sylvia left him.[1596] In October 1969, the Child Welfare Department received information that Joseph, Philip and Ashley were being cared for by Mrs Jean Collard, as Don was unable to look

after them and Sylvia had left him.[1597] As I found at [647], the three boys remained with Mrs Jean Collard until October 1975 when they returned to live with Don and Sylvia.

1374 A further piece of information in the State's possession which was of concern to officers of the Child Welfare Department, and the Department of Native Welfare, in relation to whether the Children could return to live with their parents, was Don's casual employment, and periods of unemployment. At various times, departmental officers who inspected the Collards' living conditions, noted that Don was out of work. As I found at [651] the fact that Don was engaged in seasonal farm work meant that it was more likely than not that he was out of work, or between jobs, on at least some occasions during the year.

1375 As I found at [531] to [536], despite the existence of these concerns, between 1967 and 1969, all of the Children, except Ellen and Wesley, had returned to live with Don and Sylvia in Brookton with the permission of officers of the Child Welfare Department. However, after that occurred, officers of the Child Welfare Department received information which suggested that Don and Sylvia were unable to look after some of the Siblings, and that they should be returned to Sister Kate's or to foster care. As I found at [453], on about 7 October 1969, Don and Sylvia left Beverley, Glenys and Eva with Ms Jones in Brookton, which necessitated their return to foster care, and to Sister Kate's. Furthermore, as I found at [481] in January 1971, after Beverley, Glenys and Eva were permitted to spend Christmas with Don and Sylvia, officers of the Child Welfare Department received information that Don and Sylvia had been drinking and brawling, and that the girls eventually ran away from home on 15 January 1971. (That information was consistent with other information in the State's possession at the time, namely that Don and Sylvia were convicted of being drunk in public on 24 December 1970.)

1376 As I found at [999], it was not until August 1970 that Don and Sylvia obtained a SHC house in Kondinin. By December 1971, Don and Sylvia applied for the return of Wesley. As I found at [984] after an investigation of their living conditions in early 1972, an officer of the Child Welfare Department reported that Don and Sylvia's home conditions were not suitable for the return of the Children. I found at [987] it is more likely than not that none of Don and Sylvia's children were living at home with their parents on a permanent basis at that time.

1377 Wesley was permitted to return to live with Don and Sylvia in September 1975, when Don and Sylvia were living in a house in Kondinin. By that stage, Wesley was old enough to have decided that he ***no*** longer wished to live with the Stephensons. Further, by then he was the only one of the Children (who were still wards) who was still living in foster care.

1378 It cannot be said that the failure by officers of the State to return all of the Children to Don and Sylvia's care before the end of their wardships, and especially between 1961 and 1970, was so plainly unreasonable that ***no*** reasonable person in the same position would have failed to return the Children, having regard to the information which was in the State's possession during that period, and particularly to: the observations of officers of the Child Welfare Department and the Department of Native Welfare which confirmed that Don and Sylvia continued to live at the humpy, in the same impoverished conditions, until 1970; Reports from officers of those Departments or from third parties that Don, or Don and Sylvia, were drunk at various times between 1962 and 1970; information in the State's possession concerning convictions incurred by Don (and, in December 1970, by Sylvia) for alcoholrelated offences; Don's casual employment in seasonal farming work; information provided to officers of the Child Welfare Department (including by Sylvia herself) of incidents of domestic violence which were sufficiently serious to cause physical injury to Sylvia; information provided to officers of the Child Welfare Department which indicated that in 1969, Don and Sylvia were unable to look after Beverley, Glenys and Eva, and that Don and Sylvia were unable to look after Joseph, Philip and Ashley for several periods during 1967 1969, and during the years between 1969 and 1975; and observations by officers of the Child Welfare Department that in early 1972 Don and Sylvia's home conditions (in a house in Kondinin) were not suitable for the return of the Children.

1379 The provision of this information to the State between 1962 and 1970 pointed to the conclusion that the living conditions which formed the basis for the order that the Siblings be made wards, continued to exist, without any improvement.

1380 In so far as the Siblings are concerned, once they became old enough to leave their placements and return to Don and Sylvia's care of their own volition, officers of the Child Welfare Department recognised that despite their

concerns about their living conditions if they lived with Don and Sylvia, there was little that could be done to compel the Siblings to return to foster or institutional care without their willing cooperation.

1381 In relation to Ellen, in addition to the information set out above, the State had an additional piece of information, namely that her childhood in foster care had been very stable. She lived with the Dwyers from the age of six months, had never run away or sought to return to live with Don and Sylvia, and the information available to the Department suggested that she was happy and well cared for.

1382 Taking all of these matters into account, I find that it was not plainly unreasonable for the officers or employees of the State not to permit the Children to return to live with Don and Sylvia at any time prior to the dates on which approval was given for that to occur.

1383 Having regard to the considerations set out above, even if the test for a breach of a fiduciary duty in the present context were what a reasonable person in the same position would have done, in my view, the outcome would be ***no*** different.

(D) The State's failure to ensure the Children stayed together when they were removed from Don and Sylvia's care

1384 In his closing submissions, counsel for the plaintiff pointed to the following matters as further aspects of the alleged breach by the State of its fiduciary duty to act in the best interests of the plaintiffs by maintaining their family unit: The State determined to ***place*** the Siblings at Sister Kate's notwithstanding that it had knowledge of the potential adverse psychological effects of that separation on them,[1598] and without any attempt to kept the Siblings together while at Sister Kate's;[1599] and The State ***placed*** the Children in placements in nonaboriginal families, or in institutions with nonindigenous carers (that is, Sister Kate's).[1600]

1385 As I understood the plaintiffs' case, the decisions or conduct of officers of the State which were the subject of this alleged breach of the fiduciary duties were the decisions which were made to leave the Siblings at Sister Kate's after they were made wards, and the various decisions on different dates, by which Ellen and some of the other Siblings were ***placed*** into foster care placements with nonindigenous families (and from which it appears that the inference is invited that the State failed to consider an alternative placement with an aboriginal family).

1386 I am unable to accept these submissions. The Siblings were not ***placed*** at Sister Kate's by the Director. They had already been ***placed*** there by Ms Jones, with Don and Sylvia's authority. Counsel for the plaintiffs submitted that once the Children's Court ordered that the Siblings be made wards, it was open to the State to have determined that they should be ***placed*** with their parents.[1601] Accordingly, I have understood the plaintiffs' contention to be that the State determined that the Siblings should remain at Sister Kate's after they became wards, rather than that they should be returned to Don and Sylvia's care or ***placed*** in foster care with family members or aboriginal families.

1387 The decisions to ***place*** some of the Children in placements in nonaboriginal families, were made by officers or employees of the Child Welfare Department at the various times I have noted in the course of my factual findings above.

1388 I am not persuaded that those decisions were so plainly unreasonable that ***no*** reasonable decision maker in the same circumstances in 1961 would have reached the same decisions, for six reasons.

1389 First, as I found at [890], in the late 1950s and through the 1960s, there was a general awareness by officers of the Department of Native Welfare and the Child Welfare Department that removing children from their families could have adverse psychological impacts on those children. However, the extent of that knowledge should not be overstated. As I found at [890], the extent of this knowledge, and of the significance of those potential adverse consequences, increased gradually over the years. At the time the Children were made wards, there was clearly not the same awareness of these adverse implications as might be expected of child welfare officers today. It was only by the 1970s that there can be seen an increasing emphasis within the Child Welfare Department on thorough investigations into the situation of a child suspected to be neglected, and on identifying the best course for the future care and protection of that child which involved minimum disruption to that child's life. Those developments

meant that applications for children to be made wards became less common, and periods of wardship became shorter.

1390 Secondly, counsel for the plaintiffs submitted that there was ***no*** evidence that the State considered the placement of the Siblings into foster care at any time before 1964.[1602] However, the evidence was that it had been a longstanding policy within the Child Welfare Department that where a child could be ***placed*** with a relative that would be done. There was ***no*** evidence to suggest that a foster placement with a family member was an option in this case, at least before the mid1960s. From that time on, I note that some of the Siblings were ***placed*** with Mrs Jean Collard (Don's sister in law) at various times. I have dealt with this point in further detail below at [1408].

1391 Thirdly, there was ***no*** evidence that between December 1961 and 1970, there was any alternative institution, or foster care placement, where all of the Siblings could have been ***placed*** together. The evidence of Mr Maine to which I referred at [899] above was that there were ***no*** foster placements that could have taken all of the Siblings.

1392 Fourthly, the information available to the Director included the fact that Don and Sylvia had ***placed*** the Siblings at Sister Kate's. The decision to leave the Siblings at Sister Kate's accorded with the preference shown by their parents for that institution.

1393 Fifthly, counsel for the plaintiffs submitted that there was ***no*** evidence that there was any acknowledgement of the desirability of keeping the Siblings together in the one cottage at Sister Kate's, or to encourage interaction between the Siblings outside the cottages in which they were ***placed***.[1603] I am unable to accept that submission. Sister Kate's was a private institution, it was not open to the State to dictate the placement of children within the institution. Mr Maine's evidence (to which I referred at [908]) was that those placements were a matter for the manager of the institution. However, as the evidence of Mr Mulroney (to which I referred at [906]) demonstrated, Sister Kate's was one of the institutions where sibling groups could be kept together, within a cottage home environment. The evidence established that some of the Siblings were ***placed*** in the same cottages at Sister Kate's. Donald, Darryl and Bonnie were together for much of their time at Sister Kate's and Burnbrae. Similarly, for most of their time at Sister Kate's prior to 1969, Beverley, Glenys and Eva lived in the same cottage. Furthermore, as I found at [848] there were opportunities for the Siblings to see each other on their way to and from school, and during play, while they lived at Sister Kate's.

1394 Sixthly, as I found at [895] although there was a shift in thinking within the Department of Native Welfare and the Child Welfare Department between the late 1950s and the late 1970s in relation to the merits of institutional care versus foster care, this change was a slow and gradual one. Although Sister Kate's was a large institution, it used the cottage home model, and at the time when the Siblings were made wards, that was the preferable model for institutional care. As I found at [900], it was not until the early 1970s that the gradual shift in thinking moved away from a preference for large institutions like Sister Kate's to smaller, community based cottage homes.

1395 Even if the test for a breach of fiduciary duty in the present context were what would have been done by a reasonable person in the same position as the Director or the officers or employees concerned, the outcome would be ***no*** different.

1396 Turning next to the decisions made by officers of the Child Welfare Department to ***place*** some of the Children into foster care, when those foster care placements were not with indigenous families, there is nothing to suggest that those decisions were made other than in the belief by the officers concerned that the foster care placement was in the best interests of the child concerned. I am not persuaded that any one of those decisions was so plainly unreasonable that ***no*** reasonable decision maker would have reached them, for two reasons.

1397 First, although there was some awareness on the part of officers of the Department of Native Welfare and Child Welfare Department, from the late 1950s, of the desirability of maintaining connections between aboriginal wards and their families, by ***placing*** them in foster care placements with members of their extended family or of the aboriginal community, in preference to nonaboriginal carers, the extent of this knowledge at the time when the Children were taken into care was not extensive. As I found at [939] there was ***no*** policy in the Child Welfare Department to achieve this objective until 1973, and it was not until the mid to late 1970s that the Commonwealth

and State governments developed policies recognising the importance of ***placing*** aboriginal wards with extended family, or with members of the aboriginal community.

1398 Secondly, as I found at [920], there were very limited foster care placements with aboriginal families at the time the Children were made wards, and this remained an issue throughout the period of the wardships.

1399 In both respects, the submission that the placement of the Children in foster placements with nonaboriginal families constituted, or contributed to, a breach of the State's fiduciary duty to the plaintiffs is one which reflects expectations drawn from contemporary child welfare policies. When the circumstances which existed in the late 1950s and the 1960s are taken into account, as they must be, the submission that these factors contributed to a breach of fiduciary duty by the State cannot be accepted.

1400 Even if the test were what a reasonable person in the same position as the officers of the Department of Native Welfare and Child Welfare Department would have done in relation to foster care placements for the Children, the result in my view, would be ***no*** different.

(E) The decision to apply for a maintenance order against Don in respect of the maintenance of the Children

1401 As I found at [1022] to [1023], on 13 March 1958 and 1 March 1962, orders were made by the Children's Court at Brookton requiring Don to pay maintenance in respect Ellen and of the Siblings.

1402 The plaintiffs' case was that the State chose to ***place*** Ellen in foster care, and the Siblings in Sister Kate's, and to obtain maintenance payments from Don, rather than to leave the Children with their parents, which would have enabled Don and Sylvia to spend an amount equivalent to the maintenance payments on the Children directly or on obtaining accommodation for their family.[1604]

1403 This submission cannot be accepted, for two reasons. First, as the orders for the payment of maintenance were made by the Children's Court pursuant to the terms of the Child Welfare Act, ***no*** breach of a fiduciary duty could arise from the making of those orders. Further, as I noted at [195], it was open to officers of the Child Welfare Department and the Department of Native Welfare under the Child Welfare Act to make an application for an order for the payment of maintenance by any near relative of a child, and was the necessary precursor for the making of orders by the Court. In those circumstances, it is difficult to see how a breach of a fiduciary duty could arise from any application for such an order.

1404 Secondly, and in any event, inherent in the submission by counsel for the plaintiffs was that it could be inferred that the payment of the maintenance made a significant difference to Don and Sylvia's ability to obtain and provide a home for the Children, and thus to their prospects of securing the return of the Children to their care. The evidence does not permit an inference of that kind to be drawn. As I noted at [1022] to [1033], from 13 March 1958 until 1 March 1962, Don was obliged to pay 1 pound per week in maintenance for Ellen, and from 2 March 1962 Don was obliged to pay 6 pounds per week in maintenance for the Children. (After decimal currency was introduced, this amounted to approximately $12 per week.) As I noted at [652], Don and Sylvia's evidence was that Don earned 'good money', or approximately $50 per week for most of the year, and approximately $80 $90 during the shearing season. Because they lived in the humpy, without access to basic utilities, they also had very little in the way of ordinary living expenses other than for a contribution to the rates for Bessie Ninyette's block, and the cost of clothing and food (at least some of which was obtained free of charge from the farms on which Don worked). On the other hand, clearly Don and Sylvia lived in extremely impoverished conditions in the humpy. As I observed at [664] the evidence did not permit a finding to be made as to the cause of this impoverishment. The same problem means that it is not possible to make a finding that if Don had not had to pay maintenance, that he would have put the same amount towards establishing and maintaining a home for his family, and that that additional modest sum of money per week would have enabled him to obtain a home for his family.

1405 A further impediment to accepting the submission by counsel for the plaintiffs is that it assumes that Don made all of the maintenance payments required of him. As I found at [1024] Don did not always keep up to date with his maintenance payments, and he served time in custody in lieu of payment of arrears of maintenance payments on a number of occasions.

1406 In these circumstances, I am not persuaded that the decisions by officers of the Department of Native Welfare and the Child Welfare Department to seek an order that Don pay maintenance for Ellen, and for the Siblings, were so plainly unreasonable that ***no*** reasonable decision maker would have acted in that way.

1407 Even if the test were what a reasonable person in the same position as the officers would have done, the result in my view, would be ***no*** different.

(F) Placement with family members or members of the aboriginal community

1408 The plaintiffs alleged that the State's fiduciary duties included: [107.2] In the event that the Defendant formed the view that Don and Sylvia could not adequately care for any of the Children, and that any of the Children should be removed from the care of Don and Sylvia as a trustee and a fiduciary the Defendant was obliged:

[107.2.1] not to fail to ascertain whether there were members of the Children's extended family, relatives or other members of the aboriginal community who could look after the Children,

[107.2.2] alternatively, not to ***place*** the Children elsewhere if there were members of the Children's extended family, relatives or other members of the aboriginal Community who could look after them.

1409 The plaintiffs alleged that in breach of its fiduciary duties, the State [108.2] failed at the time of the Respective Dates of Committal and thereafter to ascertain whether there were members of the plaintiffs' extended family, relatives or other members of the aboriginal community who could look after the Children;

[108.3] failed to ensure that the foster families selected were suitable placements and thus ***placed*** the Children thereafter in a group home under the control of foster families which were unsuitable;

[108.5] failed to take steps to avoid exposure of the Children to the risk of physical or emotional harm.

1410 In his opening submissions, counsel for the plaintiffs initially submitted that the reference to 'suitable' placements in par [108.3] of the Amended Statement of Claim meant 'safe' placements.[1605] However, later in his opening, he clarified his position and confirmed that the reference to 'suitable' foster families was intended to be a reference to non-indigenous families,[1606] and that this applied to the placement of the Siblings at Sister Kate's as well as to the placement of some of the Children in foster care.[1607]

1411 I largely dealt with the plaintiffs' contentions in relation to this aspect of the fiduciary duty in the course of dealing with the alleged breach of the fiduciary duty to act in the plaintiffs' best interests by preserving the plaintiffs' family unit. It is necessary only to make the following additional observations.

1412 In so far as the breach of fiduciary duty in relation to the placement of the Children with nonaboriginal families is said to have arisen by virtue of the State's failure to consider whether indigenous foster care placements were available or to ***place*** the Children with indigenous families, this allegation of a breach or breaches of duty must fail because of a lack of evidence, for three reasons. First, there was ***no*** evidence as to the considerations specifically undertaken by officers of the State in determining where the Children should be ***placed*** in a foster placement. The documents in evidence simply indicated that some of the Children were ***placed*** in foster placements, without indicating any or all of the considerations which led to the selection of that particular placement. It is not possible to infer, from the absence of documents, that officers of the State did not give consideration to the availability of family members, or members of the aboriginal community, who might have been able to foster some of the Children. Furthermore, there was some evidence that some of the Siblings' foster carers were family members. By way of example, as I noted at [482] to [483] and [437], Glenys and William lived with Mrs Jean Collard for periods of time. That evidence permits the inference that when the State had information to suggest that there were family members who were in a position to provide adequate care for at least some of the Children, those persons were asked to provide care for them.

1413 Secondly, although it was apparent that Mr and Mrs Dwyer, and Mr and Mrs Stephenson, were not aboriginal, there was ***no*** evidence in relation to whether most of the other individuals or families with whom those Siblings were ***placed*** were either related to the plaintiffs, or were aboriginal people. Accordingly, other than in relation to Ellen's

placement with Mr and Mrs Dwyer, and Wesley's placement with Mr and Mrs Stephenson, it is not possible to make any finding that the State failed to ***place*** the Children with non-aboriginal foster carers.

1414 Thirdly, even if it could be said that the State failed to ascertain whether there were family members or members of the aboriginal community who could have fostered the Children when they were made wards, there was ***no*** evidence that there were any family members (apart from Mrs Jean Collard) or members of the aboriginal community who were in a position to foster the Children at any relevant time. Had there been family members or relatives of the plaintiffs who were in a position to have fostered the Children, one would have expected the plaintiffs to have given evidence as to who those persons were, and if those persons were still living, one would have expected those persons to be called to give evidence. At ***no*** stage did Don and Sylvia give such evidence.

1415 Accordingly, for these reasons, and for the reasons set out above at par [1396] to [1400], the plaintiffs have not established that the State failed, at the time when the Children were made wards, and thereafter, to ascertain whether there were members of the plaintiffs' extended family, relatives or other members of the aboriginal community who could look after the Children, or that the State failed to ***place*** the Children with family members or members of the aboriginal community when that was an option which was open to it.

1416 Further, having regard to the evidence, and for the reasons set out above and at [1396] to [1400], I am not satisfied that the decisions by officers of the Child Welfare Department and Department of Native Welfare to ***place*** the Siblings at Sister Kate's, and to ***place*** Ellen and Wesley in foster care with nonindigenous families, were so plainly unreasonable that ***no*** reasonable decision maker in the same circumstances would have reached the same decision.

1417 Even if the test for a breach of fiduciary duty were what a reasonable person in the same circumstances would have done, the outcome in my view would be ***no*** different.

(G) Assessment and supervision of foster placements

1418 The plaintiffs alleged that the State's fiduciary duties included the following duties: [107.3] As a trustee and a fiduciary the Defendant was obliged:

[107.3.1] not to fail to ensure that any foster family selected was a placement which avoided or limited a risk of harm to any of the Children,

[107.3.2] alternatively, not to ***place*** the plaintiffs within foster placement which carried a risk of harm to any of the Children. [107.4] As a trustee and a fiduciary the Defendant was obliged:

[107.4.1] not to fail to supervise the foster family group home into which any plaintiff was ***placed*** sufficiently to detect a risk of harm to any of the Children,

[107.4.2] alternatively, not to leave the foster family group into which any plaintiff was ***placed*** unsupervised or inadequately supervised to detect a risk of harm to any of the Children; [107.5] As a trustee and a fiduciary the Defendant was obliged:

[107.5.1] not to fail to remove any of the Children from a foster home which carried a risk of harm to any of the Children,

[107.5.2] alternatively, not to let any of the Children remain in a foster home which carried a risk of harm to any of the Children.

1419 The plaintiffs alleged that in breach of these fiduciary duties, the State: [108.4] failed to adequately assess and supervise the foster family group homes;

[108.5] failed to take steps to avoid exposure of the Children to the risk of physical or emotional harm;

[108.8] failed to take any reasonable steps to protect the physical and mental health of the Children.

1420 At the outset it is necessary to be clear about the matters upon which the plaintiffs relied as the basis for the alleged breaches of the State's fiduciary duties. Initially, counsel for the plaintiffs suggested that that the Siblings were required to do excessive manual labour, and were subjected to excessive physical discipline, and that this constituted a breach by the State of its fiduciary duty to assess and supervise the Children in foster care.[1608] The evidence did not support this contention, and in closing, counsel for the plaintiffs expressly abandoned it.[1609]

1421 In his submissions, counsel for the plaintiffs made clear that the reference to 'foster family group homes' was a reference to the cottage homes at Sister Kate's, and thus confirmed that the alleged breach of fiduciary duty to assess and supervise the foster family group homes pertained only to the sexual abuse suffered by Beverley and Glenys at Sister Kate's.[1610]

1422 To the extent that the duties alleged referred to removing the children from foster homes (other than foster family group homes), counsel for the plaintiffs did not contend that any of the Children were ***placed*** in foster homes which were unsuitable, in the sense that the Children were at risk of harm, so that the State should have removed those children.[1611]

1423 However, in his opening submissions, counsel for the plaintiffs referred to inadequate assessment and supervision of foster homes as occurring in relation to shortterm weekend and holiday placements while the Siblings were at Sister Kate's.[1612] He submitted that the alleged failure to take steps to protect the physical and mental health of the children pertained to the abuse of Beverley and Glenys during weekend and holiday care from Sister Kate's.[1613]

1424 Accordingly, I have understood the plaintiffs' case in relation to this alleged breaches of the fiduciary duties it is said to have owed to pertain to the sexual abuse suffered by Beverley and Glenys which took ***place*** at Sister Kate's, and which also occurred in the course of shortterm weekend placements while Beverley and Glenys were living at Sister Kate's.

1425 Counsel for the plaintiffs submitted that the State breached these duties by ***placing*** Beverley and Glenys in an institutional setting (Sister Kate's) where the effects of sexual abuse on Glenys were not observed or attended to,[1614] and where they were deprived of the nurturing environment of their natural parents without the provision of an equivalent level of care, protection and nurturing.[1615] The plaintiffs' case was that if the State had ensured that the Siblings were ***placed*** in a nurturing environment, and where their welfare was monitored, Glenys' symptoms would have been noticed, and attended to.

1426 Counsel for the plaintiffs also submitted that the Director failed to comply with his statutory duty under the Child Welfare Act (to which I referred at [190]) to ensure that all wards were ***visited*** at least once every six months to ascertain whether the treatment, education and care of each ward was satisfactory.

1427 In addition, I understood the plaintiffs' case to be that the alleged breach also lay in the failure to have in ***place*** any system for an assessment as to the suitability (that is, the safety) of persons with whom the Siblings might be ***placed***.

1428 I deal with each of these submissions in turn. Before doing so, however, it is necessary to consider one of the premises for the plaintiff's contentions, namely that Glenys manifested signs of sexual abuse while she lived at Sister Kate's.

1429 Counsel for the plaintiffs submitted that 'Dr Jane Fitch notes in her report on Glenys that the effects of the sexual abuse on her were evident at Sister Kate's. That evidence includes chronic bed wetting and inability to eat solid food.'[1616] The evidence given by Glenys at the trial as to the physical signs that she had been sexually abused was limited. Her evidence was that because of the sexual abuse she had difficulty eating and swallowing, and she particularly hated eating fish (which was what they had for dinner every Friday) because she associated it with the sexual abuse she suffered.[1617] Glenys did not give evidence that she wet the bed while she was at Sister Kate's, and I ***place no*** weight on that part of Dr Fitch's report where she relies on Glenys' bed wetting as a sign that she had experienced sexual abuse.

1430 However, the limited evidence gives rise to the question whether Glenys' behaviour should have alerted officers of the State responsible for her care in the early 1960s to the fact that she was being sexually abused. There was ***no*** evidence as to whether in the 1960s it was known whether within the body of knowledge then extant in relation to child welfare, or psychology that symptoms like those exhibited by Glenys were commonly seen in victims of sexual abuse. Dr Fitch did not address this issue in her report, and none of the other psychologists' reports which were in evidence addressed the issue. At the same time, there was ***no*** evidence as to whether symptoms of that kind might result from other causes, such as a child's anxiety at being separated from family, which would have been relevant to the question whether the Siblings' carers could have been expected to recognise Glenys' symptoms that she had suffered sexual abuse.

1431 Having regard to Glenys' evidence, and to Dr Fitch's evidence, I accept that Glenys' difficulties in eating and swallowing were symptoms of the trauma she had suffered as a result of the sexual abuse she had experienced while living at Sister Kate's. However, the evidence does not permit a finding that that link was known within the body of knowledge of child welfare authorities or psychologists in the 1960s, so as to permit a finding that the State should have been alerted to the sexual abuse as a result of those symptoms.

1432 There was ***no*** evidence that Beverley manifested similar signs of trauma as a result of the sexual abuse she experienced while she lived at Sister Kate's.

Whether there was any, or any adequate, system of supervision of the welfare of the Siblings while they were at Sister Kate's.

1433 The plaintiffs' case was that the State was under a duty to replicate an environment of the kind which the Siblings would have had in the care of their parents, and in which Beverley and Glenys would have had a nurturing figure to whom they could report the sexual abuse or who could protect them from that sexual abuse, and that the State did not provide this system of supervision.

1434 In addition, the plaintiffs submitted that there was ***no*** evidence that the Siblings were the subject of welfare checks between 1961 and 1964, and that this established that they had not been supervised as the Child Welfare Act required. Counsel for the plaintiffs submitted that the records in evidence demonstrated that the State 'was at best sporadic in its compliance with its statutory obligations to ascertain whether their care was satisfactory and did not comply with its statutory obligations'[1618] in relation to Beverley and Glenys during the period when they were sexually assaulted.

1435 I am unable to accept these submissions for seven reasons.

1436 First, the Child Welfare Act required that the Director conduct checks of each ward at least once every six months to ascertain whether the treatment, education and care of each ward was satisfactory. Counsel for the plaintiffs submitted that there was ***no*** evidence that those checks were conducted on Beverley and Glenys prior to August 1964, and that it could therefore be inferred that ***no*** such checks were made during that period. For the reasons I have already set out at [780], I do not accept that that inference is open.

1437 Secondly, as I found at [759] to [761], Beverley was seen by a welfare officer or a doctor on two occasions in 1964, on three occasions in 1965, on three occasions in 1966, on three occasions in 1967, and once in 1968 before she left Sister Kate's to return to Don and Sylvia. Glenys was seen by a welfare officer or a doctor on two occasions in 1964, on three occasions in 1965, three occasions in 1966, on 4 occasions in 1967, on 2 occasions in 1968 and once in 1969 before she left Sister Kate's to live with Don and Sylvia. This supervision was in addition to the immediate supervision which Beverley and Glenys received from the staff of Sister Kate's. Neither Beverley nor Glenys disclosed the abuse they had suffered during these checks.

1438 Thirdly, the evidence suggested that having regard to the resources available to the Child Welfare Department and the Department of Native Welfare during the period up to 1968 and 1969 while Beverley and Glenys lived at Sister Kate's, a more intensive supervision system than that which was in ***place*** could not reasonably have been implemented. The evidence established that at the time when the Siblings were made wards, there were very few persons within the Child Welfare Department or Department of Native Welfare who had any training in psychology or social work. There were not sufficient staff with training of that kind to supervise all of the children in care, much

less to do so on a regular basis so as to permit the development of a close relationship with each ward, in the manner contemplated by the plaintiffs.

1439 Fourthly, in addition to the supervision mechanisms it implemented itself, the State was entitled to take into account the fact that the welfare of the Siblings was also supervised by the staff of Sister Kate's. Moreover, the cottage parent system which was used at Sister Kate's was within the constraints of an institutional setting the residential arrangement which most closely replicated that of a family environment for the wards who lived there. However, neither Beverley nor Glenys disclosed the sexual abuse to any of their cottage parents at Sister Kate's. Although the evidence suggested that one of their cottage parents knew the two males who had sexually abused Beverley and Glenys, the girls were not in the care of that cottage parent for the entire time during which they lived at Sister Kate's prior to 1968 and 1969. Nor did Glenys ever disclose the sexual abuse to Mrs Cross, a cottage mother with whom she formed a close attachment.

1440 Fifthly, the underlying premise of the plaintiffs' submission was the assumption that if the environment in which a child is ***placed*** replicates as closely as it can a family environment, the child will disclose the abuse, or alternatively any symptoms of abuse that the child may manifest will be identified as resulting from sexual abuse. I do not accept that that is so. Even if an arrangement replicating a family environment were in ***place***, its success in replicating the intimacy of a parentchild relationship between the carer and ward would inevitably depend on numerous incalculables, such as the time which would necessarily be required to build up a relationship of trust between the child and the carer, the compatibility of the personalities of the carer and the child, the extent to which the child had been psychologically affected by the abuse or by the circumstances leading to the child being taken into care in the first ***place***, the circumstances in which the abuse was committed (for example, the environment of secrecy or shame in which the abuse was conducted, and whether the abuser had threatened the child with consequences if the abuse were to be disclosed), whether the person who committed the abuse was known to the carer, and the training or qualifications of the carer to recognise the symptoms which might manifest as a result of sexual abuse.

1441 Sixthly, although I found that Don and Sylvia ***visited*** the Siblings regularly while they were living at Sister Kate's prior to 1968 and 1969, neither Beverley nor Glenys disclosed to Don and Sylvia during the period of their wardships the fact that they had been the victims of sexual abuse.

1442 Seventhly, as I found at [716] Beverley and Glenys decided not to tell anyone about the sexual abuse they had experienced while on weekend placements. In fact, the evidence suggested that they did not tell anyone about the abuse they had suffered until they were adults. Having made that deliberate decision, and having not even told their parents, it is difficult to see how any system of supervision might have led them to report the abuse.

There was ***no*** system of assessment of the carers responsible for the care of the Siblings while they lived at Sister Kate's

1443 Counsel for the plaintiffs submitted that there was ***no*** evidence of any system to assess the persons who had the care of the Siblings while they lived at Sister Kate's at least up until 1964,[1619] and that it could therefore be inferred that there was ***no*** system for the assessment of carers. I understood that the assessment contemplated involved checks or enquiries directed to ascertaining whether the carer posed any risk to the welfare of the Siblings.

1444 I am unable to accept the plaintiffs' submission.

1445 As I found at [786] to [791] there was little evidence in relation to whether there was any system in ***place*** for checking the suitability of permanent or occasional foster carers, or of the staff of institutions such as Sister Kate's. As I noted at [787], Mr Maine's evidence was that the Child Welfare Department had ***no*** role to play in the selection of staff at institutions like Sister Kate's. Although Mr Maine confirmed that the Child Welfare Department had responsibility for licensing institutions like Sister Kate's, and would have been concerned to confirm that Sister Kate's met the basic requirements for satisfactory care of the children who lived there, and that an institutions officers within the Department was required to ***visit*** all of the institutions licensed by the Department, there was ***no*** suggestion in his evidence that such oversight extended to assessing and checking staff or weekend carer in the manner contemplated. Having regard to the evidence, I am satisfied that it is more likely than not that ***no*** checks or

enquiries were carried out by officers of the Child Welfare Department or Department of Native Welfare in relation to whether the staff of institutions like Sister Kate's, or of weekend or occasional carers who were engaged by the staff of Sister Kate's, posed any risk to the welfare of the Children who lived at Sister Kate's.

1446 Although Mrs Patullo gave some evidence about her understanding of how the suitability of weekend carers was assessed at Sister Kate's, I found at [788] that her evidence did not permit conclusions to be drawn as to what checks (if any) were conducted by the staff responsible for the management of Sister Kate's. The dearth of evidence means that it is not possible to make a finding that ***no*** checks of the staff of Sister Kate's, or of weekend or occasional carers, were carried out by those responsible for the management of Sister Kate's.

1447 More to the point for present purposes, however, there was ***no*** evidence as to what checks or assessments could have been conducted in the early 1960s. For example, there was ***no*** evidence as to whether criminal record checks of the kind which are now commonly carried out in the workforce were able to be obtained in the early 1960s. Furthermore, there was ***no*** evidence that even if a system of checking or assessment of staff or carers had been in ***place*** for example, a criminal record check, or referee checks that such a system would have identified the risk that the Siblings might have been exposed to sexual abuse, so as to have enabled the State to take steps to protect the Siblings from that risk. There was ***no*** evidence, for example, as to whether any of the persons who assaulted Beverley and Glenys had any criminal record, or any history of sexual offending of any kind.

1448 I am not persuaded that the approach taken by officers of the Child Welfare Department in relation to the supervision of the staff of, or carers engaged by Sister Kate's, or in relation to the welfare of the Children more generally while they were at Sister Kate's was so unreasonable that ***no*** reasonable decision maker would have adopted the same approach.

1449 Even if the test were what a reasonable person in the same position as the officers of the Child Welfare Department would have done, I am not persuaded having regard to the matters set out above that the result of that test would be any different.

(H) Facilitate contact between the Children and Don and Sylvia, and members of their extended family or members of the aboriginal community

1450 The plaintiffs alleged that the State's fiduciary duty included: [107.6] As a trustee and a fiduciary the Defendant was obliged:

[107.6.1] not to fail to take adequate steps to facilitate contact between the Children and the Children' parents, Don and Sylvia,

[107.6.2] alternatively, not fail to facilitate contact between the Children and Don and Sylvia. [107.7] As a trustee and a fiduciary the Defendant was obliged not to fail to take adequate steps to facilitate contact between the Children and members of the Children's extended family or other members of the aboriginal community.

1451 The plaintiffs alleged that in breach of its fiduciary duty, the State: [108.5] failed to take steps to avoid exposure of the Children to the risk of physical or emotional harm;

[108.6] failed to take any or any adequate steps to facilitate contact between the Children and Don and Sylvia;

[108.7] failed to take any or any adequate steps to facilitate contact between the Children and the members of the plaintiffs' extended family or other members of the aboriginal community.

1452 Counsel for the plaintiffs confirmed that the reference to 'extended family and other members of the aboriginal community' in relation to the breach alleged in [108.7] of the Amended Statement of Claim was intended to mean grandparents, uncles and aunts and cousins.[1620]

1453 In his written closing submissions, counsel for the plaintiffs submitted that the State breached these duties because Don and Sylvia's attempts to ***visit*** the Siblings at Sister Kate's were often frustrated and their ***visits*** were not facilitated by the staff at Sister Kate's.[1621]

1454 I am unable to accept the plaintiffs' case in respect of this alleged breach of fiduciary duty, for four reasons.

1455 First, as I noted at [793] to [794], the policy of Sister Kate's during the period when the Siblings lived in the 1960s appears to have been that weekend leave and ***visits*** by family were allowed once a month, and that this was not out of the ordinary for institutions of the kind at the time. I found at [829] that while the Siblings were living at Sister Kate's, Don and Sylvia ***visited*** regularly, sometimes as often as every few weeks, but otherwise at least once every month or two, and that sometimes other relatives, such as the Siblings' grandparents, ***visited*** as well. I also found (at [830]) that there was ***no*** evidence to suggest that the staff of Sister Kate's or any officer of the Child Welfare Department or Department of Native Welfare, sought to make it more difficult to Don and Sylvia to ***visit*** the Siblings, or to discourage their ***visits***.

1456 In other words, the evidence established that the policy at Sister Kate's in relation to family ***visits*** for wards does not appear to have been out of the ordinary for the time, that Don and Sylvia ***visited*** on a regular basis, and their ***visits*** were not prohibited or discouraged by the staff of Sister Kate's, or by any officer of the Child Welfare Department or Department of Native Welfare. There was ***no*** evidence to support the conclusion that the State failed to facilitate contact between the Children and their extended family or other members of the aboriginal community. Members of the Children's extended family (such as their grandparents) did ***visit*** them, and there was ***no*** evidence that they were restricted in ***visiting*** when they wished to do so.

1457 Secondly, I found at [815] that until Ellen was about four years old, Don and Sylvia were able to ***visit*** her by arrangement with the Department of Native Welfare, provided that they gave the Department some prior notice so that it could arrange the ***visit***. I also found that once Don and Sylvia found out where Ellen was living, the Dwyers did not prevent Don and Sylvia from ***visiting*** Ellen at their home. I found (at [816]) that officers of the Department of Native Welfare and the Child Welfare Department did not impede contact between Ellen and Don and Sylvia, or the other members of her family.

1458 To the extent that Don and Sylvia were required to ***visit*** Sister Kate's at certain times, or to telephone in advance of a ***visit*** either to Sister Kate's or to see Ellen (before she was four years old) I am not persuaded that those requirements constituted unreasonable restrictions on Don and Sylvia's ability to see the Children. As I noted at [830], prior notice permitted the staff of Sister Kate's to ensure that the Siblings would be at Sister Kate's at the time of their parents' ***visit***. Similarly, in the early years of Ellen's wardship, prior notice of a ***visit*** by Don and Sylvia was required to enable staff of the Department of Native Welfare to arrange for Ellen to be collected from the Dwyers and taken to meet with Don and Sylvia.

1459 It is also not difficult to envisage the good sense from the perspective of the welfare of a child ward of a requirement for prior notice of a ***visit*** by a ward's parents or for ***visits*** at particular times. Such arrangements would undoubtedly have served to ensure certainty for the child involved, avoiding disappointment and distress to the child, for example as a result of unmet expectations if the parents did not attend during the usual ***visiting*** hours, or if the parents ***visited*** at a time when the child was out so that the child missed seeing them.

1460 Thirdly, when viewed in the context of the knowledge of the time, I am not persuaded that the State should have facilitated more contact between Don and Sylvia, and the Children. This is another aspect of the case in which it is important to assess the facts not by reference to contemporary standards, but by reference to the knowledge and understanding in the 1950s and 1960s of the psychological implications of foster or institutional care. As I noted at [890], during the 1950s and 1960s the staff of the Child Welfare Department had some awareness of the importance of maintaining a relationship between a child in foster care, and the child's biological parents, and the importance of encouraging ***visits*** to promote that relationship. However, the degree of understanding by staff of the importance of that connection increased over time.

1461 Fourthly, it was not entirely clear whether this aspect of the plaintiffs' case relied on a claim by the plaintiffs that Don and Sylvia were denied home ***visits*** by the Siblings. For completeness, I should indicate that I am not persuaded that the State failed to facilitate contact between Don and Sylvia by refusing their requests for home ***visits*** by the Siblings. As I noted at [967] to [972], Don and Sylvia requested the return of the Siblings for Christmas on two occasions, and in each case the decision whether to permit the ***visit*** was made by reference to the conditions in which Don and Sylvia were then living.

1462 I am not persuaded that the approach generally taken, or any decision made, by officers of those departments in relation to the contact between the Children and Don and Sylvia, or with their extended family, or with members of the aboriginal community, was so unreasonable that ***no*** reasonable decision maker would have reached the same view.

1463 Even if the test were what a reasonable person in the same position as the departmental officers would have done, I am not persuaded having regard to the matters set out above – that the outcome of that test would have been any different.

(I) Protect the Children's physical and mental health

1464 The plaintiffs alleged that the State's fiduciary duty included: [107.8] As a trustee and a fiduciary the Defendant was obliged:

[107.8.1] not to fail to take reasonable steps to protect the physical and mental health of the Children,

[107.8.2] alternatively, not to disregard the physical or mental health of the Children;

1465 The plaintiffs alleged that in breach of its fiduciary duty, the State: [108.5] failed to take steps to avoid exposure of the Children to the risk of physical or emotional harm;

[108.8] failed to take any reasonable steps to protect the physical and mental health of the Children.

1466 It was not entirely clear how this aspect of the plaintiffs' pleading was relied upon by the plaintiffs. In his opening submissions, counsel for the plaintiffs indicated that the plaintiffs did not rely on par [108.5] of the Amended Statement of Claim as asserting an independent breach of duty.[1622]

1467 However, elsewhere in his opening submissions, counsel for the plaintiffs submitted that the alleged failure of the State to take reasonable steps to protect the physical and mental health of the Children pertained to the placement of the children in weekend and holiday care during their time at Sister Kate's.[1623] In that respect, the alleged breach was said to relate to the harm alleged suffered by Beverley and Glenys when they were the victims of sexual abuse during these placements.[1624] The alleged breach lay in the failure to have in ***place*** any system for making any assessment as to the suitability (that is, the safety) of persons with whom the Siblings might be ***placed*** for a weekend or holiday placement.[1625]

1468 In his written closing submissions, counsel for the plaintiffs also appeared to rely on the following matters as supporting the alleged breach by the State of the duty to protect the physical and mental health of the Children: The decision to remove Ellen, to maintain her separation from Don and Sylvia and to maintain that separation;[1626] The failure to return Ellen to Don and Sylvia's care, notwithstanding departmental recommendations that Ellen should be returned, and on the basis of an allegation of gambling by Sylvia, the accuracy of which, and the impact of which on Ellen's welfare, was not investigated;[1627] The State's decision to forcibly separate and maintain the separation of the Siblings from Don and Sylvia.[1628] The State's removal of the Children from Don and Sylvia notwithstanding knowledge of the potential adverse effects of doing so;[1629] The State's placement of the Siblings at Sister Kate's, which involved their separation;[1630] Placement of Beverley and Glenys in an institutional setting (Sister Kate's) where: the effects of sexual abuse on Glenys were not observed or attended to;[1631] they were deprived of the nurturing environment of their natural parents and lived in an environment where they were deprived of an equivalent level of care, protection and nurturing.[1632] The loss of culture which the Children suffered as a result of their separation from Don and Sylvia, and their placement with nonaboriginal families.[1633]

1469 The discussion of these other alleged breaches (above) adequately addresses the matters relied upon to establish of the alleged breach of duty by the State in failing to avoid exposure of the Children to the risk of physical or mental harm, and the alleged failure to take reasonable steps to protect the Children from such harm.

1470 For completeness, however, there is a further matter with which I should deal. In his written closing submissions counsel for the plaintiffs dealt with 'Noncompliance with statutory duty under the Child Welfare Act 1947 (WA)'.[1634] Under that heading, he noted that the Child Welfare Act required the Director to cause all wards to be ***visited*** at least once every six months, by an officer of the Department or a person appointed for that person by the Director, to ascertain whether the treatment, education and care of the child was satisfactory. Counsel then

set out list of the occasions on which the Children were seen during their wardships. I have already dealt with counsel's submissions on this issue, in relation to Beverley and Glenys and the allegations pertaining to their sexual assaults. However, in addition, counsel for the plaintiffs submitted that the evidence established that the Child Welfare Department did not comply with its statutory obligations in relation to Ellen (for the period between 30 September 1958 and 3 June 1960, and between 3 June 1960 and 15 September 1964) in relation to Bonnie (for the period from 8 December 1961 to 3 January 1968) and in relation to Darryl, the plaintiffs' counsel submitted that he was not seen at all, but was only reported on between 2 October 1969 and 24 February 1970.

1471 The purpose to which these submissions were directed was not clear from counsel's written submissions. In his closing oral submissions, counsel for the plaintiffs submitted that the failure by the State to check on the Children (other than Beverley and Glenys, in their early years at Sister Kate's) every six months 'wouldn't result in any breach in relation to them'.[1635] However, it was not clear whether this submission was directed to the question whether the Children suffered any harm as a result of an alleged failure to adequately supervise them.[1636]

1472 Given this uncertainty, and in case counsel for the plaintiffs had intended to claim that the State breached a fiduciary duty to take reasonable steps to protect the Children from physical and mental harm by failing to ***visit*** them at least once every six months, as required by the Child Welfare Act, it is appropriate for me to deal with that claim. I do not accept that that claim is made out, for three reasons.

1473 First, for present purposes, the statutory requirement to ***visit*** each ward once every six months should be understood as a reflection of the Parliament's intention that wards should be regularly monitored to ensure that their treatment, education and care was satisfactory. A failure to ensure that these six monthly inspections were conducted could not, of itself, constitute a failure by the State to take reasonable steps to protect the physical and mental health of the Children. An inperson meeting with a ward would be one important means, but not the only means, by which a guardian could ascertain whether a ward's physical and mental needs were being met.

1474 Secondly, at [751] I set out my findings in relation to the occasions on which the Children were seen, either by welfare officers, or doctors. It is clear that not all of the Children were seen at least once every six months in every year of their wardships. However, for the reasons explained above at [780] the absence of records for the period between 1961 and 1964 in respect of the Children does not permit the conclusion to be drawn that ***no*** inspections were conducted during this period. After 1964, the evidence established that generally speaking while they lived in institutional or foster care the Children were seen regularly, and in most cases, were seen approximately every six months. The occasions on which they were seen are set out in [751] to [778].

1475 Thirdly, the evidence of Mr Maine, and of the other welfare officers which I noted above at [750], confirmed that sometimes staff shortages, and the demands of more urgent cases, meant that it was not possible to ensure that welfare checks were conducted for all wards at least every six months. Those resourcing issues must be borne in mind in assessing the reasonableness of the conduct of the officers and agents of the State.

1476 I am not persuaded that the approach taken by officers of the Child Welfare Department of Department of Native Welfare in relation to welfare checks on the Children, having regard to the available resources of those Departments, and in all of the circumstances (including the age of the Children, and where they were living at various times) was so unreasonable that ***no*** reasonable decision maker would have acted in the same way.

1477 Even if the test were what a reasonable person in the same position would have done, I am not persuaded that the outcome of that test would be any different.

(J) Avoid a conflict between the State's interest in housing the Children in a facility readily available to the State and the Children's interest in being provided in a home environment with their family or the aboriginal community

1478 The plaintiffs alleged that the State's fiduciary duty included: [107.9] As a trustee and a fiduciary the Defendant was obliged not to put itself into a conflict between its interest in housing the Children in a facility or home readily or conveniently available to the State and the Children's interest in being provided with a home environment:

[107.9.1] within the family unit of their natural parents and siblings;

[107.9.2] within the aboriginal community; and

[107.9.3] which contributed, in a balanced way, to a consistent cultural up-bringing, and to their mental wellbeing and physical safety.

1479 The plaintiffs alleged that in breach of its fiduciary duty, the State: [108.9] preferred its interest in housing the Children in preference to the Children' interests;

[108.10] sought from Don the Maintenance Payment instead of, and at the expense of, assisting Don to become able to support the Children within the family unit.

1480 In his opening submissions, counsel for the plaintiffs submitted that the essence of this alleged breach was that the State had an interest in housing the Children in facilities such as Sister Kate's which were readily and conveniently available to it, as opposed to an interest in providing them with a home environment within their family unit or within the aboriginal community.[1637]

1481 I do not accept that the State had any conflict of interest in relation to housing the Children. For the reasons I have already outlined, when the Siblings were made wards, the Director had to determine where they should live, and clearly gave consideration to the recommendation made by the Children's Court, to the fact that placement of the Siblings at Sister Kate's complied with Don and Sylvia's wishes that they live there, and to the fact that the Siblings' continued residence at Sister Kate's would enable them all to live in the one institution. Implicit in the plaintiffs' case is the contention that there were other accommodation options open to the State, apart from the Siblings' continued residence at Sister Kate's. There was ***no*** evidence that that was so, much less that it was in the State's interest to accommodate the Siblings at Sister Kate's rather than in some other alternative accommodation, so that it might be said that the State was in a position of a conflict between its interest and its duty to the interests of the Siblings.

1482 As I noted above, the decision to leave the Siblings at Sister Kate's was not so unreasonable that ***no*** reasonable decision maker would have acted in the same way.

1483 Even if the test were what a reasonable person in the same position would have done, I am not persuaded that the result would have been any different.

1484 In so far as the collection of maintenance payments is concerned, counsel for the plaintiffs submitted that this was a 'subset' of the claim under [108.9] of the Amended Statement of Claim that the State acted with a conflict of interest.[1638] The plaintiffs' case was that the State chose to ***place*** the Siblings in Sister Kate's and obtain maintenance payments from Don, rather than to leave them with their parents, which would have enabled Don and Sylvia to spend an amount equivalent to the maintenance payments on the Children directly.[1639]

1485 I dealt with the plaintiffs' contentions in relation to the payment of maintenance by Don at [1402] to [1405]. I do not accept that the State was in a position of a conflict of interest when its officers or agents sought that the Court make an order for the payment of maintenance from Don. If that were so, the State would have had a conflict of interest in every case in which it sought a maintenance payment in respect of a child ward, because in every case the making of such an order would be to the State's financial advantage (however miniscule that advantage might be within the context of the State's fiscal position overall). Furthermore, when an application for a maintenance order is expressly permitted by the Child Welfare Act I do not accept that such an application could be capable of giving rise to a breach of a fiduciary duty owed by the State by virtue of a conflict between the State's interest in obtaining the order and any duty to act in the interests of a ward.

1486 For these reasons, and those set out at [1401] to [1407], I am not persuaded that the decisions by officers of the Child Welfare Department or the Department of Native Welfare to seek an order that Don pay maintenance for Ellen, and for the Siblings, were so plainly unreasonable that ***no*** reasonable decision maker would have acted in that way.

1487 Even if the test were what a reasonable person in the same position would have done, the result would be ***no*** different.

6. THE SECONDARY FIDUCIARY DUTIES

1488 The plaintiffs allege that the State owes them secondary fiduciary duties of two kinds: first, a continuing duty to which I will refer, in shorthand, as a duty to obtain legal advice for the plaintiffs, and secondly, a continuing duty to which I will refer, in shorthand, as a duty to take reasonable steps to avoid the occurrence of further loss to the plaintiffs. For the reasons set out below, the plaintiffs' case in respect of the existence of each of these secondary fiduciary duties fails.

1489 In this section of my reasons, I deal with the following matters:

(a) the plaintiffs' pleading in relation to the fiduciary duty to obtain legal advice for the plaintiffs;

(b) whether the duty to obtain legal advice for the plaintiffs is a fiduciary duty;

(c) whether the duty to obtain legal advice is a continuing duty;

(d) the plaintiffs' pleading in relation to the duty to take reasonable steps to avoid the occurrence of further loss to the plaintiffs;

(e) whether a duty to take reasonable steps to avoid the occurrence of further loss to the plaintiffs is a fiduciary duty;

(f) whether that duty is a continuing duty.

(a) The plaintiffs' pleading in relation to the fiduciary duty to obtain legal advice for the plaintiffs

1490 The plaintiffs pleaded that until they obtained independent legal advice about the State's possible breach of the primary fiduciary duties, they could not reasonably have discovered that they had suffered loss and damage, that such loss and damage was causally connected with the events pleaded, or that they had open to each of them a cause of action against the State for loss and damage.[1640]

1491 The plaintiffs pleaded that 'by reason of the matters pleaded herein' (which appears to encompass all of the pleaded bases for the State's alleged duties as a fiduciary) the State owed and continues to owe duties to advise the plaintiffs as to their rights and entitlements, including their right to enforce compensation for breach of a fiduciary obligation against [the State] and to obtain for the plaintiffs independent legal representation or advice, or for advice for the plaintiffs to seek independent legal advice regarding [the State's] liability to the plaintiffs or their entitlement to compensation or damages.[1641]

1492 The State denied that the plaintiffs could not reasonably have discovered that any of them had suffered loss and damage or that they had a cause of action against the State, without obtaining independent legal advice.[1642]The State also denied that it was under any obligation to advise the plaintiffs of their rights and entitlements or to obtain independent legal representation or advice for them.[1643]

1493 The plaintiffs claimed that this fiduciary duty continued after the termination of the wardships. I deal with that aspect of the claim below.

(b) Whether the duty to obtain legal advice is a fiduciary duty

1494 The plaintiffs relied on the decision in Bennett v Minister of Community Welfare[1644] as supporting their claim that the State was (and remains) under a fiduciary duty to obtain legal advice for them. However, the decision of the High Court in Bennett did not establish that the Minister had acted in breach of a fiduciary duty to obtain legal advice for a beneficiary. Nevertheless, for the reasons outlined below, I accept that a fiduciary may in some circumstances be under a duty to advise a beneficiary to obtain independent legal advice, or to obtain legal advice for a beneficiary and that that may be characterised as a fiduciary duty.

The decisions at first instance, and on appeal, in Bennett

1495 Some of the references in the judgment at first instance in Bennett v Minister for Community Welfare suggest that the trial judge found that there existed a fiduciary duty to obtain independent legal advice. Nicholson J found that the Director of Community Welfare and Mr Bennett were in a relationship of guardian and ward, and went on to observe that the Director owed a fiduciary duty to him; that included in that duty was the obligation to assert rights on his behalf; that in relation to a possible action for negligence arising from the accident in the premises occupied by the guardian, the guardian was in a position of conflict with the plaintiff; and that being in such position it was the duty of the guardian to obtain for the plaintiff independent advice.[1645]

1496 On closer analysis, however, an alternative understanding of his Honour's observation is open, namely that Nicholson J found that the Director owed Mr Bennett a common law duty care of care as an incident of the existence of that fiduciary relationship. His Honour described the action brought by Mr Bennett as a claim for damages for negligence in breach of that duty of care,[1646] his reasons disclose the application of orthodox principles in relation to an action for negligence,[1647] and his Honour concluded that the Minister was not liable to Mr Bennett because the Director's breach of the duty of care was broken by the act of Mr Bennett in seeking and obtaining independent advice.[1648]

1497 In any event, by the time Bennett was appealed the case was approached as an action in negligence, the issue on the appeals being whether the causal link between the Director's breach of his common law duty of care, and Mr Bennett's damage (namely loss of the opportunity to sue) was broken when Mr Bennett obtained his own legal advice (which was to the effect that he had ***no*** cause of action) and acted upon that advice. The matter was dealt with on that basis by the Full Court of the Supreme Court,[1649] and the High Court.[1650]

Whether a duty to obtain legal advice may be characterised as a fiduciary duty

1498 There have, however, been some suggestions in the authorities that a duty to obtain legal advice for a beneficiary may be a fiduciary duty. Some of the members of the High Court in Bennett observed, by way of obiter dicta, that although the action was not one for a breach of a fiduciary duty, the Director was subject to a fiduciary duty to obtain independent legal advice for Mr Bennett. Mason CJ, Deane and Toohey JJ observed:[1651] In the courts below, the duty of care appears to have been equated to, even derived from, a fiduciary duty owed by the Director to the appellant arising out of his statutory office as guardian. That fiduciary duty was a positive duty to obtain independent legal advice with respect to the possible existence of a cause of action on the part of the appellant ... .

... The common law duty of care arose independently of the fiduciary duty which in ***no*** way displaced, qualified or derogated from the common law duty.

1499 McHugh J also observed that Mr Bennett may have had an action for a breach of a fiduciary duty:[1652] Having regard to his Honour's finding that the Minister was in breach of a fiduciary duty, it might have been thought that the action of the appellant was one brought in the exclusive equitable jurisdiction 'to enforce compensation for breach of a fiduciary obligation'. If that jurisdiction had been invoked, there would be much to be said for the view that the Minister could not escape liability to compensate the appellant even if the receipt of the legal advice by the appellant in 1976 constituted a novus actus interveniens. ...

However, the case for the appellant was pleaded as an action for damages for common law negligence and not for equitable compensation. Moreover, notwithstanding the reference by Nicholson J to a breach of fiduciary duty, his Honour decided the case on the basis that it was one involving a claim for damages for breach of a common law duty of care.'

1500 In Trevorrow the trial judge held that the APB was under a fiduciary duty to obtain independent legal advice for Mr Trevorrow.[1653] However, the Full Court disagreed that the APB was under any such fiduciary duty.[1654]

1501 Finally, in Westpac Banking Corporation v Bell Group Ltd (in liq) (***No*** 3)[1655] Lee AJA, in discussing prescriptive obligations that may be imposed on fiduciaries, observed that the duty to obtain legal advice which was referred to in Bennett was a duty that 'reflected the core of that fiduciary relationship, namely, that the director, as guardian, loyally protect and serve the interests of the ward. It was an obligation of such importance to the fiduciary relationship that it was proper to regard it as a fiduciary duty'.

1502 If the duty to obtain legal advice for a beneficiary were to be characterised as a fiduciary duty the basis for that characterisation would appear to be that the duty is an incident of the duty to avoid a conflict between the fiduciary's selfinterest and his or her duty to act on behalf of, and in the interests of, the beneficiary, rather than to characterise the duty as a discrete fiduciary duty.

1503 It is not necessary for present purposes to determine if the duty to obtain legal advice is a fiduciary duty because I am not persuaded that the State was obliged to obtain independent legal advice for the plaintiffs in this case.

Why the State was not obliged to obtain independent legal advice for the plaintiffs in this case

1504 In my view, the State was not obliged to obtain independent legal advice for the plaintiffs for five reasons.

1505 First, for the reasons I have already given, the State was not in a fiduciary relationship with the plaintiffs.

1506 Secondly, even if the State was in a fiduciary relationship with the plaintiffs, an obligation to obtain independent legal advice for the plaintiffs could only have been imposed on the State in the event that circumstances arose where its duty of loyalty to the plaintiffs required that legal advice to be obtained. The plaintiffs' claim is that the State became subject to this obligation to obtain independent legal advice for the plaintiffs when it was in breach, or potentially in breach, of the primary fiduciary duties to the plaintiffs. (I do not understand the plaintiff's case to be that the State's obligation to obtain independent legal advice, consequent on its fiduciary duty to the plaintiffs, arose because of a breach by the State of a coexisting common law duty of care to the plaintiffs.) For the reasons I have already given, the State was not subject to a fiduciary duty to the plaintiffs in respect of any of the primary fiduciary duties alleged by the plaintiffs. Accordingly, the State did not become obliged to obtain legal advice to avoid any possible conflict between its selfinterest and its duty to act in the plaintiffs' interests.[1656]

1507 Thirdly, even if the State was subject to the primary fiduciary duties, the plaintiffs' case is that the duty to obtain legal advice arose when the State could reasonably have known that damage had been suffered by the Children as a result of being ***placed*** into State care. The plaintiffs' case is that the State should have had in ***place*** a system for supervision of the Children which would have resulted in the State identifying that the Children were suffering harm.[1657] For the reasons set out in [716] to [717], I am not persuaded that the plaintiffs have established that aspect of their case.

1508 Fourthly, the imposition of a fiduciary obligation to obtain independent legal advice in this situation would be an absurd outcome, having regard to the statutory framework and circumstances.

1509 It would be an absurd outcome if the State were required to obtain legal advice for the Children in respect of the consequences of their being made wards, and at least initially in respect of the decision that the Siblings should live at Sister Kate's, in circumstances where the decision to make them wards was made by the Children's Court pursuant to the Child Welfare Act, and where the Siblings resided at Sister Kate's in compliance with a recommendation of the Children's Court. The Full Court in Trevorrow relied upon a similar 'oddity' about the proposed duty to obtain independent legal advice in that case.[1658]

1510 Fifthly, even if the State was under a fiduciary duty to obtain legal advice for the Children in respect of a possible breach by the State of its primary fiduciary duties to the Children, there could only ever be a breach of that duty if the State had breached the primary fiduciary duties in the first ***place***. Counsel for the plaintiffs accepted that that was so.[1659] For the reasons outlined above, there was ***no*** breach of those primary fiduciary duties, save in respect of the decision of the Commissioner in November 1959 that Ellen should not be returned to Don and Sylvia's care, on the basis of the allegation that Sylvia had been gambling heavily. However, that decision was superseded by the Commissioner's decision in December 1959 that Ellen should not be returned to Don and Sylvia's care, having regard to other information, including Don and Sylvia's living conditions.

(c) Whether the duty to obtain legal advice is a continuing duty

1511 Counsel for the plaintiffs submitted that the duty to obtain legal advice was a 'continuing' duty – that is, that the State continued to be subject to that duty notwithstanding the expiration of the wardships and the termination of any fiduciary relationship in that sense. The plaintiffs' case was that the duty continued until the commencement of any litigation on behalf of the plaintiffs. He conceded that he had ***no*** authority for that proposition: ultimately what we say is that it's an equity of the statute sort of argument, that the State can't say we ***no*** longer have liability because we wish to rely on the statute of limitations and you've run out of time, where if they had carried out their duty then we would have had a remedy.[1660]

1512 Counsel for the plaintiffs also conceded that in a case like this there's a certain amount of bootstraps or circularity about the argument. ... The harm that we are pleading is the harm in the carrying out of the guardianship

relationship and it really boils down to the failure to properly inquire and take into account the impact which separation from natural parents would have upon these children by the act of separating them, the application for the committal of these children. So that's the harm, that's the cause of action. That cause of action remains. You then have the duty as part of that fiduciary relationship to advise [of] that cause of action, which didn't occur.[1661]

1513 I am unable to see how the fiduciary duty to obtain legal advice (if it existed in the first ***place***) could be regarded as a continuing duty, which endured long past the time when the wardships came to an end, and which continued to apply to the State until this litigation commenced in 2010. The argument was clearly intended to bypass limitation defences. While that may be the explanation for the argument, I am unable to see any principled justification for the conclusion that a fiduciary duty continues long past the time when the fiduciary relationship itself comes to an end.

1514 That is not to say, of course, that ***no*** consequences can flow for the breach of a fiduciary duty after a fiduciary relationship has ended. Whether there is a continuing right to obtain a remedy in respect of the breach of a fiduciary duty will depend upon the application of any limitation statutes which may apply. In fact, at various stages in the argument, it appeared that when counsel for the plaintiffs referred to a 'continuing duty' what he appeared to be referring to was an argument that ***no*** limitation period applied to the breach of the fiduciary duties the plaintiffs alleged.[1662] I deal with that argument later in these reasons.

(d) The plaintiffs' pleading in relation to the duty to take reasonable steps to avoid the occurrence of further loss to the plaintiffs

1515 The plaintiffs plead that on the termination of the wardships and thereafter the State continued to owe a duty to the Children to take all reasonable steps to avoid the occurrence of further loss and damage to the plaintiffs arising out of the breaches of its duties as trustee alternatively its fiduciary duty occurring during the period of the wardships.[1663]

1516 The plaintiffs plead that such reasonable steps included providing the plaintiffs with appropriate education, counselling, psychiatric treatment and access to independent legal advice of the Children's rights arising from their committals.[1664]

1517 Having already dealt with the continuing duty to obtain legal advice, in the balance of this section of my reasons, when I discuss the duty to take reasonable steps to avoid the occurrence of further loss, I mean to refer to the provision of education, counselling and psychiatric treatment to the plaintiffs.

1518 The State denies these allegations.

(e) Whether a duty to take reasonable steps to avoid the occurrence of further loss to the plaintiffs is a fiduciary duty

1519 For the reasons I have already given, I do not accept that the State was subject to a continuing fiduciary duty to avoid the occurrence of further loss and damage to the plaintiffs.

1520 Furthermore, I accept the submission of counsel for the State that this secondary fiduciary duty is of a novel kind, for which there was ***no*** authority. ***No*** sound basis in precedent or principle was advanced by the plaintiffs to support the conclusion that a breach of a fiduciary duty can, of itself, give rise to a new fiduciary duty to provide services that would ameliorate the adverse effects of that breach. For a fiduciary duty to arise in that way would be inconsistent with the authorities which establish that the undertaking by the fiduciary of a duty to act for or on behalf of another person, in the interests of that other person, is essential to establish the existence of a fiduciary duty.

1521 Quite apart from these impediments to establishing the existence of a secondary fiduciary duty of the kind alleged, the plaintiffs did not establish that the State had failed to do what the plaintiffs contended it should have, namely to provide any, or any adequate, education, counselling or psychiatric treatment to the plaintiffs. There was ***no*** evidence that the State had failed to provide the plaintiffs with education, counselling or psychiatric treatment. In so far as the question of education is concerned, there was, however, evidence that each of the Children had attended school so long as they were willing to do so, and all undertook at least some years of high school. Glenys and Ellen have undertaken tertiary education.[1665]

1522 In so far as the question of counselling or psychiatric treatment is concerned, I take judicial notice of the fact that a public health system operates in Western Australia, and treatment for psychiatric injuries can be obtained

through that system. In addition, there was evidence that some of the plaintiffs Beverley,[1666] Glenys[1667] and Ellen[1668] have obtained counselling or psychiatric treatment. That is not to say that I do not accept that the plaintiffs would benefit from further counselling or psychiatric treatment. The expert evidence clearly established that that was so. The point for present purposes is that the plaintiffs did not establish that the State failed to provide them with the treatment they required.

7. OTHER DEFENCES AND LACHES

(a) The State's additional defences

1523 Apart from its denial of the existence of a fiduciary duty or of any breach of such a duty, the State relied on a number of other defences. Given the other conclusions I have reached, these additional defences can be dealt with very briefly. The State pleaded that the plaintiffs either have ***no*** right of action against it, or that the plaintiffs are precluded from obtaining any relief against it, because the plaintiffs have failed to comply with the requirements of the Crown Suits Act 1947. For the reasons set out below, I accept that this is so.

1524 Alternatively, the State says that the plaintiffs precluded from obtaining the relief sought because the limitation periods under the Limitation Act 1935 (WA) or the Crown Suits Act 1947 would be applied by analogy in this case. It is unnecessary to deal with this part of the State's pleading, in view of my conclusion in relation to the Crown Suits Act 1947.

1525 Finally, the State says that the grant of relief should be denied by the operation of the doctrine of laches. My findings of fact in relation to the laches defence are set out at [1048] to [1087] above. However, in view of my conclusion that the plaintiffs' actions must fail, it is not necessary to deal with the State's laches defence.

1526 For the sake of completeness, I have set out my conclusions in relation to the operation of the Crown Suits Act 1947.

(i) The plaintiffs have failed to comply with the requirements of the Crown Suits Act 1947 (WA)

1527 In this section of my reasons I deal with the following matters:

(A) The conditions set out in the Crown Suits Act for bringing an action against the Crown;

(B) The State's case;

(C) The plaintiffs' case;

(D) Why the plaintiffs have ***no*** right of action against the State, by virtue of the Crown Suits Act.

(A) The conditions set out in the Crown Suits Act for bringing an action against the Crown

1528 Since 1947, s. 5 of the Crown Suits Act has provided that, subject to that Act, the Crown may be sued in any court in the same manner as a subject. However, until 2005 (when the Crown Suits Act was amended) the right to sue the Crown was subject to s 6 of the Crown Suits Act which provided that '***no*** right of action' lay against the Crown unless two requirements were met. First, the party proposing to bring the action had to give written notice to the Crown Solicitor of his or her intention to do so, and that notice had to be given as soon as practicable, or within three months, of the cause of action accruing.[1669] Secondly, the action had to be commenced before the expiration of one year from the date on which the cause of action accrued.[1670] In the case of a continuing act, neglect or default, subsection 6(1) provided that the cause of action did not accrue until the act, neglect or default ceased, but the notice could be given and the action commenced while the act, neglect or default continued.

1529 However, whether or not notice was given, the Attorney General (on behalf of the Crown) was able to consent in writing to any action being brought against the Crown, provided that that consent was given before the expiration of six years from the date on which the cause of action accrued.[1671] Furthermore, notwithstanding the notice requirements, a party wishing to bring an action against the Crown could seek the leave of the Court to do so at any time before the expiration of six years from the date on which the cause of action accrued.[1672]

1530 As I have already mentioned, s. 6 of the Crown Suits Act was repealed in 2005, but it continues to apply to causes of action that accrued before 15 November 2005.[1673]

(B) The State's case in relation to the Crown Suits Act

1531 The State pleaded that the duties owed to the plaintiffs (if they were owed at all) were not continuing duties.[1674] Accordingly, the State pleaded that the plaintiffs have ***no*** right of action against it because the plaintiffs did not comply with the conditions set out in s. 6 of the Crown Suits Act 1947 (WA) for bringing an action against the State.

1532 The State pleaded that the plaintiffs did not give written notice to the Crown Solicitor as soon as practicable or within three months after their causes of action accrued.[1675] The State also pleaded that the plaintiffs did not commence their action before the expiration of one year from the date on which the causes of action (if any) accrued.[1676]

1533 In so far as any duties are said to have arisen from the committal of the plaintiffs as wards, the State pleaded that any cause of action in respect of those duties accrued on 31 March 1958 when Ellen was made a ward, and on 8 December 1961 when the Siblings were made wards.[1677] Accordingly, the State's case was that any action arising from the committal of the Children had to be commenced on or before 31 March 1959 (in respect of Ellen) or 8 December 1962 (in respect of the Siblings).[1678]

1534 In so far as any cause of action relates to any duty owed during the period of the wardship, the State pleaded that the latest date on which those duties could have accrued was on the cessation of the wardships.[1679]Accordingly, the State's case is that the latest date for commencing any action arising from a breach of duty owed during the period of each wardship was 1 year after the cessation of the wardships.[1680] By way of example, in the case of the youngest of the Children, Wesley, the State's case was that the latest date for commencing any action arising from a breach of duty owed during the period of his wardship was 12 March 1980 (that is, one year after the end of his wardship).

1535 The State also pleaded that any cause of action relating to a duty to obtain legal advice or representation for the plaintiffs accrued on the expiration of the limitation period for the primary cause of action, which the State says was six years after the accrual of that cause of action.[1681] In other words, the State's case was that the latest date by which any duty to provide legal advice could have accrued was six years after the date on which each of the Children's wardships ceased. The State's case was that the latest date for commencing any action arising from its failure to provide any of the plaintiffs with legal advice was, at the latest, seven years (that is, six years plus one year) after the end of each of the wardships.[1682]

1536 The State then pleaded that the plaintiffs did not receive the consent of the Attorney General, or the leave of the Court, to bring the action before the expiration of six years from the date on which any of the causes of action accrued.[1683] The State pleaded that in the case of any cause of action relating to a duty arising in relation to the committal of the Children that consent, or leave, had to be obtained on or about 31 March 1964 (in the case of Ellen) and on or about 8 December 1967 (in the case of the Siblings).[1684]

1537 In respect of any cause of action relating to any duty arising during the period of the wardships, the State pleaded that the Attorney General's consent, or the Court's leave, had to be obtained at the latest six years after the cessation of the wardships.[1685] By way of example, in the case of Wesley, whose wardship was the last to expire, on the State's case that consent, or that leave, would have to have been obtained by 12 March 1985.

1538 Finally, in respect of any cause of action arising from a failure by the State to obtain legal advice for the plaintiffs, the State pleaded that the Attorney General's consent, or the leave of the Court, had to be obtained within six years of the accrual of that cause of action, or in other words, within 12 years of the cessation of the wardships.[1686] Again, by way of example, in the case of Wesley, whose wardship was the last to expire, on the State's case that consent, or the Court's leave, would have to have been obtained by 12 March 1991.

(C) The plaintiffs' case in relation to the Crown Suits Act

1539 The plaintiffs' case was that the secondary fiduciary duties pleaded in the Amended Statement of Claim namely the duties to provide the plaintiffs with legal advice, and the duties to take action to avert further loss and damage, arising from the alleged breach by the State of the fiduciary duties not to fail to act in the plaintiffs' best interests were continuing duties, so that their cause of action has not yet accrued, for the purposes of s 6 of the Crown Suits Act. There was ***no*** dispute that the requirements set out in s 6 of the Crown Suits Act had not otherwise been complied with.

1540 Counsel for the plaintiffs submitted that the secondary fiduciary duties constituted a continuing omission, or a continuing default, for the purposes of s 6 of the Crown Suits Act. In support of that submission he referred to Hammond v Minister for Works[1687] where Ipp J (with whom Rowland J and Owen J agreed) discussed s 47A of the Limitation Act 1935 (WA). That section, like s 6 of the Crown Suits Act, provided that 'for the purposes of this section, where the act, neglect or default is a continuing one, ***no*** cause of action in respect of the act, neglect, or default accrues until the act, neglect or default ceases'. Counsel for the plaintiffs referred, in particular, to the discussion in Hammond of Huyton and Roby Gas Co v Liverpool Corporation[1688] where Scrutton LJ held that 'where after the original act there is a legal duty to avert its consequences, neglect of which is a continuing breach from day to day [there is] a continuance of injury or damage'.

1541 In relation to the secondary fiduciary duty to provide legal advice, the plaintiffs' submission was that the duty not to fail to disclose the entitlement to be advised of a right to seek a remedy continues for so long as it may be possible to obtain that remedy. It could not logically be the case that the Guardian could be entitled to absolve itself of a fiduciary duty to warn of a right to a remedy by terminating the Guardianship.[1689]

(D) Why the plaintiffs have ***no*** right of action against the State, by virtue of the Crown Suits Act

1542 Prior to the enactment of the Crown Suits Act, the only way in which an action could be brought against the Crown was by a Petition of Right, or by an action brought against the Attorney General as the representative of the Crown in cases where ***no*** coercive relief was sought.[1690] However, the enactment of s 5 and s 6 of the Crown Suits Act together established a State legislative scheme dealing with the subject of the immunity of the Crown from suit. Subject to certain limitations which are not presently relevant,[1691] those provisions defined the circumstances in which any right to proceed against the government of Western Australia existed during the operation of those provisions.[1692]

1543 The effect of s 6(1) is that although a cause of action may have accrued, ***no*** right of action lies, and so ***no*** action may be brought or commenced, unless the requisite notice is given and the stipulated one year period has not expired.[1693] Subsection 6(1) thus imposes conditions which are of the essence in order to establish a right to bring an action against the Crown.[1694]

1544 For these reasons, the Crown Suits Act is not a limitation statute. It confers a right to bring an action against the Crown where none previously existed, and conditions the right of the subject to sue the Crown.[1695]

1545 The Crown Suits Act clearly applies to this action. Unless the acts, neglects or omissions on which the plaintiffs' causes of action are based are continuing ones, the plaintiffs' failure to comply with the preconditions set out in s 6(1) of the Crown Suits Act will mean that they have ***no*** right of action against the State.

1546 Section 6(1) of the Crown Suits Act expressly recognises that the act, neglect or default on which a cause of action is based may be of a finite or continuing character.[1696] In Hammond, Ipp J (with whom Rowland J[1697]and Owen J[1698] agreed) reached the following conclusion about what was meant by a 'continuing' neglect or default[1699]: In my opinion, it is to be gathered from the history of the legislation and the authorities to which I have referred that a continuing 'neglect', or 'default' within the last paragraph of s 47A(1) is a continuing omission to comply with a continuing duty to act, such that a fresh cause of action is created each day such omission occurs.

The next question is: what is a continuing duty to act? That is not capable of being answered by a ready definition. It all depends on the nature of the duty. In the case of a contractual duty, the parties' intention will be inferred from the nature and terms of the duty; relevant factors are whether it is to be performed within a time capable of determination, and whether it is capable of being performed over a continuous period.

1547 In Hammond, the Minister for Works was subject to an obligation to refer, to the Governor, an application by a person entitled to apply for an option to purchase land which had been resumed for public works, but which was not being used for any public work. The Minister had refused to refer the appellant's application to the Governor. The question before the Court was whether the Minister's failure to refer the application to the Governor was a continuing default for the purposes of s 47A of the Limitation Act 1935 (WA). The Court in Hammond held that the Minister's obligation was to do an act capable of solitary performance, and to do it within a reasonable time.[1700]

Ipp J held that 'once the obligation is to be completely discharged by a single act, the failure to perform gives rise to only one cause of action, although that failure to perform may continue indefinitely'.[1701]

1548 The plaintiffs' case for compensation rested on the secondary fiduciary duties. Turning first to the secondary fiduciary duty to provide legal advice, the plaintiffs' case was that the State's failure to provide the plaintiffs with legal advice constitutes a continuing neglect or default, so that s 6(1) of the Crown Suits Act does not apply. I am unable to accept that submission. The question that arises for consideration is whether the provision of legal advice to the plaintiffs was something which the State was required to do once (in which case its failure to do so might simply constitute an ongoing breach) or something which the State was required to do on an ongoing, or day to day basis, in which case the cause of action would not accrue until the State's default ceased. In my view, the secondary fiduciary duty to provide legal advice is of the former kind, with the result that s 6(1) of the Crown Suits Act applied to the secondary fiduciary duty to obtain legal advice. My reasons for that conclusion are as follows.

1549 The State's secondary fiduciary duty to provide legal advice arose only in respect of the State's possible breach of its primary fiduciary duties. Whatever the nature of the acts, neglects or defaults of the State said to give rise to a breach of those primary fiduciary duties, those acts, neglects or defaults could only have occurred, or continued, until the end of each of the wardships. That is, once the wardships ended, the State could ***no*** longer perform its primary fiduciary duties (if that was what they were) as a guardian with respect to each of the Children. For that reason, the latest date on which the State could be said to have been subject to the primary fiduciary duties must have been the last day of each wardship.

1550 After that date, irrespective of how many alleged breaches of the primary fiduciary duties had occurred, the State's secondary fiduciary duty to provide legal advice would have been met by a single act: its engaging a solicitor to act for each of the plaintiffs to provide them with legal advice or representation in respect of any possible breaches of the primary fiduciary duties which had occurred during their wardships. The State cannot be said to have been under a fresh duty, day to day, to provide or obtain that legal advice or representation for the plaintiffs. The ongoing failure of the State to obtain legal advice or representation for the plaintiffs in my view therefore merely constituted a continuing breach of its obligation to do that one thing, rather than the breach of an obligation which was renewed each day.

1551 That being the case, the preconditions in s 6(1) of the Crown Suits Act had to be met before the plaintiffs had any right to commence an action for a breach of the secondary fiduciary duty to provide legal advice.

1552 In my view, it is unnecessary to consider the question the nature of the other secondary fiduciary duties. For the reasons I have already given, there is simply ***no*** basis for the plaintiffs' contention that such fiduciary duties could exist. ***No*** purpose would be served by going on to consider the possible application of the Crown Suits Actto merely hypothetical causes of action in respect of those duties.

1553 There was ***no*** dispute that if the plaintiffs had to satisfy the preconditions in s 6(1) of the Crown Suits Act in order to bring their action that they had not done so. It is now well past the last time by which the plaintiffs could have obtained the consent of the Attorney General or applied for the leave of the Court to bring their action notwithstanding non-compliance with those preconditions. However, for completeness, it is appropriate to briefly outline why that is so.

1554 Because the breach of the secondary fiduciary duty to obtain legal advice is contingent on the breach of the State's primary fiduciary duties, it is necessary to start by considering the time frame in which those primary fiduciary duties had to be commenced. As I have already explained, the latest date on which the State could be said to have been subject to the primary fiduciary duties must have been the last day of each wardship. That being the case, the last date by which the Attorney General's consent, or the leave of the Court, needed to have been obtained in order to enable the plaintiffs to bring an action against the State in respect of a breach of the primary duties, would have been six years after the end of each wardship.

1555 Once the time during which an action for a breach of the primary fiduciary duties had passed, there would have been ***no*** practical utility in the State providing legal advice to the plaintiffs in respect of a possible action for a breach of that duty. Accordingly, the last day on which the State could have been subject to any duty to provide the plaintiffs with legal advice would have been six years after the end of each of the wardships. The cause of action in

respect of a breach of the secondary fiduciary duty to provide legal advice (if that duty existed) must have accrued, at the latest, 6 years after the end of each of the wardships.

1556 That being the case, the last date by which the Attorney General's consent, or the leave of the Court, needed to have been obtained in order to enable the plaintiffs to bring an action against the State in respect of a breach of the secondary fiduciary duty to obtain legal advice, would have been six years after the cause of action for a breach of that duty accrued, namely 12 years after the end of each wardship. Having regard to the expiry of Wesley's wardship, the plaintiffs needed to have obtained the Attorney General's consent, or applied for the Court's leave, by 12 March 1991. Their failure to do so means that none of the plaintiffs have a right of action against the State for a breach of the secondary fiduciary duty to obtain legal advice.

8. THE PLAINTIFFS' CLAIM FOR EQUITABLE COMPENSATION

1557 For the reasons outlined above, the plaintiffs' action cannot succeed. In cases where a plaintiff fails to establish the liability of a defendant at first instance, it will often be appropriate for a trial judge to assess the quantum of damages which would have been awarded to a plaintiff had the plaintiff succeeded, so as to avoid the need for a further trial if the trial judge's conclusion on liability is set aside on appeal.

1558 I have set out my findings in relation to the injuries suffered by the plaintiffs and the cause of those injuries at [1025] to [1047]. However, after giving the matter careful consideration in this case, I have determined that it is not appropriate to endeavour to assess the equitable compensation I would have awarded had I reached a different conclusion in relation to the State's liability in this case, for two reasons.

1559 First, there remain many uncertainties in relation to the principles applicable to the assessment of equitable compensation for a breach of a fiduciary duty. The overall purpose of the law of fiduciary obligations is to restore the beneficiary to the position he or she would have been in if the fiduciary had complied with his or her fiduciary duty, and a beneficiary is entitled to invoke a range of remedies much broader than those typically available at common law.[1702] Because fiduciary duties have generally been concerned with protecting economic interests, compensation for breach of fiduciary duty has primarily been concerned with economic loss, rather than pain and suffering[1703] or psychiatric injury.

1560 Further, the principles governing equitable compensation do not necessarily reflect the rules for assessment of damages in tort or contract.[1704] It is far from clear whether the measure of compensatory damages in tort and contract should be applied in the context of a breach of fiduciary duty, and whether common law principles of causation, remoteness of damage, and measure of damage should be applied by analogy.[1705]

1561 Secondly, quite apart from these uncertainties, considerable complexity would arise in relation to any assessment of compensation to the plaintiffs in view of the fact that their claims for compensation depended upon a breach of the secondary fiduciary duties, which in turn depended upon a breach of the primary fiduciary duties. The assessment of compensation in relation to the plaintiffs' claim to the secondary fiduciary duty to obtain legal advice would involve determining a number of questions about the contingencies for which allowance should be made.

1562 In addition, some of the plaintiffs Bonnie,[1706] Eva,[1707] Darryl,[1708] Wesley,[1709] Glenys[1710] and Beverley[1711]received ex gratia payments from the Western Australian government under the Redress WA scheme. Each of them signed an acceptance form which indicated that it is the Government's understanding that, in the event I make a claim for damages against the State in relation to the acts or omissions the subjects of my Redress WA application, the amount of the ex gratia payment will ordinarily reduce the amount of any damages awarded.[1712]

1563 An additional question which would need to be determined is whether, and if so, how these ex gratiapayments should be taken into account in assessing equitable compensation.

1564 In all of these circumstances, the utility of attempting to assess compensation at this point is likely to be extremely limited.

CONCLUSION

1565 For the reasons set out above, the plaintiffs' action should be dismissed.

ANNEXURE A List of key persons

Name

Position held / Relationship
Oral evidence?
Reason why not called to give evidence
Don Collard
First Plaintiff
Yes

Sylvia Collard
First Plaintiff
Yes

Glen Collard
Son of Don and Sylvia Collard

No
Deceased
Donald Collard
Son of Don and Sylvia Collard

No
Deceased
Darryl Collard
Seventh Plaintiff; Son of Don and Sylvia Collard
Yes

Bonnie Miller (nee Collard)
Eighth Plaintiff; Daughter of Don and Sylvia Collard
Yes

William Collard
Son of Don and Sylvia Collard

No
Deceased
Beverley Humphries (nee Collard)
Sixth Plaintiff; Daughter of Don and Sylvia Collard
Yes

Ellen Thomas (nee Collard)
Third Plaintiff; Daughter of Don and Sylvia Collard
Yes

Glenys Collard
Second Plaintiff; Daughter of Don and Sylvia Collard

Yes

Eva Jetta (nee Collard)

Fourth Plaintiff; Daughter of Don and Sylvia Collard

Yes

Wesley Collard

Fifth Plaintiff; Son of Don and Sylvia Collard

Yes

Lynette Boag

Field Worker, Child Welfare Department August 1968 - January 1973

No

Statement tendered. Not required for cross-examination.[1713]

Susan Booth

Social Worker and Social Work Supervisor, Child Welfare Department, March 1970 - 1976; later consultant to Department

No

Statement tendered. Not required for cross-examination.[1714]

Peter Brennan

Police officer in Brookton in 1969

No

Deceased[1715]

Kathleen Joan BrentonCoward

Social Worker with the Child Welfare Department September 1971, later Superintendent of Hostels (1976) within the Department

No

Statement tendered. Not required for cross-examination.[1716]

Elizabeth Jean Collard

Foster parent / carer for some of the plaintiffs and to Joseph, Philip and Ashley Collard

No

Deceased[1717]

Glenbervie Eric Cornish

Patrol Officer, Southern District of the Department of Native Welfare, July 1956, later Acting Divisional Superintendent (also known as District Officer) at the Narrogin office.

No.

Statement tendered. Not required for cross-examination.[1718]

Jean Kathleen Hamory (nee Williams)

Welfare Officer, and later social worker and social work supervisor with the Child Welfare Department 1960 - 1991.

No

Statement tendered. Not required for cross-examination.[1719]

Brian Ross Humphries

Welfare Inspector with Department of Native Welfare in Narrogin from 1960 - 1961 or 1962; then Child Welfare Officer for the Child Welfare Department in Albany until 1998.

No.

Statement tendered. Not required for cross-examination.[1720]

Stephanie Dawn Keating (nee Fisher)

Welfare officer with the Child Welfare Department from 1969

No

Statement tendered. Not required for cross-examination.[1721]

Terence John Norman Long[1722]

Patrol Officer with the Department of Native Welfare, based at Narrogin, from 1959 to 1960, later held various positions within the Department.

No.

Deceased.[1723]

Keith Andrew Maine[1724]

Psychologist with the Child Welfare Department from 1958, later Superintendent of Longmore, Assistant Director of the Department, and Director of the Department (from 1968 1984).

Yes

Wendy Margaret Manchester[1725]

Daughter of Ellen Thomas' foster parents, Leslie and Betty Dwyer.

No

Statement tendered. Not required for cross-examination.

Kenneth James Monson[1726]

Social Worker with the Child Welfare Department from July 1969, later Supervisor and Senior Supervisor within the Department until 1976.

No

Statement tendered. Not required for cross-examination.

Terence Ernest Andrew Mulroney[1727]

Maintenance officer and Relief Officer with the Child Welfare Department from 1957 1964, and later a social worker with the Department from 1971 1973, later Social Work Supervisor and Senior Social Work Supervisor, and various other positions until 1988.

No.

Statement tendered. Not required for cross-examination.

Desmond Lloyd Semple[1728]

Social worker with the Child Welfare Department from 1970, later Supervisor, Senior Social Worker and other positions in the Department, then Director General of the Department from 1985 to 1992.

No.

Statement tendered. Not required for cross-examination.

Colin Heldenby Strover[1729]

Social Work Supervisor with the Child Welfare Department from 1967 1975.

No

Statement tendered. Not required for cross-examination

Margaret Patricia Gethin[1730]

Temporary foster carer for Glenys and Eva Collard in 1969.

No.

Statement tendered. Not required for cross-examination.

Lorraine Jean Piercy[1731]

Temporary foster carer for Beverley Collard in 1969

No

Statement tendered. Not required for cross-examination.

Mary Walsh (nee Argyle)[1732]

Field Officer with Child Welfare Department from 1964 1965.

No.

Statement tendered. Not required for cross-examination.

Caroline Jane Brazier[1733]

Social worker with the Child Welfare Department from 1967 1973, and Director General of the Department for Community Development from 2001 2006

No.

Statement tendered. Not required for cross-examination.

Mary Roslyn Mathews[1734]

Foster carer for Beverley and Eva Collard

No.

Statement tendered. Not required for cross-examination

Edward Thomas Whitney[1735]

Police Constable and officer in charge, based at Beverley Police Station from 1954 to 1958.

No

Statement tendered. Not required for cross-examination.

Christina Catherine Daniel

Wife of Superintendent of Sister Kate's, Mr John Daniel.

No

Deceased[1736]

Betty Dwyer

Foster mother of Ellen Thomas

No

Deceased[1737]

Leslie James William Dwyer

Foster father of Ellen Thomas

No

Deceased[1738]

Pearl Farmer

Bonnie Miller resided with Mrs and Mr Farmer for a time

No

Deceased[1739]

Phillip Farmer

Bonnie Miller resided with Mr and Mrs Farmer for a time

No

Deceased[1740]

Kenneth Evan Gethin

Foster parent of Eva Jetta and Glenys Collard in the 1960s

No

Deceased[1741]

Hartley Gray

Inspector in Child Welfare Department, 1969

No

Deceased[1742]

Horace Hill

Foster parent of Beverley Collard, and father of Kevin Hill (husband of Beverley Collard)

No

Deceased[1743]

Robert Browning Hill

District Officer, Child Welfare Department 1967 1968

No

Deceased[1744]

Heinz Romer

Foster carer for Darryl Collard

No

Deceased[1745]

Helen Romer

Foster carer for Darryl Collard

No

Deceased[1746]

Margaret Ord Stephenson

Foster Mother of Wesley Collard

No

Deceased[1747]

Harvey Robert Tilbrook

Officer, later Superintendent Southern Division, Department of Native Welfare, 1950s and 1960s

No

Deceased[1748]

John Waghorne

District Officer and Probation Officer, Child Welfare Department 1958 1975

No

Deceased[1749]

Henry James White

District Officer Child Welfare Department 1970

No

Deceased[1750]

Charles Robert WrightWebster

District Officer and later Superintendent, Great Southern Branch of Department of Native Welfare, 1950s

No

Deceased[1751]

Victoria Hobcroft (nee Lewis)

Welfare Officer, Child Welfare Department 1965 1972

No

Not able to give evidence due to physical or mental infirmity[1752]

Barry Edward Lewis Moulton

Child Welfare Officer (District Officer Narrogin) 1968 - 2006

No

Not able to give evidence due to physical or mental infirmity[1753]

Louise Cross

Cottage mother at Sister Kate's

No

Unable to be located, despite enquiries[1754]

Janet Hayden

Foster mother of Arthur Ashley Collard

No

Unable to be located, despite enquiries[1755]

Shirley Anne Hoare

Foster carer for Glenys Collard

No

Unable to be located, despite enquiries[1756]

Betty McIntyre

Foster carer for Beverley and Eva Collard

No

Unable to be located, despite enquiries[1757]

Helen Marchant

Social Worker, Child Welfare Department, 1968 1969

No

Unable to be located, despite enquiries[1758]

Nola Matthews

Cottage mother at Sister Kate's

No

Unable to be located, despite enquiries[1759]

Mary Patullo

Cottage mother, Sister Kate's

Yes

Alice Scott

Foster parent to Bonnie Collard

No

Unable to be located, despite enquiries, possibly deceased[1760]

Neville Barckley Stephenson

Foster father for Wesley Collard

No

Unable to be located, despite enquiries[1761]

Mary Williams

Foster carer for Eva Collard

No

Unable to be located, despite enquiries[1762]

ANNEXURE B

Key ***places*** and institutions

Mofflyn

Mofflyn was established in Victoria Park in 1923 and was initially known as the Methodist Home for Children. It became known as Mofflyn from 1961. It initially operated a dormitory style of residential care but by 1953 had moved to a cottage campus model of accommodation. It was operated by the Methodist Church and subsequently by the Uniting Church of Australia. It provided longterm general residential care for children, including wards committed to the case of the Child Welfare Department and those privately admitted.

St Joseph's

St Joseph's Girls' Orphanage in Wembley was established in 1901 by the Sisters of Mercy. It provided residential care for girls, including wards of the State, child migrants and girls who were privately admitted.

Children's Reception Centre/ Bridgewater Care and Assessment Centre

Bridgewater Care and Assessment Centre in Applecross (also known as the Children's Reception Centre) was established in 1969. It was operated by the Child Welfare Department. It provided temporary care for neglected children or children in need, and short term residential care for children who had been ***placed*** for an assessment by a professional team. It catered for children aged between three and 18 years of age.

Child Welfare Reception Home

The Child Welfare Reception Home (originally known as the Government Reception Home) in Mount Lawley was established in 1894 and provided temporary accommodation for children who were taken into care, prior to their placement with foster parents or in institutions, and for other children who needed accommodation while awaiting medical or dental treatment in Perth, or who were to appear before the Children's Court. At the times relevant to this action it was operated by the Child Welfare Department and the Department for Community Development.

Hillston

Hillston was established in 1955 in Stoneville. It was a reformatory for adolescent boys located on a working farm property. Most boys attended school on the property and also did practical farm work. Although the institution was designed for adolescent boys, boys as young as nine years of age were resident there. The resident boys were children committed to the care of the Child Welfare Department, often for committing offences or for truancy. Hillston was operated by the Child Welfare Department.

Longmore

Longmore Remand and Assessment Centre in Bentley was established in 1965 as a reformatory for boys and girls between 13 and 18 years of age. It was operated by the Child Welfare Department. It provided shortterm residential care for children awaiting Court appearances and those on remand, as well as for children committed to the care of the Department as wards. It was a facility where the assessment and treatment of psychological or behavioural problems could be undertaken, as well as the provision of accommodation for the children.[1763]

Nyandi

Nyandi in Bentley was established in 1970 and operated by the Child Welfare Department. It was a maximum security training centre with hostel accommodation for the longterm rehabilitative care of girls (most of whom had committed offences).

ANNEXURE C

INDEX OF ABBREVIATIONS

Abbreviation

Term

Commissioner

Commissioner of Native Welfare

Brookton Reserve

The Native Reserve at Brookton

Director

Director of Child Welfare Department

Director

Director of Department for Community Development

The humpy

The humpy on Bessie Ninyette's block where Don and Sylvia lived

Redress Scheme

The Redress WA scheme established by the Government of Western Australia to acknowledge and apologise to adults who, as children, were abused and/or neglected while they were in the care of the state. It ran from 2008 to 31 December 2011.

Telling our Story

A 1995 report by the Aboriginal Legal Service titled 'Telling our Story' which documented the effect of government policies that saw Aboriginal children removed from their families and raised in missions, orphanages, reserves and white foster homes.

Echoes of the Past

2002 publication of University of Western Australia Centre for Indigenous History and the Arts titled 'Echoes of the Past - Sister Kate's Home Revisited'.

ANNEXURE D

Extract from plaintiffs' statement of claim Fiduciary duty Further or in the alternative, by reason of the matters pleaded in paragraphs 1, 2, 3, 5, 6 to 37, and the Defendant owed equitable fiduciary duties to Don and Sylvia in their dealings with the Children, and the Children of Don and Sylvia, in exercising the powers of a guardian not to:

105.1 fail to act in the best interests of the Children with respect to their custody, maintenance and education, in particular, by

105.2 disregarding the best interests of the Children, in the benefits of an upbringing within the family unit of their natural parents and siblings. By reason of the matters pleaded in paragraphs 1, 2, 3, 5, 6, 35, 36, 37, 44, 45, 46, 101 103 the Defendant owed an equitable fiduciary duty to each of the Children not to fail:

106.1 to act in the Children's best interests and towards their proper custody, maintenance and education,

alternatively not to disregard the best interests of the Children;

106.2 to exercise general supervision and care in respect of all matters affecting the welfare of the Children;

106.3 to provide financially and in other ways for the Children;

106.4 to act in a protective capacity for the Children; and

106.5 to use the Maintenance Payments to promote the proper custody, maintenance, education and wellbeing of the Children. trustee and fiduciary, the Defendant's duties are as follows:

107.1 As a trustee and a fiduciary the Defendant was obliged not to fail to promote the interests of the plaintiffs in the preservation and wellbeing of the family unit of the plaintiffs including the provision of accommodation and support to assist in the preservation of the family unit,

107.2.2 alternatively not to disregard the importance to the interests of the plaintiffs of the preservation and wellbeing of the family unit of the plaintiffs;

107.2 In the event that the Defendant formed the view that Don and Sylvia could not adequately care for any of the Children, and that any of the Children should be removed from the care of Don and Sylvia as a trustee and a fiduciary the Defendant was obliged:

107.2.11 not to fail to ascertain whether there were members of the Children's extended family, relatives or other members of the Aboriginal community who could look after the Children,

107.2.2 alternatively, not to ***place*** the Children elsewhere if there were members of the Children's extended family, relatives or other members of the Aboriginal Community who could look after them.

107.3 As a trustee and a fiduciary the Defendant was obliged:

107.3.1 not to fail to ensure that any foster family selected was a placement which avoided or limited a risk of harm to any of the Children,

107.3.2 alternatively, not to ***place*** the plaintiffs within foster placement which carried a risk of harm to any of the Children.

107.4 As a trustee and a fiduciary the Defendant was obliged:

107.4.1 not to fail to supervise the foster family group home into which any plaintiff was ***placed*** sufficiently to detect a risk of harm to any of the Children,

107.4.2 alternatively, not to leave the foster family group into which any plaintiff was ***placed*** unsupervised or inadequately supervised to detect a risk of harm to any of the Children;

107.5 As a trustee and a fiduciary the Defendant was obliged:

107.5.1 not to fail to remove any of the Children from a foster home which carried a risk of harm to any of the Children,

107.5.2 alternatively, not to let any of the Children remain in a foster home which carried a risk of harm to any of the Children;

107.6 As a trustee and a fiduciary the Defendant was obliged:

107.6.1 not to fail to take adequate steps to facilitate contact between the Children and the Children' parents, Don and Sylvia,

107.6.2 alternatively, not fail to facilitate contact between the Children and Don and Sylvia;

107.7 As a trustee and a fiduciary the Defendant was obliged not to fail to take adequate steps to facilitate contact between the Children and members of the Children's extended family or other members of the Aboriginal community;

107.8 As a trustee and a fiduciary the Defendant was obliged:

107.8.1 not to fail to take reasonable steps to protect the physical and mental health of the Children,

107.8.2 alternatively, not to disregard the physical or mental health of the Children;

107.9 As a trustee and a fiduciary the Defendant was obliged not to put itself into a conflict between its interest in housing the Children in a facility or home readily or conveniently available to the State and the Children's interest in being provided with a home environment:

107.9.1 within the family unit of their natural parents and siblings;

107.9.2 within the Aboriginal community; and

107.9.3 which contributed, in a balanced way, to a consistent cultural up-bringing, and to their mental well-being and physical safety. In breach of the duty of trust and confidence, the Defendant had to the Plaintiffs, the Defendant:

108.1 did not assist Don and Sylvia in obtaining appropriate accommodation or other support to maintain the family unit but rather

removed and detained each of the Children from the care of Don and Sylvia and applied for and obtained a Court order that Don make the Maintenance Payments from his income, which could otherwise have contributed to the maintenance of the Children in a home environment comprised of a family unit of their natural parents and siblings;

108.2 failed at the time of the Respective Dates of Committal and thereafter to ascertain whether there were members of the plaintiffs' extended family, relatives or other members of the Aboriginal community who could look after the Children;

108.3 failed to ensure that the foster families selected were suitable placements and thus

placed the Children thereafter in a group home under the control of foster families which were unsuitable;

108.4 failed to adequately assess and supervise the foster family group homes;

108.5 failed to take steps to avoid exposure of the Children to the risk of physical or emotional harm;

108.6 failed to take any or any adequate steps to facilitate contact between the Children and Don and Sylvia;

108.7 failed to take any or any adequate steps to facilitate contact between the Children and the members of the plaintiffs' extended family or other members of the Aboriginal community;

108.8 failed to take any reasonable steps to protect the physical and mental health of the Children;

108.9 preferred its interest in housing the Children in preference to the Children' interests;

108.10 sought from Don the Maintenance Payment instead of, and at the expense of, assisting Don to become able to support the Children within the family unit.

JURISDICTION : SUPREME COURT OF WESTERN AUSTRALIA

IN CIVIL

CITATION : COLLARD -v- THE STATE OF WESTERN AUSTRALIA [***No*** 4] [2013] WASC 455 (S)

CORAM : PRITCHARD J

HEARD : 20 DECEMBER 2013 & ON THE PAPERS

DELIVERED : 2 APRIL 2014

FILE ***NO***/S : CIV 1772 of 2010

BETWEEN : DONALD COLLARD
First-named First Plaintiff

SYLVIA RACHEL COLLARD
Second-named First Plaintiff

GLENYS DALE COLLARD
Second Plaintiff

ELLEN THOMAS
Third Plaintiff

EVA JETTA
Fourth Plaintiff

WESLEY ROHAN COLLARD
Fifth Plaintiff

BEVERLEY ANNE HUMPHRIES
Sixth Plaintiff

DARRYL FREDERICK COLLARD
Seventh Plaintiff

BONNIE COLLARD MILLER
Eighth Plaintiff

AND

THE STATE OF WESTERN AUSTRALIA
First Defendant

Catchwords:

Costs - Whether circumstances justify departure from the usual order as to costs - Public interest litigation - Test cases - Turns on own facts

Legislation:

Rules of the Supreme Court 1971 (WA)

Supreme Court Act 1935 (WA)

Result:

No order as to costs

Category: B

Representation:

Counsel:

First-named First Plaintiff : Mr G M G McIntyre SC & Mr J I Crabtree

Second-named First Plaintiff : Mr G M G McIntyre SC & Mr J I Crabtree

Second Plaintiff : Mr G M G McIntyre SC & Mr J I Crabtree

Third Plaintiff : Mr G M G McIntyre SC & Mr J I Crabtree

Fourth Plaintiff : Mr G M G McIntyre SC & Mr J I Crabtree

Fifth Plaintiff : Mr G M G McIntyre SC & Mr J I Crabtree

Sixth Plaintiff : Mr G M G McIntyre SC & Mr J I Crabtree

Seventh Plaintiff : Mr G M G McIntyre SC & Mr J I Crabtree

Eighth Plaintiff : Mr G M G McIntyre SC & Mr J I Crabtree

First Defendant : Mr T C Russell

Solicitors:

First-named First Plaintiff : Lavan Legal

Second-named First Plaintiff : Lavan Legal

Second Plaintiff : Lavan Legal

Third Plaintiff : Lavan Legal

Fourth Plaintiff : Lavan Legal

Fifth Plaintiff : Lavan Legal

Sixth Plaintiff : Lavan Legal

Seventh Plaintiff : Lavan Legal

Eighth Plaintiff : Lavan Legal

First Defendant : State Solicitor for Western Australia

Cases referred to in judgment:

1 PRITCHARD J: On 20 December 2013, I delivered reasons for decision in this matter (the reasons for decision),[1764] and made orders dismissing the plaintiffs' action and awarding judgment for the State.

2 The State sought an order that the plaintiffs pay its costs of the action. In addition, counsel for the State also sought an order arising from my reservation of a costs question at the commencement of the trial, when the plaintiffs abandoned their claim against the Community Development Ministerial Body (the CDMB). (On that occasion, I ordered that the plaintiff's action against the CDMB be dismissed and reserved the question of costs arising from the dismissal of that part of the action.)[1765]

3 The State also sought an order for a certificate for the cost of a running transcript.

4 The plaintiffs submitted that ***no*** order for costs should be made against them because the action should be characterised as a 'test case' or as 'public interest litigation'.

5 I made orders for the filing of further submissions on the question of costs, and for the determination of the question of costs on the papers.

6 Having carefully considered the parties' submissions, I have concluded that in the special circumstances of this case, the just exercise of my discretion with respect to costs warrants the conclusion that all parties should bear their own costs, and that there should therefore be ***no*** order as to costs.

7 In these reasons for decision I discuss the general principles in relation to the award of costs, particularly the principles which have been developed in 'test cases' and in 'public interest litigation', before explaining why I have concluded that the parties should bear their own costs.

1. General principles in relation to the award of costs

8 The Court has a broad discretion to make orders in relation to the costs of, and incidental to, a proceeding.[1766]However, although broadly stated the discretion is not unqualified and must be exercised judicially in accordance with established principle and factors directly connected with the litigation.[1767] The most important factor which guides the exercise of the costs discretion is the result of the litigation.[1768]

The 'usual order' as to costs

9 Generally speaking, the Court will make an order that the successful party to an action recover his costs from the unsuccessful party, and this is known as the 'usual order as to costs'. In Oshlack v Richmond River Council[1769]McHugh J explained the basis for the rule as follows: The principle is grounded in reasons of fairness and policy and operates whether the successful party is the plaintiff or the defendant. Costs are not awarded to punish an unsuccessful party. The primary purpose of an award of costs is to indemnify the successful party. If the litigation had not been brought, or defended, by the unsuccessful party the successful party would not have incurred the expense which it did. As between the parties, fairness dictates that the unsuccessful party typically bears the liability for the costs of the unsuccessful litigation.

As a matter of policy, one beneficial by-product of this compensatory purpose may well be to instil in a party contemplating commencing, or defending, litigation a sober realisation of the potential financial expense involved. Large scale disregard of the principle of the usual order as to costs would inevitably lead to an increase in litigation with an increased, and often unnecessary, burden on the scarce resource of the publicly funded system of justice.

10 As the State was successful in defending the action the starting point for considering the proper exercise of discretion with respect to costs is that the State should be able to recover its costs from the plaintiffs. Similarly, as the action against the CDMB was dismissed following the plaintiffs' decision to abandon their action against it, the usual order would be that the CDMB would be entitled to recover its costs to that point in recognition of its success in defending the action.

11 Although the 'usual order as to costs' does not constitute an absolute rule, it is well established that a court will depart from the usual order as to costs only in 'special circumstances'.[1770] The need for 'special circumstances' emphasises that the occasions upon which it will be appropriate for a court to depart from the usual order as to costs will be rare and exceptional.[1771]

12 Among these special circumstances are cases where conduct by the successful party is considered to disentitle it to the benefit of the exercise of the discretion in its favour, such as where the successful party by its conduct effectively invites the litigation or unnecessarily protracts the proceedings, or succeeds on a point not argued before a lower court, or obtains relief which the unsuccessful party had already offered in settlement of the dispute.[1772]

13 Disentitling conduct by a successful party is not the only basis upon which a departure from the usual order as to costs may be warranted. In some appellate jurisdictions, particularly the High Court, where an appellant is a large and recurrent corporate or governmental litigant, where the other party to the appeal is not wellpositioned to meet adverse costs orders, and where the resolution of the appeal involves a question of general importance to the appellant, it is not uncommon for the grant of leave to appeal to be conditional on the appellant agreeing to pay the respondent's costs of the appeal in any event.[1773]

14 Furthermore, there have been some cases at first instance, and on appeal, in which ***no*** order as to costs has been made in circumstances where the case has been characterised as a 'test case' or as 'public interest litigation'. Some caution must be applied in approaching the exercise of the costs discretion by reference to such characterisations, for five reasons.

15 First, the position remains that there is ***no*** special rule which applies to proceedings characterised as a 'test case' or as involving issues of public interest[1774] or which requires that the usual order as to costs will not apply if the subject matter of the litigation is a matter of 'public interest'.[1775] Consequently, the characterisation of a case as a 'test case' or as involving 'public interest litigation' should be understood as shorthand for the identification in that case of a variety of circumstances which are relevant to the proper exercise of the Court's discretion to depart from the usual order as to costs.[1776]

16 Secondly, many of the cases invoking characterisations of 'public interest litigation', or of a 'test case', have involved the exercise of power pursuant to statutory provisions or rules of court (such as those which apply in relation to the New South Wales Land and Environment Court, for example[1777]) which warrant a different approach to the exercise of the discretion as to costs. Similarly, authorities from jurisdictions overseas, where there is a more developed tradition of 'public interest litigation', are of limited assistance[1778] given that different context.

17 Thirdly, it is far from settled what defines a 'test case' or 'public interest litigation',[1779] and the label of itself does not explain what it is about such a case which warrants the exercise of discretion to depart from the usual order as to costs. As McHugh J pointed out in Oshlack[1780] much litigation - ranging from prosecutions, to constitutional and administrative law litigation, and many civil actions concerning private rights and duties - concerns the public interest. It is difficult to identify any rational basis which warrants a departure from the usual order as to costs which does not involve a departure in all of these cases,[1781] or which will not result in injustice to one of the parties to the litigation.[1782]

18 Fourthly, characterisation as public interest litigation is not sufficient, on its own, to warrant a departure from the usual order as to costs.[1783] That is so in relation to 'test cases' also. To characterise litigation in that way does not deny the relevance of all matters bearing on whether there exist special circumstances that would justify a departure from the usual order as to costs.[1784]

19 Finally, to focus on whether litigation may be properly characterised as public interest litigation, or as a test case, may distract from the proper exercise of the discretion as to costs, which requires a consideration of all relevant circumstances, including whether considerations of fairness and policy warrant the conclusion that the usual order as to costs would not represent a just outcome in the circumstances.[1785]

20 I turn to consider the factors commonly arising in public interest litigation and in test cases which have been relied upon to warrant a departure from the usual order as to costs.

Factors in 'public interest litigation' which have been identified as warranting a departure from the usual order as to costs

21 The factors identified as characteristic of 'public interest litigation' include those where the subject matter of the proceeding involves a matter in the public interest[1786] (bearing in mind that the fact that an action is of interest to the public does not mean that it is in the public interest[1787]) and that the proceedings have been brought by the

plaintiff or applicant to advance that legitimate public interest.[1788] As I have already observed, these factors alone will not be sufficient to justify a departure from the usual rule as to costs.[1789] Something more is required.

22 Other factors relied upon in the cases include whether the applicant had an arguable case - that is, that the contentions advanced were not frivolous or lacking in substance or foundation,[1790] whether the proceedings involved private gain,[1791] whether the proceedings have contributed to the clarification and proper understanding of the law,[1792] or raised novel questions of general importance,[1793] or whether the proceedings will have implications for persons other than the individual litigants or will benefit the public or a large section of the public.[1794]

23 On the other hand, the fact that the litigation is brought against the State, or an agency of the State, does not mean that the litigation can be characterised as public interest litigation, or that the nature of the defendant, of itself, is a reason for departing from the usual rule as to costs.[1795]

24 In those cases where a departure from the usual order as to costs has been thought warranted on the basis that the case is a 'test case,' there has been little elaboration on what that label signifies. The fact that a case raises for the first time the meaning or operation of a legislative provision, or the application of the legal principles applicable to a novel fact situation, cannot be sufficient to characterise that case as a 'test case' for present purposes. Such cases are hardly unusual, and as a matter of policy, it is difficult to see why novelty would justify a departure from the usual order as to costs.

25 As in the case of public interest litigation, something more is required before the fact that a case is described as a test case will justify a departure from the usual order. Most often, that something extra will be the fact that the case involves a wider legal importance, or significance, than that which it has to the individual litigants.[1796] That importance or significance will ordinarily derive from the likely application of the principles established in the case to other similar cases,[1797] or from the fact that the case involves a question of construction of a statutory provision with a wide significance,[1798] or about which there have been differing views, or that the case has been brought to ascertain the correctness of a particular line of authority.[1799] The range of factors which justify a departure from the usual rule as to costs in the case of public interest litigation may also be relevant in the 'test case' context.

26 Counsel for the State submitted that in a number of the cases described as test cases, the litigation was commenced by a governmental or large commercial entity to pursue an issue of importance to it, and the unsuccessful defendant was 'simply unfortunate to have been chosen as the respondent in the litigious vehicle in which the larger interests were being pursued'.[1800] However, in none of those authorities is any rule established that the 'test case' characterisation applies only to litigation brought by governmental or large commercial entities. The decision of the New South Wales Court of Appeal in Attrill v Richmond River Shire Council[1801] was not such a case, yet the fact that that litigation had the attributes of a test case contributed to the Court's conclusion that a departure from the usual order as to costs was warranted.

2. Why a departure from the usual order as to costs is warranted in this case

27 Counsel for the State advanced a number of reasons why there should be ***no*** departure from the usual order as to costs in this case. Despite the persuasive force in some of those submissions, after taking all of the circumstances into account, I have formed the view that the special circumstances of this case warrant a departure from the usual order as to costs, on the basis that this was a test case. I have reached that view for four reasons.

28 First, this case sought to establish, for the first time in Western Australia, the existence of fiduciary duties arising from the relationship between the State and aboriginal people who were made wards of the State, and their parents. Counsel for the plaintiffs submitted that this case was a test case because it involved the clarification of the law in Western Australia 'as it relates to members of the State's Stolen Generations.'[1802]However, as I observed in the reasons for decision,[1803] this case did not concern the removal of aboriginal people pursuant to the policy of assimilation which has been referred to as resulting in 'the Stolen Generation'. Instead, in my view, this case had the attributes of a test case because it raised a number of novel issues which went well beyond the application of established principles, and which were issues of general importance. These issues included: the plaintiffs' claims that a fiduciary relationship was founded on the State's assumption of a responsibility to act in the best interests of the aboriginal people of this State following European settlement; the characterisation of various duties said to be owed by the State to the Children (in essence, to act in the best interests of the Children) as fiduciary duties; the

claim that the State owed fiduciary duties to Don and Sylvia by virtue of the Children having been made wards; the claim of the existence of secondary fiduciary duties in the form of a continuing obligation to obtain legal advice for the plaintiffs, and of a duty to take reasonable steps to avoid the occurrence of further loss to the plaintiffs, which duties were said to survive the expiration of the Children's wardships; the principles applicable to determining whether the State breached the alleged fiduciary duties; the quantification of damages for a breach of the alleged fiduciary duties; and whether the Crown Suits Act 1947 (WA) applied to the plaintiffs' claims of breach of fiduciary duties said to be owed by the State.

29 Counsel for the State acknowledged that some of these issues may be regarded as being of general importance. However, they submitted that much of the case was concerned with identifying the factual circumstances of the particular plaintiffs, and that the legal conclusions which followed from those factual findings would not be of general application to other cases, so that the case could not be regarded as a test case. I am unable to accept that submission. The outcome of every case will depend upon its particular facts. It was the advancement of the novel legal principles with which this case was concerned, and the wider significance of those principles, that gave it the character of a test case. Had the plaintiffs been successful in establishing the existence of those legal principles, the application of those principles in other cases would inevitably have depended upon the particular facts of those other cases.

30 Secondly, the limited evidence before the Court tends to support the conclusion that the case was brought on the basis that the questions resolved by this action would have significance for other possible claims by aboriginal people who were made wards in circumstances not dissimilar from those applicable to the plaintiffs. It is true, as counsel for the State pointed out, that the plaintiffs' claim was not run as a representative action. That was not surprising, given the nature of the claim, and its dependence in a number of respects on the individual circumstances of the plaintiffs.

31 However, the evidence led at the trial established that during the 1990s, the solicitors from the Aboriginal Legal Service (ALS) who were acting for the plaintiffs were also acting on behalf of other aboriginal people who had been removed from their families until the 1960s.[1804] Legal advice was sought by the ALS at various times in relation to the causes of action that might be pursued by aboriginal people who, as children, had been removed from their families, and by aboriginal people whose children were taken from their care.[1805] Legal advice was also sought by the ALS to identify those clients of the ALS whose cases might provide a suitable basis for the conduct of a test case.[1806] The ALS clearly sought to pursue a test case to clarify the law in relation to the claims of these persons, including the plaintiffs. It pursued funding for that purpose.[1807] Initially, 17 possible plaintiffs, including Don, Sylvia, Glenys, Eva and Ellen, were identified as possible plaintiffs.[1808] Glenys expressly consented to the use of her case as a test case.[1809] Following the receipt of some further funding, work was able to continue on the preparation of test cases[1810] and counsel was retained to advise on the suitability of particular plaintiffs in a test case,[1811] resulting in the preparation of five draft statements of claim.[1812]

32 Although there was a lengthy delay between this activity in anticipation of the commencement of a 'test case' and the commencement of the present action, there was nothing to suggest that when this action was commenced it was not pursued by the plaintiffs, assisted by the ALS, on the basis that it was a test case which would clarify the application of the law for other aboriginal people with similar claims. Furthermore, the different experiences of the nine plaintiffs in this case permitted the exploration of the legal principles in a range of different factual contexts. In these respects, the action had a legal importance or significance which was wider than that which it had to the individual plaintiffs.

33 Thirdly, I have taken into account the strength of the plaintiffs' case in assessing whether a departure from the usual order as to costs is warranted. Counsel for the State submitted that there was a considerable body of authority against the plaintiffs on a number of aspects of their claim. I accept that in some respects, success for the plaintiffs on some aspects of their claim required the Court to depart from existing binding, or highly persuasive, authority. In many other respects, however, the plaintiffs' claim was truly novel. In both senses, the plaintiffs' claim was one which deliberately sought to develop the law in new directions. But in my view it cannot be said that the plaintiffs' case was so lacking in merit as to undermine the claim that the just outcome would be a departure from the usual order as to costs.

34 Fourthly, the plaintiffs sought both declaratory relief, and damages. It is true, as counsel for the State submitted, that the claim for damages was of a significant quantum, and that exemplary damages were also sought. However, I am unable to accept their submission that 'the plaintiffs' closing submissions focused on the award of damages' and that for that reason, 'it cannot be concluded that the case was primarily brought to establish a point or principle of law'.[1813] It was hardly surprising that during his closing submissions, counsel for the plaintiffs addressed some submissions to the question of damages, and to how damages for a breach of the alleged fiduciary duty should be assessed. That was one of the novel aspects of the plaintiffs' claim and it was necessary for the plaintiffs' counsel to spend time developing submissions on that issue.

35 Having regard to all of these circumstances, I am satisfied that this is one of those rare and exceptional cases where the justice of the case warrants a departure from the usual order as to costs. In this case, there should be ***no*** order as to costs, so that the parties will bear their own costs.

36 In view of that conclusion it is unnecessary to deal with the State's application for a certificate for a running transcript.

[1] ts 583 (14 February 2013).

[2] Exhibit I [165].

[3] Exhibit J [122].

[4] Ts 75 (4 February 2013).

[5] Ts 1562 (7 March 2013).

[6] Exhibit JJJ, pages 1 and 2.

[7] Exhibit B [107].

[8] Exhibit JJJ, page 3.

[9] Exhibit JJJ, page 17.

[10] Exhibit JJJ, page 4.

[11] Exhibit JJJ, page 19.

[12] Exhibit JJJ, page 5.

[13] Exhibit JJJ, page 6.

[14] Exhibit JJJ, page 7.

[15] Exhibit JJJ, page 20.

[16] Exhibit JJJ, page 8.

[17] Exhibit JJJ, page 9.

[18] Exhibit JJJ, page 10.

[19] Exhibit JJJ, page 11.

[20] Exhibit JJJ, page 12.

[21] Exhibit JJJ, page 13.

[22] Exhibit JJJ, page 14.

[23] Exhibit JJJ, page 15.

[24] Exhibit JJJ, page 16.

[25] See ts 432 (13 February 2013) and Statements Tendered for Expressly Limited Purposes, filed by the plaintiffs, 14 February 2013.

[26] See Exhibit A400 (Annual Report of the Child Welfare Department for the financial year 1964 - 1965) at page 7. There were some limited exceptions to this position: those children ***placed*** in areas not served by field officers of the Child Welfare Department, and children ***placed*** with or returned to native parents or native relatives.

[27] Exhibit A9.

[28] Exhibit A265.

[29] Exhibit A320.

[30] Exhibit A320.

[31] Exhibit A226.

[32] Exhibit A320.

[33] ts 1539 (7 March 2013).

[34] See eg Exhibits A1133, A1659.

[35] Exhibit A1659.

[36] Exhibit FFF, Affidavit of Rachael Young, affirmed 21 January 2013.

[37] Exhibit FFF.

[38] Plaintiffs' Submissions on Aboriginal People and Giving of Evidence, undated, 1.

[39] See Fryer-Smith S, Aboriginal Benchbook for Western Australian Courts (2008, 2nd ed) , 5:6 - 5:10.

[40] ts 581 - 582 (14 February 2013).

[41] ts 778 (18 February 2013).

[42] Exhibits A109 - A110.

[43] ts 750 (18 February 2013).

[44] Exhibit G [85], [103], [113A]; Exhibit B [113], [116], [118].

[45] ts 775 (18 February 2013).

[46] Exhibit B [118].

[47] Exhibits A380, A530, A581, A623, A626, A628.

[48] Exhibit D.

[49] Exhibit OOO.

[50] Exhibit OOO.

[51] ts 1471 (6 March 2013).

[52] Exhibit B.

[53] ts 464 (13 February 2013).

[54] Exhibit C.

[55] ts 452 - 457 (13 February 2013).

[56] ts 1678 (8 March 2013).

[57] ts 915 (19 February 2013).

[58] ts 1165 (25 February 2013).

[59] Plaintiff's submissions on Aboriginal People and Giving Evidence, undated, 5.

[60] Exhibit N [79].

[61] Exhibit O, page 64.

[62] ts 1171 (25 February 2013).

[63] ts 581 582 (14 February 2013).

[64] ts 581 582 (14 February 2013).

[65] ts 748 (18 February 2013).

[66] ts 749 (18 February 2013).

[67] ts 754 (18 February 2013).

[68] ts 955 (20 February 2013).

[69] ts 1520 (6 March 2013).

[70] ts 1520 (6 March 2013).

[71] ts 897 - 898 (19 February 2013).

[72] ts 1522 (6 March 2013).

[73] ts 1171 (25 February 2013).

[74] ts 1172 (25 February 2013).

[75] ts 931 (20 February 2013).

[76] ts 933 (20 February 2013).

[77] Exhibit N [76].

[78] Exhibit O, page 64.

[79] ts 1017 (21 February 2013).

[80] ts 1017 (21 February 2013).

[81] Exhibit A1754; ts 1168 (25 February 2013).

[82] ts 1060 (22 February 2013); Exhibits A1801, A1810.

[83] ts 1059 - 1075 (22 February 2013); Exhibits A1798, A1801.

[84] ts 1137 (22 February 2013).

[85] ts 1062 (22 February 2013); Exhibit U.

[86] ts 1081 (22 February 2013), Exhibit S.

[87] ts 1066 - 1068, 1088 (22 February 2013).

[88] ts 1086 (22 February 2013).

[89] ts 1094 - 1095 (22 February 2013).

[90] Exhibit Q.

[91] Exhibit U; ts 1185 - 1186 (25 February 2013).

[92] ts 1186 - 1195 (25 February 2013).

[93] ts 1187 (25 February 2013).

[94] ts 1306 - 1307 (26 February 2013).

[95] Long title to the Aborigines Act 1905 (WA).

[96] Aborigines Act 1905 (WA) s 3.

[97] Aborigines Act 1905 (WA) s 2.

[98] Aborigines Act 1905 (WA) s 2.

[99] Aborigines Act 1905 (WA) s 63.

[100] Aborigines Act Amendment Act 1936 (WA).

[101] Aborigines Act Amendment Act 1936 (WA) s 2, 4.

[102] Aborigines Act Amendment Act 1936 (WA) s 2.

[103] Aborigines Act Amendment Act 1936 (WA) s 2.

[104] Aborigines Act Amendment Act 1936 (WA) s 3A.

[105] Aborigines Act Amendment Act 1936 (WA) s 3A.

[106] The Native Welfare Act 1954 (WA) came into operation on 20 May 1955: see Government Gazette 20 May 1955, 1133.

[107] Native Welfare Act 1954 (WA) s 1(3).

[108] Native Welfare Act 1954 (WA) s 2.

[109] Native Welfare Act Amendment Act 1960 (WA).

[110] There was an exception for any person who would otherwise meet the definition of native but who had served in the armed forces. Those persons were given all the rights, privileges and immunities and were subject to the duties and liabilities of a natural born or naturalised subject of the same age.

[111] Native Welfare Act Amendment Act 1960 (WA) s 3, which repealed Native Welfare Act 1954 (WA) s 3.

[112] Long title to the Native Welfare Act 1963 (WA).

[113] Native Welfare Act 1963 (WA) s 3, and the Schedule to that Act. The 1963 Act commenced operation on 1 July 1964.

[114] There continued to be an exception in the definition of 'native' for any person who would otherwise meet the definition of native but who had served in the armed forces. Those persons had the rights, privileges and immunities, and were subject to the same duties and liabilities of a natural born subject.

[115] Native Welfare Act 1963 (WA) s 10.

[116] As discerned from its long title, which referred to the establishment of the Aboriginal Affairs Planning Authority and other bodies 'for the purpose of providing consultative and other services and for the economic, social and cultural advancement of persons of Aboriginal descent in Western Australia'.

[117] Aborigines Act 1905 (WA) s 7.

[118] Aborigines Act Amendment Act 1911 (WA) s 2.

[119] Aborigines Act 1905 (WA) s 4.

[120] Aborigines Act 1905 (WA) s 6.

[121] Aborigines Act Amendment Act 1936 (WA) s 3.

[122] Aborigines Act Amendment Act 1936 (WA) s 6.

[123] Native Welfare Act 1954 (WA) s 4.

[124] Native Welfare Act 1905 - 1954 (WA) s 4, 6.

[125] Native Welfare Act Amendment Act 1960 (WA) s 5, which inserted s 7(1a) into the Native Welfare Act 1905 1954(WA).

[126] Native Welfare Act 1963 (WA) s 5.

[127] Native Welfare Act 1963 (WA) s 8.

[128] Native Welfare Act 1963 (WA) s 11(1).

[129] Native Welfare Act 1963 (WA) s 11(2).

[130] Native Welfare Act 1963 (WA) s 12.

[131] Native Welfare Act 1905 - 1954 (WA) s 7A; Native Welfare Act 1963 (WA) s 16.

[132] Aborigines Act 1905 (WA) s 42.

[133] Aborigines Act 1905 (WA) s 43.

[134] Aborigines Act 1905 (WA) s 9.

[135] Aborigines Act 1905 (WA) s 10.

[136] Aborigines Act 1905 (WA) s 12.

[137] Aborigines Act 1905 (WA) s 14, 15.

[138] Aborigines Act Amendment Act 1936 (WA) s 25.

[139] Aborigines Act Amendment Act 1936 (WA) s 26.

[140] Native Welfare Act 1905 - 1954 (WA) s 47.

[141] Native Welfare Act 1954 (WA) s 46.

[142] Native Welfare Act 1905 - 1954 (WA) s 15.

[143] Native Welfare Act 1963 (WA) s 7(f).

[144] Native Welfare Act 1963 (WA) s 18.

[145] Native Welfare Act 1963 (WA) s 20(1).

[146] Aborigines Act 1905 (WA) s 8.

[147] Aborigines Act Amendment Act 1911 (WA) s 3.

[148] Aborigines Act 1905 (WA) s 34.

[149] Aborigines Act Amendment Act 1936 (WA) s 7.

[150] Aborigines Act Amendment Act 1936 (WA) s 22.

[151] Native Welfare Act 1954 (WA) s 8.

[152] Native Welfare Act 1905 - 1954 (WA) s 38.

[153] Exhibits A104, B [15], [18] - [20].

[154] Exhibits A104, A106, G [24].

[155] Exhibit A33.

[156] Exhibit A33.

[157] Exhibit A37.

[158] Exhibit A38.

[159] Exhibit A41.

[160] Exhibit G [60]

[161] Exhibit A43.

[162] Exhibit A43.

[163] ts 775 (18 February 2013).

[164] Exhibit G [70].

[165] Exhibit A46.

[166] Exhibit A52.

[167] Exhibit G [114], [115], [117A].

[168] Long title to the Child Welfare Act 1947 (WA).

[169] Child Welfare Act 1947 (WA) s 4.

[170] Child Welfare Act 1947 (WA) s 4.

[171] Child Welfare Act 1947 (WA) s 5.

[172] Child Welfare Act 1947 (WA) s 6.

[173] Child Welfare Act 1947 (WA) s 7.

[174] Child Welfare Act Amendment Act 1972 (WA) s 4, 6, 7, 8, 9.

[175] Community Welfare Act 1972 (WA) s 5, 6.

[176] Community Welfare Act 1972 (WA) s 7, 8.

[177] Community Welfare Act 1972 (WA) s 23, inserted by Community Welfare Act Amendment Act 1972 (WA) s 7.

[178] Acts Amendment (Department of Community Service) Act 1984 (WA) s 3 - 11, 16 - 20.

[179] Child Welfare Act 1947 (WA) s 146C.

[180] Community Welfare Act 1972 (WA) s 24, inserted by Community Welfare Act Amendment Act 1972 (WA) s 7.

[181] Child Welfare Act 1947 (WA) s 19(1).

[182] Child Welfare Act 1947 (WA) s 19(3).

[183] Child Welfare Act 1947 (WA) s 19(6).

[184] Child Welfare Act 1947 (WA) s 19(1)(c).

[185] Child Welfare Act 1947 (WA) s 20(b), 30.

[186] Child Welfare Act 1947 (WA) s 30.

[187] Child Welfare Act 1947 (WA) s 25.

[188] Child Welfare Act 1947 (WA) s 20(e).

[189] Child Welfare Act 1947 (WA) s 10, 20(e).

[190] Child Welfare Act 1959 (WA) s 4(b).

[191] Child Welfare Act 1947 (WA) s 43(1).

[192] Child Welfare Act 1947 (WA) s 123.

[193] Justices Act 1902 1957 (WA) s 197.

[194] Child Welfare Act 1947 (WA) s 98.

[195] Child Welfare Act 1947 (WA) s 4.

[196] Child Welfare Act 1947 (WA) s 40.

[197] Child Welfare Act 1947 (WA) s 46.

[198] Child Welfare Act 1947 (WA) s 10 (1).

[199] Child Welfare Act 1947 (WA) s 10(1), as amended by Child Welfare Act Amendment Act 1962 (WA) s 3(A).

[200] Child Welfare Act 1947 (WA) s 63.

[201] Child Welfare Act 1947 (WA) s 64(1).

[202] Child Welfare Act 1947 (WA) s 99.

[203] Child Welfare Act 1947 (WA) s 10(2).

[204] Child Welfare Act 1947 (WA) s 4.

[205] Child Welfare Act 1947 (WA) s 13(1), 14(1).

[206] Child Welfare Act 1947 (WA) s 94.

[207] Child Welfare Act 1947 (WA) s 51.

[208] Child Welfare Act 1947 (WA) s 10(2), 48.

[209] Child Welfare Act 1959 (WA) s 9A.

[210] Child Welfare Act 1947 (WA) s 25.

[211] Child Welfare Act 1947 (WA) s 25.

[212] Child Welfare Act 1947 (WA) s 125.

[213] Child Welfare Act 1947 (WA) s 69(1).

[214] Child Welfare Act 1947 (WA) s 69(1).

[215] Child Welfare Act 1947 (WA) s 70.

[216] Child Welfare Act 1947 (WA) s 77.

[217] Plaintiffs' supplementary written submission (undated) in relation to 'State Responsibility', [1] - [5].

[218] Western Australia v Watson [1990] WAR 248.

[219] ts 1605 (7 March 2013).

[220] Western Australia v Watson [1990] WAR 248, 273 (the Court).

[221] Western Australia v Watson [1990] WAR 248, 281 (the Court).

[222] Western Australia v Watson [1990] WAR 248, 281 (the Court).

[223] Western Australia v Watson [1990] WAR 248, 281 (the Court).

[224] Western Australia v Watson [1990] WAR 248, 276 (the Court).

[225] Western Australia v Watson [1990] WAR 248, 276 (the Court).

[226] ts 784 (18 February 2013).

[227] ts 618 (14 February 2013); ts 784 (18 February 2013); ts 618 619 (14 February 2013).

[228] Exhibit A122.

[229] Exhibit G [159].

[230] Exhibit G [160]; ts 784 (18 February 2013).

[231] ts 619 620 (14 February 2013).

[232] Exhibit G [160].

[233] ts 620 (14 February 2013).

[234] ts 621 (14 February 2013).

[235] ts 621 (14 February 2013).

[236] Exhibit G [162].

[237] Exhibit A122.

[238] ts 683 686 (15 February 2013).

[239] Exhibits A126, A134.

[240] Exhibits A126, A134.

[241] Exhibit CCC, page 192, attachment MSP43.

[242] Exhibit A122.

[243] Exhibit A136.

[244] ts 790 (18 February 2013).

[245] ts 790 (18 February 2013).

[246] ts 790 (18 February 2013).

[247] ts 1473 (6 March 2013).

[248] Exhibit OOO, page 12.

[249] ts 1472 (6 March 2013).

[250] ts 1487 (6 March 2013).

[251] Exhibit A122.

[252] Exhibit G [159].

[253] See Exhibits B [125], G [157]; ts 784 (18 February 2013).

[254] Exhibit A122.

[255] Exhibit G [125].

[256] See Exhibits G [131], B [108].

[257] ts 447 (13 February 2013).

[258] ts 447 448 (13 February 2013).

[259] Exhibit K [20].

[260] ts 618 (14 February 2013).

[261] ts 782 (18 February 2013).

[262] Exhibit G [163].

[263] Exhibit G [132].

[264] ts 788 (18 February 2013).

[265] ts 788 (13 February 2013).

[266] ts 1487 (6 March 2013).

[267] Exhibit G [161].

[268] ts 1469 (6 March 2013).

[269] ts 1470 (6 March 2013).

[270] Exhibit OOO, page 7.

[271] ts 621 (14 February 2013).

[272] ts 785 (18 February 2013).

[273] ts 786 - 787 (18 February 2013).

[274] ts 825 (18 February 2013); ts 570, 573 (14 February 2013).

[275] ts 573 (14 February 2013).

[276] ts 622 (14 February 2013).

[277] ts 789 (18 February 2013).

[278] ts 789 (18 February 2013).

[279] ts 536 (13 February 2013).

[280] ts 803 - 804 (18 February 2013).

[281] Exhibit I [25].

[282] Exhibit M [35]; ts 960 (20 February 2013).

[283] Exhibit I [25].

[284] Exhibit I [25].

[285] Exhibits K [29], I [26], M [38].

[286] Exhibit I [27].

[287] ts 803 - 804 (18 February 2013).

[288] Exhibits K [29], I [25].

[289] Exhibit M [37].

[290] Exhibit K [29].

[291] Exhibit I [26].

[292] Exhibit I [30].

[293] Exhibit I [29].

[294] Exhibit M [34], [38].

[295] ts 959 (20 February 2013).

[296] Exhibit CC [20].

[297] Exhibits I [26], K [28], M, R [17].

[298] Exhibit I [26].

[299] Exhibit I [30].

[300] ts 914 (19 February 2013); Exhibit I [28].

[301] Exhibit M [34].

[302] Exhibit M [40].

[303] Exhibit R [19].

[304] Exhibit I [33].

[305] Exhibit K [30] - [31].

[306] ts 531 532 (13 February 2013).

[307] ts 577 (14 February 2013).

[308] ts 578 (14 February 2013).

[309] ts 580 (14 February 2013).

[310] ts 531 532 (13 February 2013).

[311] ts 532 (13 February 2013).

[312] ts 532 (13 February 2013).

[313] Exhibit D, page 23.

[314] Exhibit D, page 23.

[315] ts 533 (13 February 2013).

[316] Exhibit G [207] - [209].

[317] ts 805 (18 February 2013).

[318] ts 535 (13 February 2013).

[319] ts 533 (13 February 2013).

[320] ts 532 (13 February 2013); ts 559 560 (14 February 2013).

[321] ts 580 (14 February 2013).

[322] ts 580 (14 February 2013).

[323] ts 580 (14 February 2013).

[324] ts 536 (13 February 2013).

[325] ts 536 (13 February 2013).

[326] ts 560 (14 February 2013).

[327] Exhibit G [210] - [212].

[328] ts 811 (18 February 2013).

[329] ts 817 (18 February 2013).

[330] ts 802 (18 February 2013).

[331] ts 805 (18 February 2013).

[332] ts 809 (18 February 2013).

[333] ts 818 (18 February 2013).

[334] ts 819 (18 February 2013).

[335] ts 805 806 (18 February 2013).

[336] ts 807 (18 February 2013).

[337] ts 808 (18 February 2013).

[338] ts 537 (13 February 2013).

[339] Exhibits A239, A246 A248.

[340] ts 652 (15 February 2013).

[341] ts 771 (18 February 2013).

[342] ts 815 (18 February 2013).

[343] Exhibits A251 A252, A256 A260.

[344] Exhibit A241.

[345] Exhibit A245.

[346] Exhibit G [225] - [226].

[347] ts 809 (18 February 2013).

[348] ts 810 (18 February 2013).

[349] ts 574 (14 February 2013).

[350] ts 575 (14 February 2013).

[351] ts 575 (14 February 2013).

[352] ts 575 (14 February 2013).

[353] ts 575 (14 February 2013).

[354] ts 576 (14 February 2013).

[355] Exhibit D [23].

[356] Exhibit D, page 23.

[357] ts 1305 - 1307 (26 February 2013).

[358] ts 537 (13 February 2013).

[359] ts at 562 - 563 (14 February 2013).

[360] ts 537 (13 February 2013).

[361] ts 543 (13 February 2013).

[362] ts 809, 814 (18 February 2013).

[363] ts 810 (18 February 2013).

[364] ts 542 (13 February 2013).

[365] ts 542 (13 February 2013).

[366] See, for example, Bonnie's evidence at ts 914 (19 February 2013).

[367] Exhibits A251, A259 A260.

[368] Exhibit A255A.

[369] Exhibit A240.

[370] Exhibit A240.

[371] Exhibit A245.

[372] Exhibit A241.

[373] Exhibit A245.

[374] Exhibit A241.

[375] Exhibit CC.

[376] Exhibit CC [1].

[377] Exhibit CC [6].

[378] Exhibit CC [10].

[379] Exhibit CC [11].

[380] Exhibit CC [21].

[381] Exhibit CC [22].

[382] Exhibit A245.

[383] Exhibit CC [12] - [13].

[384] Exhibit CC [4].

[385] Exhibit CC [4], [13].

[386] Exhibit G [219].

[387] ts 811, 817 - 818 (18 February 2013).

[388] Exhibit G [218].

[389] ts 532 (13 February 2013).

[390] Exhibit D, page 23.

[391] Exhibit A254.

[392] ts 538 (13 February 2013).

[393] Exhibit A245.

[394] ts 533 (13 February 2013).

[395] ts 533 (13 February 2013).

[396] ts 1473 (6 March 2013).

[397] ts 1488 (6 March 2013).

[398] ts 1490 (6 March 2013).

[399] ts 558 14 February 2013).

[400] ts 1490 (6 March 2013).

[401] Exhibit D.

[402] Exhibit D, page 23.

[403] Exhibit CC [14] - [16].

[404] ts 572 (14 February 2013).

[405] ts 1476 (6 March 2013).

[406] ts 558 (14 February 2013).

[407] ts 822, 826 (18 February 2013).

[408] ts 447 - 448 (13 February 2013).

[409] ts 447 (13 February 2013).

[410] ts 448 (13 February 2013).

[411] ts 450 (13 February 2013).

[412] Exhibit B [80].

[413] ts 451 (13 February 2013).

[414] Exhibit G [132].

[415] Exhibit G [133].

[416] ts 565 - 566 (14 February 2013).

[417] ts 566 (14 February 2013).

[418] ts 566 (14 February 2013).

[419] ts 821 (18 February 2013).

[420] ts 566 567 (14 February 2013).

[421] ts 567 (14 February 2013).

[422] ts 566 567 (14 February 2013).

[423] ts 821 (18 February 2013).

[424] ts 567 (14 February 2013).

[425] ts 461 463 (13 February 2013).

[426] ts 822 (18 February 2013).

[427] ts 569 (14 February 2013).

[428] ts 570 (14 February 2013).

[429] Exhibit G [130].

[430] ts 573 (14 February 2013).

[431] ts 825 (18 February 2013).

[432] ts 825 (18 February 2013).

[433] ts 570 (14 February 2013).

[434] ts 825 (18 February 2013).

[435] ts 573 (14 February 2013).

[436] ts 912 (19 February 2013).

[437] ts 912 (19 February 2013).

[438] Exhibit K [9], [20].

[439] Exhibit K [20].

[440] ts 912 (19 February 2013).

[441] Exhibit K [15].

[442] Exhibit M [8].

[443] Exhibit M [24].

[444] Exhibit M [25].

[445] ts 957 - 958 (20 February 2013).

[446] ts 958 (20 February 2013).

[447] ts 877 - 878 (19 February 2013).

[448] Exhibit I [16], [19].

[449] Exhibit I [20].

[450] Exhibit R [8].

[451] ts 572 (14 February 2013).

[452] ts 463 (13 February 2013).

[453] ts 463 (13 February 2013).

[454] ts 823 - 824 (18 February 2013).

[455] Exhibit K [7].

[456] Exhibit M [15] [19].

[457] Exhibit I [17].

[458] ts 1306 (26 February 2013).

[459] ts 1309 (26 February 2013).

[460] ts 1306 (26 February 2013).

[461] ts 572 (14 February 2013).

[462] ts 573 (14 February 2013).

[463] ts 1305 (26 February 2013).

[464] ts 1003 (21 February 2013).

[465] Exhibit A255A.

[466] Exhibit G [137] - [143].

[467] Exhibit G [135].

[468] Exhibit G [134].

[469] ts 447 448 (13 February 2013).

[470] ts 565 (14 February 2013).

[471] Exhibit D.

[472] Exhibit D, page 23.

[473] ts 1224 (26 February 2013).

[474] ts 1224 (26 February 2013).

[475] ts 1229 (26 February 2013).

[476] Exhibit A136.

[477] Exhibit A261.

[478] Exhibit A263.

[479] Exhibit G [241] - [244].

[480] Exhibit A557.

[481] See Exhibit M [65].

[482] Exhibits A441, A449.

[483] Exhibit A449.

[484] Exhibit A451.

[485] Exhibit A465.

[486] Exhibit A466.

[487] ts 586 (14 February 2013).

[488] ts 828 829 (18 February 2013).

[489] ts 829 (18 February 2013).

[490] Exhibit A557.

[491] Exhibit A557.

[492] Exhibit A606.

[493] Exhibits A613, A640.

[494] Exhibits A735, A736.

[495] Exhibit A557.

[496] Exhibit JJJ, page 19.

[497] Exhibit M [58].

[498] Exhibit A479.

[499] Exhibit A480.

[500] Exhibit A479.

[501] Exhibit A479

[502] Exhibit A480.

[503] Exhibit A482.

[504] ts 966 (20 February 2013).

[505] ts 966 (20 February 2013).

[506] Exhibit A493.

[507] ts 967 (20 February 2013).

[508] Exhibit A502.

[509] ts 967 (20 February 2013).

[510] ts 586 (14 February 2013).

[511] ts 587 (14 February 2013).

[512] ts 588 (14 February 2013).

[513] ts 588 (14 February 2013).

[514] ts 588 (14 February 2013).

[515] ts 829 (18 February 2013).

[516] Exhibit A534.

[517] Exhibit A534.

[518] ts 973 (20 February 2013).

[519] ts 974 (20 February 2013).

[520] Exhibit A541, 552.

[521] ts 967 (20 February 2013).

[522] ts 968 (20 February 2013).

[523] ts 974 (20 February 2013).

[524] ts 966 (20 February 2013).

[525] Exhibits A511, A538.

[526] Exhibit A510.

[527] Exhibit A579.

[528] ts 976 (20 February 2013).

[529] Exhibits A736, A748, A758.

[530] Exhibit A736.

[531] Exhibit A758.

[532] ts 860, 862 (19 February 2013).

[533] Exhibit A803.

[534] Exhibit A804.

[535] Exhibit A885.

[536] Exhibits A878, A897.

[537] Exhibits A894, A903.

[538] Exhibit A911.

[539] Exhibit A939.

[540] Exhibit A939; ts 980 (20 February 2013).

[541] Exhibit A940.

[542] Exhibits A923, A940.

[543] ts 981 (20 February 2013).

[544] Exhibit M [46].

[545] Exhibits A479, A480

[546] Exhibit A479

[547] Exhibit A480.

[548] Exhibit A482.

[549] Exhibits A524, A543.

[550] Exhibit A578.

[551] Exhibits A578, A582.

[552] Exhibit A587.

[553] Exhibit A642.

[554] Exhibit A681.

[555] ts 919 (19 February 2013).

[556] Exhibit A698.

[557] ts 590 591 (14 February 2013).

[558] ts 591 (14 February 2013).

[559] ts 591 (14 February 2013).

[560] Exhibits A699, A736.

[561] Exhibit A736.

[562] Exhibits A748, A736.

[563] ts 853 (19 February 2013).

[564] ts 854 (19 February 2013).

[565] ts 858 (19 February 2013).

[566] Exhibit A705.

[567] ts 855 (19 February 2013).

[568] ts 859 (19 February 2013).

[569] Exhibit A795.

[570] Exhibit A853.

[571] Exhibit A915.

[572] Exhibit A1038.

[573] Exhibit A1162.

[574] ts 921 922 (19 February 2013).

[575] Exhibit A531.

[576] Exhibit A635.

[577] Exhibits A531, A635.

[578] Exhibits A641, A644; see also Exhibit A648.

[579] Exhibit A531.

[580] Exhibit A698.

[581] Exhibit A698.

[582] Exhibit A698.

[583] ts 590 - 591 (14 February 2013).

[584] ts 591 (14 February 2013).

[585] ts 591 (14 February 2013).

[586] Exhibit A736.

[587] Exhibit A741.

[588] Exhibit A747.

[589] Exhibit A758.

[590] ts 860, 862 (19 February 2013).

[591] ts 523 (13 February 2013).

[592] ts 524 (13 February 2013).

[593] ts 523 (13 February 2013).

[594] ts 523 (13 February 2013).

[595] Exhibits A771, A774.

[596] Exhibit A834.

[597] Exhibit A838.

[598] Exhibit A844.

[599] Exhibit A860.

[600] Exhibit A888.

[601] Exhibits A916, A928.

[602] Exhibit A971.

[603] Exhibit A991.

[604] Exhibit A1044.

[605] Exhibit A1281.

[606] Exhibits A1282, A1338 – A1339.

[607] Exhibit JJJ, page 20.

[608] ts 882 (19 February 2013).

[609] Exhibits A607, A617.

[610] Exhibits A679, A682

[611] Exhibits A680, A691.

[612] Exhibit A705.

[613] Exhibits A700, A706, A710, A736.

[614] ts 1196 (25 February 2013).

[615] Exhibit A700.

[616] Exhibit A736.

[617] ts 1198 (25 February 2013).

[618] ts 1198 (25 February 2013).

[619] Exhibit A748.

[620] Exhibit A700.

[621] ts 854 - 855 (19 February 2013).

[622] ts 855 (19 February 2013).

[623] ts 856 (19 February 2013).

[624] ts 854 - 855, 858 (19 February 2013).

[625] Exhibits A763, A756.

[626] Exhibits A759, A753.

[627] Exhibits A760, 788.

[628] ts 1199 (25 February 2013).

[629] ts 1200 (25 February 2013).

[630] ts 1200 (25 February 2013).

[631] ts 862 (19 February 2013).

[632] ts 600 (14 February 2013).

[633] Exhibit A791.

[634] Exhibits A791, A797.

[635] ts 1200 (25 February 2013).

[636] Exhibits A929, A937, A875, A914, A826.

[637] Exhibits A996, A832.

[638] Exhibits A1003, A1004.

[639] Exhibit A1319.

[640] Exhibit A1399.

[641] Exhibits A1400, A1401, A1420.

[642] ts 1206 (25 February 2013).

[643] Exhibit A1505.

[644] ts 1205 1206 (25 February 2013).

[645] Exhibit A136.

[646] Exhibit A136.

[647] Eg Exhibits A160, A168, A203, A204, A219, A378, A382, A385, A399, A434, A455, A469, A471, A551, A568, A599, A664, A702, A9731, A785, A1007, A1040.

[648] Exhibit A726.

[649] Exhibit A726.

[650] ts 1122 (22 February 2013).

[651] ts 1196 (25 February 2013).

[652] Exhibit A736.

[653] Exhibit 748.

[654] ts 1123 (22 February 2013).

[655] ts 1125 (22 February 2013).

[656] ts 1125 (22 February 2013).

[657] ts 591 (14 February 2013).

[658] ts 856 (19 February 2013).

[659] ts 858 (19 February 2013).

[660] ts 858 (19 February 2013).

[661] Exhibits A763, A756.

[662] Exhibit A754.

[663] ts 598 (14 February 2013).

[664] ts 598 (14 February 2013).

[665] ts 862 (19 February 2013).

[666] ts 1126 (22 February 2013).

[667] Exhibits A759, A753.

[668] Exhibits A791, A765.

[669] ts 1124, 1128 (22 February 2013).

[670] ts 1128 (22 February 2013).

[671] ts 1128 (22 February 2013).

[672] ts 1127 (22 February 2013).

[673] Exhibit A794.

[674] ts 1129 (22 February 2013).

[675] Exhibit A842.

[676] ts 1129 (22 February 2013).

[677] Exhibit A840.

[678] ts 1130 1131 (22 February 2013).

[679] Exhibits A893, A895.

[680] ts 1131 (22 February 2013).

[681] Exhibit A981.

[682] Exhibit A998.

[683] Exhibit A1002.

[684] Exhibits A1019, A1123.

[685] Exhibit A1024.

[686] Exhibits A1058, A1060.

[687] Exhibit A1089.

[688] Exhibits A1092 A1093, A1095.

[689] Exhibit A1126.

[690] Exhibit A1129.

[691] Exhibit A1146.

[692] Exhibit A1146.

[693] ts 606 (14 February 2013).

[694] ts 608 (14 February 2013).

[695] ts 609 (14 February 2013).

[696] ts 1135 (22 February 2013).

[697] Exhibits A1166, A1223.

[698] Exhibits A1318, A1325.

[699] Exhibits A1312, A1315.

[700] Exhibit A1344.

[701] Exhibits A1352, A1356 1357.

[702] Exhibits A1381 A1382.

[703] Exhibits A1286, A1404.

[704] Exhibits A1388, A1398, Z [47] – [52]; see also ts 608 - 609 (14 February 2013).

[705] Exhibits A1426, A1450, A1454, A1459, A1473, A1485, A1492, A1497, A1498.

[706] Exhibit A1500.

[707] Exhibits A1513, A1531.

[708] ts 610 (14 February 2013).

[709] Exhibits A1531, A1540.

[710] Exhibit N [10].

[711] Exhibit A600.

[712] Exhibit N [35].

[713] Exhibit N [44].

[714] Exhibit N [43], [45].

[715] Exhibit N [46] - [48].

[716] Exhibit A1544.

[717] Exhibits 1543, N [59].

[718] Exhibit N [60].

[719] Exhibit A1558.

[720] Exhibit O, page 65.

[721] Exhibit N [62].

[722] ts 610 (14 February 2013).

[723] Exhibit R [186] - [187].

[724] Exhibit A1567.

[725] Exhibit A1621.

[726] Exhibit A1621.

[727] Exhibit A791.

[728] ts 938 (20 February 2013).

[729] ts 940 (20 February 2013).

[730] ts 1196 (25 February 2013).

[731] ts 1196 (25 February 2013).

[732] Exhibits A763, A756.

[733] ts 862 (19 February 2013).

[734] Exhibit L [29].

[735] Exhibits A759, A753.

[736] Exhibit A765.

[737] Exhibit L [32].

[738] ts 942 (20 February 2013).

[739] ts 935 (20 February 2013).

[740] Exhibits A765, A791.

[741] ts 942 (20 February 2013).

[742] Exhibits A791, A796.

[743] ts 943 (20 February 2013).

[744] Exhibit A936.

[745] ts 943 (20 February 2013).

[746] Exhibits A996, A832.

[747] ts 944 (20 February 2013).

[748] Exhibit A1004.

[749] ts 936 (20 February 2013).

[750] Exhibit A1005.

[751] Exhibit A1402.

[752] ts 945 (20 February 2013).

[753] ts 936 (20 February 2013).

[754] Exhibits A1514, 1517.

[755] ts 1206 (25 February 2013).

[756] ts 1206 (25 February 2013).

[757] ts 945 (20 February 2013).

[758] Exhibits A1557 and A1560.

[759] Exhibit A1804.

[760] ts 946 (20 February 2013).

[761] Exhibit A1606.

[762] Exhibit A1614.

[763] ts 591 (14 February 2013).

[764] Exhibit A736.

[765] ts 592 (14 February 2013).

[766] ts 592 (14 February 2013).

[767] Exhibit A748.

[768] ts 592 (14 February 2013).

[769] ts 589 (14 February 2013).

[770] ts 600 (14 February 2013).

[771] Exhibit A758.

[772] ts 600 (14 February 2013).

[773] ts 610 (14 February 2013).

[774] Exhibit A285.

[775] Exhibit A172.

[776] Exhibit A451.

[777] Exhibit A465.

[778] Exhibit A465.

[779] Exhibit A486.

[780] Exhibit A486.

[781] Exhibit A527.

[782] Exhibit A536.

[783] Exhibit A536.

[784] Exhibit A542.

[785] Exhibit A547.

[786] Exhibit A547.

[787] Exhibit A545.

[788] Exhibit A748.

[789] Exhibits A965, A970.

[790] Exhibit A1141.

[791] Exhibit A1141.

[792] ts 451 (13 February 2013).

[793] ts 518 (13 February 2013).

[794] ts 518 (13 February 2013).

[795] Exhibit G [247].

[796] ts 860 (19 February 2013).

[797] ts 860 (19 February 2013).

[798] ts 970 (20 February 2013).

[799] Exhibit R [107] [108].

[800] ts 1198 (25 February 2013).

[801] Exhibits R [110], J [27].

[802] Exhibit A768.

[803] Exhibit A768.

[804] ts 527 (13 February 2013).

[805] ts 527 (13 February 2013).

[806] Exhibit A1395, see also Exhibit A1285.

[807] Exhibit I [25].

[808] ts 987 988 (20 February2013).

[809] ts 1199 (20 February2013).

[810] ts 879 (19 February 2013).

[811] Exhibit PPP, page 6.

[812] ts 1499 - 1500 (6 March 2013).

[813] ts 1499 - 1500 (6 March 2013).

[814] Exhibit SSS, page 4.

[815] ts 1521 (6 March 2013).

[816] ts 1521 (6 March 2013).

[817] Exhibit A99 A100.

[818] Exhibit A379.

[819] Exhibit A379.

[820] Exhibit A308.

[821] Exhibit A377.

[822] Exhibit A380.

[823] Exhibit A530.

[824] Exhibit A581.

[825] Exhibits A623, A626 and A628.

[826] Exhibit A745.

[827] Exhibit A984.

[828] Exhibits A1064, A1065.

[829] Exhibit A1350.

[830] Exhibits A1375 A1376.

[831] Exhibits A328, A329.

[832] Exhibit A355.

[833] Exhibit A873.

[834] ts 474 (13 February 2013).

[835] Exhibits A109 – A110, A743.

[836] Exhibit A985.

[837] ts 472 - 473 (13 February 2013).

[838] ts 473(13 February 2013).

[839] Exhibit G[22].

[840] Exhibit G [249] - [254].

[841] Exhibit G [255].

[842] Exhibit G [257].

[843] ts 513 (13 February 2013).

[844] Exhibit A453, A451.

[845] ts 515 (13 February 2013).

[846] Exhibit A748.

[847] ts 524 (13 February 2013).

[848] ts 870 (19 February 2013).

[849] ts 528 (13 February 2013).

[850] ts 528 530 (13 February 2013).

[851] ts 530 531 (13 February 2013).

[852] ts 480, 489 (13 February 2013).

[853] ts 483 (13 February 2013).

[854] ts 489 (13 February 2013).

[855] ts 503 (13 February 2013).

[856] Exhibit G, Annexure SC21.

[857] Exhibit G [276].

[858] Exhibit G [11].

[859] Exhibit I.

[860] ts 916 (19 February 2013).

[861] Exhibit L [68].

[862] ts 520 - 521 (13 February 2013).

[863] ts 517 (13 February 2013).

[864] ts 517 (13 February 2013).

[865] Exhibit G [288] - [289].

[866] Exhibit G [288] - [289].

[867] ts 831 (18 February 2013).

[868] ts 833 (18 February 2013).

[869] ts 834 (18 February 2013).

[870] ts 834 835 (18 February 2013).

[871] Exhibit G [295] - [298].

[872] Exhibit G [301] - [303].

[873] ts 846 849 (19 February 2013).

[874] ts 849 (19 February 2013).

[875] ts 625 (14 February 2013).

[876] Exhibit A585, cf Exhibits A595, A602.

[877] Exhibits A615, A722.

[878] ts 831 (18 February 2013).

[879] Exhibit A536.

[880] Exhibit A542.

[881] ts 623 (14 February 2013).

[882] ts 623 (14 February 2013).

[883] ts 624 (14 February 2013).

[884] ts 521 (13 February 2013).

[885] ts 835 (18 February 2013).

[886] Exhibit A767.

[887] ts 863 (19 February 2013).

[888] ts 863 (19 February 2013).

[889] ts 527 528 (13 February 2013).

[890] Exhibit A536.

[891] Exhibit A540.

[892] Exhibit A542.

[893] Exhibit A547.

[894] ts 836 (18 February 2013).

[895] ts 623 (14 February 2013).

[896] Exhibit A767.

[897] Exhibit A768.

[898] Exhibit A768.

[899] ts 527 (13 February 2013).

[900] ts 525 - 526 (13 February 2013).

[901] ts 525 526, 598 (13 February 2013).

[902] ts 863 (19 February 2013).

[903] ts 863 (19 February 2013).

[904] Exhibits A957, A1562.

[905] Don's evidence was that he was still shearing until the 1980s: ts 464 (13 February 2013).

[906] ts 771 772 (18 February 2013).

[907] ts 445 446 (13 February 2013). Don did not directly agree with Mr Mitchell's statement to that effect.

[908] ts 835 (18 February 2013).

[909] ts 464 (13 February 2013).

[910] ts 468 (13 February 2013).

[911] ts 465 (13 February 2013).

[912] ts 466 (13 February 2013).

[913] ts 822 (18 February 2013).

[914] ts 870 (19 February 2013).

[915] ts 470 (13 February 2013), 871 (19 February 2013).

[916] ts 871 (19 February 2013).

[917] ts 471 (13 February 2013).

[918] Exhibit A972.

[919] Exhibit A965.

[920] Exhibit A972.

[921] ts 603 (14 February 2013).

[922] Exhibit A980.

[923] Exhibit A980.

[924] ts 865 (19 February 2013).

[925] Exhibit A980.

[926] Exhibit A981.

[927] ts 604 (14 February 2013).

[928] Exhibit G; ts 503 509.

[929] ts 605 (14 February 2013).

[930] ts 604 (14 February 2013).

[931] ts 868 (19 February 2013).

[932] Exhibit A996.

[933] ts 605 (14 February 2013).

[934] ts 870 (19 February 2013).

[935] Exhibit A984.

[936] ts 503 - 509.

[937] Exhibit G [262] - [269].

[938] Exhibit G [262] - [269].

[939] Exhibit G [262] - [269].

[940] Exhibit G.

[941] Exhibit G.

[942] Exhibit G.

[943] ts 869 (19 February 2013).

[944] ts 1134 (22 February 2013).

[945] ts 503 - 509; Exhibit G [259].

[946] Exhibits A1243, 1244, 1305, 1309, 1310.

[947] ts 610 (14 February 2013).

[948] Exhibit A1601.

[949] Exhibit A1601.

[950] Exhibits A1625, A1639.

[951] ts 870 (19 February 2013).

[952] ts 612 (14 February 2013).

[953] ts 1316 (26 February 2013).

[954] ts 1381, 1418 (1 March 2013).

[955] ts 311 - 312 (7 February 2013).

[956] Exhibit O, page 64.

[957] Exhibit N.

[958] Exhibit N.

[959] Exhibit A1799

[960] Exhibit PPP.

[961] ts 1175 1176, 1177 (25 February 2013).

[962] ts 1178 (25 February 2013); Exhibit R.

[963] ts 1192 (25 February 2013).

[964] Exhibit A1799.

[965] Exhibit I [52].

[966] ts 1189 (25 February 2013).

[967] Exhibit I [56].

[968] ts 1194 (25 February 2013).

[969] Exhibit U, page 66 67.

[970] Exhibit PPP.

[971] Exhibit I [84].

[972] ts 1194 (25 February 2013).

[973] ts 1195 (25 February 2013).

[974] ts 1178 (25 February 2013).

[975] Exhibit Q.

[976] Exhibit Q [86].

[977] ts 1120 (22 February 2013).

[978] Exhibit I [80].

[979] Exhibit GG [2] [8].

[980] Exhibit GG [10].

[981] Exhibit GG [10].

[982] Exhibit AA [18] - [21] (Witness Statement of Glenbervie Eric Cornish).

[983] Exhibit A175.

[984] Exhibit A175.

[985] Exhibit A282.

[986] Exhibit A282.

[987] Exhibit A400.

[988] Exhibit W [16].

[989] Exhibit BB [19] (Witness statement of Jean Hamory).

[990] Exhibit DD [6] (Witness statement of Stephanie Keating).

[991] Exhibit JJ [13].

[992] Exhibit LL [60].

[993] Exhibit YY [8].

[994] Exhibit QQ [31].

[995] Exhibit QQ [67] [68].

[996] Child Welfare Act 1947 (WA) s 64(1).

[997] ts 1234 (26 February 2013).

[998] ts 1232 (26 February 2013).

[999] ts 1235 (26 February 2013).

[1000] ts 1235 (26 February 2013).

[1001] Exhibit XX [21].

[1002] Exhibit YY [22]

[1003] Exhibit JJ [32].

[1004] Exhibit DD [9].

[1005] Exhibit QQ [45].

[1006] Exhibit QQ [47].

[1007] Exhibit QQ [56].

[1008] Exhibit LL [52] [56].

[1009] ts 1232 (26 February 2013).

[1010] Exhibits A368, A406, A430, A448, A462, A493.

[1011] Exhibit A430.

[1012] Exhibits A821, A849, A885.

[1013] Exhibits A369, A405, A429, A447, A461, A493, A506, A524, A622, A758, A759, A853, A863, A915, A927, A1038.

[1014] Exhibits A748, A862, A1162.

[1015] Exhibits A1038, A1162.

[1016] Exhibits A371, A396, A412, A370, A404, A419, A442, A457, A503, A560, A826, A914, A966, A996, A1070, A1160, A1230.

[1017] Exhibits A370, A428.

[1018] Exhibits A637, A875.

[1019] Exhibits A168, A160, A190, A203, A219.

[1020] Exhibits A378, A385, A399, A417, A434, A455, A469, A471, A551, A599, A664, A702, A731, A1007, A1040, A1041, A1215.

[1021] Exhibits A1478, A1506.

[1022] Exhibits A469, A535.

[1023] Exhibit A785.

[1024] Exhibits A365, A409, A423, A426, A442, A444, A457, A459, A494, A505, A559, A619, A621, A754, A889, A968.

[1025] Exhibits A365, A409.

[1026] Exhibit A748.

[1027] Exhibits A244, A366, A371, A408, A412, A427, A443, A457, A458, A494, A561, A620, A708, A995, A1052, A1130, A1177, A1322, A1359, A1430, A1491.

[1028] Exhibits A366, A427, A1177.

[1029] Exhibits A1342, A1606.

[1030] Exhibits A363, A371, A396, A410, A424, A445, A464, A474, A508, A562, A631, A697, A709, A713, A825, A835, A912, A1039, A1199, A1298, A1328, A1403, A1567.

[1031] Exhibits A410, A424, A1039.

[1032] Exhibits A637, A1621.

[1033] Exhibits A1371, A1621.

[1034] Exhibit A1013.

[1035] ts 1247 (26 February 2013).

[1036] Exhibit N [57] - [58].

[1037] ts 1243 – 1244 (26 February 2013).

[1038] ts 1244 (26 February 2013).

[1039] Exhibit A609.

[1040] ts 1244 (26 February 2013).

[1041] ts 1244 (26 February 2013).

[1042] ts 1317 (26 February 2013).

[1043] ts 1317 (26 February 2013).

[1044] Exhibit A320.

[1045] ts 1253 (26 February 2013).

[1046] Exhibit Y [19] [20] (Witness Statement of Kathleen Brenton-Coward).

[1047] Exhibit G [178].

[1048] Exhibit G [185].

[1049] Exhibit G [186].

[1050] Exhibit G [193].

[1051] Exhibit D, page 22.

[1052] Exhibit II [24].

[1053] ts 528 (13 February 2013).

[1054] Exhibit G [195].

[1055] Exhibit A372.

[1056] Exhibit A417.

[1057] Exhibit A551.

[1058] Exhibit A568.

[1059] Exhibit A1215.

[1060] Exhibit G [231] [235].

[1061] Exhibit G [238].

[1062] Exhibit D, page 24.

[1063] Exhibit K [39].

[1064] Exhibit K [65].

[1065] Exhibit M [64].

[1066] Exhibit M [70].

[1067] Exhibit I [63] - [64].

[1068] Exhibit Q [93] - [96].

[1069] ts 1132 (22 February 2013).

[1070] Exhibit N [14].

[1071] Exhibit N [15], Exhibit O, page 65.

[1072] Exhibit N [18].

[1073] Exhibit L [21], [24].

[1074] Exhibit A964.

[1075] Exhibit I [99].

[1076] Exhibit G [239].

[1077] Exhibit N [53].

[1078] ts 917 (19 February 2013).

[1079] ts 917 (19 February 2013).

[1080] ts 962 (20 February 2013).

[1081] Exhibit M [67].

[1082] ts 962 (20 February 2013).

[1083] ts 880 (19 February 2013).

[1084] Exhibit I [121].

[1085] ts 1121 (22 February 2013).

[1086] ts 1121 (22 February 2013).

[1087] Exhibit N [21].

[1088] Exhibit N [21].

[1089] Exhibit N [31].

[1090] Exhibit N [48].

[1091] ts 1305 (26 February 2013).

[1092] Exhibit A1013.

[1093] Exhibit A1252.

[1094] Exhibit GG [10].

[1095] Exhibit GG [10].

[1096] Exhibit CC [16].

[1097] Exhibit CC [14] [17].

[1098] Exhibit BB [20] [26], [33] [34].

[1099] Exhibit DD [10] [12].

[1100] Exhibit JJ [14] [19].

[1101] Exhibit LL [22].

[1102] Exhibit LL [35] - [38].

[1103] Exhibit LL [24].

[1104] Exhibit LL [25].

[1105] Exhibit QQ [33].

[1106] Exhibit QQ [33].

[1107] Exhibit QQ [34] - [35].

[1108] Exhibit QQ [55].

[1109] Exhibit QQ [65].

[1110] ts 1231 (26 February 2013).

[1111] ts 1231 (26 February 2013).

[1112] Exhibit A287.

[1113] Exhibit A287.

[1114] Exhibit A297.

[1115] Exhibit A297.

[1116] Exhibit A236.

[1117] Bowlby J, Maternal Care and Mental Health, (1951) WHO; ts 1248 - 1249.

[1118] ts 1248 (26 February 2013).

[1119] ts 1251 (26 February 2013).

[1120] Exhibit GG [2] - [3].

[1121] Exhibit GG [13].

[1122] Exhibit A198.

[1123] ts 1234 (26 February 2013).

[1124] ts 1127 (26 February 2013).

[1125] ts 1230 (26 February 2013).

[1126] ts 1229 (26 February 2013).

[1127] Exhibit A381.

[1128] ts 1250 - 1251 (26 February 2013).

[1129] Exhibit A198.

[1130] ts 1254 (26 February 2013).

[1131] ts 1244 (26 February 2013)..

[1132] ts 1253 1254 (26 February 2013).

[1133] ts 1253 1254 (26 February 2013).

[1134] Exhibit LL [49] [50].

[1135] Exhibit A1158.

[1136] Exhibit A1210.

[1137] Exhibit A1210.

[1138] Exhibit A1210.

[1139] ts 1251 (26 February 2013).

[1140] ts 1251 (26 February 2013).

[1141] Exhibit JJ [27] - [28].

[1142] Exhibit QQ [42].

[1143] Exhibit LL [45].

[1144] Exhibit LL [45].

[1145] ts 1253 (26 February 2013).

[1146] Exhibit LL [41] -– [45].

[1147] ts 1236 (26 February 2013).

[1148] ts 1237 (26 February 2013).

[1149] Exhibit X [46] - [48].

[1150] Exhibit X [50].

[1151] Exhibit AA [6].

[1152] Exhibit GG [2] - [7].

[1153] ts 1224 1226 (26 February 2013).

[1154] ts 1227 (26 February 2013).

[1155] ts 1227 (26 February 2013).

[1156] Exhibit DD [10] [12].

[1157] Exhibit X [46] - [47].

[1158] ts 1226 (26 February 2013).

[1159] Exhibit SS [32].

[1160] Exhibit Y [16] - [18].

[1161] Exhibit A1594.

[1162] Exhibit A1607 [2].

[1163] Exhibit A1607 [4].

[1164] Exhibit A1608.

[1165] Exhibit A1608 [4] [5].

[1166] Exhibit A1608 [7].

[1167] Exhibit QQ [91] - [98].

[1168] Exhibit A1630.

[1169] Exhibit A1630, page 2. Similar concerns had been identified in other States: see Sommerlad E A, 'Aboriginal Children Belong in the Aboriginal Community: Changing Practices in Adoption' (1977) 12(3) Australian Journal of Social Issues 167 at 168.

[1170] Exhibit A1630, page 3.

[1171] Exhibit A1630, page 2.

[1172] Exhibit A1667, page1 2 of the Report.

[1173] Exhibit A1667, page 6, 9 10.

[1174] Exhibit A1667, page 17.

[1175] Exhibit A1667.

[1176] Exhibit A1661.

[1177] Exhibit A1661.

[1178] Exhibit A1653.

[1179] Exhibit A171.

[1180] Exhibit A172.

[1181] ts 794 - 795 (18 February 2013).

[1182] ts 795 (18 February 2013).

[1183] ts 795 (18 February 2013).

[1184] Exhibit A177.

[1185] Exhibit GG.

[1186] ts 795 (18 February 2013).

[1187] ts 794 (18 February 2013).

[1188] ts 796 (18 February 2013).

[1189] Exhibit GG [31].

[1190] Exhibit A179.

[1191] Exhibit A184.

[1192] Exhibit A189.

[1193] Exhibit A193.

[1194] Exhibit A189.

[1195] Exhibit A195.

[1196] Exhibit A200.

[1197] ts 801 802 (18 February 2013).

[1198] Exhibit G [245].

[1199] Exhibit A413.

[1200] Exhibit A413.

[1201] ts 1242 (26 February 2013).

[1202] Exhibit A705.

[1203] ts 855 (19 February 2013).

[1204] Exhibit A1141.

[1205] ts 1248 (26 February 2013).

[1206] ts 1248 (26 February 2013).

[1207] Exhibit A970.

[1208] ts 864 865 (19 February 2013).

[1209] Exhibit E, pages 1 7.

[1210] Exhibit E, pages 8 16.

[1211] Exhibit E, pages 30 38.

[1212] Exhibit E, pages 17 29.

[1213] Exhibit A276.

[1214] Exhibit A285.

[1215] Exhibit A293.

[1216] Exhibit A465.

[1217] Exhibit A527.

[1218] ts 1222 (26 February 2013).

[1219] ts 1223 (26 February 2013).

[1220] ts 1223 (26 February 2013).

[1221] The paper was published as part of a collection of papers under the title 'Thinking about Australian Aboriginal Welfare with particular reference to Western Australia': Exhibit A671.

[1222] Exhibit A671, page 26.

[1223] ts 1233 (26 February 2013).

[1224] ts 1233 (26 February 2013).

[1225] ts 1223 (26 February 2013).

[1226] References to the order appear in Exhibits A123, A124 and A129.

[1227] Exhibit A164.

[1228] Exhibit A164.

[1229] Exhibits A254, A241.

[1230] Exhibit A254.

[1231] Exhibits A267, A272.

[1232] See, for example, Exhibits A123, A342.

[1233] See, for example, Exhibits A123, A124 and A129.

[1234] See, for example, Exhibits A334, A349 and A350.

[1235] ts 1547 – 1548 (7 March 2013).

[1236] Exhibit BBB-11, page 4.

[1237] Exhibit BBB-11, page 4 - 5.

[1238] Exhibit BBB-11, page 4.

[1239] Exhibit BBB-11, page 4.

[1240] Exhibit BBB-11, page 6.

[1241] Exhibit BBB-11, page 5.

[1242] Exhibit BBB-11, page 13 - 14.

[1243] Exhibit BBB-11, page 14.

[1244] Exhibit BBB-11, page 13.

[1245] Exhibit BBB-11, page 14.

[1246] Exhibit BBB-11, page 14.

[1247] Exhibit BBB-11, page 7.

[1248] Exhibit BBB-11, page 7.

[1249] Exhibit BBB-11, page 7.

[1250] Exhibit BBB-11, page 9.

[1251] Exhibit BBB-11, page 8.

[1252] Exhibit BBB-11, page 18.

[1253] Exhibit BBB-11, page 19.

[1254] Exhibit BBB-11, page 17.

[1255] Exhibit BBB-11, page 19.

[1256] Exhibit BBB-11, page 20.

[1257] Exhibit BBB-11, page 28.

[1258] Exhibit BBB-11, page 28.

[1259] Exhibit BBB-11, page 29.

[1260] Exhibit BBB-11, page 29.

[1261] Exhibit BBB-11, page 30.

[1262] Exhibit BBB-11, page 25.

[1263] Exhibit BBB-11, page 25.

[1264] Exhibit BBB-11, page 25.

[1265] Exhibit BBB-11, page 25.

[1266] Exhibit BBB-11, page 24.

[1267] Exhibit BBB-11, page 26.

[1268] Exhibit BBB-11, pages 26 - 27.

[1269] Exhibit BBB-11, page 27.

[1270] Exhibit BBB-11, page 15.

[1271] Exhibit BBB-11, page 15.

[1272] Exhibit BBB-11, page 15.

[1273] Exhibit BBB-11, page 15.

[1274] Exhibit BBB-11, page 16.

[1275] Exhibit BBB-11, page 15.

[1276] Exhibit BBB-11, page 17.

[1277] Exhibit BBB-11, pages 16 - 17.

[1278] Exhibit BBB-11, page 21.

[1279] Exhibit BBB-11, page 21.

[1280] Exhibit BBB-11, page 21.

[1281] Exhibit BBB-11, page 22.

[1282] Exhibit BBB-11, page 21.

[1283] Exhibit BBB-11, page 21.

[1284] Exhibit BBB-11, page 22.

[1285] Exhibit BBB-11, page 27.

[1286] Exhibit BBB-11, page 11.

[1287] Exhibit BBB-11, page 10.

[1288] Exhibit BBB-11, page 10.

[1289] Exhibit BBB-11, page 10.

[1290] Exhibit BBB-11, page 10.

[1291] Exhibit BBB-11, page 11.

[1292] Exhibit BBB-11, pages 10 - 11.

[1293] Exhibit BBB-11, page 11; see also Exhibit BBB-15, page 13 (Dr Smith).

[1294] Exhibit A1880.

[1295] Exhibit A1895.

[1296] Exhibit A1896.

[1297] Exhibits A1915, A1924, A1926, A1928, A1917, A1930.

[1298] Exhibit AAAA.

[1299] ts 1684, 1685 (7 June 2013).

[1300] Exhibits A1910 - A1913.

[1301] Exhibits A1938.

[1302] Exhibit A1933.

[1303] See eg Exhibits A1933, A1935.

[1304] Exhibit A1947.

[1305] Exhibit A1939.

[1306] Exhibit A1942.

[1307] Exhibits A1970l, A1991, A1993.

[1308] Exhibits A1947, A2014, A2069.

[1309] Exhibit A1956.

[1310] See, for example, Exhibits A1973, A1974, A1975, A1981, A1982, A1983, A1984, A1985, A1986, A1987, A1988, A1989, A1990, A1997, A1998, A2000, A2001, A2002, A2004, A2005, A2008, A2009, A2012, A2013,

[1311] Exhibit A1944, A1945.

[1312] Exhibit A1949.

[1313] Exhibit A1950.

[1314] Exhibit A1950.

[1315] Exhibit A1955.

[1316] Exhibit A1957.

[1317] Exhibit A1965.

[1318] Exhibit A1967.

[1319] Exhibit A1980.

[1320] Exhibit A2017

[1321] Exhibit A1980.

[1322] Exhibit A2028.

[1323] Exhibit A2115.

[1324] Exhibit A2127.

[1325] Exhibit A2134.

[1326] Exhibit A2139.

[1327] Exhibit A2140.

[1328] Exhibit A2145.

[1329] Exhibit A2144.

[1330] Exhibit A2150A.

[1331] Exhibit A2165.

[1332] Exhibit A2168.

[1333] Exhibits A2175, A2176.

[1334] Exhibit A2177.

[1335] See, for example, Exhibits A2179 - A2182.

[1336] See, for example, Exhibits A2184, A2186, A2187, A2187, A2188, A2189, A2190.

[1337] Exhibit CCC.

[1338] Exhibit GGG.

[1339] ts 54 (4 February 2013).

[1340] ts 60 (4 February 2013).

[1341] Amended Statement of Claim [105].

[1342] Amended Statement of Claim [105] referring to [1] - [3].

[1343] Amended Statement of Claim [105] referring to [1].

[1344] Amended Statement of Claim [105] referring to [36] and [45].

[1345] Amended Statement of Claim [105] referring to [35], [37], [44] and [46].

[1346] Amended Statement of Claim [105] referring to [5] and [6].

[1347] Amended Statement of Claim [105].

[1348] Further Amended Defence [105].

[1349] Further Amended Defence [2(a)] and [2(b)].

[1350] Further Amended Defence [36] and [45].

[1351] Further Amended Defence [36].

[1352] ts 79, 84 (4 February 2013); 135 (5 February 2013).

[1353] Amended Defence [105] and [107].

[1354] Amended Defence [105] - [107].

[1355] ts 56 (4 February 2013).

[1356] Discussed in Western Australia v Commonwealth; Wororra Peoples & Biljabu v The State of Western Australia (Second Native Title Act case) [1995] HCA 47; (1995) 183 CLR 373, 425 (the Court).

[1357] Haebich A, For Their Own Good: Aborigines and government in the south west of Western Australia, 1900 1940 (1988) 54, note 11.

[1358] Aborigines Act Amendment Act 1936 (WA) s 1.

[1359] Hasluck P, Black Australians: A Survey of Native Policy in Western Australia, 18291897 (1942) 160-1, quoted in Biskup P, Not Slaves Not Citizens: The Aboriginal problem in Western Australia, 18981954 (1973).

[1360] Plaintiffs' Closing Submissions [17].

[1361] Aborigines Protection Act 1886 (WA) s 6.

[1362] Aborigines Act 1905 (WA) s 6.

[1363] Aborigines Act 1905 (WA) s 60.

[1364] Haebich A, For Their Own Good: Aborigines and government in the south west of Western Australia, 19001940 (1988) 74, note 52, referring to the speech given by the then Minister for Lands, J M Drew.

[1365] Plaintiffs' Closing Submissions [1] - [2].

[1366] Plaintiffs' Closing Submissions [3] - [4].

[1367] ts 77 (4 February 2013).

[1368] The Cherokee Nation v The State of Georgia [1831] USSC 6; (1831) 30 US 1.

[1369] Plaintiffs' Closing Submissions [14].

[1370] ts 58 (4 February 2013).

[1371] ts 59 (4 February 2013).

[1372] The Cherokee Nation v The State of Georgia [1831] USSC 6; (1831) 30 US 1.

[1373] The Cherokee Nation v The State of Georgia [1831] USSC 6; (1831) 30 US 1.

[1374] The Cherokee Nation v The State of Georgia [1831] USSC 6; (1831) 30 US 1, 17 (Marshall CJ).

[1375] The Cherokee Nation v The State of Georgia [1831] USSC 6; (1831) 30 US 1, 20 (Marshall CJ), 27 (Johnson J), 42 - 43 (Baldwin J), 53 - 54 (Thompson J, dissenting), 80 (Story J, concurring with Thompson J)

[1376] See, for example, Worcester v The State of Georgia [1832] USSC 39; (1832) 31 US 515, 555, 559 - 560 (Marshall CJ), 581 582 (M'Lean J); United States v Kagama [1886] USSC 194; (1886) 118 US 375, 381 - 382 (Miller J); The Cherokee Nation v Southern Kansas Railway Company [1890] USSC 168; (1890) 135 US 641, 653

(Harlan J); Stephens v The Cherokee Nation [1899] USSC 121; (1899) 174 US 445, 486, 491 (Fuller CJ); The Cherokee Nation v Hitchcock [1902] USSC 179; (1902) 187 US 294, 306 (White J, for the Court); Lone Wolf v Hitchcock (1903) 187 US 553, 566 - 567 (White J, for the Court).

[1377] United States v Creek Nation [1935] USSC 104; (1935) 295 US 103, 109 - 110 (Van Devanter J, for the Court).

[1378] Lane v Pueblo of Santa Rosa [1919] USSC 57; (1919) 249 US 110, 113 (Van Devanter J, for the Court); United States v Creek Nation [1935] USSC 104; (1935) 295 US 103, 110 (Van Devanter J).

[1379] United States v Mitchell [1983] USSC 154; (1983) 463 US 206.

[1380] United States v Mitchell [1983] USSC 154; (1983) 463 US 206, 225 (Marshall J).

[1381] United States v Mitchell [1983] USSC 154; (1983) 463 US 206, 222, 224 - 226 (Marshall J), but cf the dissenting opinion of Powell J (with whom Rehnquist J and O'Connor J joined).

[1382] Guerin v The Queen (1984) 13 DLR (4th) 321.

[1383] Guerin v The Queen (1984) 13 DLR (4th) 321, 334, 340 (Dickson CJ), 346 (Beetz J concurring), 349 (Chouinard J & Lamer J concurring).

[1384] Guerin v The Queen (1984) 13 DLR (4th) 321, 334 (Dickson CJ), 346 (Beetz J concurring), 349 (Chouinard J & Lamer J concurring).

[1385] Guerin v The Queen (1984) 13 DLR (4th) 321, 356 (Wilson J & McIntyre J concurring).

[1386] Guerin v The Queen (1984) 13 DLR (4th) 321, 357 (Wilson J & McIntyre J concurring).

[1387] R v Sparrow (1990) 70 DLR (4th) 385.

[1388] The Constitution Act, 1982, being Schedule B to the Canada Act 1982 (UK), 1982, c11.

[1389] R v Sparrow (1990) 70 DLR (4th) 385, 408 (Dickson CJC & La Forest J, for the Court).

[1390] R v Sparrow (1990) 70 DLR (4th) 385, 409 (Dickson CJC & La Forest J, for the Court).

[1391] Delgamuukw v British Columbia [1997] 3 SCR 1010, [162] (Lamer CJ, Cory & Major JJ).

[1392] New Zealand Maori Council v Attorney General [1987] 1 NZLR 641, 664 (Cooke P).

[1393] New Zealand Maori Council v Attorney General [1987] 1 NZLR 641.

[1394] New Zealand Maori Council v Attorney General [1987] 1 NZLR 641, 664 (Cooke P).

[1395] New Zealand Maori Council v Attorney General [1987] 1 NZLR 641, 664 (Cooke P).

[1396] New Zealand Maori Council v Attorney General [1987] 1 NZLR 641, 673 (Richardson J), 693 (Somers J), 702 - 703 (Casey J), 715 (Bisson J).

[1397] Fejo v Northern Territory [1998] HCA 58; (1998) 195 CLR 96, 148 - 149 [101] (Kirby J).

[1398] Breen v Williams [1996] HCA 57; (1996) 186 CLR 71, 94 - 98 [24] - [28] (Dawson & Toohey JJ), 111 113 (Gaudron & McHugh JJ), 137 [71] - [72] (Gummow J).

[1399] See, for example, McInerney v MacDonald [1992] 2 SCR 138; Norberg v Wynrib [1992] 2 SCR 226; M (K) v M (H)[1992] 3 SCR 6; Canson Ent Ltd v Boughton & Co [1992] 3 SCR 534.

[1400] Pilmer v Duke Group Ltd (in liq) [2001] HCA 31; (2001) 207 CLR 165, 212 - 213 [124] - [125] (Kirby J).

[1401] See the discussion of the authorities by Kirby J in Thorpe v Commonwealth (***No*** 3) [1997] HCA 21; (1997) 144 ALR 677, 688 (Kirby J).

[1402] Mabo v Queensland (***No*** 2) [1992] HCA 23; (1992) 175 CLR 1, 199 (Toohey J).

[1403] Mabo v Queensland (***No*** 2) [1992] HCA 23; (1992) 175 CLR 1, 203 (Toohey J).

[1404] Mabo v Queensland (***No*** 2) [1992] HCA 23; (1992) 175 CLR 1, 166 - 167 (Dawson J).

[1405] Mabo v Queensland (***No*** 2) [1992] HCA 23; (1992) 175 CLR 1, 60 (Brennan J)

[1406] Mabo v Queensland (***No*** 2) [1992] HCA 23; (1992) 175 CLR 1, 113 (Deane & Gaudron JJ).

[1407] Wik Peoples v State of Queensland [1996] HCA 40; (1996) 187 CLR 1, 96 (Brennan CJ).

[1408] Wik Peoples v State of Queensland [1996] HCA 40; (1996) 187 CLR 1, 96 (Brennan CJ).

[1409] See, for example, Thorpe v Commonwealth of Australia (***No*** 3) [1997] HCA 21; (1997) 144 ALR 677, 688 689 (Kirby J); Coe v Commonwealth of Australia [1993] HCA 42; (1993) 118 ALR 193, 202 - 204 (Mason CJ).

[1410] Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41, 68 (Gibbs CJ), 96 (Mason J), 141 (Dawson J), Clay v Clay [2001] HCA 9; (2001) 202 CLR 410, 429 - 430 [39] (the Court, citing Plowright v Lambert (1885) 52 LT 646, 652 (Field J)).

[1411] Breen v Williams [1996] HCA 57; (1996) 186 CLR 71, 107 (Gaudron & McHugh JJ); Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41, 96 (Mason J).

[1412] Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41, 68 (Gibbs CJ), 141 (Dawson J); Breen v Williams [1996] HCA 57; (1996) 186 CLR 71, 92 (Dawson & Toohey JJ), 106 (Gaudron & McHugh JJ).

[1413] Breen v Williams [1996] HCA 57; (1996) 186 CLR 71, 107 (Gaudron & McHugh JJ); Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41, 96 - 97 (Mason J), 141 - 142 (Dawson J).

[1414] Breen v Williams (1996) 186 CLR 71, 107 (Gaudron & McHugh JJ); Pilmer v Duke Group Ltd (in liq) [2001] HCA 31; (2001) 207 CLR 165, 217 [136] (Kirby J); Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41, 69 – 70 (Gibbs J).

[1415] Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41, 96 - 97 (Mason J), 141 - 142 (Dawson J); Breen v Williams [1996] HCA 57; (1986) 186 CLR 71, 92 - 93 (Dawson & Toohey JJ); Grimaldi v Chameleon Mining NL (***No*** 2) [2012] FAFC 6; [2012] FCAFC 6; (2012) 200 FCR 296, 345 [177] (Finn, Stone & Perram JJ). See also Edelman J, 'The Importance of the fiduciary undertaking' in Equity (2013) 128.

[1416] Finn P D, 'The Fiduciary Principle' in Youdan T G (ed) Equity, Fiduciaries and Trusts (1989) 1, 47.

[1417] News Ltd v Australian Rugby Football League Ltd [1996] FCA 870; (1996) 64 FCR 410, 541 (Lockhart, von Doussa & Sackville JJ).

[1418] Red Hill Iron Ltd v API Management Pty Ltd [2012] WASC 323 [362].

[1419] Breen v Williams [1996] HCA 57; (1996) 186 CLR 71, 93 (Dawson & Toohey JJ).

[1420] Bodney v Westralia Airports Corporation Pty Ltd [2000] FCA 1609; (2000) 109 FCR 178, 196 [42] [66] (Lehane J).

[1421] Cf the basis for the action in Cubillo v Commonwealth of Australia [2001] FCA 1213; (2001) 112 FCR 455, 573 [452] (the Court).

[1422] Clay v Clay [2001] HCA 9; (2001) 202 CLR 410, 430 [40] (the Court); Bennett v Minister of Community Welfare[1992] HCA 27; (1992) 176 CLR 408, 426 - 427 (McHugh J).

[1423] Clay v Clay [2001] HCA 9; (2001) 202 CLR 410, [46] (the Court); State of South Australia v LampardTrevorrow[2010] SASC 56; (2010) 106 SASR 331, 399 [327] (the Court); Cubillo v Commonwealth of Australia [2001] FCA 1213;(2001) 112 FCR 455 [460] (the Court).

[1424] Child Welfare Act 1947 (WA) s 10(1).

[1425] Cf Wedd v Wedd [1948] SAStRp 8; [1948] SASR 104, 106 106 (Mayo J); In the Marriage of Newbery (1977) 27 FLR 246, 248 (Demack SJ).

[1426] Cf Carltona Ltd v Commissioner of Works [1943] 2 All ER 560.

[1427] See, for example, Paramasivam v Flynn [1998] FCA 1711; (1998) 90 FCR 489, 504 - 505 (the Court).

[1428] Paramasivam v Flynn [1998] FCA 1711; (1998) 90 FCR 489, 504 - 505 (the Court).

[1429] ts 58 (4 February 2013).

[1430] Breen v Williams [1996] HCA 57; (1996) 186 CLR 71, 82 (Brennan CJ), 92 (Dawson & Toohey JJ); Permanent Building Society (in liq) v Wheeler (1994) 11 WAR 187, 237 - 239 (Ipp J, Malcolm CJ & Seaman J agreeing); South Australia v Lampard-Trevorrow [2010] SASC 56; (2010) 106 SASR 331, 399 [329] (the Court).

[1431] Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41, 102 - 103 (Mason J), Breen v Williams [1996] HCA 57; (1996) 186 CLR 71, 82 (Brennan CJ), 92 (Dawson & Toohey JJ), Clay v Clay [2001] HCA 9; (2001) 202 CLR 410, 430 [40], 432 - 433 [46] (the Court).

[1432] Hospital Products Ltd v United States Surgical Corporation [1984] HCA 64; (1984) 156 CLR 41, 97 (Mason J).

[1433] Breen v Williams [1996] HCA 57; (1996) 186 CLR 71, 133 (Gummow J).

[1434] Cubillo v Commonwealth of Australia [2001] FCA 1213; (2001) 112 FCR 455, 577 [465] (the Court).

[1435] Cubillo v Commonwealth of Australia [2001] FCA 1213; (2001) 112 FCR 455, 577 [465] (the Court), citing Tito v Waddell (***No*** 2) [1977] Ch 106, 139.

[1436] Breen v Williams [1996] HCA 57; (1996) 186 CLR 71, 93 (Dawson & Toohey JJ); Bell Group Ltd (in liq) v Westpac[2008] WASC 239; (2008) 39 WAR 1, 565 [4537] (Owen J).

[1437] Grimaldi v Chameleon Mining NL (***No*** 2) [2012] FCAFC 6; (2012) 200 FCR 296, 345 [178] - [179] (Finn, Stone & Perram JJ).

[1438] Breen v Williams [1996] HCA 57; (1996) 186 CLR 71, 93 (Dawson & Toohey JJ), 113 (Gaudron & McHugh JJ), see also at 135 and 137 (Gummow J), Pilmer v Duke Group Ltd (in liq) [2001] HCA 31(2001) 207 CLR 165, 220 [136] (Kirby J); Bell Group Ltd (in liq) v Westpac [2008] WASC 239; (2008) 39 WAR 1, 568 [4552] (Owen J).

[1439] See Finn P D 'The Fiduciary Principle' in Youdan T G (Ed) Equity, Fiduciaries and Trusts (1989) 1, 27.

[1440] Amended Statement of Claim [107.9].

[1441] Breen v Williams [1996] HCA 57; (1996) 186 CLR 71, 113 (Gaudron & McHugh JJ), 137 (Gummow J); Pilmer v Duke Group Ltd (in liq) [2001] HCA 31; (2001) 207 CLR 165, 197 - 198 [74] (McHugh, Gummow, Hayne & Callinan JJ), 214 [127] (Kirby J).

[1442] Breen v Williams [1996] HCA 57; (1996) 186 CLR 71, 137 - 138 (Gummow J); see also P D Finn 'The Fiduciary Principle' in T G Youdan (ed) Equity, Fiduciaries and Trusts (1989) 1, 28.

[1443] State of South Australia v LampardTrevorrow [2010] SASC 56; (2010) 106 SASR 331, 401 [337] (the Court).

[1444] Farah Constructions Pty Ltd v SayDee Pty Ltd [2007] HCA 22; (2007) 230 CLR 89 [103] (the Court).

[1445] Farah Constructions Pty Limited v SayDee Pty Limited [2007] HCA 22; (2007) 230 CLR 89.

[1446] Kennon v Spry [2008] HCA 56; (2008) 238 CLR 366, 407 - 408 [125].

[1447] Kennon v Spry [2008] HCA 56; (2008) 238 CLR 366, 394 [75].

[1448] Westpac Banking Corp v Bell Group Ltd (in liq) (***No*** 3) [2012] WASCA 157; (2012) 89 ACSR 1, 145 [900] (Lee AJA), 318 [1961] (Drummond AJA), 489 - 492 [2716] [2733] (Carr AJA).

[1449] Bell Group Ltd (in liq) v Westpac [2008] WASC 239; (2008) 39 WAR 1, 575 [4581] (Owen J).

[1450] Bell Group Ltd (in liq) v Westpac [2008] WASC 239; (2008) 39 WAR 1, 574 [4578] (Owen J).

[1451] Friend v Brooker [2009] HCA 21; (2009) 239 CLR 129, 160 [84] - [89] (French CJ, Gummow, Hayne & Bell JJ).

[1452] ts 61.

[1453] Friend v Brooker [2009] HCA 21; (2009) 239 CLR 129, 160 [84] (French CJ, Gummow, Hayne & Bell JJ).

[1454] Friend v Brooker [2009] HCA 21; (2009) 239 CLR 129, 160 [84] (French CJ, Gummow, Hayne & Bell JJ).

[1455] Friend v Brooker [2009] HCA 21; (2009) 239 CLR 129, 161 - 162 [92] (Heydon J).

[1456] Friend v Brooker [2009] HCA 21; (2009) 239 CLR 129, 161 [88] (French CJ, Gummow, Hayne & Bell JJ).

[1457] Bell Group Ltd (in liq) v Westpac [2008] WASC 239; (2008) 39 WAR 1, 574 - 575 [4578] [4581] (Owen J).

[1458] Bell Group Ltd (in liq) v Westpac [2008] WASC 239; (2008) 39 WAR 1, 574 - 575 [4578] [4582](Owen J).

[1459] Amended Statement of Claim [107.1].

[1460] Amended Statement of Claim [107.2.1], [107.2.2].

[1461] Amended Statement of Claim [107.5.1].

[1462] Permanent Building Society (in liq) v Wheeler (1994) 11 WAR 187, 238 - 239 (Ipp J, Malcolm CJ & Seaman J agreeing); Bell Group Ltd (in liq) v Westpac [2008] WASC 239; (2008) 39 WAR 1, 530 [4375], 564 [4531] (Owen J).

[1463] As to the position of trustees, see Bristol & West Building Society v Mothew [1998] 1 Ch 1, 16.

[1464] See Meagher, Heydon and Leeming (eds) Meagher, Gummow and Lehane's Equity Doctrines and Remedies, 2002, [5-295] for a number of examples.

[1465] See, generally, Meagher, Heydon and Leeming (eds) Meagher, Gummow and Lehane's Equity Doctrines and Remedies, 2002, [5-295] - [5-330].

[1466] Westpac Banking Corp v Bell Group Ltd (in liq) (***No*** 3) [2012] WASCA 157; (2012) 89 ACSR 1, 134 [840] [841] (Lee AJA).

[1467] Westpac Banking Corp v Bell Group Ltd (in liq) (***No*** 3) [2012] WASCA 157; (2012) 89 ACSR 1, 134 [839] (Lee AJA).

[1468] Westpac Banking Corp v Bell Group Ltd (in liq) (***No*** 3) [2012] WASCA 157; (2012) 89 ACSR 1, 489 [2715] (Carr AJA).

[1469] See, for example, Heydon J D 'Are the duties of company directors to exercise care and skill fiduciary?' in Degelings and Edelman J (eds) Equity in Commercial Law (2005) 185; Firios L 'Precluding prescriptive duties in fiduciary relationships: The problems with the prescriptive delimitation' (2012) 40 ABLR 166; Goldfinch A 'Trustee's duty to exercise reasonable care: A fiduciary duty', (2004) 78 ALJ 678.

[1470] State of South Australia v LampardTrevorrow [2010] SASC 56; [2010] SASC 56; (2010) 106 SASR 331, 399 [329] (the Court); Cubillo v Commonwealth of Australia [2001] FCA 1213; (2001) 112 FCR 455 [462] (the Court); Tusyn v Tasmania [2004] TASSC 50; (2004) 13 Tas R 51, 56 [11] (Blow J).

[1471] Tusyn v Tasmania [2004] TASSC 50; (2004) 13 Tas R 51, 56 [11] (Blow J).

[1472] Paramasivam v Flynn [1998] FCA 1711; (1998) 90 FCR 489, 506 (the Court).

[1473] Paramasivam v Flynn [1998] FCA 1711; (1998) 90 FCR 489, 507 - 508 (the Court).

[1474] Williams v Minister, Aboriginal Land Rights Act 1983 [1999] NSWSC 843; (1999) 25 Fam LR 86.

[1475] Williams v Minister, Aboriginal Land Rights Act 1983 [1999] NSWSC 843; (1999) 25 Fam LR 86, 242 [745] (Abadee J). Although the decision was the subject of an appeal, the fiduciary aspect of the case was largely laid aside in the appeal: Williams v Minister, Aboriginal Land Rights Act 1983 (2000) Aust Torts Reports 81-578, [55] (Heydon JA).

[1476] Cubillo v Commonwealth of Australia (***No*** 2) [2000] FCA 1084; (2000) 103 FCR 1.

[1477] Cubillo v Commonwealth of Australia [2001] FCA 1213; (2001) 112 FCR 455 [465] (the Court).

[1478] Cubillo v Commonwealth of Australia [2001] FCA 1213; (2001) 112 FCR 455 [465] (the Court).

[1479] Cubillo v Commonwealth of Australia [2001] FCA 1213; (2001) 112 FCR 455, 577 [466] (the Court).

[1480] Tusyn v Tasmania [2004] TASSC 50; (2004) 13 Tas R 51, 63 [28] (Blow J).

[1481] Webber v State of New South Wales [2003] NSWSC 1263; (2004) 31 Fam LR 425, 432 [29] (Dunford J).

[1482] Webber v State of New South Wales [2003] NSWSC 1263; (2004) 31 Fam LR 425, 432 [29] (Dunford J).

[1483] SB v State of New South Wales [2004] VSC 514; (2004) 13 VR 527, 623 [661] (Redlich J).

[1484] Trevorrow v South Australia (***No*** 5) [2007] SASC 285; (2007) 98 SASR 136 [1001] (Gray J).

[1485] Trevorrow v South Australia (***No*** 5) [2007] SASC 285; (2007) 98 SASR 136, 344 [1002], [1006] (Gray J).

[1486] State of South Australia v LampardTrevorrow [2010] SASC 56; (2010) 106 SASR 331.

[1487] State of South Australia v Lampard-Trevorrow [2010] SASC 56; (2010) 106 SASR 331, 401 [334] (the Court).

[1488] State of South Australia v Lampard-Trevorrow [2010] SASC 56; (2010) 106 SASR 331, 401 [337] (the Court).

[1489] State of South Australia v Lampard-Trevorrow [2010] SASC 56; (2010) 106 SASR 331, 402 [342] (the Court).

[1490] Amended Statement of Claim [107.3.2].

[1491] Amended Statement of Claim [107.8.1].

[1492] Pilmer v Duke Group Ltd (in liq) [2001] HCA 31; (2001) 207 CLR 165, 197 [71] (McHugh, Gummow, Hayne & Callinan JJ, citing Norberg v Wynrib [1992] 2 SCR 226, 312 (Sopinka J)), 217 [136] (Kirby J).

[1493] See, for example, Paramasivam v Flynn [1998] FCA 1711; (1998) 90 FCR 489, 505 (the Court); Williams v Minister, Aboriginal Land Rights Act 1983 [1999] NSWSC 843; (1999) 25 Fam LR 86, 242 [745] (Abadee J); Webber v State of New South Wales [2003] NSWSC 1263; (2004) 31 Fam LR 425, 432 [29] (Dunford J); SB v State of New South Wales [2004] VSC 514; (2004) 13 VR 527, 623 (Redlich J).

[1494] Amended Statement of Claim [105.2].

[1495] Amended Statement of Claim [107.1].

[1496] Amended Statement of Claim [107.6].

[1497] There have been statutory relaxations of the strict approach to fiduciary duties in the context of trustees: see Maguire v Makaronis [1997] HCA 23; (1997) 188 CLR 449, 473 - 474 (Brennan CJ, Gaudron, McHugh & Gummow JJ).

[1498] Regal (Hastings) Ltd v Gulliver [1967] 2 AC 134, 137 (Viscount Sankey), 144 - 145 (Lord Russell of Killowen), 153 (Lord Macmillan), 154, 156 - 157 (Lord Wright), 158 - 159 (Lord Porter); Phipps v Boardman [1966] UKHL 2; [1967] 2 AC 46; Warman International Ltd v Dwyer [1995] HCA 18; (1995) 182 CLR 544, 558 (Mason CJ,

Brennan, Deane, Dawson & Gaudron JJ); Maguire v Makaronis [1997] HCA 23; (1997) 188 CLR 449, 473 - 474 (Brennan CJ, Gaudron, McHugh and Gummow JJ).

[1499] Warman International Ltd v Dwyer [1995] HCA 18; (1995) 182 CLR 544, 557 (Mason CJ, Brennan, Deane, Dawson & Gaudron JJ) referring to Meinhard v Salmon (1928) 164 NE 545, 546 (Cardozo CJ).

[1500] Fexuto Pty Ltd v Bosnjak Holdings Pty Ltd [2001] NSWCA 97; (2001) 37 ACSR 672, [120] - [121] (Spigelman CJ), [685] (Fitzgerald J).

[1501] Amended Statement of Claim [105.1].

[1502] Amended Statement of Claim [107.1].

[1503] Amended Statement of Claim [107.6].

[1504] ts 69 (4 February 2013).

[1505] ts 87 (4 February 2013).

[1506] Fouche v Superannuation Fund Board [1952] HCA 1; (1952) 88 CLR 609, 641 (the Court); Daniel v Anderson(1995) 37 NSWLR 438, 499 (Clarke JA & Sheller JA).

[1507] Plaintiffs' Closing Submissions [43].

[1508] ts 1352 (1 March 2013).

[1509] ts 1352 (1 March 2013).

[1510] Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] EWCA Civ 1; [1948] 1 KB 223, 229 - 230.

[1511] ts 1374 (1 March 2013).

[1512] ts 88 (4 February 2013).

[1513] ts 88 (4 February 2013).

[1514] ts 357 - 358 (8 February 2013).

[1515] ts 358 (8 February 2013).

[1516] ts 381 (8 February 2013).

[1517] ts 359 (8 February 2013).

[1518] ts 359 (8 February 2013).

[1519] Cubillo v Commonwealth of Australia (***No*** 2) [2000] FCA 1084; (2000) 103 FCR 1, 465 - 466 (O'Loughlin J); Tito v Waddell [1977] Ch 106, 139.

[1520] Cf for example s 6(1) of the Aboriginals Ordinance (NT) considered in Kruger v Commonwealth [1977] HCA 27;(1997) 190 CLR 1, 35 - 36 (Brennan CJ).

[1521] Amatek Ltd v Googoorewon Pty Ltd [1993] HCA 16; (1993) 176 CLR 471, 477 (the Court); Northern Suburbs General Centenary Reserve Trust v Commonwealth [1993] HCA 12; (1993) 176 CLR 555, 563 (Mason CJ, Deane, Toohey & Gaudron JJ).

[1522] Birch v Allen [1942] HCA 17; (1942) 65 CLR 621, 625 - 626 (Latham CJ).

[1523] Native Welfare Act 1905 1954 (WA) s 4.

[1524] Native Welfare Act 1905 1954 (WA) s 6.

[1525] Native Welfare Act 1905 1954 (WA) s 8.

[1526] Minister for Immigration & Citizenship v Li [2013] HCA 18; (2013) 87 ALJR 618, 637 [63] (Hayne, Keifel & Bell JJ); 631 [29] (French CJ), 641 [88] (Gageler J); Kruger v Commonwealth [1997] HCA 27; (1997) 190 CLR 1, 36 - 37 (Brennan CJ), see also at 52 (Dawson J).

[1527] Minister for Immigration & Citizenship v Li [2013] HCA 18; (2013) 87 ALJR 618, 637 640 [63] - [76] (Hayne, Keifel & Bell JJ); 629 - 631[23] - [30] (French CJ); 641 - 642 [88] - [91] (Gageler J).

[1528] Minister for Immigration & Citizenship v Li [2013] HCA 18; (2013) 87 ALJR 618, 638 [67] (Hayne, Keifel & Bell JJ) citing Klein v Domus Pty Ltd [1963] HCA 54; (1963) 109 CLR 467, 473 (Dixon CJ) and Project Blue Sky (1998) 194 CLR 35; 641 [90] (Gageler J).

[1529] Minister for Immigration & Citizenship v Li [2013] HCA 18; (2013) 87 ALJR 618, 638 [69] (Hayne, Keifel & Bell JJ) referring to Associated Provincial Picture Houses Ltd v Wednesbury Corp [1947] EWCA Civ 1; [1948] 1 KB 223, 229 - 230 (Lord Greene MR).

[1530] Minister for Immigration & Citizenship v Li [2013] HCA 18; (2013) 87 ALJR 618, 638 [67] (Hayne, Keifel & Bell JJ) citing Secretary of State for Education & Science v Tameside Metropolitan Borough Council [1976] UKHL 6; [1977] AC 1014, 1064 (Lord Diplock).

[1531] Minister for Immigration & Citizenship v Li [2013] HCA 18; (2013) 87 ALJR 618, 639 [76] (Hayne, Keifel & Bell JJ).

[1532] See generally Minister for Immigration & Citizenship v Li [2013] HCA 18; (2013) 87 ALJR 618, 638 - 639 [64] -]76] (Hayne, Keifel & Bell JJ).

[1533] Minister for Immigration & Citizenship v Li [2013] HCA 18; (2013) 87 ALJR 618, 644 [105] (Gageler J) referring to Dunsmuir v New Brunswick [2008] 1 SCR 190 [47].

[1534] Bell Group Ltd (in liq) v Westpac Banking Corporation (***No*** 9) [2008] WASC 239; (2008) 39 WAR 1, 573 - 575 [4573] [4582]; Westpac Banking Corporation v Bell Group Ltd (in liq) [2012] WASCA 157; (2012) 89 ACSR 1, 49 [928] (Lee AJA); 317 [1954] (Drummond AJA).

[1535] Re Smith and Fawcett Ltd [1942] Ch 304, 306 (Lord Greene MR).

[1536] Bell Group Ltd (in liq) v Westpac Banking Corporation (***No*** 9) [2008] WASC 239; (2008) 39 WAR 1, 583 [4619] (Owen J).

[1537] Bell Group Ltd (in liq) v Westpac Banking Corporation (***No*** 9) [2008] WASC 239; (2008) 39 WAR 1, 583 [4619] (Owen J).

[1538] Westpac Banking Corporation v Bell Group Ltd (in liq) [2012] WASCA 157; (2012) 89 ACSR 1, 149 [923] (Lee AJA); 324 [1983] (Drummond AJA).

[1539] Westpac Banking Corporation v Bell Group Ltd (in liq) [2012] WASCA 157; (2012) 89 ACSR 1, 150 [933] (Lee AJA), citing Whitehouse v Carlton Hotel Pty Ltd [1987] HCA 11; (1987) 162 CLR 285, 294 (Mason, Deane & Dawson JJ).

[1540] Bell Group Ltd (in liq) v Westpac Banking Corporation (***No*** 9) [2008] WASC 239; (2008) 39 WAR 1, 583 [4619] (Owen J); Westpac Banking Corporation v Bell Group Ltd (in liq) [2012] WASCA 157; (2012) 89 ACSR 1, 320 [1966] – [1969] (Drummond AJA).

[1541] Permanent Building Society (in liq) v Wheeler (1994) 11 WAR 187, 218 (Ipp J, Malcolm CJ & Seaman J agreeing).

[1542] Westpac Banking Corporation v Bell Group (in liq) [2012] WASCA 157; (2012) 89 ACSR 1, 134 [840] (Lee AJA).

[1543] Westpac Banking Corporation v Bell Group (in liq) [2012] WASCA 157; (2012) 89 ACSR 1, 136 [852] (Lee AJA).

[1544] SB v State of New South Wales [2004] VSC 514; (2004) 13 VR 527, 591.

[1545] Cubillo v Commonwealth of Australia (***No*** 2) [2000] FCA 1084; (2000) 103 FCR 1. 378 [305] (Redlich J), [1223] (O'Loughlin J).

[1546] Kruger v Commonwealth [1997] HCA 27; (1997) 190 CLR 1, 36 - 37 (Brennan CJ),

[1547] ts 68 - 69, 85, 86 (4 February 2013).

[1548] Cubillo v Commonwealth of Australia (***No*** 2) [2000] FCA 1084; (2000) 103 FCR 1, 36 [85] (O'Loughlin J).

[1549] ts 1536 (7 March 2013).

[1550] ts 1536 (7 March 2013).

[1551] ts 314 (7 February 2013).

[1552] ts 1437 (6 March 2013).

[1553] ts 314 (7 February 2013).

[1554] See the heading to par [77] - [80] and [85] - [120] of the Plaintiffs' Closing Submissions.

[1555] ts 308 (7 February 2013).

[1556] ts 1441 (1 March 2013).

[1557] ts 91 (4 February 2013).

[1558] Plaintiffs' Closing Submissions [77].

[1559] Plaintiffs' Closing Submissions [102] - [111].

[1560] Plaintiffs' Closing Submissions [77].

[1561] Plaintiffs' Closing Submissions [78].

[1562] Exhibit A122.

[1563] Plaintiffs' Closing Submissions [87].

[1564] Plaintiffs' Closing Submissions [88].

[1565] Plaintiffs' Closing Submissions [89] - [93].

[1566] Plaintiffs' Closing Submissions [102] - [111].

[1567] Exhibit A240.

[1568] Plaintiffs' Closing Submissions [91] - [92].

[1569] Exhibit A245.

[1570] Exhibit CC [16].

[1571] Exhibit A245.

[1572] Exhibit A241.

[1573] Exhibit A172.

[1574] Plaintiffs' Closing Submissions [81] - [84].

[1575] Plaintiffs' Closing Submissions [102] - [111].

[1576] Plaintiffs' Closing Submissions [112].

[1577] Plaintiffs' Closing Submissions [114] - [116].

[1578] Plaintiffs' Closing Submissions [117].

[1579] ts 1438 - 1439 (1 March 2013).

[1580] Exhibit A177.

[1581] Exhibit A195.

[1582] Exhibit A200.

[1583] Plaintiffs' Closing Submissions [102] - [111].

[1584] Exhibit A768.

[1585] Exhibit A1395.

[1586] ts 1437 (1 March 2013).

[1587] Plaintiffs' Closing Submissions [112].

[1588] Plaintiffs' Closing Submissions [114] - [116].

[1589] Exhibit A285.

[1590] Exhibit A451.

[1591] Exhibit A465.

[1592] Exhibit A486.

[1593] Exhibit A527.

[1594] Exhibit A547

[1595] Exhibit A748.

[1596] Exhibit A536.

[1597] Exhibit A767.

[1598] Plaintiffs' Closing Submissions [118] - [120].

[1599] Plaintiffs' Closing Submissions [121] - [126].

[1600] ts 310 (7 February 2013).

[1601] ts 1374 (1 March 2013).

[1602] ts 308 (7 February 2013).

[1603] ts 1443 (1 March 2013).

[1604] ts 314.

[1605] ts 92 (4 February 2013).

[1606] ts 310 (7 February 2013).

[1607] ts 310 (7 February 2013).

[1608] ts 311 (7 February 2013).

[1609] ts 1381 (1 March 2013).

[1610] ts 310 - 311(7 February 2013).

[1611] ts 318 (7 February 2013).

[1612] ts 91 (4 February 2013).

[1613] ts 316 - 317 (7 February 2013).

[1614] Plaintiffs' Closing Submissions [132].

[1615] Plaintiffs' Closing Submissions [133].

[1616] Plaintiffs' Closing Submissions [131].

[1617] Exhibit Q [48].

[1618] Plaintiff's Closing Submissions [76].

[1619] ts 311 (7 February 2013).

[1620] ts 313 (7 February 2013).

[1621] Plaintiff's Closing Submissions [127].

[1622] ts 312 (7 February 2013).

[1623] ts 316 - 317 (7 February 2013).

[1624] Defendant's Closing Submissions [131] - [134].

[1625] ts 317 (7 February 2013).

[1626] Plaintiff's Closing Submissions: heading to [77] and following.

[1627] Plaintiffs' Closing Submissions: heading to [77] and following, esp [81] - [84].

[1628] Plaintiffs' Closing Submissions: heading to [85] and following.

[1629] Plaintiffs' Closing Submissions [118] - [120].

[1630] Plaintiffs' Closing Submissions [121] - [126].

[1631] Plaintiffs' Closing Submissions [132].

[1632] Plaintiffs' Closing Submissions [133].

[1633] Plaintiffs' Closing Submissions [128] - [130].

[1634] Plaintiffs' Closing Submissions - heading to par [72] - [76].

[1635] ts 1419 (1 March 2013).

[1636] ts 1419 (1 March 2013.

[1637] ts 314 (7 February 2013).

[1638] ts 314 (7 February 2013).

[1639] ts 314 (7 February 2013).

[1640] Amended Statement of Claim [118].

[1641] Amended Statement of Claim [19].

[1642] Further Amended Defence [118].

[1643] Further Amended Defence [119]

[1644] Bennett v Minister of Community Welfare [1992] HCA 27; (1992) 176 CLR 408.

[1645] Bennett v Minister for Community Welfare (1988) Aust Torts Reports 80-210, 68,090 (Nicholson J).

[1646] Bennett v Minister for Community Welfare (1988) Aust Torts Reports 80-210, 68,087 (Nicholson J)

[1647] Bennett v Minister for Community Welfare (1988) Aust Torts Reports 80-210, 68,091 68,092 (Nicholson J).

[1648] Bennett v Minister for Community Welfare (1988) Aust Torts Reports 80-210, 68,092 (Nicholson J).

[1649] Bennett v Minister for Community Welfare (1990) Aust Torts Reports 81-048, 68, 157 (Pidgeon J), 68,166 (Seaman J), cf 68,158 - 68, 161 (Rowland J, dissenting, but not as to the question whether the action was one for negligence arising from a breach of a common law duty of care).

[1650] Bennett v Minister of Community Welfare [1992] HCA 27; (1992) 176 CLR 408, 412 (Mason CJ, Deane & Toohey JJ), 417 (Gaudron J) and 426 - 428 (McHugh J).

[1651] Bennett v Minister of Community Welfare [1992] HCA 27; (1992) 176 CLR 408, 411 - 412 (Mason CJ, Deane & Toohey JJ).

[1652] Bennett v Minister of Community Welfare [1992] HCA 27; (1992) 176 CLR 408, 426 - 427 (McHugh J).

[1653] Trevorrow v State of South Australia (***No*** 5) [2007] SASC 285; (2007) 98 SASR 136 [1002], [1006] (Gray J).

[1654] State of South Australia v LampardTrevorrow [2010] SASC 56; (2010) 106 SASR 331, 402 [339] - [344] (the Court).

[1655] Westpac Banking Corporation v Bell Group Ltd (in liq) (***No*** 3) [2012] WASCA 157; (2012) 89 ACSR 1 [897] (Lee AJA).

[1656] Cf Cubillo v Commonwealth of Australia (***No*** 2) [2000] FCA 1084; (2000) 103 FCR 1, 403 [1289] (O'Loughlin J); Cubillo v Commonwealth of Australia [2001] FCA 1213; (2001) 112 FCR 455, 578 [467] [478] (the Court).

[1657] ts 1378 (1 March 2013).

[1658] State of South Australia v LampardTrevorrow [2010] SASC 56; (2010) 106 SASR 331, 402 [342] [343] (the Court).

[1659] ts 1390, 1392 - 1393 (1 March 2013).

[1660] ts 66 - 67 (4 February 2013).

[1661] ts 67 - 68 (4 February 2013).

[1662] ts 1408, 1411 (1 March 2013).

[1663] Amended Statement of Claim [123].

[1664] Amended Statement of Claim [123]. Counsel for the plaintiff confirmed that there was ***no*** difference between the continuing duty to obtain legal advice pleaded at Amended Statement of Claim [123] and [119]: ts 1393 (1 March 2013).

[1665] Exhibits Q [218], I [72].

[1666] Exhibit I [146].

[1667] Exhibit Q [237].

[1668] Exhibit I [67].

[1669] Crown Suits Act 1947 (WA) s 6(1)(a).

[1670] Crown Suits Act 1947 (WA) s 6(1)(b).

[1671] Crown Suits Act 1947 (WA) s 6(2).

[1672] Crown Suits Act 1947 (WA) s 6(3).

[1673] See Limitation Legislation Amendment and Repeal Act 2005 (WA) s 7.

[1674] Further Amended Defence [127(a)A].

[1675] Further Amended Defence [127(a)].

[1676] Further Amended Defence [127(b)].

[1677] Further Amended Defence [127(a)B].

[1678] Further Amended Defence [127(b)A].

[1679] Further Amended Defence [127(a)C].

[1680] Further Amended Defence [127(b)B].

[1681] Further Amended Defence [127(a)D].

[1682] Further Amended Defence [127(b)C].

[1683] Further Amended Defence [127(c)].

[1684] Further Amended Defence [127(c)A].

[1685] Further Amended Defence [127(c)B].

[1686] Further Amended Defence [127(c)C].

[1687] Hammond v Minister for Works (1992) 8 WAR 505.

[1688] Hammond of Huyton & Roby Gas Co v Liverpool Corp [1926] 1 KB 146.

[1689] Plaintiffs' Closing Submissions [49].

[1690] See Judamaia v The State of Western Australia (unreported, Full Ct Sup Ct of WA, Lib ***No***. 960114) at 12 19 (Rowland J, Franklyn J agreeing); Biljabu v The State of Western Australia (unreported, Sup Ct of WA, Lib ***No***. 930719, 21 December 1993) at 6 - 12 (Owen J); Judamaia v The State of Western Australia (unreported, Sup Ct of WA, Lib ***No***. 950137, 23 January 1995) at 23 - 25 (Owen J); Yougarla v Western Australia (1998) 146 FLR 128, 153 (Murray J).

[1691] See British ***American*** Tobacco Australia Ltd v The State of Western Australia [2003] HCA 47l; (2003) 217 CLR 30[22] (Gleeson CJ).

[1692] British ***American*** Tobacco Australia Ltd v The State of Western Australia [2003] HCA 47l; (2003) 217 CLR 30 [22] (Gleeson CJ).

[1693] British ***American*** Tobacco Australia Ltd v The State of Western Australia [2003] HCA 47l; (2003) 217 CLR 30 [55] (McHugh, Gummow and Hayne JJ).

[1694] British ***American*** Tobacco Australia Ltd v The State of Western Australia [2003] HCA 47l; (2003) 217 CLR 30 [55] (McHugh, Gummow and Hayne JJ).

[1695] Western Australia v Watson [1990] WAR 248 (Malcolm CJ, Brinsden & Seaman JJ); Biljabu v The State of Western Australia (1993) 11 WAR 372, 378 - 379 (Owen J); Judamaia v The State of Western Australia (unreported, Full Ct Sup Ct of WA, Lib ***No***. 960114) at 26 (Malcolm CJ, Franklyn J agreeing), and at 10 - 11, 15 and 20 (Rowland J, Franklyn J agreeing), set aside on appeal but leaving open the question whether the Crown Suits Act applied to the proceedings: Judamaia v The State of Western Australia (1996) 17 Leg Rep 2; Yougarla v Western Australia(1999) 21 WAR 488 [143] (Anderson J).

[1696] Yougarla v Western Australia (1998) 146 FLR 128, 155 - 156 (Murray J).

[1697] Hammond v Minister for Works (1992) 8 WAR 505, 506.

[1698] Hammond v Minister for Works (1992) 8 WAR 505, 517.

[1699] Hammond v Minister for Works (1992) 8 WAR 505, 511; referred to with approval by Owen J in Judamaia v The State of Western Australia (unreported, Sup Ct of WA, 23 January 1995, Lib ***No***. 950137) at 32 - 34 (Owen J), and on appeal in Judamaia v The State of Western Australia (unreported, Full Ct Sup Ct of WA, Lib ***No*** 960114) at 43 - 47 (Malcolm CJ, Franklyn J agreeing) and 21 - 22 (Rowland J, Franklyn J agreeing), and see also Yougarla v The State of Western Australia (1998) 146 FLR 128, 156 (Murray J).

[1700] Hammond v Minister for Works (1992) 8 WAR 505, 515.

[1701] Hammond v Minister for Works (1992) 8 WAR 505, 516.

[1702] Breen v Williams [1996] HCA 57; (1996) 186 CLR 71; Pilmer v Duke Group Ltd (in liq) [2001] HCA 31; (2001) 207 CLR 165, 224 [150] (Kirby J).

[1703] The Hon. Justice W. Gummow 'Breach of Fiduciary Duty' in T.G. Youdan Equity, Fiduciaries and Trusts (1989) 57, 81.

[1704] Pilmer v Duke Group Ltd (in liq) [2001] HCA 31; (2001) 207 CLR 165, 201 [85] (McHugh, Gummow, Hayne & Callinan JJ).

[1705] Youyang Pty Ltd v Minter Ellison Morris Fletcher [2003] HCA 15; (2003) 212 CLR 484 [38] - [39] (the Court).

[1706] ts 923 (19 February 2013); Exhibit A1870.

[1707] ts 946 (20 February 2013); Exhibit A1871.

[1708] ts 984 (20 February 2013); Exhibit A1873.

[1709] ts 1022 (21 February 2013); Exhibit A1874.

[1710] ts 1136 (2 February 2013); Exhibit A1868.

[1711] Exhibit A1845.

[1712] Exhibits A1845 (Beverley), A1868 (Glenys), A1870 (Bonnie), A1871 (Eva), A1873 (Darryl), A1874 (Wesley).

[1713] Exhibit W.

[1714] Exhibit X.

[1715] Exhibit EEE.

[1716] Exhibit Y.

[1717] Exhibit FFF.

[1718] Exhibit AA.

[1719] Exhibit BB.

[1720] Exhibit CC.

[1721] Exhibit DD.

[1722] Exhibit GG.

[1723] Exhibit HH.

[1724] Exhibit V.

[1725] Exhibit II.

[1726] Exhibit JJ.

[1727] Exhibit LL.

[1728] Exhibit QQ.

[1729] Exhibit SS.

[1730] Exhibit TT

[1731] Exhibit VV.

[1732] Exhibit XX.

[1733] Exhibit YY.

[1734] Exhibit ZZ.

[1735] Exhibit AAA.

[1736] Exhibit CCC.

[1737] Exhibit CCC.

[1738] Exhibit CCC.

[1739] Exhibit CCC.

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[1759] Exhibit CCC.

[1760] Exhibit CCC.

[1761] Exhibit CCC.

[1762] Exhibit CCC.

[1763] Exhibit A381.

[1764] Collard v The State of Western Australia (***No*** 4) [2013] WASC 455. These reasons should be read in conjunction with those earlier reasons for decision. The same abbreviations have been used.

[1765] ts 34 (4 February 2013).

[1766] Supreme Court Act 1935 (WA) s 37; Rules of the Supreme Court 1971 (WA) O 66 r 1(1).

[1767] Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 [65] (McHugh J, Brennan CJ agreeing), see also [22] (Gaudron & Gummow JJ).

[1768] Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 [66] (McHugh J, Brennan CJ agreeing).

[1769] Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 [67] (McHugh J, Brennan CJ agreeing).

[1770] Roe v Director General, Department of Environment and Conservation [2011] WASCA 57 (S) [12] (Martin CJ & Murphy JA); Ruddock v Vadarlis (***No*** 2) [2001] FCA 1865; (2001) 115 FCR 229; The Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources [2007] FCA 1863; (2007) 98 ALD 651 [29] (Marshall J).

[1771] Roe v Director General, Department of Environment and Conservation [2011] WASCA 57 (S) [13] (Martin CJ & Murphy JA); see also A South-West Forests Defence Foundation (Inc) v Lands and Forrest Commission (1995) 86 LGERA 382, 384; Buddhist Society of Western Australia (Inc) v Shire of SerpentineJarrahdale [1999] WASCA 57 (S)[11].

[1772] Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 [69] (McHugh J, Brennan CJ agreeing).

[1773] Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 [137] (Kirby J); see also CSR Ltd v Eddy[2005] HCA 64; (2005) 226 CLR 1 [81] (Gleeson CJ, Gummow & Heydon JJ).

[1774] Roe v Director General, Department of Environment and Conservation [2011] WASCA 57 (S) [12] (Martin CJ & Murphy JA) and see the cases discussed therein.

[1775] Ruddock v Vadarlis (***No*** 2) [2001] FCA 1865; (2001) 115 FCR 229 [21] (Black CJ & French J).

[1776] Ruddock v Vadarlis (***No*** 2) [2001] FCA 1865; (2001) 115 FCR 229 [14] (Black CJ & French J).

[1777] See pt 4 r 4.2(1) of the Land and Environment Court Rules 2007 (NSW) which provides that the Court 'may decide not to make an order for the payment of costs against an unsuccessful applicant in any proceedings if it is satisfied that the proceedings have been brought in the public interest'. See also Hume Coal Pty Limited v Alexander (***No*** 4) [2013] NSWLEC 106 [25] - [32] for a recent discussion of the principles applied in the exercise of that discretion. See also the statutory context discussed in Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 [45] (Gaudron & Gummow JJ).

[1778] See, for example, the authorities discussed in Vriend v Alberta (1996) 141 DLR (4th) 44; and Kenai Lumber Company Inc v LeResche (1982) 646 P2d 215.

[1779] Cf Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 [30] (Gaudron & Gummow JJ).

[1780] Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 [71] (McHugh J, Brennan CJ agreeing).

[1781] Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 [71] - [75] (McHugh J, Brennan CJ agreeing).

[1782] Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 [97] (McHugh J, Brennan CJ agreeing).

[1783] Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 [54] (McHugh J, Brennan CJ agreeing).

[1784] Cf Ruddock v Vadarlis (***No*** 2) [2001] FCA 1865; (2001) 115 FCR 229 [14] (Black CJ & French J).

[1785] Cf Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 [30] (Gaudron & Gummow JJ).

[1786] Cf Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 [20], [49] (Gaudron & Gummow JJ), [136] (Kirby J).

[1787] Lion Laboratories Ltd v Evans [1985] QB 526, 553; Blue Wedges Inc v Minister for Environment, Heritage and the Arts [2008] FCA 8; (2008) 165 FCR 211 [73] (Heerey J).

[1788] Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 [20], [49] (Gaudron & Gummow JJ), [136] (Kirby J); Roe v Director General, Department of Environment and Conservation [2011] WASCA 57 (S) [15] (Martin CJ & Murphy JA).

[1789] Roe v Director General, Department of Environment and Conservation [2011] WASCA 57 (S) [12] (Martin CJ & Murphy JA).

[1790] Roe v Director General, Department of Environment and Conservation [2011] WASCA 57 (S) [21] (Martin CJ & Murphy JA).

[1791] Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 [20], [49] (Gaudron & Gummow JJ), [136] (Kirby J); Roe v Director General, Department of Environment and Conservation [2011] WASCA 57 (S) [22] - [23] (Martin CJ & Murphy JA).

[1792] Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 [20], [49] (Gaudron & Gummow JJ), [136] (Kirby J); Roe v Director General, Department of Environment and Conservation [2011] WASCA 57 (S) [16] (Martin CJ & Murphy JA); Attrill v Richmond River Shire Council (1995) 38 NSWLR 545, 556 (Kirby P, Clarke JA agreeing).

[1793] Save the Ridge Inc v Commonwealth [2006] FCAFC 51; (2006) 230 ALR 411 [12]; Blue Wedges Inc v Minister for Environment, Heritage and the Arts [2008] FCA 8; (2008) 165 FCR 211 [73] (Heerey J).

[1794] Oshlack v Richmond River Council [1998] HCA 11; (1998) 193 CLR 72 [20], [49] (Gaudron & Gummow JJ); Attrill and Ors v Richmond River Shire Council (1995) 38 NSWLR 545, 556 (Kirby P, Clarke JA agreeing).

[1795] Cf South Melbourne City Council v Hallam (***No*** 2) (1994) 83 LGERA 307, 311 (Tadgell J, Coldrey J agreeing).

[1796] A Goninan and Co Ltd v Gill [2001] NSWCA 77; (2001) 51 NSWLR 441, 460 (Heydon JA, Sheller & Giles JJA agreeing).

[1797] Cf State of South Australia v Lampard-Trevorrow [2008] SASC 370 [36] (White J).

[1798] Cf Commissioner of Taxation v B and G Plant Hire Pty Ltd [1994] FCA 1257; (1994) 52 FCR 257, 270 (Gummow J); Securities Commissioner v Kiwi Co-operative Dairies Ltd [1995] 3 NZLR 26, 36 (Blanchard J, for the Court).

[1799] A Goninan and Co Ltd v Gill [2001] NSWCA 77; (2001) 51 NSWLR 441, 459 - 460 (Heydon JA, Sheller & Giles JJA agreeing); Attrill v Richmond River Shire Council (1995) 38 NSWLR 545, 556 (Kirby P, Clarke JA agreeing).

[1800] Defendant's submissions [10].

[1801] Attrill v Richmond River Shire Council (1995) 38 NSWLR 545.

[1802] Plaintiffs' submissions [4].

[1803] Collard v The State of Western Australia (***No*** 4) [2013] WASC 455 [13] - [14].

[1804] Collard v The State of Western Australia (***No*** 4) [2013] WASC 455 [1056].

[1805] Collard v The State of Western Australia (***No*** 4) [2013] WASC 455 [1057].

[1806] Collard v The State of Western Australia (***No*** 4) [2013] WASC 455 [1060], [1063].

[1807] Collard v The State of Western Australia (***No*** 4) [2013] WASC 455 [1059].

[1808] Collard v The State of Western Australia (***No*** 4) [2013] WASC 455 [1063].

[1809] Collard v The State of Western Australia (***No*** 4) [2013] WASC 455 [1060].

[1810] Collard v The State of Western Australia (***No*** 4) [2013] WASC 455 [1069].

[1811] Collard v The State of Western Australia (***No*** 4) [2013] WASC 455 [1069].

[1812] Collard v The State of Western Australia (***No*** 4) [2013] WASC 455 [1071].

[1813] Defendant's submissions [15].

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