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Form 3A/B UCPR 6.2

STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of NSW
Division	Common Law
List	Common Law General
Registry	Supreme Court Sydney
Case number	2021/00117924

TITLE OF PROCEEDINGS

First Plaintiff	Eileen Cummings
First Defendant	Commonwealth of Australia ACN 000000000

FILING DETAILS

Filed for	Plaintiff[s]
Legal representative	Simon Morrison
Legal representative reference Contact name and telephone	Tristan Roland Gaven 07 3837 9455
Your reference	6298056

NOTICE OF LISTING

This matter has been listed for Directions (Common Law Registrar) at Supreme Court Sydney on 17 June 2021 at 09:00 AM.

ATTACHMENT DETAILS

In accordance with Part 3 of the UCPR, this coversheet confirms that both the Statement of Claim (e-Services), along with any other documents listed below, were filed by the Court.

Statement of Claim (UCPR 3A/3B) (Stolen Generation Northern Territory Statement of Claim (FINAL_signed).pdf)

[attach.]

STATEMENT OF CLAIM

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	General (Representative Proceedings)
Registry	Sydney
Case number	2021/

TITLE OF PROCEEDINGS

Plaintiff	Eileen Cummings
Defendant	Commonwealth of Australia

FILING DETAILS

Filed for	Eileen Cummings, plaintiff
Legal representative	Tristan Gaven, Shine Lawyers
Legal representative reference	6251736
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TYPE OF CLAIM

- Personal injury – other

RELIEF CLAIMED**Interim relief**

1. Pursuant to r. 7.10 of the Rules, a representative be appointed to represent in this proceeding the interests of those group members:
 - (a) who are deceased at the time of the commencement of the proceedings, or who die after the commencement of the proceedings; and
 - (b) who died intestate; and
 - (c) in respect of whose estate there is or, before the expiry of the period in which applications for such grant may be brought, has been no application for a grant of administration to any person.
2. To the extent required, an extension of the period in which this action may be commenced by the plaintiff (by herself and on behalf of the group members), pursuant to s. 44 of the *Limitation Act 1981* (NT).

Relief claimed by plaintiff on her own behalf and on behalf of the group members (CPA s 161(1)(b))

3. Damages.
4. Costs.
5. Interest pursuant to s 100 of the *Civil Procedure Act 2005* (NSW).
6. Such further or other order as the Court deems fit.

DESCRIPTION OF GROUP MEMBERS (CPA s 161(1)(a))

1. The plaintiff and the group members are or were descendants of the aboriginal inhabitants of Australia or the Torres Strait Islands (**'First Nations persons'**) and either:
 - (a) are or were persons (**'Removed Children'**) who:
 - (i) were immediately prior to their removal as described in (ii) below:
 - (A) less than 18 years of age; and
 - (B) in the Northern Territory; and
 - (C) living in the care of a parent, or other person providing such care out of natural love and affection or in accordance with the laws and customs or cultural practices of the First Nations community in which the person was then living (such parents or carers being together and severally **'carers'**); and

- (ii) were removed from the care and supervision of their carers by persons acting under authority of the Administrator of the Northern Territory or the Director (as defined below) from time to time ('**Officers**'), without such removal having been effected by:
 - (A) in the case of removals before the commencement of the *Child Welfare Ordinance 1958* (Cth) on 2 February 1959 – an order from the Justices or a Special Magistrate pursuant to the *State Children's Act 1895* (SA) ('**Children's Act**'); or
 - (B) in the case of removals after the commencement of the *Child Welfare Ordinance 1958* (Cth) – an order from a Children's Court; (such order being, as the context admits, a '**Court Order**', and the removal without a Court Order being a '**removal**'); and
- (iii) after removal, were placed by Officers, and thereafter held, in the care of institutions, facilities, foster parents or adoptive parents (together and severally '**Institutions**') who were not First Nations Persons; or
- (b) are or were persons ('**Kinship Group Members**') who:
 - (i) immediately prior to a removal were living in a close relationship with the Removed Child, within the meaning of Part XI of the *Wrongs Act 1958* (Vic); and
 - (ii) suffered mental harm as a result of the removal of the Removed Child and/or the consequent absence of the Removed Child.

COMMON QUESTIONS OF LAW OR FACT (CPA s 161(1)(c))

The questions of law or fact common to the claims of the plaintiff and the group members (together and severally '**claimants**') are:

1. Whether:
 - (a) the Director; or
 - (b) the Patrol Officers;
 were officers, servants or agents of the Commonwealth;
2. Whether the Commonwealth, by conduct as described in paragraph 36 below, unlawfully or falsely imprisoned Removed Children;
3. Whether the Commonwealth owed the Commonwealth duty of care to the claimants or any of them;
4. Whether the Commonwealth duty of care required the Commonwealth, by its officers, servants or agents, to take the Available Precautions or any of them;
5. Whether the Commonwealth:

- (a) had adequate systems to avoid; further or alternatively
 - (b) by its officers, servants and agents including the Director and Patrol Officers – took reasonable care to avoid;
- the conduct the subject of the alleged Unjustified Removals Breaches;
6. Whether the Commonwealth:
- (a) had adequate systems to avoid; further or alternatively
 - (b) by its officers, servants and agents including the Director and Patrol Officers – took reasonable care to avoid;
- the conduct the subject of the alleged Aggravated Removals Breaches;
7. Whether the Commonwealth:
- (a) had adequate systems to avoid; further or alternatively
 - (b) by its officers, servants and agents including the Director and Patrol Officers – took reasonable care to avoid;
- the conduct the subject of the alleged Avoidable Isolations Breaches;
8. Whether the Commonwealth:
- (a) had adequate systems to avoid; further or alternatively
 - (b) by its officers, servants and agents including the Director and Patrol Officers – took reasonable care to avoid;
- the conduct the subject of the alleged Institutional Supervision Breaches;
9. Whether the Commonwealth's scope of liability extends to harms caused by Breaches as described in Questions 5 to 8 or any of them.

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A. PARTIES

(i) Plaintiff and group members

1. The plaintiff:
 - (a) is a natural person;
 - (b) is a descendant of the aboriginal inhabitants of Australia within the meaning of *inter alia* the *Aboriginal and Torres Strait Islander Act 2005* (Cth);
 - (c) was born _____ in Central Arnhem Land in the Northern Territory;
 - (d) was known from birth as Wykundi;
 - (e) is one of the Removed Children as defined in paragraph 2 below; and
 - (f) as at the date of commencement of this proceeding is 77 years old.

2. The plaintiff commences this proceeding pursuant to Part 10 of the *Civil Procedure Act 2005* (NSW) on her own behalf and on behalf of all persons who are or were descendants of the aboriginal inhabitants of Australia or the Torres Strait Islands (**'First Nations persons'**) and either:
 - (a) are or were persons (**'Removed Children'**) who:
 - (i) immediately prior to their removal as described in (ii) below were:
 - (A) less than 18 years of age; and
 - (B) in the Northern Territory; and
 - (C) living in the care of a parent, or other person providing such care out of natural love and affection or in accordance with the laws and customs or cultural practices of the First Nations community in which the person was then living (such parents or carers being together and severally **'carers'**); and
 - (ii) were removed from the care and supervision of their carers by persons acting under authority of the Administrator of the Northern Territory or the Director (as defined below) from time to time (**'Officers'**), without such removal having been effected by:
 - (A) in the case of removals before the commencement of the *Child Welfare Ordinance 1958* (Cth) on 2 February 1959 – an order from the Justices or a Special Magistrate pursuant to the *State Children's Act 1895* (SA) (**'Children's Act'**); or
 - (B) in the case of removals after the commencement of the *Child Welfare Ordinance 1958* (Cth) – an order from a Children's Court;

- (such order being, as the context admits, a '**Court Order**', and the removal without a Court Order being a '**removal**'); and
- (iii) after removal, were placed by Officers, and thereafter held, in the care of institutions, facilities, foster parents or adoptive parents (together and severally '**Institutions**') who were not First Nations Persons; or
- (b) are or were persons ('**Kinship Group Members**') who:
- (i) immediately prior to a removal were living in a close relationship with the Removed Child, within the meaning of Part XI of the *Wrongs Act 1958* (Vic); and
- (ii) suffered mental harm as a result of the removal of the Removed Child and/or the consequent absence of the Removed Child.

Particulars

The Kinship Group Members are or include persons who were immediately prior to the removal of a Removed Child:

- (A) *the carer or a carer of the Removed Child; or*
- (B) *living with (or habitually living with) the Removed Child and under the care and supervision of the same carer or carers as the Removed Child.*

Further particulars in relation to Kinship Group Members may be provided following the trial of common questions or otherwise as the Court may direct.

3. As at the time of commencement of this proceeding there are seven or more persons who have claims against the defendant as set out in this statement of claim.

(ii) Commonwealth

4. The defendant (the '**Commonwealth**') is:
- (a) the Crown in right of the Commonwealth of Australia; and
- (b) capable of being sued pursuant to Part IX of the *Judiciary Act 1903* (Cth).

B. COMMONWEALTH RESPONSIBILITY FOR OFFICERS

(i) Commonwealth empowered to make laws for Northern Territory government

5. At all material times from 1 January 1911 until 1 July 1978, the Commonwealth:
- (a) held the full powers of the Crown in respect of the Northern Territory, pursuant to *inter alia*:
- (i) s. 122 of the Constitution of the Commonwealth of Australia; and
- (ii) the *Northern Territory Acceptance Act 1910* (Cth) ('**Acceptance Act**'); and

(b) in the premises – was responsible for the government of the Northern Territory.

(ii) Commonwealth appointed the Administrators

6. From not later than 12 June 1931 until not earlier than 10 December 1973 ('Period') the Commonwealth, pursuant to s. 4(1) of the *Northern Territory Administration Act 1910* (Cth) ('Admin Act'), from time to time appointed Administrators for the Northern Territory under seal of the Commonwealth (each such appointee being the 'Administrator' in respect of the period of the said appointment).

Particulars

The Administrators and their respective periods of appointment were as follows:

- a) *Robert Weddell – 12 June 1931 to 29 March 1937;*
- b) *the Hon. Aubrey Abbott – 29 March 1937 to 30 June 1946;*
- c) *Arthur Driver BEM – 1 July 1946 to 30 June 1951;*
- d) *the Hon. Frank Wise AO – 1 July 1951 to 30 June 1956;*
- e) *James Archer OBE – 1 July 1956 to 1 April 1961;*
- f) *Roger Nott CBE – 1 April 1961 to October 1964;*
- g) *Roger Dean CBE – 1 October 1964 to 4 March 1970; and*
- h) *the Hon. Sir Frederick Chaney KBE AFC – 4 March 1970 to 10 December 1973.*

(iii) Commonwealth made or approved laws

7. During the Period until not later than 12 June 1947 the Governor-General of the Commonwealth had, pursuant to s. 13(1) of the Admin Act, and from time to time exercised power to make ordinances having the force of law in the Northern Territory.

8. On and from 12 June 1947:

(a) a Legislative Council was established for the Northern Territory; and

Particulars

Section 4(1) of the Admin Act (as amended).

(b) thereafter during the Period:

- (i) the Legislative Council was empowered to make ordinances for the peace, order and good government of the Northern Territory; but
- (ii) such ordinances had no force or effect until assented to by the Administrator or by the Governor-General of the Commonwealth.

(iv) Commonwealth appointed Directors*Aboriginal Ordinances 1918-1957*

9. During the Period until not later than 12 June 1947 the Governor-General of the Commonwealth or his deputy made:
- (a) the *Aboriginals Ordinance 1918*;
 - (b) the *Aboriginals Ordinance 1923*;
 - (c) the *Aboriginals Ordinance 1924*;
 - (d) the *Aboriginals Ordinance (No.2) 1924*;
 - (e) the *Aboriginals Ordinance 1925*;
 - (f) the *Aboriginals Ordinance 1927*;
 - (g) the *Aboriginals Ordinance 1928*;
 - (h) the *Aboriginals Ordinance (No.2) 1928*;
 - (i) the *Aboriginals Ordinance 1930*;
 - (j) the *Aboriginals Ordinance 1933*;
 - (k) the *Aboriginals Ordinance 1936*;
 - (l) the *Aboriginals Ordinance 1937*;
 - (m) the *Aboriginals Ordinance (No.2) 1937*;
 - (n) the *Aboriginals Ordinance 1939*;
 - (o) the *Aboriginals Ordinance 1941*;
 - (p) the *Aboriginals Ordinance 1943*; and
 - (q) the *Aboriginals Ordinance 1947*.
10. During the Period from 12 June 1947 until May 1957 the Legislative Council made, and the Administrator by assenting made effective:
- (a) the *Aboriginals Ordinance 1953*; and
 - (b) the *Aboriginals Ordinance (No.2) 1953*.
11. Pursuant to s. 4 of the *Aboriginals Ordinance 1918* and its successor provisions in the further Ordinances referred to in the two preceding paragraphs (together and severally '**Aboriginals Ordinances**'), the Administrator appointed:
- (a) during the Period until about April 1939 – a Chief Protector of Aboriginals; and
 - (b) during the Period from about April 1939 – a Director or Acting Director of Native Affairs (such office having the functions formerly discharged by the Chief Protector of Aboriginals).
- (the person from time to time holding the said office being the '**Director**').

Particulars

So far as the plaintiff is able to say prior to completion of discovery, the Directors (including Acting Directors) from time to time during the Period were as follows:

- a) *Dr Cecil Cook – 1927 to 17 April 1939;*
- b) *Ernest Chinnery – 18 April 1939 to 1946;*
- c) *Francis Moy – 1946 to 1953;*
- d) *Harry Giese – 1954 to 13 May 1957; and*
- e) *as Acting Directors within the said Period:*
 - i. *R K McCaffery from 17 October 1949 to on or about 30 January 1950, and from 22 May 1953 to 25 November 1954; and*
 - ii. *C R Stahl from on or about 20 December 1951 to on or about 19 February 1952.*

12. In the premises set out in the preceding paragraph:
- (a) each Director held office as an appointee of the Commonwealth (by the Governor-General); and
 - (b) in the premises in (a) –
 - (i) the Director was an officer of the Commonwealth; and
 - (ii) the Commonwealth was and is liable for the acts and omissions of the Director in the discharge of his office.

Welfare Ordinance 1953

13. On and from about 13 May 1957:
- (a) the Aboriginal Ordinances were repealed and replaced by the *Welfare Ordinance 1953 (NT)* ("**1953 Ordinance**"); and thereafter during the Period
 - (b) pursuant to s.7 of the 1953 Ordinance, the responsible Minister of the Commonwealth was authorised to and did appoint a Director of Welfare (and references in this pleading to the '**Director**' shall mean in respect of the period from 13 May 1957 the said Director of Welfare);
 - (c) the Director was, "under the Administrator, responsible for" the administration of the 1953 Ordinance and sundry amending or replacement Ordinances;

Particulars

So far as the plaintiff is able to say prior to completion of discovery:

- a) *the Director from about 13 May 1957 to about 1972 was Harry Giese.;*
and
- b) *the amending or replacement Ordinances included:*

- i. the Welfare Ordinance 1955;*
- ii. the Welfare Ordinance 1957;*
- iii. the Welfare Ordinance (No. 2) 1957;*
- iv. the Welfare Ordinance 1959;*
- v. the Welfare Ordinance 1960;*
- vi. the Welfare Ordinance 1961;*
- vii. the Welfare Ordinance 1963; and*
- viii. the Social Welfare Ordinance 1964 (No. 31 of 1964).*

Further particulars may be provided following completion of discovery.

14. In the premises set out in the preceding paragraph:
- (a) the Director held office pursuant to an appointment made or made effective by the Commonwealth by its responsible Minister; and
 - (b) in the premises in (a):
 - (i) the Director was an officer of the Commonwealth; and
 - (ii) the Commonwealth was and is liable for the acts and omissions of the Director in the discharge of his office.
- (v) Commonwealth Public Service – Native Affairs Branch**
15. From about April 1939 until 1973, the Commonwealth:
- (a) had as a department of the Commonwealth public service a department known as:
 - (i) from April 1939 until January 1955 – the Native Affairs Branch; and
 - (ii) from January 1955 until 1973 – the Welfare Branch;
 (**‘Commonwealth Department’**);
 - (b) placed the Commonwealth Department under the supervision of the Director; and
 - (c) employed within the Commonwealth Department persons titled “Patrol Officers” or “Welfare Officers” (**‘Patrol Officers’**).
16. In the premises set out in the preceding paragraph:
- (a) the Director; and
 - (b) Patrol Officers;
- and each of them:
- (i) were officers or employees of the Commonwealth; and
 - (ii) were persons for whose acts and omissions in the course of their employment, or for whose exercise of functions or duties of their offices, the Commonwealth was and is liable.

C. REGIMES FOR LAWFUL REMOVAL OF CHILDREN

(i) State Children's Act – 1911-1959

17. Pursuant to s. 7 of the Acceptance Act and s. 5 of the Admin Act, at all material times from 1 January 1911 until 2 February 1959 the Children's Act had effect in the Territory as if it were a law of the Territory.

18. Pursuant to the Children's Act:

- (a) constables were permitted, without warrant, to apprehend any child appearing or suspected to be a destitute or neglected child, and take that child before Justices as defined;

Particulars

Children's Act ss. 32, 33. "Justices" was defined as a Special Magistrate, or any two or more Justices of the Peace.

- (b) the Justices, upon complaint being made in the prescribed form, and upon being satisfied that the child was in fact a destitute child or a neglected child, could order that the child be sent to an institution, to be there detained or otherwise dealt with under the Children's Act until the child attained the age of 18 years; and

Particulars

Children's Act s. 33.

- (c) if any child was brought before Justices charged by the child's parents with being an uncontrollable or incorrigible child, the Justices, upon being satisfied that the charge was well-founded, could order that the child be sent to an institution, to be there detained or otherwise dealt with under the Children's Act until the child attained the age of 18 years.

Particulars

Children's Act s. 34.

(ii) Child Welfare Ordinance – 1959-73

19. On or about and from 2 February 1959:

- (a) the Children's Act was repealed and replaced in the Northern Territory by the *Child Welfare Ordinance 1958* (Cth) ('**Child Welfare Ordinance**'); and thereafter
- (b) the responsible Minister for the time being of the Commonwealth was to, and from time to time did, appoint a Director of Child Welfare ('**Child Welfare Director**');

- (c) the Child Welfare Director was responsible, under the Administrator, for the administration of the Child Welfare Ordinance;

Particulars

Child Welfare Ordinance s. 36.

- (d) the Administrator in Council could and did from time to time, by notice in the Gazette, establish 'Children's Courts';

Particulars

Child Welfare Ordinance s. 21.

- (e) a Patrol Officer, police officer, or person authorised in writing by the Administrator:
- (i) could, without warrant, take into custody a child appearing or suspected by that person to be a destitute, neglected, incorrigible or uncontrollable child;
 - (ii) was required immediately to inform the Child Welfare Director of a step taken in (i); and
 - (iii) could make an application to the Children's Court that the child be declared a destitute, neglected, incorrigible or uncontrollable child;

Particulars

Child Welfare Ordinance ss. 31, 32(3) and 33(2).

- (f) where the Child Welfare Director was informed that a child had been taken into custody under s. 31, the Child Welfare Director was required to ensure that the child was as soon as practicable, and not later than 14 days after the Child Welfare Director was so informed, brought before a Children's Court under an application made by a Patrol Officer or police officer that the child be declared a destitute, neglected, incorrigible or uncontrollable child;

Particulars

Child Welfare Ordinance ss. 33(1)(a).

- (g) where an application was made to a Children's Court that a child be declared a destitute, neglected, incorrigible or uncontrollable child, the guardian of the child, being the guardian having the actual care of the child, was required to attend the Court during the proceedings, unless the Court was satisfied that it would be unreasonable to require attendance;

Particulars

Child Welfare Ordinance ss. 31, 32(3) and 33(2).

- (h) a Children's Court could, upon the hearing of an application that a child be declared a destitute, neglected, incorrigible or uncontrollable child:
 - (i) declare that the child was a destitute, neglected, incorrigible or uncontrollable child; and
 - (ii) order a child so declared to be:
 - (A) committed to the care of the Child Welfare Director;
 - (B) committed to the care of a person who was willing to undertake the care on such terms and conditions as the Court thought fit until the child attained 18 years of age or during such shorter period as the Court thought fit;
 - (C) sent to an institution specified in the order and detained or otherwise dealt with there under the *Child Welfare Ordinance* until the child attained 18 years of age or during such shorter period as the Court thought fit; or
 - (D) released on probation on such conditions (if any) as the Court ordered; and

Particulars

Child Welfare Ordinance s. 36.

- (i) where an order was made under the Child Welfare Ordinance that a child be committed to the care of a person who was willing to undertake the care, the Court was not to commit the child to the care of a person of a spiritual faith to which the father, or other person having the right to direct in what religion the child shall be educated, objected.

Particulars

Child Welfare Ordinance s. 37(2)(a).

D. REGIME FOR REMOVAL OF FIRST NATIONS CHILDREN

- 20. During the Period the Commonwealth established and implemented a system or regime:
 - (a) in respect of children who were First Nations Persons and of:
 - (i) mixed European descent; further or alternatively
 - (ii) relatively light-skinned complexion;
 (the said features constituting '**Mixed Descent**' for the purposes of this pleading);
 - (b) under which the said children were:
 - (i) removed from their carers:
 - (A) by reason of, *inter alia*, their Mixed Descent;
 - (B) in the case of removals before 2 February 1959:

- (a) without proof that the child was destitute or neglected within the meaning of the Children's Act; and
 - (b) without application to or order from the Justices;
- (C) in the case of removals after 2 February 1959:
 - (a) without proof that the child was destitute, neglected, incorrigible or uncontrollable within the meaning of the Child Welfare Ordinance;
 - (b) without application to or order from a Children's Court; and
 - (c) without the child's carer(s) being required to attend the Court hearing or the Court determining that it would be unreasonable to require such attendance;
- (ii) committed to the care of Institutions (as defined above) without a Court Order;
- (iii) committed to the care of Institutions that:
 - (A) were physically distant from the carers, or which the carers were forbidden from accessing;
 - (B) required the child to speak English, regardless of the birth language of the child;
 - (C) were culturally dissonant from the First Nations community in which the child had been living until the removal, and instead required the child:
 - (a) to observe Anglo-Australian customs and cultural practices; and
 - (b) not to observe the laws and customs and cultural practices of the child's First Nations community or carers; further or alternatively
 - (D) practised a spiritual faith which the child's carers prior to the removal did not practice, and instead required the child:
 - (a) to practice the spiritual faith of the Institution; and
 - (b) not to practice the spiritual beliefs of the child's First Nations community or carers; and
- (iv) required to remain at premises or locations directed by the Director or the Institution (as the case may be), and not permitted to return to their carers or remove themselves to a place of their choosing until the Removed Child:
 - (A) in the case of male persons – attained the age of 18 years; and
 - (B) in the case of female persons – was so permitted by the Director or his delegate;
 (the features in (iv) being the '**Residence Constraint**');
 (the features in (a), together with any combination of (b)(i) to (iv), being the '**Removal Regime**').

Particulars

The Removal Regime was operated by the Commonwealth Department, under the direction of the Director;

The Removal Regime was described in various documents and policy statements made or issued by the Commonwealth and its officers, including the following:

- i. report dated 12 September 1911 from Mr F J Mitchell, the Acting Administrator of the Northern Territory to the Minister for External Affairs;*
- ii. report dated 16 January 1929 from Mr J W Bleakley to the Prime Minister of the Commonwealth;*
- iii. policy statement attached to a letter from the Secretary of the Prime Minister's Department to Mr A N Brown dated about 1931;*
- iv. report dated 20 November 1934 from Mr J A Carrodus, Secretary of the Department of the Interior, to the Minister of the Interior;*
- v. ministerial reply prepared in about June 1935 by the Department of the Interior to the Anti-Slavery and Aborigines Protection Society in London;*
- vi. statement issued in about February 1939 by the Hon J McEwen, Minister for the Interior, entitled "Commonwealth Government's Policy with respect to Aborigines";*
- vii. report dated 18 January 1940 by the Director, Mr Chinnery, to the Administrator;*
- viii. press release by the Minister of the Interior dated 3 December 1940;*
- ix. report dated 23 December 1949 from Mr Ted Evans, Patrol Officer, to the Acting Director of Native Affairs;*
- x. memorandum by Mr R S Leydin, Government Secretary, to the Administrator concerning Mr Evans' 23 December 1949 report;*
- xi. letter dated 20 March 1950 from the Director, Mr Moy, to the Administrator;*
- xii. letter dated 13 November 1950 from Mr Leydin, Government Secretary, to the Director of Northern Territory Affairs;*
- xiii. letter dated 24 October 1951 from the Director, Mr Moy, to the Administrator, Mr Wise;*
- xiv. letter dated 21 November 1951 from the Administrator, Mr Wise, to the Secretary of the Department of Territories;*
- xv. report of the Administrator dated 28 February 1952 to the Secretary, Department of Territories;*

- xvi. memorandum dated 17 April 1952 by the Minister, Sir Paul Hasluck;
 - xvii. instruction dated 1 May 1952 by the Director, Mr Moy, to the following officers of the Commonwealth Department: District Superintendent, Darwin; Assistant District Superintendent, Alice Springs; Patrol Officers Evans, Ryan, Penhall, Bray, Greenfield, and Lovegrove;
 - xviii. report dated about February 1954 by the Acting Director, Mr McCaffrey, to the Administrator entitled "Coloured Children — Policy"; and
 - xix. document dated 25 August 1959 entitled "Tests to be applied in considering whether or not a part aboriginal child should be taken from an Aboriginal mother on a settlement or pastoral property".
- Further particulars may be provided after discovery and receipt of expert evidence.

E. THE REMOVALS

(i) Plaintiff's background

21. The plaintiff is a First Nations person of Mixed Descent.
22. The plaintiff's mother, Florrie Lindsay:
 - (a) was a Ngalakan woman; and
 - (b) during the time that the plaintiff lived on Mainoru Station, was employed at the Station by the Station's owners, performing domestic duties in the homestead and other menial labour.
23. The plaintiff's (non-biological) father, Chuck-A-Duck Lindsay:
 - (a) was a Rembarrnga man; and
 - (b) during the time that the plaintiff lived on Mainoru Station, was employed at the Station by the Station's owners as a stockman.
24. During the time that the plaintiff lived on Mainoru Station, the plaintiff's mother and father:
 - (a) were in a stable and loving relationship; and
 - (b) resided in a small home on the Station, which was clean and well-kept.
25. Immediately prior to the plaintiff's removal in or about September 1948 the plaintiff's lawful guardians were her mother and her father.
26. At all material times from her birth until her removal in or about September 1948, the plaintiff:

- (a) lived on Mainoru Station with her mother and father;
- (b) from time to time when the plaintiff's mother was unable to attend to the plaintiff's care by reason of employment commitments, was cared for by her grandparents;
- (c) lived in proximity to and in kinship with members of the plaintiff's extended family, from whom the plaintiff derived familial support and companionship;
- (d) spoke the Ngalakan and Rembarrnga languages;
- (e) did not speak English;
- (f) observed traditional Ngalakan and Rembarrnga laws and customs, practices, and rituals;
- (g) did not observe Baptist or Methodist cultural practices and beliefs;
- (h) was generally:
 - (i) healthy;
 - (ii) happy;
 - (iii) well cared-for;
 - (iv) well behaved; and
 - (v) well nourished; and
- (i) was not, and could not reasonably have been considered to be:
 - (i) destitute;
 - (ii) neglected;
 - (iii) incorrigible; or
 - (iv) uncontrollable.

(ii) Plaintiff's removal and placement in Institutions

27. In about late August or early September 1948, the plaintiff:
- (a) was approached by a Patrol Officer who asked whether she wanted to go for a ride in his car;
 - (b) accepted the offer and got into the car;
 - (c) was driven by the Patrol Officer away from Mainoru Station and the care of her parents and carers;
 - (d) was not permitted to leave the car or the supervision of the Patrol Officer until they reached Maranboy Police Station;
 - (e) was thereafter not permitted to leave Maranboy Police Station for several days; and
 - (f) was then removed from the Maranboy Police Station by the Patrol Officer and driven to the Retta Dixon Home on the Bagot Aboriginal Reserve in Darwin.

Particulars

So far as the plaintiff is able to say prior to discovery, the Patrol Officer was J Ronald Ryan, a Patrol Officer in the Native Affairs Branch of the Northern Territory Administration of the Commonwealth.

Further particulars may be provided following the completion of discovery.

- (g) was placed in the care of the Retta Dixon Home, being an Institution (as defined above) operated by the Aborigines Inland Mission;
 - (h) was confined to, and not permitted nor able to leave, the premises of the Retta Dixon Home until about late September 1948;
 - (i) in about late September 1948 was removed from the Retta Dixon Home by officers of the Commonwealth and taken by boat to Croker Island;
 - (j) on or about 1 October 1948 was placed by officers of the Commonwealth into the care of the Methodist Overseas Mission on Croker Island; and
 - (k) from about 1 October 1948 until 1958 was confined to Croker Island and not permitted nor able to leave Croker Island.
28. During the time that she resided at the Retta Dixon Home the plaintiff:
- (a) was required to speak English;
 - (b) was not permitted to speak the Ngalakan or Rembarrnga languages;
 - (c) was required to attend a Baptist Church and to observe Baptist rituals and practises; and
 - (d) was not permitted or able to observe Ngalakan or Rembarrnga traditional laws and customs, rituals or practises.
29. During the time that she resided on Croker Island, the plaintiff:
- (a) was named by officers, employees, or agents of the Commonwealth as "Eileen Smith", which was not a name given to her by her mother or father;

Particulars

National Archives of Australia document F1 1952/978. Further particulars may be provided after discovery.

- (b) was required to speak English;
- (c) was not permitted to speak the Ngalakan and Rembarrnga languages;
- (d) was confined to Croker Island and could not leave the Island;
- (e) had her movement on the Island restricted, in that she was punished by employees of the Methodist Overseas Mission if she visited First Nations residents of the Island outside the Mission;

- (f) was required to attend a Methodist Church and to observe Methodist rituals and practises; and
- (g) was not permitted nor able to observe Ngalakan or Rembarrnga traditional laws and customs, rituals or practises.

30. The plaintiff:

- (a) in about 1958 was removed from Croker Island by officers or employees of the Commonwealth and placed into the care of a Methodist hostel in Darwin in order to attend high school in Darwin; and
- (b) in about 1961 was removed by officers or employees of the Commonwealth from the Methodist hostel in Darwin and placed into the care of the Methodist Trainee College Institute in Brisbane.

Particulars

Particulars may be provided after discovery.

31. During the periods referred to in the two preceding paragraphs the plaintiff:

- (a) was required to speak English;
- (b) was not permitted to speak the Ngalakan or Rembarrnga languages;
- (c) was required to attend a Methodist Church and to observe Methodist rituals and practises; and
- (d) was not permitted to observe Ngalakan or Rembarrnga traditional laws, customs, rituals or practises.

32. The matters referred to in paragraphs 27 to 31 inclusive were effected by the Commonwealth, by its officers, pursuant to the Removal Regime.

(iii) Group Members – removals of Removed Children

33. Each of the Removed Children is, or in the case of deceased Removed Children was, a First Nations person of Mixed Descent.

Particulars

Particulars relating to individual group members may be provided following the trial of common questions or otherwise as this Honourable Court may direct.

34. During the Period, the Commonwealth, by its Director(s) and Patrol Officers:

- (a) implemented the Removal Regime, including the Residence Constraint, in respect of each of the Removed Children; and

- (b) took the steps in (a) for reasons including the reason that the Removed Child was a person of Mixed Descent.

Particulars

Particulars relating to individual group members may be provided following the trial of common questions or otherwise as this Honourable Court may direct.

F. CLAIMS – UNLAWFUL IMPRISONMENT

(i) Plaintiff's unlawful imprisonment

35. The plaintiff:

- (a) from the time of her removal from Mainoru Station until her arrival at the Retta Dixon Home;
- (b) during her residence at the Retta Dixon Home; further or alternatively
- (c) during her residence at Croker Island;

was:

- (i) completely subject to the direction of the Director or the Institution, as the case may be, as to her place and mode of living;
- (ii) as to her place and mode of living – materially more restrained than a child not of Mixed Descent, in that the plaintiff:
- (A) was subject to the matters pleaded in paragraphs 27, 28 and 29 above respectively;
- (B) was, as a result of the Residence Constraint, required to live separately from her carer(s);
- (C) was required to speak a language other than her birth language;
- (D) was not permitted to observe the cultural and spiritual practices, traditional laws and customs, and rituals of the community in which she had been born; further or alternatively
- (E) was required to observe cultural and spiritual practices and rituals other than those of the community in which she had been born;
- (iii) in the premises in (i) and (ii) – totally restrained as to her liberty;
- (iv) subject to the total restraint without lawful excuse; and
- (v) in the premises in (i) to (iv) inclusive – unlawfully and falsely imprisoned by the Commonwealth.

(ii) Unlawful imprisonment – Removed Children

36. Each of the Removed Children:

- (a) during the process of his or her removal; and thereafter
 - (b) during the period when the Residence Constraint was applied to the person;
- was:

- (i) completely subject to the direction of the Director or the Institution, as the case may be, as to their place and mode of living;
- (ii) as to their place and mode of living – materially more restrained than a child not of Mixed Descent, in that the Removed Child:
 - (A) was, as a result of the Residence Constraint, required to live separately from their carer(s);
 - (B) was required to speak a language other than their birth languages;
 - (C) was not permitted to observe the cultural and spiritual practices, traditional laws and customs and rituals of the communities in which they had been born; further or alternatively
 - (D) was required to observe cultural and spiritual practices and rituals other than those of the community in which they had been born;
- (iii) in the premises in (i) and (ii) – totally restrained as to their liberty;
- (iv) subject to the total restraint without lawful excuse; and
- (v) in the premises in (i) to (iv) inclusive – unlawfully and falsely imprisoned by the Commonwealth.

37. By reason of their unlawful imprisonment, some or all of the Removed Persons suffered loss and damage.

Particulars

Particulars will be provided after the determination of the common questions or otherwise as the Court may direct.

G. NEGLIGENCE – COMMONWEALTH DUTY OF CARE

(i) Foreseeable risk of harm

38. At all material times during the Period a reasonable person in the position of:

- (a) the Director; or
- (b) a Patrol Officer;

knew or ought to have expected that:

- (i) a child (including without limitation a child of Mixed Descent) who was:
 - (A) living in the care and under the supervision of the child's natural parents or kin (being carers as defined above);

- (B) emotionally and materially supported by the child's carers according to their ordinary means and mode of living; and
 - (C) raised in the culture or spiritual beliefs of the carers;
- (being a '**Non-neglected Child**') was thereby living according to the standards expected by the Australian and international community in respect of the raising of children;

Particulars

*The said knowledge is to be inferred from the existence of the legislative presumption reflected in Child Welfare Ordinance s. 37(2)(a) and the general law rules expressed in such cases as *The Queen v Nash (1883) 10 QBD 454*, *Barnardo v McHugh [1891] AC 388*, and *Mace v Murray (1955) 92 CLR 370*.*

So far as the said matters ought reasonably to have been known, they ought reasonably to have been known because of the contemporaneous Anglo-Australian community expectations reflected in, inter alia, Child Welfare Ordinance s. 37(2)(a) and the general law.

Further particulars may be provided following discovery and receipt of expert reports.

- (ii) a child living as described in (i) was more likely to enjoy positive physical and emotional development than a child removed from the circumstances described in (i)(A) to (C);

Particulars

The plaintiff refers to and repeats the particulars set out under (i) above.

- (iii) the circumstance that a child described in (i) was:

- (A) a First Nations person; or
- (B) a First Nations person and of Mixed Descent; or
- (C) a female person in (A) or (B);

did not constitute and could not rationally constitute the child as:

- (a) destitute or neglected within the meaning of the Children's Act;
or
- (b) destitute, neglected, incorrigible or uncontrollable within the meaning of the Child Welfare Ordinance;

as the case may be;

Particulars

The said knowledge, in respect of the plaintiff, is to be inferred from the circumstance that the plaintiff was, prior to her removal, living with her carers and well cared-for, nourished and well behaved.

So far as the said matters ought reasonably to have been known in respect of the plaintiff, they ought reasonably to have been known because the matters were available to the Commonwealth officers:

- a. upon reasonable observation of the plaintiff, her family and her living circumstances prior to her removal, or*
- b. upon reasonable enquiry of persons familiar with the plaintiff, her family and her living circumstances prior to her removal.*

Further particulars relating to the plaintiff may be provided following discovery and receipt of expert reports.

In relation to the group members:

- i. knowledge of the said matters is to be inferred from the circumstance that the Commonwealth, by its officers, was aware of children as described in paragraph (iii)(A) to (C) above who were living with their carers and were well cared-for, well-nourished and well behaved; and*
- ii. so far as the said matters ought reasonably to have been known, the matters ought reasonably to have been known because examples of children as described in "f" hereof were common through the Aboriginal Reservations and Missions in the Northern Territory.*

Further particulars relating to individual group members may be provided following discovery and receipt of expert reports.

- (iv) there was a risk that the removal of a child from an environment described in (i) above:
 - (A) without the informed consent and support of the child's carers;
 - (B) without being accompanied by an adult with whom the child was comfortable and familiar;
 - (C) without being accompanied by an adult who was:
 - (a) familiar with the child's cultural traditions and practices; and
 - (b) able to communicate in the child's birth language(s); further or alternatively;
 - (D) by persons without appropriate training or experience in caring for children;
 would cause the experience of removal to be traumatic for the child;

Particulars

The said matters are matters of ordinary human experience. Further particulars may be provided following discovery and receipt of expert reports.

(v) in respect of:

(A) non-neglected Children; and

(B) children (including children who were First Nations persons or First Nations persons of Mixed Descent) who were destitute or neglected within the meaning of the Children's Act, or destitute, neglected, incorrigible or uncontrollable within the meaning of the Child Welfare Ordinance, as the case may be (**'Neglected Children'**);

there was a risk that the removal of the child into an environment where the child:

(a) was not living in the care and under the supervision of such kin as were reasonably capable of providing material and emotional support according to the child's family's ordinary means and mode of living;

(b) was not raised in the cultural and spiritual practices and traditions of the child's birth community;

(c) was required to speak a language other than the child's birth language;

(d) was prohibited or discouraged from speaking the child's birth language or observing the cultural and spiritual practices and traditions of the child's birth community; further or alternatively

(e) was prevented, by distance or by the rules of the Institution where the child was living, from accessing such material or emotional support as the child's kin might be able to provide;

might cause harms to the child;

Particulars

The plaintiff refers to and repeats the particulars set out under (iv) above.

(vi) the harms that might be caused as set out in (v) included mental harm;

Particulars

*The mental harm included mental trauma, severe anxiety, social withdrawal and other indicia of psychological or psychiatric disorders (**'Mental Harm'**).*

As to knowledge or the bases on which the said risks ought reasonably to have been known, the plaintiff refers to and repeats the particulars set out

under (iv) above. Further particulars may be provided following receipt of experts' reports.

- (vii) there was a risk that removal of any child (whether a Non-neglected Child or a Neglected Child) into an environment where the child experienced or observed, or was likely to experience or observe:
- (A) poor nutrition;
 - (B) physical abuse;
 - (C) sexual abuse; further or alternatively
 - (D) systemic racism;
- might cause harms to the child including:
- (a) physical injury; and
 - (b) Mental Harm;

Particulars

The said matters are matters of ordinary human experience. Further particulars may be provided following discovery and receipt of experts' reports.

- (viii) the risks described above ('**Removal Risks**') were not far-fetched or fanciful;
- (ix) the Removal Risks, if they eventuated, were very serious;
- (x) the Removal Risks were especially acute for:
- (A) First Nations children; further or alternatively
 - (B) First Nations children of Mixed Descent;

Particulars

Such children were from a racial minority that was notoriously subject to racial denigration and disparagement, and further:

- i. were physically distant from their carers; and*
- ii. suffered having their carers subject to movement controls (such as the regulations forbidding aboriginal persons from leaving approved reservations, missions, other lands or place of employment without prior approval of the Director or a person authorised by the Director as described in paragraph 39(iv) below) ('**Movement Controls**') which restricted or removed the ability of the carers to provide material or emotional support to the child;*
- iii. being matters that were incidents of the Removal Regime and of the regulation of aborigines during the Period.*

Knowledge of the said matters is to be inferred from the circumstance that reports of the living conditions imposed on Removed Children at Institutions such as the Retta Dixon Home, Kahlin Compound, Roper River Mission School, Yirrkala, Half-caste Home Alice Springs, Crocker Island Mission and Garden Point (Melville Island) mission were published from time to time during the Period, including:

- a. *correspondence from 29 October 1937 from the Deputy Chief Protector of Aborigines to The District Officer concerning the fact that the matron was unable to ensure children kept clean and well-groomed at the Half-caste Home Alice Springs;*
- b. *correspondence from 8 September 1934 to The Secretary of the Department of Interior from the Deputy Administrator concerning the roof falling in, inadequate light and ventilation in the dining room and kitchen, the stove is beyond repair as well the kitchen which food is prepared in is dark and covered with soot at the Half-caste Home Alice Springs;*
- c. *inspection report of Roper River School on 19 December 1967 concerning the fact boys are 'making do' with toilet facilities in buildings that "even in good repair would be inadequate for their needs" as well as the fact in general the buildings are poorly maintained and are in urgent need of repair, cleaning and repainting;*
- d. *inspection report of Roper River School on 9 August 1967 addressing the fact the school is in a dilapidated state, verandas could be classified as unsafe, school toilets are deep pit systems with no staff toilets and a lawn mower required;*
- e. *correspondence from 3 March 1967 from the Head Teacher of Roper River School to The Assistant Director concerning repair of school veranda required (one child injured by falling through), school louvres either missing or replaced by hardwood, building needs repaint, roof needs sealing to prevent remainder of insulation from falling down;*
- f. *correspondence to The Administrator of the Northern Territory; Further particulars may be provided following discovery and receipt of experts' reports;*
- g. *memorandum from the Department of Interior dated 3 September 1935 acknowledging that the conditions of the homes for half-caste girls including accommodation and classrooms are inadequate;*
- h. *a letter from Education Branch to the Minister for the Interior discusses the unsatisfactory accommodation at the compound. The letter details that*

- over 40 children were being taught on a 10 feet wide veranda which is not suitable for a learning environment;*
- i. a statement by the Commissioner of Police dated 15 December 1928 detailing an incident of a missionary by the name of Miss Annie Lock unlawfully removing three children;*
 - l. the report on the Administration of the Northern Territory for the year ending 1938-1939 discussed that the accommodation and facilities at the present institution in Darwin were inadequate and proposed to erect a new institution. The report mentioned that one inmate died during the reporting year suffering from a chronic ailment;*
 - m. the report of the Methodist Church of Australia – Care of half-caste children (Croker Island Mission) Part 1 discussed that the accommodation at Darwin is both unsatisfactory and inadequate and the necessity to erect a new building;*
 - n. Garden Point (Melville Island) Review Report dated 21 February 1950 discussed the difficult living conditions for both inmates and staff where both had to share the same accommodation. It also reported on impact of isolation and lack of access to medical care in the event of infectious diseases or medical emergencies; and*
 - o. a memorandum to the Secretary of the Commonwealth Treasury reported the old Telegraph Office in Alice Springs where half cast children were housed, was in a state of decay and overcrowded.*
- (xi) there was a material risk that removal of a Non-neglected Child would cause:
- (A) the carers of the Child; further or alternatively
 - (B) other children living under the care and supervision of the same carers as the Child (such other children being 'Siblings' for the purposes of this pleading, whether or not biological siblings);
- to suffer Mental Harm including depression, traumatic stress disorders and other psychological or psychiatric harms;

Particulars

The said matters are matters of ordinary human experience. Further particulars may be provided following discovery and receipt of experts' reports.

- (xii) the risks described in (xi) ('Families Risks') were not far-fetched or fanciful;
- (xiii) the Families Risks, if they eventuated, were very serious;

- (xiv) the Families Risks were especially acute for carers and siblings of Removed Children, such carers and Siblings being First Nations persons.

Particulars

The said carers and Siblings, being First Nations persons, were themselves subject to movement controls (as defined above) and therefore had no or reduced ability to travel to visit the Removed Child.

Further particulars may be provided following discovery and receipt of experts' reports.

(ii) Control over risks of harm

39. At all material times during the Period the Commonwealth, by:

- (a) the Director; further or alternatively
 (b) the Patrol Officer(s);

had:

- (i) the discretion:
- (A) whether to remove each of the Removed Children from their pre-removal environment ('Home');
- (B) where to place the Removed Child after removal, and in particular:
- (a) whether to place the Child with other kin of the Child who were capable of providing such material and emotional support as was customary in the child's birth community;
- (b) whether to place the Child with an Institution (as defined above);
- (c) in the case of the Director – whether and how to ensure that the Child while placed as described in (a) or (b) was not exposed to the Removal Risks;
- (ii) the physical resources to act upon the discretions in (i), including resources of manpower, weaponry and means of transport;
- (iii) the financial resources to act upon the discretions in (i); and
- (iv) statutory powers over the movements of, financial means of, or means of communication available to any First Nations person wishing to challenge an exercise of discretion described in (i).

Particulars

The Director pursuant to the Aboriginal Ordinances had powers including powers:

- (A) *to declare a place to be a prohibited area, such that it was an offence for a First Nations person to be or remain in it: s. 11;*

- (B) to cause First Nations people "to be kept within the boundaries of any reserve or aboriginal institution or to be removed to and kept within the boundaries of any reserve or aboriginal institution, or to be removed from one reserve or aboriginal institution to another reserve or aboriginal institution, and to be kept therein": s. 16(1);
- (C) to grant licences to employ First Nations persons: ss. 22-23;
- (D) to seize and control the property of First Nations people, and to act in their names: s. 43; and
- (E) to issue lawful directions to First Nations people, in circumstances where they could be arrested without warrant by a Patrol Officer or by a police officer who had "just cause to suspect" that they had committed or were about to commit an offence against the Ordinance, including non-compliance with any such direction: ss. 52, 55.

The Welfare Ordinance applied only to First Nations persons, and the majority of First Nations persons governed by the Aboriginal Ordinances were, on the commencement of the Welfare Ordinance, declared en masse to be "wards" under the Welfare Ordinance. The Director then had the following powers under the Welfare Ordinance:

- (F) to declare a place to be a prohibited area for wards: s. 13(c);
- (G) to take a ward into custody or to authorise a person to do so: s. 17(1)(a)-(b);
- (H) to order that the ward be removed to, and kept within, a reserve or institution, or removed from one reserve or institution to another: s. 17(1)(c)-(e);
- (I) the guardianship of the person and estate of a ward: s. 24; and
- (J) the general care and management of all property of a ward and all income received by a ward: ss. 25, 28.

Further particulars may be provided following completion of discovery and receipt of experts' reports.

40. In the premises set out in the preceding paragraph, at all material times in respect of each of the Removed Children the Commonwealth had control over:
- (a) in respect of the Removed Children – the Removal Risks; and
 - (b) in respect of Kinship Group Members – the Families' Risks.

(iii) Vulnerability

41. At all material times the Removed Children:

- (a) were minors;
- (b) were dependent for their care and supervision upon the adults having custody of them from time to time;
- (c) had no or no practicable means of challenging the exercise of a discretion described in paragraph 39(i); and
- (d) in the premises, were vulnerable to the Commonwealth's exercise of its powers of control over their persons and modes of living.

42. At all material times the Kinship Group Members:

- (a) in the case of Kinship Group Members who were minors at the time of the removal of the Removed Child – were minors;
- (b) lacked or were likely to lack:
 - (i) the physical resources to oppose the exercise of a discretion described in paragraph 39(i);
 - (ii) the financial resources to challenge a discretion described in paragraph 39(i);
 - (iii) the practical ability to travel to or communicate with:
 - (A) the Commonwealth officers empowered to review and overturn the exercise of a discretion described in paragraph 39(i); or
 - (B) the Removed Child; and

Particulars

The Kinship Group Members were or were likely to be subject to movement controls.

- (iv) in the premises, were vulnerable to the Commonwealth's exercise of its powers of control over the Removed Children.

(iv) Commonwealth's duty of care

43. In the premises set out in paragraphs 36 to 42 above, at all material times during the Period the Commonwealth owed to a class of persons including the plaintiff and group members (together and severally '**Claimants**') a duty to take reasonable care, by its officers, servants and agents, to avoid:

- (a) in the case of the Removed Children – the Removal Risks of harm; and
 - (b) in the case of the Kinship Group Members – the Families' Risks of harm;
- (together and severally the '**Commonwealth's duty of care**').

H. NEGLIGENCE – APPROPRIATE PRECAUTIONS

44. At all material times, during the Period, it was the case that the Removal Risks and the Families Risks were likely to be materially reduced if the Commonwealth, by its officers, servants and agents:

- (a) had and observed reasonable systems for ensuring; further or alternatively
- (b) exercised due care and diligence to ensure:

that:

- (i) Non-neglected Children who were First Nations persons, or First Nations persons of Mixed Descent:
 - (A) were not the subject of removal; alternatively
 - (B) were not the subject of removal without due process of law;
- (ii) Neglected children who were First Nations persons, or First Nations persons of Mixed Descent, were not the subject of removal without due process of law;
- (iii) children described in (i) or (ii), if subject to removal (as defined):
 - (A) were removed by persons with appropriate training and experience in childcare;
 - (B) were accompanied by adults familiar to the child;
 - (C) were placed in the care and under the supervision of such kin as were reasonably capable of providing material and emotional support according to the child's family's ordinary means and mode of living;
 - (D) were raised in the cultural and spiritual practices and traditions of the child's birth community;
 - (E) were permitted and encouraged to continue speaking the child's birth language(s);
 - (F) were not required only to speak in a language other than the child's birth language(s);
 - (G) were permitted and encouraged to learn and participate in the cultural and spiritual practices and traditions of the child's birth community;
 - (H) were not prohibited from learning and participating in the cultural and spiritual practices and traditions of the child's birth community;
 - (I) had access to, and were supported to receive, such material or emotional support as the child's kin might be able to provide; further or alternatively; and
 - (J) were not placed in an environment where the Child experienced or observed:

- (a) poor nutrition;
- (b) physical abuse;
- (c) sexual abuse; further or alternatively
- (d) systemic racism;

(the precautions in (a) and (b)(i)-(iii)(J) being together and severally the **Available Precautions**).

45. During the Period the financial costs and logistical burdens of taking the Available Precautions were not disproportionate, having regard to:

- (a) their likely effect in reducing the probability of:
 - (i) the Removal Risks in respect of persons who were or might become Removed Children; further or alternatively
 - (ii) the Families Risks in respect of persons who were or might become Kinship Group Members;
- (b) the gravity of the risks of harm if:
 - (i) the Removal Risks or any of them eventuated in respect of a Removed Child; further or alternatively
 - (ii) the Families Risks or any of them eventuated in respect of carers or siblings of a Removed Child;
- (c) the positive social utility in:
 - (i) enabling Non-neglected Children who were First Nations persons, or First Nations persons of Mixed Descent, to be raised in their family networks and cultural and spiritual traditions and practices;
 - (ii) enabling Neglected Children who were First Nations persons, or First Nations persons of Mixed Descent, to be removed to non-neglectful environments whilst retaining access to their family networks and cultural and spiritual traditions and practices;
 - (iii) enabling children as described in (i) and (ii), even if removed, to be raised:
 - (A) in the care and under the supervision of such kin as were reasonably capable of providing material and emotional support according to the child's family's ordinary means and mode of living;
 - (B) in the cultural and spiritual practices and traditions of the child's birth community;
 - (C) in or with competence in the child's birth languages;
 - (D) in or in familiarity with the cultural and spiritual practices and traditions of the child's birth community;

- (E) with access to such material or emotional support as the child's kin might be able to provide; further or alternatively
- (F) in an environment where the child was not exposed (by experience or observation) to:
 - (a) poor nutrition;
 - (b) physical abuse;
 - (c) sexual abuse; further or alternatively
 - (d) systemic racism; and
- (d) the social detriment in causing or allowing:
 - (i) the Removal Risks to eventuate in respect of a child; further or alternatively
 - (ii) the Families Risks to eventuate in respect of the carers or Siblings of a child.

Particulars

It would be socially detrimental for a regime designed to protect vulnerable children to fail to have adequate systems in place to avoid causing them mental harm, which would self-evidently undermine the purpose of the regime.

46. In the circumstances set out in the two preceding paragraphs, a reasonable person in the position of the Commonwealth would have taken Available Precautions.
47. By reason of the matters set out in the three preceding paragraphs, the Commonwealth's duty of care required the Commonwealth, by its officers, servants and agents:
- (a) to have and observe reasonable systems for ensuring; further or alternatively
 - (b) to exercise reasonable care and diligence to ensure;
- the matters set out in paragraph 44(i) to (iii)(J) above.

I. NEGLIGENCE – BREACHES OF DUTY

(i) **Removal of Non-neglected Children**

48. During the Period the Commonwealth:
- (a) had no or no adequate systems to ensure; further or alternatively
 - (b) by its officers, servants and agents including the Director and Patrol Officers – failed to take reasonable care to ensure;
- that children who were:
- (i) First Nations persons, or First Nations persons of Mixed Descent; and
 - (ii) Non-neglected Children;

were:

- (A) not removed from the care and supervision of their carers;
- (B) were not the subject of removal without due process of law (such as pursuant to a Court Order); further or alternatively
- (C) were not the subject of removal:
 - (a) without the informed consent and support of the child's carers;
 - (b) without being accompanied by an adult with whom the child was comfortable and familiar;
 - (c) without being accompanied by an adult who was familiar with the child's cultural traditions and practices;
 - (d) without being accompanied by an adult who was able to communicate in the child's birth language(s); and, or alternatively
 - (e) by persons without appropriate training or experience in caring for children.

Particulars

So far as the plaintiff is able to say prior to the completion of discovery, the said matters are to be inferred from the circumstance that the plaintiff and some of the Removed Children were Non-neglected Children but were removed anyway and were removed without a Court Order.

Further particulars may be provided following completion of discovery and receipt of experts' reports.

49. By reason of the matters in paragraph 48(a), further or alternatively paragraph 48(b) (together and severally '**Unjustified Removals Breaches**')
- (a) the plaintiff and some of the other Removed Children were removed from the care and supervision of their carers; and
 - (b) by reason of the said removal:
 - (i) the said Removed Children (including the plaintiff); and
 - (ii) Kinship Group Members of the Removed Children;
 suffered loss and damage.

Particulars

The plaintiff refers to and repeats the matters set out in paragraphs 21 to 32 above.

By reason of the plaintiff's removal, the plaintiff suffered:

- a. Distress, hurt and humiliation;*
- b. Persistent Depressive Disorder;*
- c. Loss of language, cultural identity and cultural standing; and*
- d. Loss of nurture and support of, and connection with, family.*

Further particulars of the plaintiff's loss and damage will be provided following receipt of expert reports and prior to trial or otherwise as the Court may direct.

Particulars relating to the affected group members will be provided following the trial of common questions or otherwise as the Court may direct.

50. But for the Unjustified Removals Breaches, the Removed Children referred to in the preceding paragraph:
- (a) would not have been removed; further or alternatively
 - (b) would not have suffered the said loss and damage.

51. In the premises set out in:
- (a) the two preceding paragraphs, the Unjustified Removals Breaches were a necessary condition of the harms referred to in paragraph 49(b);
 - (b) paragraphs 44 to 47 above, it is appropriate for the scope of the Commonwealth's liability in respect of the Unjustified Removals Breaches to extend to the said harms.

52. In the premises set out in the four preceding paragraphs, the Unjustified Removals Breaches were a necessary cause of the harms referred to in paragraph 49(b).

(ii) Removal of Neglected Children without due process

53. During the Period, the Commonwealth:
- (a) had no or no adequate systems to ensure; further or alternatively
 - (b) by its officers, servants and agents including the Director and Patrol Officers – failed to take reasonable care to ensure:

that children who were:

- (i) First Nations persons, or First Nations persons of Mixed Descent; and
- (ii) Neglected Children;

were not the subject of removal:

- (A) without being accompanied by an adult with whom the child was comfortable and familiar;
- (B) without being accompanied by an adult who was familiar with the child's cultural traditions and practices;
- (C) without being accompanied by an adult who was able to communicate in the child's birth language(s); and, or alternatively

- (D) by persons without appropriate training or experience in caring for children.

Particulars

So far as the plaintiff is able to say prior to the completion of discovery, the said matters are to be inferred from the circumstance that some of the Removed Children were Neglected Children and were not removed in the manner described in (A)-(D) above.

Further particulars may be provided following completion of discovery and receipt of experts' reports.

54. By reason of the matters in paragraph 53(a), further or alternatively paragraph 53(b) (together and severally **Aggravated Removals Breaches**):
- (a) Removed Children were removed from the care and supervision of their carers without the precautions described in paragraph 53(b)(ii)(A) to (D) inclusive; and
 - (b) by reason of the said removals:
 - (i) the said Removed Children; and
 - (ii) Kinship Group Members who were kin to the said Removed Children; suffered loss and damage.

Particulars

Particulars relating to the affected group members will be provided following the trial of common questions or otherwise as the Court may direct.

55. But for the Aggravated Removals Breaches:
- (a) the Removed Children referred to in the preceding paragraph would not have been removed in the manner described in paragraph 54(a);
 - (b) the said Removed Children would not have suffered the said loss and damage; and
 - (c) the Kinship Group Members referred to in paragraph 54(b) would not have suffered the said loss and damage.
56. In the premises set out in:
- (a) the two preceding paragraphs, the Aggravated Removals Breaches were a necessary condition of the removal of each of the children referred to in paragraph 54;
 - (b) paragraphs 44 to 47 above, it is appropriate for the scope of the Commonwealth's liability in respect of the Aggravated Removals Breaches to extend to harms resulting from the said Removals.

57. In the premises set out in the three preceding paragraphs, the Aggravated Removals Breaches were a cause of the harms referred to in paragraph 54(b).

(iii) Failure to place with alternative kin

58. During the Period the Commonwealth:

- (a) had no or no adequate systems to ensure; further or alternatively
- (b) by its officers, servants and agents including the Director and Patrol Officers – failed to take reasonable care to ensure:

that Neglected Children who were First Nations persons, or First Nations persons of Mixed Descent, were placed in the care and under the supervision of such kin as were reasonably capable of providing material and emotional support according to the child's family's ordinary means and mode of living ('**Alternative Kin**').

Particulars

Particulars relating to the affected group members may be provided following completion of discovery and receipt of experts' reports and following the trial of common questions.

59. By reason of the matters in paragraph 58(a), further or alternatively paragraph 58(b) (together and severally '**Avoidable Isolations Breaches**');

- (a) Removed Children who were Neglected Children but who had kin available to be carers (such children being the '**Alternative Care Subgroup**') were not placed in the care and under the supervision of the said kin: and
- (b) by reason of the matters in (a):
 - (i) the Alternative Care Subgroup; further or alternatively
 - (ii) Kinship Group Members of the Alternative Care Subgroup; suffered loss and damage.

Particulars

Particulars relating to the affected group members will be provided following the trial of common questions or otherwise as the Court may direct.

60. But for the Avoidable Isolations Breaches:

- (a) the Alternative Care Subgroup:
 - (i) would have been placed in the care and under the supervision of the alternative kin; and
 - (ii) would not have suffered the said loss and damage; and

- (b) the Kinship Group Members who were the alternative kin referred to in (a)(i) in respect of a child in the Alternative Care Subgroup;
 - (i) would have been given the care and supervision of the said child; and
 - (ii) would not have suffered the said loss and damage.

61. In the premises set out in:

- (a) the two preceding paragraphs, the Avoidable Isolations Breaches were a necessary condition of the harms referred to in paragraph 59(b); and
- (b) paragraphs 44 to 47 above, it is appropriate for the scope of the Commonwealth's liability in respect of the Avoidable Isolations Breaches to extend to the said harms.

62. In the premises set out in the three preceding paragraphs, the Avoidable Isolations Breaches were a cause of the harms referred to in paragraph 59(b).

(iv) **Failure to place with appropriate Institutions**

63. During the Period the Commonwealth:

- (a) had no or no adequate systems to ensure; further or alternatively
- (b) by its officers, servants and agents including the Director and Patrol Officers – failed to take reasonable care to ensure:

that Removed Children were placed in Institutions where the child was raised:

- (i) in the cultural and spiritual practices and traditions of the child's birth community;
- (ii) in, or with competence in the child's birth language;
- (iii) in, or in familiarity with the cultural and spiritual practices and traditions of the child's birth community; and
- (iv) with access to such material or emotional support as the child's kin might be able to provide.

64. By reason of the matters in paragraph 63(a), further or alternatively paragraph 63(b) (together and severally '**Inappropriate Placements Breaches**') the plaintiff and some of the other Removed Children were placed in Institutions that:

- (a) were physically distant from the carers, or which the carers were forbidden from accessing;
- (b) required the child to speak English, regardless of the birth language of the child;
- (c) were culturally dissonant from the First Nations community in which the child had been living until the removal, but instead required the child:

- (i) to observe Anglo-Australian expectations as to customs and cultural practices; and
 - (ii) not to observe the customs and cultural practices of the child's First Nations community or carers; further or alternatively
- (d) practised a spiritual faith which the child's carers prior to the removal did not practice and required the child:
- (i) to practice the spiritual faith of the Institution; and
 - (ii) not to practice the spiritual faith or the traditional spiritual beliefs and practices of the child's First Nations community or carers.
65. By reason of the Breaches alleged in the preceding paragraph:
- (a) the said Removed Children (including the plaintiff); further or alternatively
 - (b) Kinship Group Members who were kin to the said Removed Children;
- suffered loss and damage.

Particulars

The plaintiff refers to and repeats the matters set out in paragraphs 21 to 32 above.

By reason of the plaintiff's removal, the plaintiff suffered:

- a. Distress, hurt and humiliation;*
- b. Persistent Depressive Disorder;*
- c. Loss of language, cultural identity and cultural standing; and*
- d. Loss of nurture and support of, and connection with, family.*

Further particulars of the plaintiff's loss and damage will be provided following receipt of expert reports and prior to trial or otherwise as the Court may direct.

Particulars relating to the affected group members will be provided following the trial of common questions or otherwise as the Court may direct.

66. But for the Inappropriate Placements Breaches, the Removed Children referred to in the preceding paragraph:
- (a) would have been placed in Institutions where the child was raised:
 - (i) in the cultural and spiritual practices and traditions of the child's birth community;
 - (ii) in or with competence in the child's birth language;
 - (iii) in or in familiarity with the cultural and spiritual practices and traditions of the child's birth community; and

- (iv) with access to such material or emotional support as the child's kin might be able to provide; and
 - (b) would not have suffered the said loss and damage.
67. In the premises set out in:
- (a) the two preceding paragraphs, the Inappropriate Placements Breaches were a necessary condition of the harms referred to in paragraph 65; and
 - (b) paragraphs 44 to 47 above, it is appropriate for the scope of the Commonwealth's liability in respect of the Inappropriate Placements Breaches to extend to the said harms.
68. In the premises set out in the three preceding paragraphs, the Inappropriate Placements Breaches were a cause of the harms referred to in paragraph 65.
- (v) **Failure to ensure safe Institutions**
69. During the Period, the Commonwealth:
- (a) had no or no adequate systems to ensure; further or alternatively
 - (b) by its officers, servants and agents including the Director and Patrol Officers – failed to take reasonable care to ensure:
- that Removed Children placed in Institutions were not subject to or exposed to:
- (i) poor nutrition;
 - (ii) physical abuse;
 - (iii) sexual abuse; further or alternatively
 - (iv) systemic racism.
70. By reason of the matters in paragraph 69(a), further or alternatively paragraph 69(b) (together and severally '**Institutional Supervision Breaches**') some of the Removed Children placed in Institutions were subject to or exposed to:
- (i) poor nutrition;
 - (ii) physical abuse;
 - (iii) sexual abuse; further or alternatively
 - (iv) systemic racism.
71. By reason of the Institutional Supervision Breaches alleged in the preceding paragraph the said Removed Children suffered loss and damage.

Particulars

Particulars relating to the affected group members will be provided following the trial of common questions or otherwise as the Court may direct.

72. But for the Institutional Supervision Breaches, the Removed Children referred to in the preceding paragraph:
- (a) would have been placed in in Institutions where the child was not subject to or exposed to:
 - (i) poor nutrition;
 - (ii) physical abuse;
 - (iii) sexual abuse; further or alternatively
 - (iv) systemic racism; and
 - (b) would not have suffered the said loss and damage.
73. In the premises set out in:
- (a) the two preceding paragraphs, the Institutional Supervision Breaches were a necessary condition of the harms referred to in paragraph 71; and
 - (b) paragraphs 44 to 47 above, it is appropriate for the scope of the Commonwealth's liability in respect of the Institutional Supervision Breaches to extend to the said harms.
74. In the premises set out in the three preceding paragraphs, the Institutional Supervision Breaches were a cause of the harms referred to in paragraph 71.

AND THE PLAINTIFF CLAIMS, ON HER OWN BEHALF AND ON BEHALF OF THE GROUP MEMBERS:

- A. Damages.
- B. Costs.
- C. Interest pursuant to s 100 of the *Civil Procedure Act 2005* (NSW).
- D. Such further or other order as the Court deems fit.

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the Legal Profession Uniform Law Application Act 2014 that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.

Signature



Capacity

Solicitor for the plaintiff

Date of signature

28 April 2021

NOTICE TO DEFENDANT

If you do not file a defence within 28 days of being served with this statement of claim:

- **You will be in default in these proceedings.**
- **The court may enter judgment against you without any further notice to you.**

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

HOW TO RESPOND

Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 If you intend to dispute the claim or part of the claim, by filing a defence and/or making a cross-claim.**
- 2 If money is claimed, and you believe you owe the money claimed, by:**
 - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
 - Filing an acknowledgement of the claim.
 - Applying to the court for further time to pay the claim.

3 If money is claimed, and you believe you owe part of the money claimed, by:

- Paying the plaintiff that part of the money that is claimed.
- Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at www.ucprforms.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address	Law Courts Building, Lv 5 - 184 Phillip Street, Sydney NSW 2000
Postal address	Supreme Court of NSW, GPO Box 3, Sydney NSW 2001
Telephone	1300 679 272

AFFIDAVIT VERIFYING

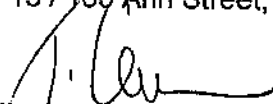
Name Tristan Roland Gaven
 Address 13/160 Ann Street, BRISBANE QLD 4000
 Occupation LAWYER
 Date 28 April 2021

I on oath:

- 1 I am a Special Counsel at Shine Lawyers, solicitors for the plaintiff in this proceeding. I am the solicitor on the record for the plaintiff in this proceeding and have day to day conduct of this proceeding on behalf of the plaintiff and I am duly authorised to swear this affidavit on the plaintiff's behalf.
- 2 I believe that the allegations of fact in the statement of claim are true.

SWORN at 13 / 160 Ann Street, BRISBANE QLD 4000

Signature of deponent



Name of witness

Paris Maree Hamrey

Address of witness

13 / 160 Ann Street, BRISBANE QLD 4000

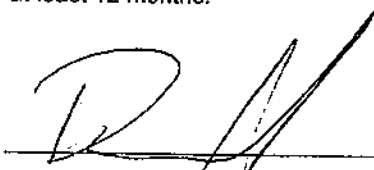
Capacity of witness

Solicitor

And as a witness, I certify the following matters concerning the person who made this affidavit (the deponent):

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least 12 months.

Signature of witness



Note: The deponent and witness must sign each page of the affidavit. See UCPR 35.7B.

FURTHER DETAILS ABOUT PLAINTIFF**Plaintiff**

Name Eileen Cummings
Address 7 Bee Court
Malak Northern Territory 0810

Legal representative for plaintiff

Name Tristan Roland Gaven
Practising certificate number 00059359 (Queensland Law Society)
Firm Shine Lawyers
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Fax 07 3229 1999
Email tgaven@shine.com.au
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DETAILS ABOUT DEFENDANT**Defendant**

Name Commonwealth of Australia
Address

Electronic service address processservice@ags.gov.au

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