Federal Court of Australia

Cubillo v Commonwealth of Australia (includes summary) [2001] FCA 1213 (31 August 2001)

Last Updated: 31 August 2001

FEDERAL COURT OF AUSTRALIA

CUBILLO & GUNNER v THE COMMONWEALTH

D10 OF 2000; D11 OF 2000

SUMMARY

In accordance with the practice of the Federal Court in cases of public interest, the Court has prepared this brief summary to accompany the reasons for judgment, delivered today. It must, of course, be emphasised that the only authoritative pronouncement of the Court's reasons is that contained in the published reasons for judgment. This summary is intended to assist in understanding the principal conclusions reached by the Court, but is necessarily incomplete.

On 11 August 2000, a Judge of the Federal Court, O'Loughlin J, dismissed proceedings brought by Lorna Cubillo and Peter Gunner against the Commonwealth. Mrs Cubillo and Mr Gunner have appealed against the judgment of the primary Judge. The judgment we publish today deals with the arguments presented on the appeal.

Mrs Cubillo was aged eight when she was taken, along with fifteen other part-Aboriginal children, from the Phillip Creek Settlement, about forty kilometres north of Tennant Creek in the Northern Territory, in 1947. She was taken to the Retta Dixon Home in Darwin and remained there until October 1956. Mr Gunner was aged seven when he was removed from Utopia Station and taken to St Mary's Hostel, south of Alice Springs, in May 1956. He remained there until 1963. The Retta Dixon Home was conducted by the Aborigines Inland Mission of Australia, while St Mary's Hostel was run by the Australian Board of Missions.

The appellants claimed at the trial that their removal had taken place in consequence of a policy, endorsed by successive Commonwealth governments, whereby part Aboriginal children were taken from their families and placed in missions or institutions. The appellants said their removal and detention caused them pain and suffering (including serious psychological harm), loss of enjoyment of life and loss of cultural heritage. They also said that the Commonwealth was legally responsible for the wrongs done to them and was liable to compensate them in damages.

The appellants each relied on four causes of action to support their claims for damages:

(i) wrongful imprisonment and deprivation of liberty;

(ii) a breach of the statutory duty allegedly owed to them by the Director of Native Affairs, in failing to provide for their custody, maintenance and education, for which breach the Commonwealth was said to be vicariously responsible;

(iii) a breach of the duty of care allegedly owed to them by the Commonwealth; and

(iv) a breach of the Commonwealth's fiduciary duties.

The trial before the primary Judge lasted 106 days. His Honour's judgment runs to 485 printed pages. The legal and factual issues dealt with by the primary Judge were complex.

The primary Judge emphasised that the case presented particular difficulties because so much time had passed since the relevant events. (Mrs Cubillo's removal had occurred more than fifty years before the trial while, in Mr Gunner's case, more than forty years had elapsed.) There were therefore very large gaps in the evidence. His Honour also pointed out that the appellants had chosen to sue only the Commonwealth. They had not sued, for example, the Directors of Native Affairs or Welfare. Nor had they sued the individuals who (as the primary Judge found) had separately assaulted Mrs Cubillo and Mr Gunner while they were institutionalised. The issue was not therefore whether **anyone was liable** to the appellants for what they had experienced, but whether **the Commonwealth was liable.**

The primary Judge rejected the appellants' claims against the Commonwealth, essentially for two reasons.

First, on the evidence presented at the trial, his Honour found that the appellants had failed to establish any of the causes of action on which they had relied. Although the primary Judge accepted much of the evidence given by the appellants, he made a number of significant findings adverse to their case. In particular, his Honour found that on the evidence before him

* at the relevant times, there was no general policy in force in the Northern Territory supporting the indiscriminate removal and detention of part-Aboriginal children, irrespective of the personal circumstances of each child;

* Mrs Cubillo had failed to establish that, at the time of her removal, she was in the care of an adult Aboriginal person whose consent to her removal had not been obtained;

* Mr Gunner's mother, Topsy Kundrilba, had given her informed consent to her son's removal from Utopia Station to St Mary's Hostel; and

* the Commonwealth had not actively promoted or caused the appellants' detention.

Secondly, the primary Judge refused to grant an extension of time to the appellants in which to institute proceedings in respect of their common law causes of action (wrongful imprisonment and breach of duty). Such an extension of time was necessary because the causes of action had become barred under Northern Territory legislation by reason of the very long delay in commencing proceedings. The primary Judge found that the Commonwealth had suffered "irremediable prejudice" in defending the proceedings since it was unable to bring forward evidence from potential witnesses who had died or who were unavailable because of ill health. His Honour, in the exercise of his discretion, declined to grant an extension of time.

The issues on the appeal were considerably narrower than those dealt with by the primary Judge. For example, the appellants no longer pressed their claim founded on breach of statutory duty. More

importantly, they did not challenge the major factual findings, adverse to their case, made by the primary Judge. They also accepted that the Commonwealth had sustained significant prejudice in defending the case, by reason of the delay in the appellants commencing the proceedings.

It is also important to appreciate that we have found that the appellants attempted to alter their case on appeal. In particular, they sought to reformulate the breach of duty case in an effort to overcome adverse findings of fact made by the primary Judge. We have concluded that it would be unfair to the Commonwealth, and not in accordance with legal principle, to permit the appellants to change their case at this late stage in the proceedings.

So far as the primary Judge's rejection of the appellants' substantive claims are concerned, we have reached the following conclusions:

* The primary Judge did not err in rejecting the appellants' false imprisonment claims. The unchallenged findings of fact are very difficult for the appellants to overcome. Alternative legal arguments advanced by them on the appeal do not demonstrate that the primary Judge made any error.

* The primary Judge correctly held that there was no basis for the appellants' claims founded on an alleged breach of fiduciary duties said to be owed by the Commonwealth to the appellants.

We also have decided that it was open to the primary Judge to hold that the Commonwealth had sustained irremediable prejudice by reason of the appellants' delay in commencing proceedings and that no extension of time should be granted to them. It follows that, independently of the primary Judge's rejection of the appellants' substantive claims, his Honour was entitled to hold that the appellant's common law causes of action had to fail. In our view, it was also open to the primary Judge to hold (as he did) that any equitable claim based on breach of fiduciary duties had been barred because of the lapse of time.

We make one further observation. We are, of course, conscious of the controversy surrounding the existence or otherwise of what has become known as the "Stolen Generation". Neither the primary Judge nor this Court was asked to make findings on this issue, and it would be inappropriate for us to do so. The questions raised at the trial and on the appeal concerned the circumstances in which two individuals, Mrs Cubillo and Mr Gunner, were long ago removed from their families and placed in institutions, and the legal consequences that flowed from those events. Our task, like that of the primary Judge, is to decide the issues presented to us in accordance with law.

The result is that the appeals have been dismissed.

The full text of the Court's judgment, reported as *Cubillo & Gunner v The Commonwealth* [2001] FCA 1213, will shortly be available on the Court's website at www.fedcourt.gov.au.

FEDERAL COURT OF AUSTRALIA

Cubillo v Commonwealth of Australia [2001] FCA 1213

FALSE IMPRISONMENT - removal of part-Aboriginal children in 1947 and 1953 from their families and placement in institutions - whether the Commonwealth actively promoted or caused the appellants' detention - whether a committal order under s 6 of the *Aboriginals Ordinance 1918* (NT) ("*Aboriginals*

Ordinance") was vitiated by *Wednesbury* unreasonableness - whether finding that the Director of Native Affairs detained the appellants was justified on the evidence - whether it was common ground at trial that the Directors of Native Affairs and Welfare had not exercised their statutory powers in relation to the appellants - whether independent discretion rule applies.

BREACH OF DUTY - reformulation of appellants' case on alleged breaches of duty by the Commonwealth - whether the appellants should be permitted to raise new arguments on appeal - whether Commonwealth would be prejudiced.

LIMITATION OF ACTIONS - common law causes of action statute barred - whether primary Judge erred in refusing an extension of time in which to institute proceedings pursuant to s 44(3)(b) of the *Limitations Act 1981* (NT) - whether primary Judge bound to consider each cause of action separately - whether primary Judge erred in finding that the Commonwealth had sustained irremediable prejudice.

EQUITY - fiduciary duties - whether findings of fact precluded a claim founded on breach of fiduciary duties - whether equitable claims barred in any event by laches.

The Constitution s 75(iii)

Federal Court of Australia Act 1976 (Cth), ss 24(1A), 27.

Judiciary Act 1903 (Cth), ss 35(1)(a), 44(2A), 44(3), 79.

Aboriginals Ordinance 1918 (NT), ss 3, 3A, 4, 5, 6, 7, 8, 13, 15, 16, 17, 19.

Aboriginal Land Rights (Northern Territory) Act 1976 (Cth).

Limitation of Suits and Actions Act 1866 (SA), ss 36, 37, 47.

Limitation Act 1981 (NT), ss 3, 9, 12, 21, 22, 36, 44.

Northern Territory Acceptance Act 1910 (Cth), s 7.

Northern Territory (Administration) Act 1910 (Cth), s13

Northern Territory (Administration) Act 1947 (Cth), ss 4N, 4U, 4V, 4W, 4Y.

Aboriginals Ordinance 1911 (NT).

Northern Territory Aboriginals Act 1910 (SA).

Welfare Ordinance 1953 (NT) ss 6, 7, 8, 10, 14, 17, 24, 32.

Welfare Ordinance (No 2) 1957 (NT), s 4.

Welfare Ordinance 1961 (NT), s 5.

Aboriginals Ordinance 1939 (NT), ss 2, 3, 4.

Aboriginals Ordinance (No. 2) 1953 (NT), ss 3, 4, 5, 7, 8.

Limitation Act 1985 (ACT).

Limitation of Actions Act 1994 (Qld), s 31(2).

Limitation of Actions Act 1936 (SA)

Limitation Act 1969 (NSW), s 60E(1).

Federal Court Rules, O 52 r 10(2)(b), O 11 r 2(a).

Kruger v Commonwealth [1997] HCA 27; (1997) 190 CLR 1, discussed.

Northern Territory v GPAO (1999) 196 CLR 553, cited.

Waters v The Commonwealth [1951] HCA 9; (1951) 82 CLR 188, cited.

Ross v Chambers (Unreported, NTSC, 5 April 1956, Kriewaldt J), discussed.

Namatjira v Raabe [1959] HCA 13; (1959) 100 CLR 664, cited.

Australian Securities and Investments Commission v Edensor Nominees Pty Ltd (2000) 177 ALR 329, cited.

Paramasivam v Flynn [1998] FCA 1711; (1998) 90 FCR 489, discussed.

Carr v Finance Corporation of Australia Ltd [1981] HCA 20; (1980) 147 CLR 246, cited.

Sanofi v Park Davis [1982] HCA 9; (1980) 149 CLR 147, cited.

Hall v Nominal Defendant [1966] HCA 36; (1996) 117 CLR 423, cited.

Dousi v Colgate Palmolive Pty Ltd (1987) 9 NSWLR 374, cited.

Meddings v The Council of the City of the Gold Coast [1988] 1 Qd R 528, cited.

Southern Cross Exploration NL v Fire and All Risks Insurance Company Ltd (No 2) (1990) 21 NSWLR 200, cited.

D A Christie Pty Ltd v Baker [1996] VicRp 89; [1996] 2 VR 582, cited.

Associated Provincial Picture Houses Ltd v Wednesbury Corporation [1947] EWCA Civ 1; [1948] 1 KB 223, cited.

Myer Stores Ltd v Soo [1991] VicRp 97; [1991] 2 VR 597, considered.

Field v Nott [1939] HCA 41; (1939) 62 CLR 660, cited.

Murray v Ministry of Defence [1988] UKHL 13; [1988] 1 WLR 692, cited.

Herring v Boyle [1834] EngR 139; (1834) 1 CM&R 377; 149 ER 1126, cited.

Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd [1986] HCA 34; (1986) 160 CLR 626, cited.

Enever v The King [1906] HCA 3; (1906) 3 CLR 969, cited.

Attorney-General (NSW) v Perpetual Trustee Co. Ltd [1952] HCA 2; (1952) 85 CLR 237, cited.

Attorney-General (NSW) v Perpetual Trustee Co. Ltd [1955] AC 457, cited.

Australian Competition and Consumer Commission v Golden Sphere International Inc. [1998] FCA 598; (1998) 83 FCR 424, cited.

Clayton Robard Management Ltd v Siu [1986] HCA 40; (1988) 162 CLR 24, cited.

Minister for Aboriginal Affairs v Peko-Wallsend Ltd [1986] HCA 40; (1986) 162 CLR 24, cited.

Attorney-General (NSW) v Quin (1990) 170 CLR 1, cited.

Minister for Immigration and Multicultural Affairs v Eshetu (1999) 197 CLR 611, cited.

Friends of Hinchinbrook Society Inc v Minister for the Environment (No 2) (1997) 69 FCR 28, cited.

CDJ v VAJ (1998) 197 CLR 172, cited.

Allesch v Maunz [2000] HCA 40; (2000) 173 ALR 648, cited.

Warren v Coombes [1979] HCA 9; (1979) 142 CLR 531, applied.

Minister for Immigration and Multicultural Affairs v Jia 178 ALR 421, cited.

News Ltd v Australian Rugby Football League Ltd [1996] FCA 870; (1996) 64 FCR 410, cited.

Minister for Immigration, Local Government and Ethnic Affairs v Hamsher (1992) FCR 359, applied.

Crimmins v Stevedoring Industry Finance Committee [1999] HCA 59; (1999) 200 CLR 1, considered.

X (Minors) v Bedfordshire County Council [1995] UKHL 9; [1995] 2 AC 633, considered.

Barrett v Enfield London Borough Council [1999] 3 WLR 79, considered.

Stovin v Wise [1996] UKHL 15; [1996] AC 923, cited.

Pyrenees Shire Council v Day [1998] HCA 3; (1998) 192 CLR 330, cited.

Attorney-General v Prince [1998] 1 NZLR 262, cited.

B v Attorney-General [1999] 2 NZLR 296, cited.

W v Attorney-General [1999] 2 NZLR 709, cited.

Hillman v Black [1996] SASC 5941; (1996) 67 SASR 490, cited.

Phelps v Hillingdon London Borough City Council [2000] UKHL 47; [2000] 4 All ER 504, cited.

Perre v Apand Pty Ltd [1999] HCA 36; (1999) 198 CLR 180, cited.

Banque Commerciale SA En Liquidation v Akhil Holdings Ltd (1990) 169 CLR 279, cited.

Mitanis v Pioneer Concrete (Vic) Pty Ltd [1997] FCA 1040; (1997) ATPR 41-591, cited.

Water Board v Moustakas [1988] HCA 12; (1988) 180 CLR 491, applied.

Sola Optical Australia Pty Ltd v Mills [1987] HCA 57; (1987) 163 CLR 628, considered.

Ward v Walton (1989) 66 NTR 20, cited.

Brisbane South Regional Health Authority v Taylor [1996] HCA 25; (1996) 186 CLR 541, applied.

Williams v Minister, Aboriginal Land Rights Act 1983 (No 2) (1999) [1999] NSWSC 843; 25 Fam LR 86, cited.

House v The King [1936] HCA 40; (1936) 55 CLR 499, cited.

Lovell v Lovell [1950] HCA 52; (1950) 81 CLR 513, cited.

Sydney City Council v Zegarac (1998) 43 NSWLR 195, cited.

Holt v Wynter [2000] NSWCA 143; (2000) 49 NSWLR 128, cited.

Ravinder Rihini Pty Ltd v Krizaic [1991] FCA 318; (1991) 30 FCR 300, cited.

Bennett v Minister of Community Welfare [1992] HCA 27; (1992) 176 CLR 408, cited.

Lindsay Petroleum Co. v Hurd (1874) LR 5 PC 221, cited.

Orr v Ford [1989] HCA 4; (1989) 167 CLR 316, applied.

Clay v Clay [2001] HCA 9; (2001) 178 ALR 193, cited.

Countess of Bective v Federal Commissioner of Taxation [1932] HCA 22; (1932) 47 CLR 417, cited.

Wik Peoples v Queensland (1996) 187 CLR 1, cited.

Pilmer v Duke Group Ltd [2001] HCA 31; (2001) 180 ALR 249, applied.

Norberg v Wynrib [1992] 2 SCR 226, cited.

Securities and Investments Commission v Chenery Corporation [1943] USSC 32; (1943) 318 US 80, cited.

Breen v Williams (1996) 186 CLR 71, cited.

Tito v Waddell (No 2) [1977] Ch 106, cited.

Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997).

Senate Legal and Constitutional References Committee, *Healing: A Legacy of Generations* (2000).

Peter Read, *The Stolen Children: The Removal of Aboriginal Children in New South Wales 1883 to 1969* (1982).

J Clarke, *Case Note* (*Cubillo v Commonwealth*) (2001) 25 *Melb Uni LR* 218.

Cross on Evidence (6th Aust ed).

LORNA CUBILLO v COMMONWEALTH OF AUSTRALIA

D 10 of 2000

PETER GUNNER v COMMONWEALTH OF AUSTRALIA

D 11 of 2000

SACKVILLE, WEINBERG & HELY JJ

MELBOURNE

31 August 2001

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY D 10 OF 2000

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	LORNA CUBILLO
	APPELLANT
AND:	COMMONWEALTH OF AUSTRALIA
	RESPONDENT
JUDGES:	SACKVILLE, WEINBERG & HELY JJ
DATE OF ORDER:	31 AUGUST 2001
WHERE MADE:	MELBOURNE

THE COURT ORDERS THAT:

1. The appeal be dismissed.

2. The parties file and serve written submissions as to costs within 28 days.

Note: Settlement and entry of orders is dealt with in Order 36 of the Federal Court Rules.

IN THE FEDERAL COURT OF AUSTRALIA

VICTORIA DISTRICT REGISTRY D 11 OF 2000

ON APPEAL FROM A JUDGE OF THE FEDERAL COURT OF AUSTRALIA

BETWEEN:	PETER GUNNER
	APPELLANT
AND:	COMMONWEALTH OF AUSTRALIA

	RESPONDENT
JUDGES:	SACKVILLE, WEINBERG & HELY JJ
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PLACE:	MELBOURNE

REASONS FOR JUDGMENT

INTRODUCTION

1 On 11 August 2000, a Judge of this Court, O'Loughlin J, dismissed proceedings brought by Lorna Cubillo ("Mrs Cubillo") and Peter Gunner ("Mr Gunner") against the respondent ("the

Commonwealth"): *Cubillo v The Commonwealth (No 2)* [2000] FCA 1084; (2000) 103 FCR 1. The two proceedings were heard together and raised similar, although not identical, issues. Mrs Cubillo and Mr Gunner have each appealed against the judgment of the primary Judge.

2 There is a question as to whether his Honour's judgment was final or interlocutory in character. The significance of that question is that the answer determines whether Mrs Cubillo and Mr Gunner are entitled to appeal as of right or whether they must first obtain the leave of the Court: see *Federal Court of Australia Act 1976* (Cth) (the "*Federal Court Act*"), s 24(1A). We address the question later (see [181] below). In this judgment, we refer to Mrs Cubillo and Mr Gunner together as "the appellants".

3 The trial before the primary Judge occupied 106 sitting days over a period commencing on 3 August 1998 and concluding on 31 March 2000. His Honour heard evidence in Darwin, Tennant Creek, Alice Springs and Melbourne. The judgment, as reported in the *Federal Court Reports* is 485 pages in length. Both the trial and the judgment attracted intense public interest.

4 The degree of interest in the case reflected the nature of the allegations made by the appellants. While it is not easy to summarise accurately the contentions advanced by the appellants at trial, the first two paragraphs of his Honour's judgment capture the broad scope of the appellants' case:

> *"The applicants, Mrs Lorna Cubillo and Mr Peter Gunner, are said to be members of `the Stolen Generation'. That is the term that has been widely used to refer to the former practice of taking part-Aboriginal children from their families and placing them in missions or institutions. Mrs Cubillo has claimed that in 1947 she and 15 other children were forcibly removed by servants or agents of the respondent from the Phillip Creek Native Settlement and thereafter detained in the Retta Dixon Home in Darwin. Mr Gunner has claimed that in 1956 he was forcibly removed by servants or agents of the [Commonwealth] from Utopia Station and thereafter detained in St Mary's Hostel in Alice Springs. The applicants have instituted proceedings against the [Commonwealth], alleging that it is the party which bears the legal responsibility for the injuries and damages that they have suffered as a result of their removal and detention. Their claims for compensation have been rejected by the Commonwealth.*
> *The opening statement in the closing submissions of counsel for the applicants laid out the base upon which these proceedings were fought:*
>
> `These cases concern great injustice done by the Commonwealth of Australia to two of its citizens. By the actions of the Commonwealth, Lorna Cubillo and Peter Gunner were removed as young children from their families and communities. They were taken hundreds of kilometres from the countries of their birth. They were prevented from returning. They were made to live among strangers, in a strange place, in institutions which bore no resemblance to a home. They lost, by the actions of the Commonwealth, the chance to grow among the warmth of their own people, speaking their people's languages and learning about their country. They suffered lasting psychiatric injury. They were treated as orphans when they were not orphans. They lost the culture and traditions of their families. Decades later, the Commonwealth of Australia says in this

case that it did them no wrong at all'."

5 According to the findings of the primary Judge, Mrs Cubillo was born on 8 August 1938 and was therefore aged eight when she was removed from the Phillip Creek Settlement to the Retta Dixon Home in Darwin in July 1947. She remained at the Retta Dixon Home until October 1956. Both the Phillip Creek Settlement and the Retta Dixon Home were conducted by the Aborigines Inland Mission of Australia ("AIM"). At the time of her removal, Mrs Cubillo was known as Lorna Nelson and her traditional name was Napanangka.

6 The primary Judge accepted that Mr Gunner was born on 19 September 1948 (although there was some uncertainty about the precise date). He was therefore aged seven when he was removed from Utopia Station to St Mary's Hostel, located to the south of Alice Springs, in May 1956. St Mary's was established by Sister Eileen Heath as a hostel for part-Aboriginal children in 1946 and shortly thereafter was acquired by the Australian Board of Missions ("ABM"), an Anglican mission organisation. Mr Gunner remained at St Mary's Hostel until February 1963.

7 An especially unusual feature of this case is that the trial took place more than 50 years after Mrs Cubillo's removal from the Phillip Creek Settlement and more than 40 years after Mr Gunner's removal from Utopia Station. The extremely long delay between the occurrence of the key events and the institution of legal proceedings played an important part in the arguments advanced both at trial and on the appeal. The lapse of time may be of little consequence to historians or social commentators who seek to interpret the events that took place decades ago. But it is of considerable significance in a legal system that places a high value on the parties to a dispute receiving a fair trial.

8 It is also important to appreciate that the appellants sued only the Commonwealth. They did not sue, for example, the AIM or the ABM (the operators of the institutions in which the appellants were placed) or the individuals who were alleged to have assaulted or mistreated each of them in the institutions. Nor did the appellants sue the estates of the various Directors of Native Affairs or Welfare in the Northern Territory who were said to have been responsible for unlawfully removing and detaining them. Doubtless the appellants had good reasons not to join other parties to the proceedings. There is, for example, no legislation in force in the Northern Territory which sheets home to later office holders legal responsibility for any wrongdoing that may have been committed by their predecessors. Moreover, there are obvious practical difficulties in instituting proceedings against the estates of persons who died long ago. Be that as it may, the question presented by the case was whether **the Commonwealth,** not some other person or entity, was liable to compensate the appellants for the wrongs allegedly done to them as children so many years ago.

9 The primary Judge's reasons for dismissing the appellants' claims were complex and detailed. His Honour made it clear, however, that he saw his task as to determine the specific allegations made by each of the appellants and not to pass judgment on the social policies that led to the removal and institutionalisation of many part-Aboriginal children (at [79]):

> *"The task of the court is to examine the evidence - both oral and documentary - in a clinical manner, devoid of emotion, for the purpose of ascertaining, first whether the applicants have causes of action against the Commonwealth; secondly, whether, if they*

do, they should be permitted to prosecute them, having regard to their delay in the institution of proceedings; and thirdly, if they are permitted to prosecute them, whether they have made out their claims."

(The broader issues are examined by the Human Rights and Equal Opportunity Commission, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families* (1997) and the Senate Legal and Constitutional References Committee, *Healing: A Legacy of Generations* (2000)).

10 We are, of course, conscious of the controversy surrounding the existence or otherwise of what has become known as the "Stolen Generation" (a term apparently coined by Peter Read, *The Stolen Children: The Removal of Aboriginal Children in New South Wales 1883 to 1969* (1982)). It is, however, important to stress that neither the primary Judge nor this Court was asked to make findings on that issue, and it would be inappropriate for us to do so. The task of this Court is to determine the matter in controversy by application of the law to the facts determined in accordance with proper procedures. The questions raised at the trial and on the appeal concerned the circumstances in which two individuals, Mrs Cubillo and Mr Gunner, were long ago removed from their families and placed in institutions and the legal consequences that flow from those events. Moreover, as will become clear, the issues on appeal were considerably narrower than those at trial. We have therefore had no occasion to revisit the evidence which led his Honour to make findings about the policies of successive Commonwealth Governments relating to the removal of part-Aboriginal children from their families. Nothing we say should be read as indicating any view which we may have about those findings.

COURSE OF THE PROCEEDINGS

THE PLEADED CASES

11 Mrs Cubillo and Mr Gunner commenced separate proceedings in the High Court of Australia on 30 October 1996 and 31 October 1996, respectively. The proceedings were within the original jurisdiction of the High Court since the Commonwealth was a party to each action: *Constitution,* s 75(iii). The High Court, by orders made on 26 November 1996 pursuant to s 44 of the *Judiciary Act 1903* (Cth) ("*Judiciary Act*"), remitted further proceedings to the Federal Court. Orders were ultimately made by the primary Judge that the proceedings be heard together and that evidence in one be evidence in the other.

12 The cases pleaded by Mrs Cubillo and Mr Gunner were similar. They alleged that they had been removed from their families and detained in institutions against their will. They further alleged that the Commonwealth had been responsible for taking them into custody and, thereafter for detaining them. The appellants each relied on four causes of action to support their claims for compensatory, aggravated and exemplary damages against the Commonwealth:

(i) the "wrongful imprisonment and deprivation of liberty" of each of the appellants, a claim based principally but not solely on the ground that their removal and detention by the Director of Native Affairs were unlawful and beyond the powers conferred by ss 6, 7 and 16 of the *Aboriginals Ordinance 1918* (NT) ("*Aboriginals Ordinance)*;

(ii) a breach of the statutory duty allegedly owed by the Director of Native Affairs to each of the appellants, in failing to provide for their custody, maintenance and education as required by s 5(1)(d) and (f) of the *Aboriginals Ordinance,* for which breach the Commonwealth was said to be vicariously liable;

(iii) a breach of the duty of care allegedly owed by the Commonwealth to each of the appellants (a claim put in a variety of ways, but primarily on the basis that the removal and detention of each appellant breached the Commonwealth's "duty to take reasonable care" because the Commonwealth and the Director of Native Affairs had failed to take into account the individual circumstances of each appellant, in particular the relationship with his or her family and community); and

(iv) a breach of the fiduciary duty said to be owed by the Commonwealth to each of the appellants.

13 The appellants ultimately contended that they were each entitled to be compensated for pain and suffering (including psychological injury), loss of enjoyment of life, loss of culture and of entitlements associated with being recognised as a traditional owner of traditional lands for the purposes of the *Aboriginal Land Rights (Northern Territory) Act 1976* (Cth) ("*Land Rights Act*"). The appellants also pleaded that the Commonwealth had acted with a "conscious and contumelious disregard for [their] welfare and rights", thereby causing substantial distress and humiliation. This plea was said to justify a claim for aggravated and exemplary damages against the Commonwealth.

14 The defences filed on behalf of the Commonwealth included pleas that, insofar as the appellants sought damages at common law or for breach of statutory duty, their claims had been statute barred by the *Limitation of Suits and Actions Act 1866* (SA) ("*1866 Act*") or the *Limitation Act 1981* (NT) ("*Limitation Act*"), both of which were said to apply to the proceedings by virtue of the *Judiciary Act*. The Commonwealth also pleaded that any claims for equitable compensation were barred either by analogy to the barring by statute of the common law claims or by the doctrine of laches.

15 The response of the appellants to the Commonwealth's limitation defence was to seek, if necessary, an order pursuant to s 44 of the *Limitation Act* extending the time for the institution of proceedings against the Commonwealth claiming damages at common law or for breach of statutory duty. The appellants also denied that their claims for equitable compensation had been barred.

16 The Commonwealth opposed the appellants' application for an extension of time on the ground that it would be unjust for the application to be granted having regard to the unreasonable delay in claiming relief and the consequent prejudice to the Commonwealth in defending the proceedings. The principal prejudice sustained by the Commonwealth was said to be the difficulty in identifying and locating witnesses, the unavailability of witnesses and the inability of witnesses to recall the relevant circumstances.

THE INTERLOCUTORY JUDGMENT

17 At a directions hearing on 12 March 1998, counsel for the Commonwealth advised the primary Judge that the Commonwealth intended to move for summary dismissal of the proceedings. Time was set aside in August 1998 for the hearing of the foreshadowed motion. To take account of the possibility that the motion might not succeed, the trial was listed to commence on 1 March 1999.

18 On 5 June 1998, the Commonwealth filed the foreshadowed motion. In the alternative to orders dismissing the proceedings, the Commonwealth sought an order that the appellants' applications for an extension of time under s 44 of the *Limitation Act* be determined as separate questions before the trial of other issues.

19 In the event, the time set aside in August 1998 was devoted to hearing, in advance of the trial proper, evidence from six aged and frail witnesses. The Commonwealth's motion was heard in March 1999, immediately following the opening addresses given at the trial by counsel for the appellants and for the Commonwealth.

20 The primary Judge delivered a detailed interlocutory judgment on 30 April 1999 in which he declined to make the orders sought by the Commonwealth: *Cubillo v Commonwealth* [1999] FCA 518; (1999) 89 FCR 528 ("*Cubillo (No 1)*"). His Honour held that each of the actions should be permitted to go to trial and that none of the pleaded causes of action should be struck out. He criticised aspects of the pleaded cases, but granted leave to the appellants to file further amended statements of claim consistent with his reasons for judgment.

21 The primary Judge noted (at 587) that the appellants maintained that they had separate causes of action in respect of each category of damage sustained by them. They had submitted that their respective causes of action for psychiatric and psychological injuries did not accrue until each appellant had become aware, or should reasonably have become aware, of the existence of the injuries and of their connection to his or her removal and detention. These events were said to have occurred within the relevant limitation periods. His Honour pointed out that it would be very difficult to test this submission without evidence establishing when the appellants had sustained their injuries and when each related the injuries to his or her removal and detention. The primary Judge also took the view (at 590) that it was desirable to hear evidence on the factual questions raised by the appellants' application for extension of time. In these circumstances, he concluded that it was inappropriate to order that the applications for extensions of time be heard and determined prior to the trial of the substantive issues raised by the appellants' pleadings.

22 His Honour then addressed the Commonwealth's submission that the proceedings should be summarily dismissed because of what was said to be the irreparable prejudice it would experience in defending the claims after such lengthy delays. He rejected the Commonwealth's contention, in substance for these reasons (at 598):

> *"I have come to the conclusion that the present application, based on hardship, has been made prematurely. The applicants have instituted their proceedings and, within reason, they are entitled to run their case as they see fit.*
>
> *...*
>
> *As the Court has earlier determined that it would not hear and determine the preliminary issues that were advanced by the Commonwealth, my assessment of the current position is that the Court cannot now assess the issues of the Commonwealth's claim to have suffered irreparable prejudice without considering, at the same time, the issue of hardship to the applicants if their applications for extensions of time were to be refused."*

23 It is perhaps worth noting that substantial segments of his Honour's judgment in *Cubillo (No 1)* are reproduced in the primary Judgment. For example, a good deal of the material in the sections headed "Extension of Time" and "Hardship" in *Cubillo (No 1)* (at 580-598) appears with only editorial changes in the broadly equivalent sections of the primary Judgment [1308]-[1425].

THE WITNESSES

24 In consequence of his Honour's rulings in *Cubillo (No 1)* he proceeded to hear the evidence on the appellants' substantive cases, as well as evidence directed to the prejudice sustained by the Commonwealth and to factors relevant to the appellants' application for an extension of time. It is not necessary for the purposes of the appeal to identify all the witnesses who gave evidence. It is useful, however, to describe the categories of witnesses called by the parties to support their respective cases. It is also convenient to identify persons who, by reason of death or infirmity, were unable to give evidence at the trial and who were regarded by the primary Judge as potentially significant witnesses. The absence of these persons played an important part in the arguments at trial and on the appeal.

25 His Honour divided Mrs Cubillo's witnesses into four groups. The first comprised four elderly Aboriginal women whose evidence was directed mainly to the circumstances of the removal of the part-Aboriginal children, including the young Lorna Nelson, from the Phillip Creek Settlement. Secondly, two witnesses were called who had also been removed as children from the Phillip Creek Settlement to the Retta Dixon Home. Thirdly, other inmates of the Retta Dixon Home during Mrs Cubillo's stay gave evidence as to conditions at the Home, including alleged acts of brutality directed at inmates. The final group included expert witnesses in the fields of history, anthropology and psychiatry.

26 Mr Gunner's witnesses addressed aspects of his life at Utopia Station and the circumstances prevailing at St Mary's Hostel during his time there (including evidence of sexual molestation by staff members). Mr Gunner also relied on expert evidence from a psychiatrist and anthropologist.

27 The primary Judge identified three categories of witnesses for the Commonwealth. The evidence of the first group related to the removal of Mrs Cubillo from the Phillip Creek Settlement and the conditions at the Retta Dixon Home while Mrs Cubillo was kept there. Witnesses in this group included an inmate of the Home, persons engaged by the AIM to work at the Home and a welfare officer employed by the Northern Territory Administration. It also included Mr Les Penhall, then a cadet patrol officer who drove the truck which transported the Phillip Creek children to the Retta Dixon Home, and Mr Desmond Walter, a former missionary posted to the Home from 1954 to 1955, whom Mrs Cubillo accused of having beaten her, thereby inflicting on her physical and emotional injuries.

28 The second group of witnesses for the Commonwealth gave evidence of Mr Gunner's circumstances at Utopia Station and of the conditions prevailing at St Mary's Hostel. These witnesses included Sister Eileen Heath, who founded St Mary's Hostel but left in 1955 to become a welfare officer in the Northern Territory Administration, and Captain Colin Steep, who was the warden at St Mary's from January 1956 until November 1959.

29 The third group included former patrol officers and other officers of the Native Affairs Branch or the Welfare Branch of the Northern Territory Administration who gave evidence as to the policies and practices of the time in relation to part-Aboriginal children in the Northern Territory. In addition, the Commonwealth called its own expert and medical evidence. An instructing solicitor for the Commonwealth also filed affidavits concerning potential witnesses who were dead or could not be located.

30 In his judgment, the primary Judge identified a number of persons who had the potential to be "important" or "significant" witnesses but who had died before the trial or were otherwise unable to give helpful evidence [53]-[63]. These included the following:

* The four successive Administrators of the Northern Territory during the period 1946 to 1961, all of whom could have given evidence as to the policies adopted during that period in relation to part-Aboriginal children in the Northern Territory. All had died before the trial.

* Mr Frank Moy, who was the Director of Native Affairs from 14 November 1946 until 21 May 1953 and who held office when Mrs Cubillo was removed from the Phillip Creek Settlement [55]-[57]. His Honour considered it curious that neither party "could produce a single document in respect of that removal" [56]. He was satisfied that Mr Moy "would have had some knowledge and some involvement in the removal of the children" but that, because of Mr Moy's death, there was no way of finding out the details of his knowledge or involvement [1401].

* Miss Amelia Shankelton, who was "directly involved" in taking Mrs Cubillo from the Phillip Creek Settlement to the Retta Dixon Home and was the Superintendent of the Home throughout the whole period of Mrs Cubillo's residency [62]. Miss Shankelton died in 1990. His Honour considered that the absence of her evidence was a "huge gap" [1403].

* Mr R K McCaffrey, who was the Acting Director of Native Affairs from 22 May 1953 to 25 November 1954. The primary Judge considered Mr McCaffrey to be a "potentially valuable witness" who might have been able to assist the Court with respect to the standards and operations of the Retta Dixon Home during the relevant time [1402].

* Mr Harry Giese, who became Director of Native Affairs on 26 November 1954 and who continued in that position until 1963. (The Native Affairs Branch was renamed the Welfare Branch upon the repeal of the *Aboriginals Ordinance* on 13 May 1957 and Mr Giese thereupon became the Director of Welfare.) His Honour noted that a substantial amount of written material prepared or approved by Mr Giese was in evidence, but that this was "no substitute for Mr Giese's oral evidence" [58]. He found that Mr Giese had the potential to be a "most important witness" and that such evidence as he may have been able to give about Mr Gunner's removal from Utopia had been lost. Mr Giese was alive at the time of the trial but was too infirm to give evidence.

* All the District Welfare Officers or Acting District Welfare Officers who were stationed at Alice Springs during Mr Gunner's stay at St Mary's Hostel. According to his Honour, each had the potential to give important evidence as to how the Native Affairs Branch and later the Welfare Branch administered policy [61]. He mentioned in particular Mr Harry Kitching, who was personally involved in the events surrounding the removal of Mr Gunner from Utopia Station. Mr Kitching in fact gave evidence, but his

memory of the events was confused. His Honour found that "that confusion ha[d] the potential to have an adverse impact on the Commonwealth in the preparation of its defence" [1404].

31 In later sections of the judgment, the primary Judge referred to other persons whose evidence might have shed light on important events, but who were dead or infirm. For example, when analysing the evidence relating to the removal of Mrs Cubillo from the Phillip Creek Settlement, his Honour noted that the evidence disclosed nothing about the role played by Mr Ivor Thomas, the missionary in charge of the Settlement, Mrs Thomas or Mr Colley, the resident school teacher. All had died [441].

THE ORDERS

32 We refer later in this judgment to the reasoning of the primary Judge on the various issues raised by him, at least to the extent that they remain issues on the appeal. At this point it is necessary only to note that the primary Judge made the following substantive order:

> "*The [sic: Each] application for an extension of time under s 44(b) [sic: s 44(1)] of the* Limitation Act 1981 *(NT) is refused and each claim is dismissed.*"

(The order is reproduced in the report in the *Australian Law Reports: Cubillo v Commonwealth* [2000] FCA 1084; (2000) 174 ALR 97, at 582. The order is not reproduced in the *Federal Court Reports*.) His Honour also reserved any question of costs for further consideration. We were informed that the primary Judge was not asked to make any order for costs.

33 The appellants filed their respective notices of appeal on 1 September 2000. In doing so, they plainly proceeded on the assumption that the primary Judge's judgment was final and that an appeal lay as of right to the Full Court.

34 The Commonwealth took the position, however, that the primary Judgment was interlocutory in character, since an order refusing an extension of time is interlocutory and not final. Accordingly, on 24 October 2000, the Commonwealth filed a notice of motion seeking, *inter alia,* to strike out the appeal as incompetent. It maintained that by virtue of s 24(1A) of the *Federal Court Act* the appellants could not bring an appeal against the interlocutory judgment without the leave of the Court.

35 In order to guard against the possibility that the Commonwealth was right, the appellants filed their own motion seeking leave to appeal from the judgment. They also sought an order extending the time for applying for leave to appeal, since the application for leave had not been filed within seven days from the pronouncement of the judgment as required by *Federal Court Rules* ("*FCR*") O 52 r 10(2)(b) in the case of interlocutory judgments.

THE LEGISLATION

36 In order to understand the judgment of the primary Judge and the issues at trial and on appeal it is necessary to set out the provisions of the legislation at the heart of the case. In this section we deal with the *Aboriginals Ordinance*, the *Welfare Ordinance 1953* (NT) and the limitations legislation in force in the Northern Territory, namely the *1866 Act* and the *Limitation Act*.

THE ORDINANCE MAKING POWER

37 The Commonwealth acquired exclusive jurisdiction over the Northern Territory in 1910: *Northern Territory Acceptance Act 1910* (Cth). Section 13(1) of the *Northern Territory (Administration) Act 1910* (Cth) ("*Administration Act*") empowered the Governor-General to make Ordinances having the force of law in the Northern Territory, subject to a power of disallowance in each House of Parliament: see s 13(2), (3). The *Administration Act* provided for the Governor-General to appoint an Administrator for the Territory who was to perform the powers and functions of his office according to the tenor of his commission and according to instructions given by the Minister: s 4.

38 Until 1947, the powers of the Governor-General under the *Administration Act* remained substantially the same. The *Northern Territory (Administration) Act 1947* (Cth) amended the *Administration Act* to establish a Legislative Council, with power to make Ordinances for the peace, order and good government of the Territory: s 4U. Such Ordinances had no effect until assented to by the Administrator (s 4V) and the Governor-General had power to disallow any Ordinance within six months of the Administrator's assent (s 4W). The Administrator was not to assent to any Ordinance relating to "Aboriginals or Aboriginal Labour" unless the Ordinance contained a clause suspending its operation until the signification of the Governor-General thereon (s 4Y(c)). See generally *Kruger v The Commonwealth* [1997] HCA 27; (1997) 190 CLR 1, at 49-50, per Dawson J; *Northern Territory v GPAO* (1999) 196 CLR 553, at 576-577, per Gleeson CJ and Gummow J.

THE ABORIGINALS ORDINANCE 1918 (NT)

The Provisions

39 The Governor-General made the *Aboriginals Ordinance* pursuant to s 13(1) of the *Administration Act* on 12 June 1918. It came into force the following day. The *Aboriginals Ordinance* repealed the *Aboriginals Ordinance 1911* (NT) and also declared that the *Northern Territory Aboriginals Act 1910* (SA), which had been continued in force by the *Acceptance Act,* ceased to apply to the Northern Territory.

40 The *Aboriginals Ordinance* was repealed by the *Welfare Ordinance 1953* (NT) ("*Welfare Ordinance*"), with effect from 13 May 1957. It was therefore in force when Mrs Cubillo and Mr Gunner were removed in 1947 and 1956, respectively. It was also in force throughout the period Mrs Cubillo was resident at the Retta Dixon Home and for the first year of Mr Gunner's residence at St Mary's Hostel.

41 Section 4 of the *Aboriginals Ordinance,* in its original form, provided for the appointment of a "Chief Protector of Aboriginals" by the Administrator. The Chief Protector was to be "under the Administrator" and was to be "responsible for the administration and execution of this Ordinance". In 1939, the title of "Chief Protector of Aboriginals" was changed to "Director of Native Affairs": see *Aboriginals Ordinance 1939* (NT), ss 2, 3. The Administrator was also empowered by s 4 to appoint Protectors of Aboriginals, a title which survived the 1939 amendments. Section 4(4) of the *Aboriginals Ordinance* provided that the Director could, in relation to any matter or class of matters, delegate all or any of his powers and functions.

42 Section 3 of the *Aboriginals Ordinance* defined the word "Aboriginal" in terms reflecting the attitudes of the times. The expression was defined to mean any person who was

> "*(a) an aboriginal native of Australia or of any of the islands adjacent or belonging thereto; or*
> *(b)* a half-caste who lives with an aboriginal native as wife or husband; or
>
> *(c)* a half-caste, who, otherwise than as the wife or husband of such an aboriginal native, habitually lives or associates with such aboriginal natives; or
>
> *(d)* a half-caste male child whose age does not apparently exceed eighteen years; or
>
> *(e)* a female half-caste not legally married to a person who is substantially of European origin or descent and living with her husband."

The term "half-caste" was defined, in a circular fashion, to mean

> "*...any person who is the offspring of parents, one but not both of whom is an aboriginal and includes any person one of whose parents is a half-caste.*"

Although his Honour does not appear to have made a formal finding concerning the application of these definitions to Mrs Cubillo in July 1947, the time of her removal from the Phillip Creek Settlement, there seems to be no doubt that she fell within pars (c) and (e) of the definition of "Aboriginal" in force at that time.

43 The *Aboriginals Ordinance (No 2) 1953* (NT) (the "*1953 Ordinance*"), which came into force on 1 October 1953**,** removed all references to "half-castes" in the *Aboriginals Ordinance* and substituted a new definition of "Aboriginal": see ss 3, 5, 7, 8, Schedule. The new definition was as follows:

> "*(a) a person who is an aboriginal native of Australia...;*
> *(b)* a person who lives after the manner of, follows, adheres to or adopts the customs of persons described in paragraph (a) of this definition and at least one of whose ancestors was a person described in that paragraph;
>
> *(c)* a person, being under the age of eighteen years, at least one of whose ancestors was a person described in paragraph (a) of this definition, and:
>
> *(i)* whose care, custody, or control has been undertaken by the Director under section six of this Ordinance before the date when the Aboriginals Ordinance (No 2) 1953 comes into operation; or
>
> *(ii)* whom the Director has caused to be kept in a reserve or an aboriginal institution under section sixteen of this Ordinance, before the date when the Aboriginals Ordinance (No 2) 1953 comes into operation; or
>
> *(d)* ...".

One consequence of the *1953 Ordinance* was that part-Aboriginal people who formerly were "Aboriginals" because they were so-called "half-castes" were now no longer necessarily within the amended definition of "Aboriginal".

44 The primary Judge found that Mrs Cubillo came within par (c) of the amended definition of

"Aboriginal" [140]. He made this finding because at the time she was under the age of eighteen; one of her ancestors was an Aboriginal native of Australia; and an order of committal had been made on 18 August 1953 pursuant to ss 6 and 16 of the *Aboriginals Ordinance* committing her to the Retta Dixon Home until 8 August 1956, the date thought to be her eighteenth birthday. His Honour did not specify the date from which Mrs Cubillo came within the definition but presumably he took the view that it was on 1 October 1953, the date of commencement of the *1953 Ordinance.*

45 His Honour found that Mr Gunner, whose removal from Utopia Station did not occur until 1956, came within par (b) of the 1953 definition, as his mother was an Aboriginal native of Australia and he was a person living "after the manner of" persons who were Aboriginal natives of Australia [1140]. Although his Honour did not expressly say so, that finding was presumably limited to the time Mr Gunner was living at Utopia Station, prior to his removal to St Mary's Hostel. However, on 20 February 1957 a declaration was made by the Director of Native Affairs pursuant to s 3A of the *Aboriginals Ordinance,* declaring that Mr Gunner was deemed to be an Aboriginal within the meaning of the *Aboriginals Ordinance.* Section 3A, which was amended by s 4 of the *1953 Ordinance,* provided that such a declaration could be made if, *inter alia,* the Director considered it in the best interests of the person concerned: s 3A(1)(b). Previously, s 3A had given the Director an unfettered discretion to grant exemption certificates to Aboriginals, removing them in whole or in part from the controls imposed by the *Aboriginals Ordinance.*

46 Section 5(1) of the *Aboriginals Ordinance* empowered the Director of Native Affairs (formerly the Chief Protector):

> "*(a) to apportion, distribute, and apply, as seems most fit, under the direction of the Administrator, the moneys at his disposal for the purpose of carrying out this Ordinance; (b)* to distribute blankets, clothing, provisions, and other relief or assistance to the aboriginals;
>
> *(c)* to provide, as far as practicable, for the supply of food, medical attendance, medicines, and shelter for the sick, aged and infirm aboriginals;
>
> *(d)* to provide, when possible, for the custody, maintenance, and education of the children of aboriginals;
>
> *(e)* to manage and regulate the use of all reserves for aboriginals; and
>
> *(f)* to exercise a general supervision and care over all matters affecting the welfare of the aboriginals, and to protect them against immorality, injustice, imposition and fraud."

47 Section 6(1) of the *Aboriginals Ordinance,* prior to the 1953 amendments, provided as follows:

> "*(1) The Director shall be entitled at any time to undertake the care, custody, or control of any aboriginal or half-caste if, in his opinion it is necessary or desirable in the interests of the aboriginal or half-caste for him to do so, and for that purpose may enter any premises where the aboriginal or half-caste is or is supposed to be, and may take him into his custody.*"

Section 6(2) required any person "on whose premises an aboriginal or half-caste is", on demand by or on behalf of the Director, to facilitate by all reasonable means within his power the taking into custody of the aboriginal or half-caste. The 1953 amendments removed the references to "half-caste" in s 6 of the *Aboriginals Ordinance* (see [43] above).

48 Section 7(1) of the *Aboriginals Ordinance,* in its pre-1953 form, provided as follows:

> "*(1) The Director shall be the legal guardian of every aboriginal and of every half-caste child, notwithstanding that the child has a parent or other relative living, until the child attains the age of eighteen years, except while the child is a State child within the meaning of the Act of the State of South Australia in force in the Northern Territory entitled* The State Children Act *1895, or any Act of that State or Ordinance amending or substituted for that Act.*"

49 The *1953 Ordinance* repealed and replaced s 7 with a simpler provision, as follows:

> "*7. The Director is the legal guardian of all aboriginals*".

50 Section 13(1) of the *Aboriginals Ordinance* empowered the Administrator to declare any mission, school, home or other privately supported institution to be an "aboriginal institution for the maintenance, custody, and care of aboriginal and [before 1953] half-caste children". Any such declaration was to name some person as the Superintendent of the aboriginal institution: s 13(2). The Administrator was empowered to revoke any declaration made under s 13(1): s 13(3). Section 13(6) of the *Aboriginals Ordinance,* in its pre-1953 form, provided as follows:

> "*(6) Every aboriginal and half-caste child for the time being an inmate of any aboriginal institution shall be under the control and supervision of the Superintendent.*"

51 As the primary Judge observed [142], s 13 of the *Aboriginals Ordinance* conferred a power on the Director of Native Affairs that was independent of the power conferred by s 6. The purpose of s 13 was to provide for the creation of "aboriginal institutions" which were then subject to other provisions of the legislation such as s 14, authorising the Administrator to grant leases of Crown Lands to Aboriginal institutions. The Director could undertake the care, custody or control of an Aboriginal child pursuant to s 6 (in the circumstances specified in that provision) and, having done so, could place the child in an Aboriginal institution.

52 Section 15 of the *Aboriginals Ordinance* gave a Protector power to approve the removal of Aboriginals or half-castes. Section 15, so far as relevant, in its pre-1953 form, provided as follows:

> "*(1) A Protector may if he thinks fit give authority in writing to any person so desiring it for the removal of any aboriginal, or any female half-caste, or any half-caste male child under the age of eighteen years, from one district to another, or from any reserve or aboriginal institution to another reserve or aboriginal institution, or to any place beyond the Northern Territory.*
>
> *...*

> *(4) Any person who, without the authority in writing of a Protector, removes or causes to be removed any aboriginal or any female half-caste or any half-caste child under the age of eighteen years from one district to another, or to any place beyond the Northern Territory, shall be guilty of an offence against this Ordinance.*"

53 Section 16(1) of the *Aboriginals Ordinance* gave the Director important powers in relation to Aboriginals on reserves or in Aboriginal institutions. Section 16(1), in its pre-1953 form, provided as follows:

> "*(1) The Director may cause any aboriginal or half-caste 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.*"

Any Aboriginal or half-caste who refused or resisted removal or who refused to remain within a reserve or aboriginal institution was guilty of an offence: s 16(2). Section 16(3) excluded from the scope of s 16(1) any Aboriginal or `half-caste':

> "*(a) who is lawfully employed by any person; or*
> *(b)* who is the holder of a permit to be absent from the reserve or aboriginal institution in question; or
>
> *(c)* who is a female lawfully married to and residing with a husband who is substantially of European origin or descent; or
>
> *(d)* for whom, in the opinion of the Director, satisfactory provision is otherwise made."

Case Law

54 In *Kruger v The Commonwealth* [1997] HCA 27; (1997) 190 CLR 1, a challenge was made to the constitutional validity of ss 6, 7 and 16 of the *Aboriginals Ordinance.* The attack included contentions that the provisions infringed implied constitutional rights to freedom of movement and association, an implied constitutional immunity from detention without due process and an implied constitutional guarantee of legal equality. In rejecting the constitutional challenge (Gaudron J dissenting), the members of the High Court addressed aspects of the construction of ss 6, 7 and 16.

55 Brennan CJ observed (at 35) that the power in s 6 was conditioned upon the Director's opinion that "it [was] necessary or desirable in the interests of the Aboriginal or half-caste for him to do so". According to the Chief Justice (at 35-36):

> "*This is a power which in terms is conferred to serve the interests of those whose care, custody or control might be undertaken. It is not a power to be exercised adversely to those individual interests*".

His Honour also said (at 37) that s 7 of the *Aboriginals Ordinance* was a law calculated to advance the interests of the "Aboriginals and half-castes of the Northern Territory".

56 The Chief Justice pointed out (at 36) that a power which is to be exercised in the interests of another may be misused and commented that:

> *"[r]evelations of the ways in which the powers conferred by the Ordinance were exercised in many cases has profoundly distressed the nation".*

Nonetheless, he noted that "the susceptibility of a power to its misuse is not an indicium of its invalidity". Brennan CJ also addressed (at 36-37) the need for the discretionary power to be exercised reasonably. He did so in these terms:

> *"[W]hen a discretionary power is statutorily conferred on a repository, the power must be exercised reasonably, for the legislature is taken to intend that the discretion be so exercised. Reasonableness can be determined only by reference to the community standards at the time of the exercise of the discretion and that must be taken to be the legislative intention. Therefore, it would be erroneous in point of law to hold that a step taken in purported exercise of a discretionary power was taken unreasonably and therefore without authority if the unreasonableness appears only from a change in community standards that has occurred since the step was taken."*

57 The Chief Justice took the view (at 37) that s 16 was a provision of a different kind. On its face it was not simply intended to serve the interests of the persons over whom the power might be exercised. He quoted with approval comments made by Fullagar J in *Waters v The Commonwealth* [1951] HCA 9; (1951) 82 CLR 188, at 194-195. In that case the plaintiff, an "Aboriginal" within the "*Aboriginals Ordinance*", sought relief in respect of what he claimed was unlawful detention. He had been taken into custody and removed to a reserve in pursuance of an order made by the Director of Native Affairs under ss 6 and 16 of the *Aboriginals Ordinance*, because of his involvement in a "protest strike" and other industrial action on an Aboriginal reserve: see at 195. One of the arguments advanced by the plaintiff was that the statutory powers had not been exercised bona fide for any purpose for which they were conferred. The passage from Fullagar J's judgment quoted by Brennan CJ is this:

> *"The powers which the Director wields are vast, and those over whom he wields them are likely often to be weak and helpless. His responsibility is heavy. When he acts, every presumption has to be made in his favour. He must often act on his own opinion in circumstances of difficulty, and no court can substitute its opinion for his. But, on the other hand, the courts must be alert to see that, if that which is not expected does happen and he does mistake or abuse his power, the mistake or abuse does not go either undetected or unredressed. The material before me in this case, however, fails completely, in my opinion, to make a prima facie case of abuse of power.*
> *It was argued that, both under s 6 and under s 16, the only consideration which should affect the discretion of the Director was the welfare of the particular Aboriginal concerned. This may be so under s 6, but, so far as s 16 is concerned, it is, in my opinion, by no means the only legitimate consideration. Unlike s 6, s 16 contains no reference to the formation of any particular opinion on the part of the Director. The*

> *discretion given is in terms absolute. I have no intention, on such an application as this, of laying down any rules for the guidance of the Director. But I think I should say that, in my opinion, he may legitimately take into consideration a number of other factors in addition to the welfare of the particular Aboriginal concerned, and that these include the welfare of other Aboriginals and the general interests of the community in which the particular Aboriginal dwells.*"

58 Other members of the Court in *Kruger* expressed the view that the *Aboriginals Ordinance* was intended to have a "welfare" purpose. Both Dawson and Toohey JJ referred to the legislative antecedents of the *Ordinance* in order to support this view, although their views as to the origins of the legislation were not identical: see at 52, per Dawson J; at 76, per Toohey J. Dawson J (with whom McHugh J agreed) observed (at 51-2) that

> "*whilst s 16 did not contain any explicit requirement that the powers which it conferred were to be exercised for the welfare of Aboriginals or `half-castes', it is clear enough that it was so circumscribed.*"

Gummow J thought (at 162) that the powers of the Director were

> "*reasonably capable of being seen as necessary for a legitimate non-punitive purpose (namely the welfare and protection of those persons [liable to be taken into custody and care]".*

See also at 76-77, 85, per Toohey J; cf at 129-130 per Gaudron J (dissenting). It is not entirely clear whether there was any substantial difference between Brennan CJ's approach to s 16 and that of Dawson and Gummow JJ. (For criticism of the approach to the construction of the *Aboriginals Ordinance* in *Kruger,* see J Clarke, *Case Note* (*Cubillo v Commonwealth*) (2001) 25 Melb Uni LR 218, at 222-224.)

59 Reference should also be made to the decision of Kriewaldt J of the Supreme Court of the Northern Territory in *Ross v Chambers* (unreported, 5 April 1956). The issue in that case was whether Aboriginals of full age could sue in their own names, having regard to the terms of s 7 of the *Aboriginals Ordinance* in its post-1953 form. Kriewaldt J held that s 7 did not prevent the plaintiffs proceeding without naming a next friend. His Honour rejected the defendant's argument that s 7 was intended to equate, in every respect, the position of an adult aboriginal *qua* the Director to the position of an infant ward *qua* his or her guardian.

60 Kriewaldt J pointed out that guardians of infants are generally entitled to the legal care and custody of their wards. His Honour continued:

> "*[C]ustody includes the right to determine the place of residence of the ward. Can it be suggested that since 1953 the Director can, as a matter of course determine the place of residence of every adult aboriginal in the Territory? If section 7 requires an affirmative answer, then the section operated to repeal section 16 which restricts the right of the Director to determine the residence of aboriginals if the aboriginal is lawfully employed, or if the aboriginal is a female lawfully married to a white person.*"

61 Kriewaldt J considered that there were further reasons supporting his construction of s 7. These included the language of s 5(1)(d) and (f) which

> "*points to the custody of infant aboriginals being normally elsewhere than in the Director and derogates from the argument that section 7 gives to him perpetual custody of all aboriginals, infant or adult.*"

His Honour pointed out that s 6 presupposed that the Director was not in law at all times possessed of the custody of every aboriginal and ss 15 and 16 would not have been necessary if the Director were a guardian "to the fullest extent". He concluded that s 7 was not intended to create a new status for aboriginals differing from that which the earlier legislation had created.

62 It should be noted that in *Ross v Chambers,* Kriewaldt J expressed the tentative view, *obiter,* that the word "aboriginal" was used in s 7(1) in its pre-1953 form as an adjective and that, accordingly, the sub-section was intended to refer only to half-caste and Aboriginal children. His Honour acknowledged, however, that the contrary view seemed to have been taken by Fullagar J in *Waters v The Commonwealth* [1951] HCA 9; (1951) 82 CLR 188, at 193. In *Kruger v The Commonwealth,* the question of construction was not adverted to expressly, but the judgments appear to assume that s 7(1) was not confined in the manner suggested by Kriewaldt J.

63 In *Kruger v The Commonwealth* only Dawson J referred to *Ross v Chambers.* Dawson J merely observed (at 52) that the "precise scope of s 7...is far from clear as was recognised...in *Ross v Chambers*" and recorded Kriewaldt J's view that the guardianship for which the section provided could not, as regards adult Aboriginals, embrace all the incidents which normally attach to the relationship of guardian and ward.

THE WELFARE ORDINANCE 1953 (NT)

The Provisions

64 The *Welfare Ordinance* came into force on 13 May 1957. By that date, Mrs Cubillo had left the Retta Dixon Home. The *Welfare Ordinance* is therefore relevant only to Mr Gunner's position. He, of course, remained in St Mary's Hostel until 1963.

65 The Director of Welfare was appointed by the Minister and was responsible, under the Administrator, for the administration of the *Welfare Ordinance:* s 7(1). The Director's duties were set out in s 8. They included the following:

> "*(a) in relation to wards, to take steps -*
> *(i)* to promote their social, economic and political advancement for the purpose of assisting them and their descendants to take their place as members of the community of the Commonwealth;
>
> *(ii)* to arrange as far as is practicable for the education of wards...;
>
> *(iii)* to promote their physical well being, to inculcate proper habits of hygiene and sanitation and to improve their standards of nutrition and housing;

(iv) to detect, prevent and cure disease...;

(v) to arrange for their vocational training and to obtain suitable employment for them in industrial and other enterprises...;

(vi) to provide such relief and assistance as is necessary or appropriate; and

(vii) to exercise a general supervision and care over matters affecting their welfare;

(b) ...;

(c) to supervise and regulate the use and management of institutions, other than institutions established by the Commonwealth;

(d) to control the management of institutions established by the Commonwealth;

(e) to supervise and regulate the use and management of reserves;

(f) ...".

The Director was empowered to delegate all or any of his powers, functions and authorities under the *Welfare Ordinance:* s 10(1*).*

66 The primary Judge held that s 8(c) of the *Welfare Ordinance* imposed a statutory duty on the Director of Welfare to supervise and regulate St Mary's Hostel [1261]. His Honour considered that, although s 8(c) of the *Welfare Ordinance* was not expressed in the same terms as the *Aboriginals Ordinance,* the Director of Welfare was subject to the same duty of supervision and regulation as was imposed on the Director of Native Affairs.

67 The expression "ward" was defined in s 6 to mean a person in respect of whom a declaration under s 14 was in operation. Section 14 was not in terms confined to Aboriginals, but that was its effect. Section 14(1) empowered the Administrator to

"*declare a person to be a ward if that person, by reason of -*
(a) his manner of living;

(b) his inability, without assistance, adequately to manage his own affairs;

(c) his standard of social habit and behaviour; and

(d) his personal associations,

stands in need of such special care or assistance as is provided for by this Ordinance."

Section 14(2)(a) provided that a person eligible to vote in federal elections, or who would be so eligible if aged 21, could not be declared a ward. The effect of this, as the High Court observed in *Namatjira v Raabe* [1959] HCA 13; (1959) 100 CLR 664, at 667, was to exclude, subject to minor exceptions, everybody except Aboriginals (the latter then being ineligible to vote: see Clarke, *Case Note,* at 244).

68 Section 14(2) was repealed by the *Welfare Ordinance 1961* (NT), s 5. Section 32 of the *Welfare Ordinance* permitted a ward to apply on certain specified grounds to the Wards Appeal Tribunal for

the revocation of a declaration under s 14.

69 Section 17 conferred powers on the Director in relation to wards:

> "*(1) Where the Director considers that it is in the best interests of a ward, he may -*
> *(a)* take the ward into his custody;
>
> *(b)* authorize a person to take the ward into custody on behalf of the Director;
>
> *(c)* order that the ward be removed to, and kept within, a reserve or institution;
>
> *(d)* order that the ward be kept within a reserve or institution; and
>
> *(e)* order that the ward be removed from one reserve or institution to another reserve or institution.
>
> *(2)* The Director shall not exercise a power under the last proceeding sub-section if by so doing-
>
> *(a)* a child under, or appearing to be under, the age of fourteen years would be removed from his parents; or
>
> *(b)* a parent would be removed from his children,
>
> unless the Administrator has, in writing, authorized the Director so to do."

70 Section 24 of the *Welfare Ordinance,* in its original form, provided that, except for the purposes of commencing certain legal proceedings, the Director was "the guardian of all wards for all purposes". In consequence of an amendment effected by s 4 of the *Welfare Ordinance (No 2) 1957* (NT), s 24(1) provided that the Director was

> "*the guardian of the person and estate of a ward as if that ward were an infant and the Director were the guardian of that infant for all purposes except [the commencement of certain legal proceedings].*"

71 The Administrator declared Mr Gunner, along with some 15,000 others, to be a ward under s 14 of the *Welfare Ordinance* on the day it came into force, 13 May 1957. The primary Judge, however, found that there was no evidence that the Director of Welfare had ever made an order for the continued detention of Mr Gunner under s 17 of the *Ordinance* [155].

Case Law

72 In *Namatjira v Raabe,* the artist Albert Namatjira had been sentenced to six months imprisonment for supplying liquor to Mr Raberaba, a ward within the meaning of the *Welfare Ordinance*. Mr Raberaba, like Mr Gunner and many others, had been declared a ward by a "block" declaration. Mr Namatjira challenged his conviction on the ground, *inter alia,* that the declaration making Mr Raberaba a ward was invalid because Mr Raberaba was not afforded an opportunity to be heard prior to the declaration being made.

73 In an *ex tempore* judgment, Dixon CJ, on behalf of the Court, rejected the contention. He

described (at 669) wardship as "a special status of pupilage". This suggested, at least initially, that it might prove necessary to imply a condition that an opportunity be given to the proposed ward to argue against the making of the declaration. But his Honour considered that a "block" declaration was in fact authorised by the legislation (at 669-670):

> *"If you then turn to the actual operation of s 14, it is at once apparent that it is directed to the large body of persons existing in the Northern Territory of whom it might well be thought that it was necessary to give them the particular status of wards as described in the Ordinance. It is a status substantially the same as that which they occupied under the* Aboriginals Ordinance. *Next you find that the power to declare them wards is given to the Administrator. The Administrator is, in the Northern Territory, the head of the government in that Territory, that is to say, the local government of that Territory. One would not expect to find, if it was intended that each individual case were to be inquired into and the particular circumstances of the case ascertained, that such a duty or function would be committed to the head of a government, even if it be the head of a government of a federal territory. The head of a government acts usually on the advice of officers and upon departmental reports.*
> *To sum the matter up, the legislation takes the place of prior legislation under which a large body of aboriginals had a particular status analogous to that which is given here; it confers a power to give a similar status to persons who stand in need of special care and assistance; the power is almost confined in its application to aboriginals, having regard to the ambit of the exclusions; they are persons who might be regarded as being as a class in such need and on the grounds enumerated; the power is reposed in the Administrator of the Territory; a person declared a ward has a right of appeal should he choose to exercise it and be in a position to exercise it; and the status given is protective in its nature."*

THE LIMITATIONS LEGISLATION

The Judiciary Act

74 Neither the primary Judgment nor the submissions explained precisely why the *1866 Act* (an enactment which continued in force in the Northern Territory after 1910) and the *Limitation Act* applied to the claims brought by the appellants. It seems to have been assumed that s 79 of the *Judiciary Act* has this effect. Section 79 provides as follows:

> *"The laws of each State or Territory, including the laws relating to procedure, evidence, and the competency of witnesses, shall, except as otherwise provided by the Constitution or the laws of the Commonwealth, be binding on all Courts exercising federal jurisdiction in that State or Territory in all cases to which they are applicable."*

75 The primary Judge was exercising federal jurisdiction in the Northern Territory when hearing the case there. This is because the proceedings, which were originally instituted in the High Court and remitted to the Federal Court, involved a matter in which the Commonwealth was a party: *Constitution,* s 75(iii); *Judiciary Act 1903* (Cth) ("*Judiciary Act*"), s 44(2A), (3); *Northern Territory v*

GPAO (1999) 196 CLR 553, at 575, per Gleeson CJ and Gummow J. Neither party suggested that the fact that a small part of the case was heard in Melbourne precluded it being said that the primary Judge was exercising federal jurisdiction in the Northern Territory: cf *Kruger v The Commonwealth* [1997] HCA 27; (1997) 190 CLR 1, at 138-139, per Gaudron J. Since it was not suggested that any Commonwealth law "otherwise provided" within the meaning of s 79 of the *Judiciary Act,* the effect of s 79 was therefore to render the limitation laws of the Territory applicable to the present case. There was nothing in the language of the *1866 Act* or the *Limitation Act* which made it impossible for them to be "picked up" by s 79: see *Kruger v Commonwealth,* at 140, per Gaudron J; *Australian Securities and Investments Commission v Edensor Nominees Pty Ltd* (2000) 177 ALR 329, at 350, per Gleeson CJ, Gaudron and Gummow JJ. We therefore proceed on the basis adopted by the parties, namely that the Northern Territory limitations legislation applied to the appellants' claims.

The Limitation Periods

76 All laws in force in the Northern Territory at the time of the acceptance of the Territory by the Commonwealth continued in force: *Northern Territory Acceptance Act 1910* (Cth), s 7. The laws so continued included the *1866 Act* which remained in force until 26 February 1982. On that date, the *Limitation Act* came into force. Section 3(2) of the *Limitation Act* provided that the Acts of South Australia listed in Part II of the Schedule, including the *1866 Act,* were to "cease to apply as laws of the Territory". Of course in the present case, the alleged false imprisonment of each of the appellants and the acts said to constitute breaches of the duties owed to them by the Commonwealth occurred long before 1982.

77 The *1866 Act,* s 36, provided that all actions grounded "upon the case" and "actions for other causes which would be brought in the form of actions called trespass on the case", save as thereafter excepted, were to be "commenced and sued within six years next after the cause of such action or suit, but not after". Section 37 of the *1866 Act* provided, *inter alia,* that all actions for assault, trespass and imprisonment were to be "commenced and sued within three years next after the cause of such action, but not after". Section 47 provided that if a person was an infant when his or her right to bring an action first accrued, the relevant limitation period commenced to run when that person became of full age.

78 Section 9 of the *Limitation Act* provides as follows:

> "*(1) Except as provided in [s 44] nothing in this Act*
> *(a)* enables a person to bring an action that was barred before the commencement of this Act by an enactment repealed or amended by this Act, except so far as the cause or right of action may be revived by confirmation in accordance with this Act; or
>
> *(b)* ....
>
> *(2)* The time for bringing proceedings in respect of a cause of action that arose before the commencement of this Act shall, if it has not then expired, expire at the time it would have expired -
>
> *(a)* had this Act not come into operation; or

(b) had this Act at all material times been in operation,

whichever is the later.

(3) Except as provided in this section, nothing in this Act affects an action if the cause of action upon which that action is founded arose before the commencement of this Act."

79 It will be seen that where a person's action is barred under the *1866 Act* before the commencement of the *Limitation Act,* that person cannot thereafter bring the action (in the absence of revival by confirmation) except pursuant to an order for extension of time under s 44: s 9(1), (3). If the time for bringing proceedings in respect of a cause of action that arose before the commencement of the *Limitation Act* had not expired by the date of commencement, the applicable limitation period is to be determined in accordance with s 9(2).

80 The *Limitation Act* provides that an action in tort is "not maintainable" after the expiration of a limitation period of three years from the date on which the cause of action first accrues: s 12(1)(b). Section 12 does not apply, save insofar as it may be applied by analogy, to a cause of action for equitable relief: s 21. The *Limitation Act* provides for the suspension of limitation periods where the person having a cause of action is under a disability but specifies, in any event, a limitation period which expires three years after the disability ceases: s 36(1).

When Were the Tortious Causes of Action Barred?

81 The issue of whether the appellants' causes of action in tort had been statute barred remained live until close to the end of the trial. Senior counsel for the appellants ultimately acknowledged in his final submissions at the trial that the limitation periods for each of the appellants' causes of action in tort had expired before the institution of the proceedings in October 1996 [1308]. The appellants did not seek to resile from this concession on the appeal.

82 In these circumstances, it is not strictly necessary to recount his Honour's reasoning as to when the tortious causes of action had been barred. However, the reasoning provides a starting point for the primary Judge's analysis of the appellants' applications for extension of time. Moreover, it was common ground that his Honour had relied on provisions in the *Limitation Act* that did not in truth apply to the appellants' causes of action. The correct position should therefore be explained.

83 The primary Judge appears to have proceeded on the basis that the limitation periods applicable to the appellants' causes of action are those prescribed by the *Limitation Act,* although at some points in the judgment he appears to have left open the possibility that the *1866 Act* was applicable. He apparently took the view that s 3(5) of the *Limitation Act* has the effect that the limitation periods prescribed by the *Limitation Act* can apply to causes of action arising long before its commencement. Section 3(5) of the *Limitation Act* provides that, subject to s 9, the *Act* applies in the Northern Territory to the exclusion of all Imperial and South Australian Acts relating to limitation of actions. In adopting this approach, his Honour seems to have overlooked the words qualifying s 3(5), namely "[s]ubject to section 9".

84 Neither party suggested that anything of substance turned on his Honour's apparent oversight. His Honour found [1327] that the causes of action in false imprisonment accrued during the respective

infancies of Mrs Cubillo and Mr Gunner and that the effect of s 36 of the *Limitation Act* was that the limitation period expired three years after each attained the age of twenty-one. In Mrs Cubillo's case, this would mean that she should have instituted her proceedings for false imprisonment before 8 August 1962 (34 years before she in fact did so) and that Mr Gunner should have instituted his proceedings for false imprisonment before 19 September 1972 (24 years before he in fact did so).

85 On the appeal the parties accepted that the ultimate findings made by the primary Judge were correct. The appellants did not, however, dispute the Commonwealth's contention that the result came about in each case by reason of ss 37 and 47 of the *1866 Act,* read in conjunction with s 9(1) and (3) of the *Limitation Act,* and not by reason of s 36 of the *Limitation Act.*

86 The primary Judge found that Mrs Cubillo's cause of action for breach of duty resulting in psychological injury and "cultural loss" accrued while she was an infant, prior to her departure from the Retta Dixon Home. He further found that the limitation period ended on 8 August 1962 (if the *Limitation Act* applied) or on 8 August 1965 (if the *1866 Act* applied) [1328]. The appeal proceeded on the basis that the correct date was 8 August 1965, by reason of ss 36 and 47 of the *1866 Act,* read together with s 9(1) and (3) of the *Limitation Act.*

87 The primary Judge distinguished between Mrs Cubillo's cause of action for breach of duty, insofar as it was alleged to have resulted in psychological injury and cultural loss, and the cause of action insofar as it allegedly resulted in loss of entitlements under the *Land Rights Act.* He found that her loss was sustained in 1981 when ministerial approval was given to the Land Commissioner's report affecting what Mrs Cubillo claimed were her traditional lands. His Honour concluded that the relevant limitation period expired in 1984, apparently by reason of s 12 of the *Limitation Act* [1331].

88 Assuming that his Honour was correct to deal with Mrs Cubillo's claim for loss of entitlements separately from her other claims (an issue not raised on the appeal), it would seem that the relevant limitation period expired in 1987 - that is, the six year period provided for by s 36 of the *1866 Act* that was rendered applicable to Mrs Cubillo's cause of action by s 9(2)(a) of the *Limitation Act.*

89 In the case of Mr Gunner, the primary Judge found that his cause of action for breach of duty causing psychological injury and cultural loss accrued while he was an infant. His Honour concluded that the relevant limitation ended either on 19 September 1975 (six years after he attained his majority) or on 19 September 1972 (three years after attaining his majority) [1339]. The former was accepted by the parties as correct, by reason of ss 36 and 47 of the *1866 Act,* read with s 9(1) and (3) of the *Limitation Act.*

90 The primary Judge, applying the same approach as in Mrs Cubillo's case, found that Mr Gunner's claim for breach of duty causing loss of entitlements under the *Land Rights Act* first occurred in 1979, following Ministerial acceptance of the relevant Land Commissioner's report. His Honour considered that the limitation period for the cause of action had expired in 1982, by reason of s 12 of the *Limitation Act* [1339]. On the assumption that his Honour was correct to regard this claim separately from the other claims founded on breach of duty, it was not disputed that the limitation period expired in 1985 by virtue of s 36 of the *1866 Act*, rendered applicable to the cause of action by s 9(2) of the *Limitation Act.*

An Extension of Time

91 The appellants' application for an extension of time in which to institute proceedings was brought pursuant to s 44(1) of the *Limitation Act.* Section 44 relevantly provides as follows:

> "*(1) Subject to this section, where this or any other Act prescribes or limits the time for-*
> *(a)* instituting an action;
>
> *(b)* doing an act, or taking a step in an action; or
>
> *(c)* doing an act or taking a step with a view to instituting an action,
>
> a court may extend the time so prescribed or limited to such an extent, and upon such terms, if any, as it thinks fit.
>
> *(2)* A court may exercise the powers conferred by this section in respect of an action that it -
>
> *(a)* has jurisdiction to entertain; or
>
> *(b)* would, if the action were not out of time, have jurisdiction to entertain.
>
> *(3)* This section does not -
>
> *(a)* ...
>
> *(b)* empower a court to extend a limitation period prescribed by this Act unless it is satisfied that -
>
> *(i)* facts material to the plaintiff's case were not ascertained by him until some time within 12 months before the expiration of the limitation period or occurring after the expiration of that period, and that the action was instituted within 12 months after the ascertainment of those facts by the plaintiff; or
>
> *(ii)* ...,
>
> and that in all the circumstances of the case, it is just to grant the extension of time.
>
> (4) ...
>
> (5) Proceedings under this section may be determined by the court at any time before or after the close of pleadings."

92 It should be noted that s 44(5) of the *Limitation Act* appears to contemplate that an application for an extension of time in which to institute proceedings may be dealt with in conjunction with a hearing on the merits of the substantive claims relied on in the proceedings. This was the course adopted by the primary Judge in the present case.

THE FACTS

93 The judgment at first instance does not contain an account in chronological order of the facts found by the primary Judge. Findings of fact are made at various points throughout the judgment and

factual issues are frequently revisited, not always in identical terms. The following is an account of the course of events drawn from his Honour's findings as we understand them. It has been supplemented in relation to certain non-contentious matters by findings recorded in the interlocutory judgment. We have also included references to his Honour's reasoning on some factual questions. With a few exceptions, the findings of fact set out in this account are not now challenged.

MRS CUBILLO

Background

94 Mrs Cubillo was born on Banka Banka Station, a pastoral property located north of Tennant Creek in the Northern Territory, some 985 kilometres south of Darwin. According to Mrs Cubillo's birth certificate, she was born on 8 August 1938. While his Honour entertained some doubt about the accuracy of the birth certificate, he seems to have accepted that as her birth date [6], [396].

95 Mrs Cubillo said that her biological mother was Maude (or Maudie) Nampijimpa and her father was a white soldier, named Horace George Nelson. The primary Judge seems to have accepted that Maude Nampijimpa died when Mrs Cubillo was very young and that her father had deserted her mother [395]. In any event, Mrs Cubillo grew up believing that Maisie Nampijimpa, her maternal aunt, was her mother [393]. His Honour stated that he took references in the pleadings to Mrs Cubillo's "mother" as intended to refer to Maisie Nampijimpa, who could be regarded as *in loco parentis* as far as Mrs Cubillo was concerned: *Cubillo (No 1),* at 540.

96 In about late 1942, Mrs Cubillo was moved to Six Mile Creek, a temporary ration depot established for Aboriginal people managed by missionaries employed by the AIM. The AIM was and is a Protestant interdenominational faith mission founded in about 1905 [512]. It was based in Sydney and, during the 1940s and 1950s, had missionaries working in a variety of places in the Northern Territory and elsewhere in Australia [512]. Six Mile Creek was so named because it was located six miles east of the old Tennant Creek Telegraph Station. There was no evidence that any restrictions were placed on Aboriginal persons living at Six Mile Creek [409].

The Phillip Creek Settlement

97 In about August 1945, the ration depot at Six Mile Creek was relocated to the Phillip Creek Settlement. The Settlement was on the banks of Phillip Creek, about forty kilometres north of Tennant Creek and some six kilometres from Banka Banka Station. Both Mrs Cubillo and Maisie were moved to the Phillip Creek Settlement.

98 The Native Affairs Branch was heavily involved both in the relocation of the ration depot and in the lives of the Aboriginal community at the Phillip Creek Settlement. The Northern Territory Administration provided the land for the Phillip Creek Settlement and supplied all materials needed for buildings on the site. The Administration also provided rations for the Aboriginal people living at the Settlement [410]. In short, the Native Affairs Branch had a "deep financial involvement...in the operations of the Phillip Creek Settlement" [413]. His Honour found that the Administrator regarded the Settlement as a "departmental settlement" [501].

99 The Phillip Creek Settlement was managed by a Mr Ivor Thomas, a missionary appointed by the

AIM. Mr Thomas occupied the position of superintendent of the Settlement throughout the time that Mrs Cubillo remained there. The staff at the settlement included Mrs Thomas and a school teacher, Mr Colley, who conducted a school for Aboriginal and part-Aboriginal children which Mrs Cubillo attended. The primary Judge found that there was a potential for the Native Affairs Branch to exert control over the management of the Settlement, but there was no evidence that it did so [413].

100 The Phillip Creek Settlement had separate dormitories for Aboriginal girls and boys. A third dormitory housed the part-Aboriginal boys and girls [422]. Mrs Cubillo slept in the third dormitory with other part-Aboriginal children [734]. She attended school five days a week [1515], although conditions at the school were "very primitive" [497]. She "received great comfort from her extended family and the community at the Settlement" [445]. There was, however, no evidence of the relationship between Mrs Cubillo and Maisie Nampijimpa at the Phillip Creek Settlement [734]. This apparently curious gap in the evidence is explained by the fact that Mrs Cubillo testified that Maisie was living at Banka Banka when the move to the Retta Dixon Home took place. His Honour considered that Mrs Cubillo had become confused on that question [421] and found that Maisie Nampijimpa was living at the Phillip Creek Settlement when the children were removed [421].

The Removal

101 On Wednesday, 23 July 1947, Miss Shankelton arrived at the Phillip Creek Settlement [455]. Miss Shankelton knew at least a week before the event that the removal of the children at the Settlement was to occur, since an article written by Gladys Dinham, a missionary at the Retta Dixon Home, in the AIM magazine of 17 July 1947 referred to the fact that "seventeen more children at Tennant Creek are waiting to enter the Home" [438].

102 Mr Penhall, then aged 24 [447], attended the Phillip Creek Settlement in his capacity as a Cadet Patrol Officer [455]. Someone in authority had previously sent another employee of the Native Affairs Branch to Yuendumu, where Mr Penhall was stationed and told Mr Penhall to get a truck and drive it over 500 kilometres from Alice Springs via Tennant Creek to the Phillip Creek Settlement. Mr Penhall was also instructed to purchase and supply rations for a known number of people [508]. The primary Judge found that Patrol Officers and all other employees of the Native Affairs Branch and, later, the Welfare Branch, were employees of the Commonwealth [1086].

103 The primary Judge accepted Mr Penhall's evidence that he had no involvement in the removal of the children other than as the driver of the truck. He was not instructed to confer with the Aboriginal people at the Phillip Creek Settlement and did not discuss the removal with the children [441]. According to his Honour, Mr Penhall's involvement in the matter "was minimal...as he was a Cadet Patrol Officer whose instructions were limited to acting as a transport officer" [442].

104 Curiously enough, later in the judgment, when considering whether the Native Affairs Branch was responsible for the removal of the children, his Honour said [508] that

> *"Mr Penhall's involvement in the removal of the children from Phillip Creek cannot be dismissed as minimal; it cannot be said of him that he was a mere driver for Miss Shankelton when she and her mission removed the children".*

His Honour also said that Mr Penhall was "instrumental" in placing Mrs Cubillo in the Retta Dixon Home [1152]. An explanation for the apparently inconsistent findings as to Mr Penhall's involvement may lie in the fact that officers of the Native Affairs Branch, including Mr Penhall, were involved in planning the physical removal prior to his arrival at the Phillip Creek Settlement. The planning presumably included arranging for the truck and the supplies required for the journey. The first finding concerning Mr Penhall may have related to his involvement on the day; the second may have concerned his involvement in the planning process.

105 The sixteen part-Aboriginal children from the Settlement set off in a truck driven by Mr Penhall at 9 am on Thursday, 24 July 1947 [455]. The party spent two nights on the track before reaching the Retta Dixon Home in Darwin on Saturday, 26 July 1947.

106 The primary Judge accepted Mrs Cubillo's evidence that her removal from the Phillip Creek Settlement was a "sad and traumatic event" from which she continued to suffer [445]. He said that he took this view regardless of whether her removal was with the informed consent of those who cared for her. His Honour found that the day of the removal was "an occasion of intense grief" [452] and that the children and their families suffered "terrible pain" [443]. He rejected a submission by the Commonwealth that some or all of the parents (many of whom did not speak English) initiated the children's removal by asking the AIM or the Native Affairs Branch to assist them in getting a better education for the children. This was not a "realistic possibility" [503]:

> "*The distressing scenes that accompanied the children's departure from Phillip Creek transcended the sadness that would have accompanied a parting between mother and child that was initiated by the mother.*"

His Honour quoted and appears to have accepted Mrs Cubillo's evidence that a "tussle" took place between Miss Shankelton and one of Mrs Cubillo's aunts who was resisting handing over a baby [423]. According to Mrs Cubillo's quoted evidence:

> "*Were there other people, other Aboriginal people around the truck when this tussle was going on? - Yes, there were many. By this time there was a commotion. There was a lot of people crying, people were hitting themselves with hunting sticks and blood was pouring down their faces.*"

Mr Creed Lovegrove, a former Patrol Officer, who had a distinguished career in the Northern Territory and whose evidence his Honour found to be "honest and genuine", said that he would have interpreted these actions as "signs of enormous distress and extreme sorrow" [424].

Did the Parents Consent?

107 One of the issues at the trial was whether the parents or carers of the Aboriginal children at the Phillip Creek Settlement had consented to their removal to the Retta Dixon Home. His Honour said that in the absence of evidence that any other person in authority (such as Mr Thomas, the Superintendent of the Settlement) consulted with the mothers of the children, there was very little time for Miss Shankelton to explain to the families of sixteen or seventeen children what was happening and to obtain their informed consent to the proposed removal [456]. Indeed, his Honour observed that

"obtaining the consent of the families of 16 or 17 children in a period of no more than 24 hours seems highly unlikely" [442].

108 His Honour added that this finding, which pointed to a non-consensual removal of the children, created substantial prejudice to the Commonwealth because it was denied the opportunity to call witnesses who might have rebutted the finding, such as Mr Moy, Miss Shankelton and Mr Thomas [442]. His Honour acknowledged that it was possible that Mr or Mrs Thomas or the teacher, Mr Colley, might have counselled the families prior to Miss Shankelton's arrival, but this was conjecture. The

> "*episode shows the difficulties that were faced by both the [appellants] and the Commonwealth. So much time has passed: so many witnesses are dead, that it is not possible to proceed with confidence*" [443].

109 His Honour ultimately concluded that the evidence did not permit him to be satisfied that any of the mothers or carers at the Phillip Creek Settlement either had or had not given their informed consent to the removal of the children. He expressed his conclusion this way:

> "*There was no acceptable evidence, one way or the other, that would justify a finding that Aboriginal families were consulted about their children being taken from Phillip Creek to the Retta Dixon Home: nor was there any direct evidence that would support a finding that they were not consulted* [440].
>
> ...
>
> *I remain satisfied with Mr Penhall's evidence that he, a young man and still a cadet, relied on Miss Shankelton's advice that she had explained everything to the mothers; I realise that there is a possibility that Miss Shankelton may have believed that, by telling the mothers of the imminent departure of their children, their lack of complaint amounted to consent. I cannot however, make a finding that any of the mothers gave their informed consents to the removal of their children* [457].
>
> ...
>
> *Mrs Cubillo has failed to establish that she was, at that time, in the care of an adult Aboriginal person (such as Maisie) whose consent to her removal was not obtained* [511]."

Who Made the Decision?

110 The primary Judge also considered who decided that the children should be moved to the Retta Dixon Home and why the decision was made. The utilisation of Mr Penhall in the move was sufficient to substantiate a finding that the authorities did approve of the move (bearing in mind that the Director's approval was required pursuant to s 15 of the *Aboriginals Ordinance*), but the details of any such approval were "wholly lacking" [502]. It was probable that the AIM, having recently opened the Retta Dixon Home, made a decision to move the part-Aboriginal children, whom it regarded as being in its care at the Phillip Creek Settlement, from the Settlement to the newly established Home [502]. His Honour therefore found that the AIM was the "dominant force in the move" [502].

111 So far as the Native Affairs Branch was concerned, his Honour made the following finding [508]:

> *"[T]he totality of the exercise indicated a measure of involvement by the Native Affairs Branch sufficient to find, as I do, that the Native Affairs Branch participated in the decision to remove and in the removal of the children from Phillip Creek. There is an invitation to infer that the Director of Native Affairs acted under s 6 of the 1918 Ordinance; a contrary inference would point to illegal activity on the part of the director. However, the evidence is too lacking for concrete findings to be made with respect to the reasons behind the director's decision to participate in the removal.*"

His Honour later said that Mrs Cubillo was removed from the Phillip Creek Settlement to the Retta Dixon Home as part of a "joint exercise that involved both the [AIM] and the Native Affairs Branch" [511].

112 The primary Judge found that, although it was possible that Mr Moy, the Director of Native Affairs, had been purporting to act "within the umbrella of s 6 of the *Aboriginals Ordinance*" [1133], there was

> "*no evidence upon which [the] Court could rely to make a finding that the Phillip Creek children were the subjects of an exercise of power by the Director...that exceeded the boundaries of s 6 or s 16 of the* Aboriginals Ordinance. *Conversely, there [was] no evidence that the Director...acted pursuant to those statutory provisions*" [503].

According to his Honour, the evidence was simply "too lacking for concrete findings to be made with respect to the reasons behind the Director's decision to participate in the removal" [508]. There was a "void in the evidence" which meant that no finding could be made as to why the Director decided to place her in the Retta Dixon Home [1264].

The Retta Dixon Home

113 The Retta Dixon Home was set up in 1946 by the AIM as a home for part-Aboriginal children who had returned to Darwin after the War. The Home was initially called the "Aborigines Inland Mission Home, Darwin", but by April 1948 it had become known as the Retta Dixon Home in honour of one of the founders of the AIM [512]. It was the first and only home conducted by the AIM [502].

114 The Home was established on an unoccupied section of the Bagot Aboriginal Reserve which was situated about eight kilometres from the centre of Darwin [513]. The location of the Home on the Bagot Aboriginal Reserve is significant because of the Director's power under s 5(1)(e) of the *Aboriginals Ordinance* to "manage and regulate the use of all reserves for aboriginals". According to his Honour, that power extended to managing and regulating the operations of the Home [147]. The Home was ultimately relocated in 1961, after Mrs Cubillo had left [576].

115 The Northern Territory Administration provided the buildings and furnishings for the Home in the form of surplus army stores [525]. Nonetheless, in July 1947, when the removal of the children from the Phillip Creek Settlement to the Retta Dixon Home took place, the Home had not yet received official recognition from the authorities. It was not until 17 December 1947 that the Home was declared by the Northern Territory Administrator under s 13(1) of the *Aboriginals Ordinance* to be an "Aboriginal

institution" for the purposes of the *Ordinance* [514]. On that day, Miss Shankelton was appointed the founding Superintendent of the Home, in conformity with s 13(2), and she retained that position throughout the period Mrs Cubillo was an inmate [514]. As Superintendent, she had the control and supervision of all children in the Home: *Aboriginals Ordinance,* s 13(6). Miss Shankelton also had responsibility for the day-to-day management of the Home and reported to the Director of the AIM [515]. The AIM had sole responsibility for the selection and appointment of staff at the Home [522]. From the outset the Northern Territory Administration provided an annual grant for the Home, which was formalised in 1954 on the basis that the Administration would meet 90 per cent of operating expenses and of the cost of capital equipment [525].

116 The primary Judge found that the Superintendent and staff at the Retta Dixon Home were not servants and agents of the Commonwealth [1142]. Although the Home was declared to be an Aboriginal institution for the purposes of the *Aboriginals Ordinance,* it operated independently of the Directors by receiving part-Aboriginal children placed at the instigation of their parents. The Superintendent had "substantial independence" in exercising powers over all children in the institution. That independence was not consistent with the Superintendent being a servant or agent of the Commonwealth [1142].

117 Despite this finding as to the Superintendent's position, the primary Judge inferred from the Director's involvement in Mrs Cubillo's removal from the Phillip Creek Settlement that he was also involved in placing her in the Retta Dixon Home [1163]. He further inferred that the Director detained Mrs Cubillo in the institution from the time of her arrival [1163]. His Honour, however, did not accept that the Commonwealth "actively promoted and or caused" Mrs Cubillo's imprisonment [1167]. It will be necessary to return to the findings concerning the detention of Mrs Cubillo, as they were challenged by the Commonwealth.

118 Officers of the Native Affairs Branch made periodic visits to the Retta Dixon Home and submitted written reports to their superiors [343]. The reports commented on a variety of matters, such as the conditions at the Home, staffing problems and the health and welfare of the children. While the Directors had "quite extensive" regulatory and supervisory powers over the Home [1141], they did not extend to the hiring and firing of staff and there was no evidence that the Directors had attempted to exercise such a power in relation to staff [344].

119 The authorities did not regard Retta Dixon Home as satisfactory for its inmates [343]. The Native Affairs Branch recognised from the early 1950s that the Retta Dixon Home was an unsuitable location for children due to its proximity to the Bagot Reserve, where there was said to be a lot of drinking and gambling [343], [597]. The older girls at the Home slept in a dormitory acquired from the army and were locked in at night for their own protection [625]. Although the conditions at the Home were not good and were in "need of substantial improvement" [558], his Honour considered that, having regard to the shortage of funds and building materials, the conditions did not amount to a breach of any duty the Director might have owed to Mrs Cubillo [1141], [1267]. There was some evidence of overcrowding at the Home: as at 30 June 1951, 81 children and twelve adults were housed there, up from 67 children and ten adults a year earlier [541]. By 1954, 110 children were in residence [527]. But his Honour did not consider that overcrowding was an on-going problem or that Mrs Cubillo suffered in any way from the overcrowding [542]. Children at the Home attended regular schools and, although they had to perform

chores, had some play facilities [628], [629]. Mrs Cubillo was the only child at the Retta Dixon Home during the time she was an inmate to progress to high school [719].

120 Mrs Cubillo's time at Retta Dixon Home was unhappy. She craved for, but did not receive the love and affection she needed and pined for her family [635], [729]. This was not, however, the fault of Miss Shankelton and the other missionaries but was more likely the result of Mrs Cubillo's character and personality [729]. The primary Judge acknowledged that discipline at the Retta Dixon Home, on today's standards, was "very severe" [592], but not excessively so [1266]. Corporal punishment was administered to inmates, but (leaving aside Mr Walter's conduct) did not amount to "flogging" [1266]. The missionaries discouraged the children from speaking their traditional languages and they were sometimes punished if they did so [593]. The most likely reason for this policy was "practicality": the need for English to constitute the common language for communication [593].

121 Maisie Nampijimpa never visited Mrs Cubillo during the time the latter was an inmate of the Retta Dixon Home [637]. The only time Mrs Cubillo saw her "mother" during that period was during the 1955/56 school holidays when Mrs Cubillo, then aged 17, visited her cousin, Maisie's daughter [638]. By that time it was difficult for Mrs Cubillo to communicate with Maisie whose English was limited. The primary Judge was not prepared to find that the Home "had an active policy that would have prevented Maisie from visiting Lorna". On the other hand, his Honour considered that it would be "equally unfair to hold that Maisie did not visit Lorna because Maisie had lost interest in Lorna" [637].

122 While Mrs Cubillo (like Mr Gunner) suffered trauma and shock through her period of institutionalisation [1244], it was the removal and detention rather than the conditions of detention that caused her sufferings [1247]. The primary Judge found that Mrs Cubillo's removal and her "continued presence" at Retta Dixon Home were responsible for the loss of her Aboriginal culture and her native tongue [657]. Mrs Cubillo was taught nothing about her Aboriginal background and had no opportunity to keep in touch with it [654]. Mrs Cubillo's sense of loss for her Aboriginal community and family came from the severing of her ties and the loss of her language, culture and relationship with the land, not from the conditions at the Retta Dixon Home [1247].

The 1953 Committal Order

123 On 18 August 1953, some six years after Mrs Cubillo was removed to the Retta Dixon Home, the Director of Native Affairs made an order pursuant to ss 6 and 16 of the *Aboriginals Ordinance* committing her to the custody of the Retta Dixon Home until 8 August 1956 (thought to be her eighteenth birthday). The order was made in 1953 because at that time it was proposed to amend the *Aboriginals Ordinance* to remove the references to "half-castes" and to substitute a new definition of "Aboriginal" (see [42]-[43] above). It was apparently thought that in order for Mrs Cubillo to be brought within the amended definition, the Director's powers under ss 6 or 16 of the *Aboriginal Ordinance* would have to be invoked (see par (c)(ii) of the definition, [43] above). His Honour held that the committal order of 18 August 1953 offered "total protection" to the Director and the Commonwealth in respect of Mrs Cubillo's detention between 1953 and 1956 [1156]. There is no appeal from this holding.

The Walter Incident

124 In about July 1954, Mr Walter, together with his wife, was posted to the Retta Dixon Home. Mr

Walter, then aged about 24, was put in charge of the boys' dormitory. He and his wife left the Home some time in 1955 and they resigned from AIM shortly before 12 October 1955 [661]. Mr Walter gave evidence at the trial, but the primary Judge found that he was not a credible witness [674], [677].

125 Although Mr Walter denied it, the primary Judge found that Mr Walter had severely beaten Mrs Cubillo with the buckle of his trouser belt [705]. This incident took place during an outing to Berry Springs, some 50 kilometres from Darwin, [682], although his Honour made no finding as to the precise date of the incident. The beating was so severe that it drew blood, lacerating Mrs Cubillo's hands, face and breast [678], [729]. On another occasion, Mr Walter acted improperly towards Mrs Cubillo in that he placed his hand on the upper part of her leg when they were alone together in a car, causing her to cry [677], [687], [729]. The primary Judge found that neither the Commonwealth nor the Director knew of the incidents involving Mr Walter [1255].

126 On 27 July 1954, the Superintendent of the Bagot Reserve, Mr L K Dentith submitted a report to the Acting Director of Native Affairs (Mr McCaffrey) which contained a hearsay account of a flogging administered by Mr Matthews and Mr D "Watters" (apparently Mr Walter) to three boys several days earlier [664]. A tennis racquet was allegedly used as the instrument of punishment. The report was highly critical of Mr Matthews, who was assessed as being "unsuited for work with young people" [Document A75.A056]. "Mr D Watters" was said to be "just as bad at punishing as Matthews" but apparently the boys said that they could club together to "bash" "Mr Watters" if he were to hit any of them [664].

127 Mr McCaffrey submitted the report to the Administrator under cover of a memorandum of 28 July 1954 [Document A75.A057]. The memorandum referred to assaults by Mr Matthews on children, and reported that on at least one occasion Mr Matthews "had gone berserk". The memorandum continued:

> "*I now have another problem with Mr Walters [sic] who has taken upon himself the role of Judge and Chief Whipper. His activities will be closely watched, and although Miss Shankelton gave undertakings in this regard, I am afraid I cannot accept her word in the future.*
> *The Mission is quick to place all the blame on the environment, but I differ in that regard. The basic trouble is the complete inability of the staff to conduct such a Home. They are unrealistic and particularly narrow and fanatical in their views. A number of the staff are middle-aged and older and obviously have no proper training or vocation for their task.*"

The Administrator made the following handwritten notation on that memorandum:

> "*The urgency of a transfer to Gawler of a lot of these people is obvious. The authorities at the Retta Dixon Home appear to be absolutely unsuitable. I hope you can arrange to keep some watch on their activities.*"

In late July 1954, Mr McCaffrey exercised his powers under s 19 of the *Aboriginals Ordinance* and ordered Mr Matthews to leave the Bagot Reserve [336].

128 On 27 October 1954, Mr Dentith submitted a further report to the District Superintendent, Native

Affairs Branch which referred to an incident involving an attack by Mr Walter upon a child aged about twelve where Mr Walter was described as being white with rage and having "gone mad" [672].

129 The primary Judge appears to have accepted these reports as credible notwithstanding that the authors were unavailable for cross-examination and Mr Walter denied knowledge of their contents [669], [674]. Nonetheless, his Honour found that neither the Director nor the Commonwealth ought to have known of the assault committed by Mr Walter or of his propensity to commit the assaults [1255]. His Honour stated that in reaching this conclusion, he had not overlooked the concerns expressed by Mr McCaffrey about Mr Walter. He nowhere explained, however, how his conclusion was consistent with the contents of the reports to which he referred in the judgment.

After the Retta Dixon Home

130 Mrs Cubillo left the Retta Dixon Home in October 1956, when the Home found her a position as a live-in housekeeper [718]. She married in January 1957 [718]. She and her husband had six children, but the marriage was not a happy one and ended in divorce in about 1989 [718], [724].

131 Mrs Cubillo suffered from post-traumatic stress disorder of increasing severity, as well as mild to severe depression, with episodes of more severe depression [1435]. She sustained psychiatric injury as a consequence of her removal and detention at the Retta Dixon Home [1488].

132 It was unrealistic to expect that Mrs Cubillo, having lived the life of a white girl for ten years at the Retta Dixon Home could have returned to her former Aboriginal life, at least without active assistance from family members [654]. Nonetheless, Mrs Cubillo had the opportunity since she was about seventeen, if she had wished to take it, to investigate whether she wished to return to a tribal life or, as would be more likely, to an Aboriginal life that "enjoyed fundamental aspects of western civilisation" [656]. If it had been her wish to resume contact with her Aboriginal family there were opportunities she could have made for herself, but she did nothing [656].

MR GUNNER

133 Mr Gunner was born at or near a cattle station known as Utopia Station [12]. The date of his birth was recorded on a form as 19 September 1948. The primary Judge regarded this as the date of his birth although the prospect of it being correct was remote [810].

134 Mr Gunner's mother, Topsy Kundrilba, rejected him at birth and for some time thereafter. That position later changed and when Mr Gunner left Utopia in May 1956 he enjoyed the conventional maternal love and affection that a child has from his or her mother [1478]. At that time he also left a happy, healthy Aboriginal community and environment. He had been accepted as part of that community [769]. He grew up speaking Anmatyerr (his mother's family's main language) and knew little or no English at the time of his removal [1518].

The Removal

135 In 1955, Mr Kitching, a patrol officer, visited Utopia Station on two occasions and prepared reports. The report of 14 September 1955 recorded that Mr Gunner and another child had been seen "with their parents" and that both were willing to attend school and go to St Mary's Hostel in the

coming year [778].

136 Mr Kitching prepared a further report to the Director of Welfare dated 17 May 1956, which was countersigned by Mr McCoy, the Acting District Welfare Officer at Alice Springs [781]. This document contained a request for the "admission of part-aboriginal child, Peter Gunner, to St Mary's Church of England Hostel, Alice Springs". The document also recorded the following:

> "*The mother desires that Peter be admitted to St Mary's Hostel, to enable him to be educated to a European standard and removed from native camp life. Recommended by A/Patrol Officer Kitching.*"

A second entry was as follows:

> "*As shown in the attached report, Peter's future well-being is dependent on his being removed from his present environment, to an institution where his personal needs, in all aspects, will receive the attention they deserve.*"

This entry, so the primary Judge found, was an indication that the officers of the Director of Welfare, as well as the Director himself, were mindful of the individual well-being of Mr Gunner [781]. The document concluded with a recommendation that it was in the best interests of Mr Gunner that he be admitted to St Mary's Hostel.

137 There was a further document attached to the report. The document was headed "Form of consent by a Parent" and contained a thumb print surrounded by the typed words "Topsy her mark Kundrilba". It read as follows [782]:

> "*I, TOPSY KUNDRILBA being a full-blood Aboriginal (female) within the meaning of the Aboriginals Ordinance 1918-1953 of the Northern Territory, and residing at UTOPIA STATION do hereby request the DIRECTOR OF NATIVE AFFAIRS to declare my son PETER GUNNER aged seven (7) years, to be an Aboriginal within the meaning and for the purposes of the said Aboriginals Ordinance. MY reasons for requesting this action by the Director of Native Affairs are:*
> *1.* My son is of Part-European blood, his father being a European.
>
> *2.* I desire my son to be educated and trained in accordance with accepted European standards, to which he is entitled by reason of his caste.
>
> *3.* I am unable myself to provide the means by which my son may derive the benefits of a standard European education.
>
> *4.* By placing my son in the care, custody and control of the Director of Native Affairs, the facilities of a standard education will be made available to him by admission to St Mary's Church of England Hostel at Alice Springs."

138 The primary Judge found that although there was no way of knowing whether Topsy Kundrilba understood this document, she had given her informed consent to her son going to St Mary's [787]. This finding appears to have been based on the contemporaneous reports to which his Honour had

referred. His Honour also found that Topsy Kundrilba had asked the Director to assume the care, custody and control of her son and the Director had accepted that role [790].

139 The precise date of Peter Gunner's removal from Utopia Station could not be ascertained, but it could not have been earlier than 6 April 1956 (the date of a report by Mr Kitching foreshadowing the removal), nor later than 24 May 1956 (the date he was admitted to St Mary's Hostel) [817]. Mr Kitching transported Mr Gunner to Alice Springs from Utopia. After being removed from Utopia Station, Mr Gunner stayed for a short time with an Aboriginal family at a place called the "Bungalow" [817]. He was admitted to St Mary's Hostel on 24 May 1956. In removing Mr Gunner, Mr Kitching was acting on behalf of Mr Gunner's mother; he was not the instrument of the Director's power under s 6 of the *Aboriginals Ordinance* [1133]. The Director did not participate in the removal of Mr Gunner from Utopia [1133].

140 Mr Gunner had not wanted to leave his mother and his extended family, but his mother had consented to his leaving and had requested Mr Kitching to take him away [838]. At the time he was removed, Mr Gunner spoke no English [839]. Mr Gunner's removal and subsequent institutionalisation were traumatic events for a little boy, notwithstanding his mother's consent [807], [836]. In particular, Mr Gunner had been very distressed by being forcibly taken from his community at Utopia Station [807], [934].

141 On 21 May 1956, Mr Giese made an order committing Mr Gunner to the custody of St Mary's Hostel until what was thought to be his eighteenth birthday on 19 September 1966. The order was made pursuant to ss 6 and 16 of the *Aboriginals Ordinance*: [789], [839]. A second committal order, in the same terms, was made by Mr Giese on 19 February 1957. There was no evidence to explain the reasons for the making of the second order [839].

142 On 13 May 1957, the Administrator declared Mr Gunner to be a ward pursuant to s 14 of the *Welfare Ordinance* [155]. There was, however, no evidence that the Director had made an order for the detention of Mr Gunner under s 17 of the *Welfare Ordinance* [155], which had come into force on the date the wardship declaration was made. Nonetheless, the primary Judge considered that the absence of evidence was not a justification to find that the Director had not used those powers [1252], particularly having regard to the fact that s 17 of the *Welfare Ordinance* did not require the exercise of power to be recorded in writing.

St Mary's Hostel

143 St Mary's Hostel was situated to the south of Alice Springs, near Mt Blatherskite. During the War it had been a rest home for service men and women known as the Lady Gowrie Rest Home. It was acquired by the ABM shortly after the War. The Hostel itself was established by Sister Eileen Heath in 1946.

144 On 19 December 1946, St Mary's Hostel was licensed under s 13(1) of the *Aboriginals Ordinance* as an "Aboriginal Institution for the maintenance, custody and care of Aboriginals and half-castes" [744]. On the same day, the Administrator nominated Sister (described as Deaconess) Heath as the Superintendent of the institution pursuant to s 13(2) of the *Aboriginals Ordinance*. On 17 April 1950, the earlier licence was revoked and replaced with fresh licences limiting St Mary's activities to those of an

"Aboriginal Institution for the maintenance, custody and care of half-castes" [744]. The Anglican Archdeacon of the Northern Territory was named as Superintendent of St Mary's, but Sister Eileen Heath continued to perform the same work as she had previously [744].

145 The costs of running St Mary's were substantially subsidised by the Commonwealth. Initially funds were provided by the Commonwealth for specific projects, but by 1952 the ABM submitted its annual budgets for approval by the Commonwealth. Ultimately the Commonwealth met 90 per cent of the approved operating and capital costs of the institution [753]. The Welfare Branch came to exercise a "measure of control" over the day-to-day activities of St Mary's Hostel. The Hostel was aware of and accepted that control [344]. Moreover, the Directors of Native Affairs and Welfare had supervisory and regulatory powers over St Mary's Hostel (as well as the Retta Dixon Home) that were "quite extensive", although they did not extend to the hiring and firing of staff [1141].

146 Captain Steep succeeded Sister Eileen Heath as Warden of St Mary's Hostel. He and his wife took up their positions in January 1956, some four months before Mr Gunner's arrival [748]. They stayed for almost four years, leaving in December 1959 [841]. The Steeps in turn were succeeded as Warden by Mr Bennier. The Benniers resigned in May 1961 [33].

147 Following Sister Eileen Heath's resignation from St Mary's, the Acting Administrator and the Commonwealth Minister, Sir Paul Hasluck, wrote letters complaining strongly about the administration of St Mary's [756]-[758]. Some of these complaints were made before or at about the time the Steeps commenced their duties. By the latter part of 1956, the Director of Welfare (Mr Giese), the Administrator and others in authority were all expressing grave concerns about St Mary's Hostel, its staff and management [1034].

148 The primary Judge found that, although some complaints had predated the tenure of the Steeps, the decline in conditions at St Mary's Hostel started with the departure of Sister Eileen and the arrival of Captain Steep. Captain Steep did not keep any records of the children's health or personal circumstances while he was Warden [857]. St Mary's Hostel was inadequately staffed, had inadequate facilities and permitted unhygienic and unsanitary conditions to exist for a long period of time [1050]. Mrs Ballagh, a Welfare Officer employed at Alice Springs from 1956 to 1968, wrote reports consistently and harshly critical of the conditions at St Mary's Hostel [60]. Her adverse reports were damming [1028], to the point where the Hostel reminded her of "the Poor Law institutions many years ago" [1063]. According to the primary Judge, the conditions were unsatisfactory even by the standards of the day [1066]. Severe corporal punishment was administered, but his Honour declined to find that it was excessive by contemporary standards.

149 The primary Judge summarised his conclusion in relation to the conditions at St Mary's in the following passage [1073]:

> *"The evidence of Mr Gunner and others of children searching for food in rubbish bins and dumps, the lack of social contact with children outside the Hostel, the failure to return him to his family during school holidays, the shocking conditions of the Hostel as depicted in the reports from Mrs Ballagh and others, the quality of its staff and the conduct of Mr Constable add up to a damning indictment of St Mary's. The documents*

that were received into evidence were sufficient; they revealed a failure on the part of St Mary's to staff and administer the Hostel appropriately. St Mary's failed in its management and its care for the children; it also failed in that it did not provide proper and adequate facilities based on the standards of the day. What it provided may have been better than that available for the part Aboriginal children in native camps. But that was not the test. St Mary's was offering those children the opportunity to enter European society and to learn European standards. A spartan existence for the children might have been acceptable and understandable. Lack of hygiene was not."

150 The primary Judge said that he was satisfied that the Director had failed to exercise his supervisory and regulatory powers over St Mary's Hostel. Inspections had been carried out, reports made and concerns expressed to responsible persons but the results had been inadequate and unsatisfactory [1141]. Later, his Honour found that the officers of the Native Affairs Branch had adequately supervised and monitored St Mary's Hostel.

> "*[T]he fault, if it were fault...lay in not taking appropriate action when it became apparent from its supervision and monitoring that the church authorities were failing in their responsibilities*" [1241].

151 There was an ongoing duty on the Director, by reason of his power of supervision and regulation to ensure that the institution maintained an appropriate standard [1262]. The Director had power to remove the children from St Mary's Hostel and he should have done so [1268].

152 For some unknown reason, Mr Gunner never returned to Utopia or to his mother, Topsy Kundrilba, during school holidays [793]. He either stayed at St Mary's Hostel or travelled with a group of children on an interstate holiday [887]. His failure to return home was a "mystery", since there was nothing to prevent him doing so [891].

153 Mr Gunner did not have equal opportunity for education with white children. He was a child who had no background in the English language or in European culture. It was not possible, even with the best will in the world, to give him the same opportunities for an education as those that would have been enjoyed by a white child of the same age who was already speaking English and for whom the culture and environment at a school would not have been as foreign as it was to a part-Aboriginal child from the bush [870].

The Constable Incidents

154 Mr Constable arrived at St Mary's on 28 August 1958 [894]. He was appointed for an initial term of two years, but his appointment was extended on two occasions, in 1960 and 1962. Evidence was given by four former inmates of St Mary's as to sexual impropriety on the part of Mr Constable which the primary Judge ruled to be admissible [961]. Mr Constable himself gave evidence.

155 By his own admission, Mr Constable had engaged in "grossly improper conduct" [908]. It could be described as "perverted behaviour" [992]. The primary Judge accepted that, on the standard of proof required by *Briginshaw v Briginshaw* [1938] HCA 34; (1938) 60 CLR 336, Mr Constable had engaged in some form of sexual impropriety directed towards Mr Gunner [993]. This included specific

instances of sexual misconduct while Mr Gunner, then aged about 15, was in the shower [994]. Mr Gunner told no-one in authority about the incidents. The Commonwealth and the Director did not know of the assault or of Constable's propensity to commit it [1255].

After St Mary's Hostel

156 Mr Gunner left St Mary's Hostel in February 1963. A patrol officer took him to Angas Downs Station, where work had been arranged for him by the Welfare Branch [909]-[913]. There was nothing in the evidence to suggest that he had been "detained" by the Director whilst he was at Angas Downs [1150]. Mr Gunner subsequently worked on other stations and at a variety of jobs. He married in 1971, but has no children. In 1986 he commenced work as an Aboriginal Liaison Officer in Alice Springs [919]. Later he returned to live at Utopia Settlement.

157 As with Mrs Cubillo, the primary Judge found that the dreadful conditions at St Mary's did not contribute to Mr Gunner's loss [1247]. It was the removal and detention as distinct from the manner of the removal and the manner of the detention that were the causes of the injuries that Mr Gunner suffered [1563]. As the result of his removal and subsequent experiences during detention Mr Gunner suffered from depression and other disorders [1481]-[1485], [1488].

158 Had Mr Gunner remained at Utopia Station he would have gone through the ritual process by which a boy becomes a man. He had lost the opportunity to acquire status, power and authority in traditional terms [1519], [1520]. This loss, however, was not total and was reversible [1512]. Mr Gunner had attempted to mitigate his loss by returning to Utopia in 1991, reuniting with his family and finding a degree of acceptance [1523]. He could, however, have done more since he had known at least since 1969 where to find his mother and his community.

THE PRIMARY JUDGMENT

159 The judgment delivered by the primary Judge does not lend itself readily to a concise summary. This is not merely a function of its length, although it is certainly very detailed. The difficulty arises, in part at least, from the complex and interrelated factual questions his Honour was required to address. In order to deal with these questions he had to consider and analyse a great volume of documentary and oral evidence, much of which related to events, policies, attitudes and understandings of the 1940s and 1950s.

160 His Honour faced the further difficulty that the appellants' contentions appear not always to have been put with precision and they seem also to have shifted ground on certain issues in the course of the trial. In some instances, for example in relation to false imprisonment claims, the appellants ultimately relied on alternative arguments that, if not inconsistent with the pleadings, were not clearly signalled by them. The primary Judgment attempts to accommodate the appellants' shifts in position, but not in a manner that is always easy to summarise briefly. Indeed, the difficulties confronting his Honour were brought home by the fact that, on the appeal, a good deal of time was spent endeavouring to ascertain whether particular arguments relied on by the appellants had been advanced at the trial.

A BRIEF OVERVIEW

161 We propose to deal separately in some detail with his Honour's reasoning in relation to each of the causes of action now relied on, namely false imprisonment, breach of duty and breach of fiduciary duty (although it should be noted that the arguments on appeal were different in important respects from those put to his Honour) (see [351]-[368] below). We intend in this section to limit ourselves to a number of observations about the findings made and conclusions reached by his Honour, including the form of orders made by him.

Findings of Fact

162 (i) His Honour identified the "primary allegation" made by both applicants in their final pleadings as the claim that their removals and detentions were "unlawful and beyond the power conferred by sections 6 and 16 of the *Aboriginals Ordinance*". It is not surprising that his Honour should have characterised the effect of the pleadings in this way. The pleaded cases on false imprisonment expressly alleged that the removal and detention of the appellants were unlawful and beyond the powers conferred by the *Aboriginals Ordinance.* The claims founded on the breach of duty allegedly owed by the Director of Native Affairs, as the guardian of each of the appellants, did not expressly allege that the removal and detention were unlawful. Nonetheless, they were supported by particulars that were identical in part to those given in support of the allegation that the removal and detention were unlawful. In the case of Mrs Cubillo, the particulars were as follows:

> "*(a) The removal and detention of the Applicant occurred under the dictate of or pursuant to a general policy of removal and detention of half-caste children from their Aboriginal parents and without regard for the individual circumstances of the Applicant*
> (b) In applying the general policy of removal and detention of half caste children in respect of the Applicant the Director of Native Affairs failed to exercise his discretion properly or at all, in that he failed to consider and determine whether the removal and detention of the Applicant was necessary or desirable in the interests of the Applicant or of her mother."

163 Having identified the primary allegation made by the appellants, his Honour considered whether there was "an indiscriminate policy of removal" in force at the relevant times. He concluded early in his judgment that the appellants had not produced evidence sufficient to establish a finding that there was a general policy of removal and detention of part-Aboriginal children as they had alleged in their pleadings [300]. Much later in the judgment, the primary Judge returned to the topic and repeated the finding [1160]. He added a further observation related specifically to the circumstances of the appellants:

> "*if, contrary to that finding, there was such a policy, the evidence in these proceedings would not justify a finding that it was ever implemented as a matter of course in respect of [Mrs Cubillo and Mr Gunner]*".

It is fair to say, therefore, that his Honour rejected the primary allegation made by the appellants.

164 (ii) His Honour rejected the appellants' allegations that there were several malign "identifiable purposes" behind the Commonwealth's policy of removal of part-Aboriginal children. His Honour

made the following specific findings:

* The Commonwealth's policy did not have the purpose, either in 1947 or in 1956, of the "destruction of the child's association and connection with the child's Aboriginal mother, family and culture" [1145]. (His Honour accepted, however, that this may have been the consequence of the policy so far as particular children were concerned.)

* While there were limited education and employment opportunities for part-Aboriginal children in the Northern Territory, the policy did not have the purpose of providing domestic and manual labour for the European community [1147].

* Although there were pre-war writings promoting a policy of what his Honour described as "miscegenation", at the relevant times it could not be said that a purpose of the removal policy was (as alleged by the appellants) to "breed out `half caste' Aboriginal people and protect the primacy of the Anglo-Saxon community" [1148].

His Honour did accept the appellants' submission that one purpose of the policy of removal was to assimilate part-Aboriginal children into non-Aboriginal society. He considered, however, that this was thought at the time to be in the best interests of the children concerned.

165 (iii) The primary Judge formed the view that neither Mrs Cubillo nor Mr Gunner had been an untruthful witness, but that each had to some extent unconsciously engaged in "exercises of reconstruction based not on what they knew at the time but on what they must have convinced themselves must have happened" [125]. Despite these reservations, the primary Judge accepted the substance of their evidence on certain strongly contested factual questions. In particular, after considering the evidence at length, his Honour made the following findings:

* Mrs Cubillo, while a resident of the Retta Dixon Home, had been the victim of a severe beating by Mr Walter. In consequence of this beating, Mrs Cubillo sustained lacerations to her hands, face and one breast, partially severing one of her nipples [678].

* Mr Gunner was the victim of "perverted behaviour" while at St Mary's Hostel [992]. The improper conduct had been perpetrated by Mr Constable, who held an appointment as a missionary at St Mary's Hostel from 1958 until 1964 [993].

166 (iv) His Honour analysed in great detail the evidence relating to the removal of Mrs Cubillo from the Phillip Creek Settlement and that of Mr Gunner from Utopia Station. Specifically, he considered whether, as the Commonwealth contended, a responsible person in each of the communities had consented to the removal and transfer of the children.

167 In the case of Mrs Cubillo, his Honour's findings reflected the incompleteness of the evidence. He found that the evidence was insufficient to warrant a finding that the parents of the Phillip Creek children consented to their children going to Darwin for a better education and standard of living [503]. On the other hand, his Honour also found that Mrs Cubillo (on whom the onus of proof rested) had failed to establish that, at the time of her removal, she was in the care of an adult Aboriginal person, such as her maternal aunt and "adopted" mother Maisie Nampijimpa, whose consent to her removal had not been obtained [511].

168 The findings relating to Mr Gunner were more categorical. His Honour found that Mr Gunner's mother, Topsy Kundrilba, had given "her informed consent to her son going to St Mary's [Hostel]" [787]. Contrary to the impression that may have been inadvertently given by the primary Judge's brief summary of reasons for judgment (the summary is not in the *Federal Court Reports* but is reproduced in the *Australian Law Reports*: *Cubillo v Commonwealth* [2000] FCA 1084; (2000) 174 ALR 97, at 110-111), this finding was not based solely on a form of consent which bore Topsy Kundrilba's thumbprint, but was supported by other contemporaneous documentation. His Honour also found that Mr Gunner was not removed from Utopia Station by the Director of Native Affairs in the exercise of statutory powers. Rather, Mr Gunner had been "taken from his family at the request of his mother so that he might be housed and educated at Alice Springs" [1265]. His Honour accepted that Mr Kitching, then an acting patrol officer in the Native Affairs Branch at Alice Springs, took Mr Gunner from Utopia Station to Alice Springs. He found, however, that Mr Kitching was "acting on behalf of the mother and not in the exercise of the Director's powers" and that the Director had not participated in Mr Gunner's removal [1133], [1265].

169 (v) The primary Judge found that the Director of Native Affairs had detained both Mrs Cubillo and Mr Gunner. In the case of Mrs Cubillo, his Honour found that the Director of Native Affairs, through his delegate, Cadet Patrol Officer Penhall, participated in the removal of Lorna Nelson from the Phillip Creek settlement and that this constituted a taking by the Director [1133], [1162]. So far as Mrs Cubillo's detention at the Retta Dixon Home was concerned, his Honour approached the matter as follows [1163]:

> "*Was she detained there by the Commonwealth or the Director? Undoubtedly, she was detained by the Aborigines Inland Mission, but the possible involvement of the Commonwealth and the Director is not so clear. Mr Penhall drove the truck that transported Lorna to the Retta Dixon Home; his conduct would have been known to the Director. In other words, the Director (who was her guardian) knew or ought to have known that Lorna was resident in [the] Retta Dixon [Home]. Although there is no other evidence available, I feel that it is appropriate to draw an inference from the Director's involvement in her removal from Phillip Creek that he was also involved in placing Lorna in the Retta Dixon Home. In other words, I infer that the Director detained Lorna in the institution from the time of her arrival.*"

170 In the case of Mr Gunner, as we have noted, the primary Judge found that the Director of Native Affairs did not participate in Mr Gunner's removal from Utopia Station. Nonetheless, his Honour found that, by reason of the Director having committed Mr Gunner to St Mary's Hostel, he had detained Mr Gunner there during the life of the committal order. His Honour also found that the Director had detained Mr Gunner after the *Welfare Ordinance*, which repealed the *Aboriginals Ordinance* under which the original committal order had been made, came into force on 13 May 1957 [1233].

Vicarious Liability

171 (vi) The primary Judge addressed what he saw as a central plank in the appellants' arguments, namely that the Commonwealth was vicariously liable for the acts and omissions of its employees and officers in the course of their employment. It is perhaps a little curious that his Honour considered the

question of vicarious liability before analysing whether the appellants had made out their claims of tortious conduct on the part of the Directors of Native Affairs and Welfare and of other Commonwealth officers or employees and, if they had, on what basis the appellants might have succeeded. In fairness, however, it should be said that his Honour's approach may have reflected the course of argument. On the appeal, the appellants' written submissions placed the question of vicarious liability at the forefront of their argument, although in oral submissions (after discussion with the Court) the issue was dealt with towards the end of the appellants' case.

172 His Honour found that each of the relevant Directors was a member of the Commonwealth Public Service and an officer of the Commonwealth [1086]. He also found that all Patrol and Welfare Officers and other employees of the Native Affairs and Welfare Branches were employees of the Commonwealth [1086]. His Honour noted [1088] the "basic principle in tort law" that

> "*an employer is liable for the damage caused by the negligent acts and omissions of its servants when they are acting within the scope of their employment*".

He held, however, that this principle is qualified by the so-called "independent discretion rule" that

> "*the Commonwealth will not be vicariously liable if the law charged an employee with a discretion and a responsibility in the execution of an independent legal duty*" [1088].

According to his Honour, despite criticisms of the principle by some commentators and its abrogation in some jurisdictions, the principle was firmly established as part of the common law [1116].

173 The primary Judge concluded [1122] that no vicarious liability would have attached to the Commonwealth as the result of Mrs Cubillo's removal from the Phillip Creek Settlement to the Retta Dixon Home if that removal had been effected by the Director in accordance with s 6 of the *Aboriginals Ordinance.* He would have come to the same conclusion if Mr Gunner had been removed from Utopia Station and taken to St Mary's Hostel in accordance with s 6. Of course, if the Director had acted in conformity with s 6 of the *Aboriginals Ordinance,* his actions would have been lawful and there could be no question of vicarious liability. His Honour later made it clear, however, that his observations were directed to actions **purportedly** in compliance with s 6 of the *Aboriginals Ordinance* [1133].

174 The primary Judge also rejected the appellants' alternative submission that the Directors, specifically Mr Moy and Mr Giese, had lacked independence and adopted a "subservient role" to the Administrator and the Minister. There was no justification for the appellants' submission that if Mr Moy had acted under s 6 of the *Aboriginals Ordinance* to remove and detain Mrs Cubillo, he did so in a "sense of subservience to either the Administrator or the Minister" [1125]. If, contrary to his Honour's findings, the Director had removed and detained Mr Gunner in 1956 in purported exercise of ss 6 or 17 of the *Aboriginals Ordinance,* he would have been acting independently, free from the control of the Commonwealth [1132].

Extension of Time

175 (vii) His Honour addressed and determined the appellants' application under s 44(1) of the

Limitation Act for an extension of time in which to institute the proceedings in respect of the common law causes of action. In the course of doing so, he made the findings as to when the various causes of action had been barred to which we have already referred (see [81]-[90] above). We outline his Honour's reasoning on the application for extension of time later in this judgment (see [402]-[417] below). In the result, his Honour's orders included an order in each case refusing the application for an extension of time under s 44(1) of the *Limitation Act.* The primary Judge also held that the appellants' equitable claims had been barred by laches.

Damages

176 (viii) Although his Honour ultimately concluded that the proceedings should be dismissed, he assessed the damages the appellants would have been awarded, had they been successful in establishing their claims. He assessed damages in respect of their pain and suffering and loss of enjoyment of life, including psychiatric injury sustained in consequence of their removal and institutionalisation. On this basis, he notionally awarded Mrs Cubillo a "global sum" of $110,000 and Mr Gunner the sum of $125,000 [1545]. To each award he would have added a modest amount of interest ($16,800 for Mrs Cubillo and $19,100 for Mr Gunner [1547]). Because his Honour found that the Commonwealth had not acted in "contumelious disregard" for the appellants' welfare or rights he considered that no award of exemplary or aggravated damages could be made in their favour [1556].

Basis for the Orders

177 (ix) Finally, as we have noted, his Honour made orders refusing the appellants' applications for an extension of time in which to institute proceedings and dismissing each claim. The judgment does not explain, in terms, why his Honour made orders in this form. On one view, given the appellants' concession (albeit one made belatedly) that their causes of action in tort had been statute barred, it may have been enough for the primary Judge simply to dismiss the application for extension of time in respect of those causes of action and to deal separately with the equitable claims founded on breach of fiduciary duty.

178 A possible reading of the judgment is that the primary Judge decided to dismiss the proceedings because he held that the appellants' causes of action in tort had been statute barred, that their applications for extensions of time should be dismissed and that their breach of fiduciary duty claims failed on the merits. An order dismissing the proceedings for those reasons would be consistent with the approach taken in *Paramasivam v Flynn* [1998] FCA 1711; (1998) 90 FCR 489. There the primary Judge rejected an application to extend time under the *Limitation Act 1985* (ACT). His Honour also granted summary judgment to the respondent, on the ground that the proceedings were not maintainable, having been instituted out of time and an extension of time having been refused: see at 511-512, where the Full Court held that the primary Judge was correct to take this approach.

179 The alternative interpretation of the judgment is that the primary Judge dismissed the proceedings in consequence of having rejected the appellant's claims because the claims failed on such evidence as was adduced. On this reading, the order dismissing the proceedings was not made (or was not made solely) by reason of his Honour's holding that the tortious causes of action had been statute barred and that the applications for extensions of time should be refused.

180 In our view, it is clear enough that his Honour dismissed the proceedings both because he rejected the appellants' substantive claims on their merits and because he refused to grant the extensions of time sought by them. In analysing the appellants' false imprisonment claims we explain why, despite some ambiguity in the reasoning of the primary Judge, we conclude that his Honour intended to reject those claims on their merits and not merely because he declined to make orders extending time for the institution of proceedings. (see [243] below)**.** We also explain the reasoning which led his Honour to reject on the merits the appellants' claims based on alleged breaches by the Commonwealth of its duty of care. Similarly, it is clear that his Honour rejected the appellants' claims insofar as they were founded on breach of fiduciary duty owed to them by the Commonwealth. Towards the conclusion of his judgment, his Honour explained that he had considered the extension of time question

> "*upon the premise that, contrary to my findings, each [appellant] had sustainable causes of action against the Commonwealth* [1425]."

This observation reinforces the view we have expressed.

FINAL OR INTERLOCUTORY?

181 The main significance of the form of the orders made by the primary Judge is in relation to whether they are final or interlocutory orders. If the former, the appellants do not require leave to appeal; if the latter, they do: *Federal Court Act,* s 24(1A). To guard against the possibility that the orders were interlocutory in character, the appellants filed a notice of motion seeking leave to appeal from the judgment insofar as such leave was necessary.

182 On our construction of the judgment, the order dismissing the proceedings was final since it finally disposed of the substantive rights of the parties: *Carr v Finance Corporation of Australia Limited* [1981] HCA 20; (1980) 147 CLR 246, at 248, per Gibbs CJ; at 253-254, per Mason J; *Sanofi v Parke Davis Pty Ltd* [1982] HCA 9; (1981) 149 CLR 147, at 153, *per curiam.* It follows that the appellants were entitled to appeal as of right.

183 If, contrary to our view, the primary Judge dismissed the proceedings in substance because the tortious causes of action were statute barred and because he refused to make an order extending time pursuant to s 44(1) of the *Limitation Act,* the position may be less clear cut. In *Paramasivam v Flynn* the Full Court held (at 493) that, where a cause of action was statute barred and the application for an extension of time was dismissed, the fact that the primary Judge also granted summary judgment for the defendant meant that the decisions appealed against were final in nature. The Court did not refer to *Hall v Nominal Defendant* [1966] HCA 36; (1966) 117 CLR 423, where a majority of the High Court held that the dismissal of an application for an extension of time within which to proceed against the Nominal Defendant was an interlocutory order, for the purposes of s 35(1)(a) of the *Judiciary Act,* since the applicant was not prevented, at least in theory, from bringing further proceedings seeking an extension of time. Nor did the Court refer to decisions of intermediate appellate courts applying *Hall v Nominal Defendant:* see, eg, *Dousi v Colgate Palmolive Pty Ltd* (1987) 9 NSWLR 374; *Meddings v The Council of the City of the Gold Coast* [1988] 1 Qd R 528; *Southern Cross Exploration NL v Fire and All Risks Insurance Company Ltd (No 2)* (1990) 21 NSWLR 200; *D A*

Christie Pty Ltd v Baker [1996] VicRp 89; [1996] 2 VR 582, at 601-602, per Hayne JA; at 610-611, per Charles JA.

184 There are differences between the present case and *Paramasivam v Flynn,* on the one hand, and *Hall v Nominal Defendant,* on the other. In the latter case, the order refusing to grant an extension of time was made in proceedings preliminary to the bringing of an action: see at 440, per Taylor J. No order had been made dismissing proceedings. Not all the earlier cases, however, can necessarily be distinguished on this basis: see *Southern Cross Exploration,* where the proceedings had been dismissed for non-compliance with a self-executing order, but the order refusing to extend time within which to comply with the self-executing order was treated as interlocutory.

185 It is not necessary to determine whether *Paramasivam v Flynn* correctly decided that the orders in that case were final. We proceed on the basis that, for the reasons we have given, the order made by the primary Judge dismissing the proceedings was final and that, accordingly, the appellants are entitled to appeal as of right from that order.

THE SCOPE OF THE APPEAL

186 The issues canvassed on the appeal were very much more circumscribed than and to some extent different from those dealt with by the primary Judge. In large measure this is a consequence of the fact that the appellants did not challenge the most important findings of fact adverse to their cases. Among the findings made by the primary Judge not challenged by the appellants are these:

* at the relevant times there was no general policy in force in the Northern Territory supporting the indiscriminate removal and detention of part-Aboriginal children, irrespective of the personal circumstances of each child;

* the Commonwealth's policy of removal of part-Aboriginal children, at those times, did not have the malign purposes attributed to it by the appellants;

* Mrs Cubillo had failed to establish that, at the time of her removal, she was in the care of an adult Aboriginal person whose consent to her removal had not been obtained; and

* Mr Gunner's mother, Topsy Kundrilba, had given her informed consent to her son's removal from Utopia Station to St Mary's Hostel.

187 In addition, senior counsel for the appellants, Mr Rush QC, accepted in the course of argument on the appeal that it was open to the primary Judge to find that the Commonwealth would sustain "significant prejudice" in being forced to defend proceedings instituted so many years after the relevant events occurred. While this concession was not framed in precisely the language used by the primary Judge, it is significant in assessing the challenge to his Honour's refusal to grant the appellants' application for an extension of time.

188 On the appeal, apart from findings of fact not challenged, there was some common ground. Moreover, the appellants did not seek to pursue a number of arguments advanced at trial and modified a number of others. In consequence, many of the questions that attracted public attention at the trial were not addressed on the appeal. Indeed, it is fair to say that the appellants sought to reconstruct significant aspects of their respective cases in order to accommodate the findings of fact

not subject to challenge. The following is an outline of the major issues not in dispute on the appeal or in respect of which the appellants' position changed between the trial and the appeal.

189 (i) At the trial, the appellants initially disputed the Commonwealth's contention that their causes of action founded on false imprisonment and breach of duty had been statute barred. The appellants did not ultimately press this contention in final submissions to the primary Judge, but it was a live issue until the final stages of the trial. On the appeal, it was common ground that the appellants' causes of action founded on false imprisonment and breach of duty had been statute barred as described earlier in this judgment. It follows that the appellants must obtain an order under s 44 of the *Limitation Act* extending time in which to institute proceedings if they are to succeed in establishing those causes of action.

190 (ii) The appellants not only accepted that it was open to the primary Judge to find that the Commonwealth had sustained significant prejudice in defending the proceedings, but acknowledged that his Honour correctly stated the principles governing the grant of an extension of time under s 44(1) of the *Limitation Act.* They maintained nonetheless that his Honour erred in the exercise of his discretion.

191 (iii) The appellants no longer pressed the claims against the Commonwealth based on an alleged breach of statutory duty by the Director of Native Affairs.

192 (iv) The appellants' false imprisonment claims were modified on appeal. At trial, as his Honour observed, each appellant relied primarily on the allegation that her or his removal and subsequent detention were unlawful because they were beyond the powers conferred by ss 6 and 16 of the *Aboriginals Ordinance.* That contention was not pursued on appeal, presumably because of the primary Judge's unchallenged finding rejecting the appellants' contention that there had been a general policy of removal and detention of part-Aboriginal children without regard for their individual circumstances.

193 At the trial, the appellants were permitted to advance an alternative argument in support of their false imprisonment claims, notwithstanding that the alternative had not been expressly pleaded. In the case of Mrs Cubillo, the alternative contention took as its starting point the proposition that she had been detained by the Director of Native Affairs (a finding ultimately made by his Honour [1163]). Mrs Cubillo submitted that the fact of detention by the Director was enough to sheet home the detention to the Commonwealth and, in accordance with the authorities, cast the onus of establishing lawful justification for the detention on the Commonwealth. This, it was said, the Commonwealth had failed to do since the evidence indicated (despite the appellants' pleading to the contrary) that the Director had not removed or detained her in purported exercise of his powers pursuant to ss 6 and 16 of the *Aboriginals Ordinance* and that there was no other lawful basis for the detention.

194 A similar contention was put on behalf of Mr Gunner. It was said that he had been detained by the Director at St Mary's Hostel and that the Commonwealth had not discharged its onus of demonstrating a lawful justification for his detention.

195 On the appeal, the appellants restated the alternative argument, subject to two qualifications:

* At trial, Mrs Cubillo maintained that the Commonwealth was liable to her for false imprisonment from

the date of her removal from the Phillip Creek Settlement in 1947 until she left the Retta Dixon Home in October 1956, aged 18. On the appeal, it was conceded that Mrs Cubillo had no claim for false imprisonment after 18 August 1953. It was on that date that the Acting Director of Native Affairs made a committal order pursuant to ss 6 and 16 of the *Aboriginals Ordinance* committing Mrs Cubillo "to the custody of the Retta Dixon Home, Darwin, until 8 August 1956", her eighteenth birthday.

* In the case of Mr Gunner, it was common ground that on 21 May 1956 the Director of Native Affairs had signed an order pursuant to ss 6 and 16 of the *Aboriginals Ordinance* committing Mr Gunner to the custody of St Mary's Hostel until 19 September 1966 (apparently thought at the time to be his eighteenth birthday). It was also common ground on the appeal (although not at trial) that the order made on 21 May 1956 ceased to have effect on the repeal of the *Aboriginals Ordinance* by the *Welfare Ordinance 1953* (NT) which came into force on 13 May 1957. On the appeal (although not at trial), Mr Gunner accepted that the committal order made on 21 May 1956 provided a complete defence to his claim for false imprisonment between that date and 13 May 1957, unless the order could be regarded as void or voidable on grounds of so-called *Wednesbury* unreasonableness: *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1947] EWCA Civ 1; [1948] 1 KB 223. Mr Gunner maintained, however, that no lawful justification had been shown for his detention after 13 May 1957 since there was no evidence that the Director of Welfare used his powers on or after that date under s 17 of the *Welfare Ordinance* to "order" that Mr Gunner be kept at St Mary's Hostel.

196 (v) The appellants' breach of duty claims were narrowed and substantially reformulated on the appeal. Indeed, as we explain later (see [340]-[350] below) the appellants' case on breach of duty changed considerably between the filing of written submissions and oral argument on the appeal.

197 The appellants pleaded that their removal and detention constituted a breach of the duty of care the Commonwealth (not the Directors) owed to them. The central factual allegation relied on to support the pleading was that the Commonwealth had pursued a general policy of removal and detention of part-Aboriginal children without regard to their individual circumstances. His Honour found that that allegation had not been made out. However, he gave a number of other reasons for rejecting the appellants' breach of duty claims, including holding that the Commonwealth owed no duty of care to the appellants.

198 On the appeal, the appellants (as their submissions were ultimately formulated) contended that the Commonwealth had breached its duty of care in a number of respects that had not been specifically pleaded. The centrepiece of the submissions on appeal was that the Commonwealth had breached its duty of care in relation to the **manner of removal** of Mrs Cubillo from the Phillip Creek Settlement and Mr Gunner from Utopia Station. Other alleged breaches included a failure by the Commonwealth to take reasonable care to ensure that the appellants, while in institutional care, maintained contact with their respective families and that they were protected from physical or sexual assault.

199 The appellants' reformulated submissions gave rise to a debate as to whether they had been live issues at the trial and, if not, whether the appellants should be permitted to raise them for the first time on appeal.

THE FALSE IMPRISONMENT CLAIMS

THE PLEADED CASE

200 Mrs Cubillo alleged that her removal from the Phillip Creek Settlement on 24 July 1947 and her subsequent institutionalisation in the Retta Dixon Home between 26 July 1947 until she left the Home in 1956 constituted "wrongful imprisonment and deprivation of liberty" by the Director of Native Affairs. A similar allegation was made in relation to the removal of Mr Gunner from his mother's custody in 1956 and his subsequent institutionalisation in St Mary's Hostel. Mr Gunner was allegedly detained in St Mary's by the Director of Native Affairs until 13 May 1957, the date the *Aboriginals Ordinance* was repealed and the *Welfare Ordinance* came into force, and thereafter by the Director of Welfare. These allegations provided the foundation for the appellants' claims against the Commonwealth in relation to what was said to be their false imprisonment.

201 The appellants ultimately put their false imprisonment claims against the Commonwealth in three ways. It is fair to say that the first two ways were clearly identified in the pleadings, the third less clearly, if at all. We shall explain the first two ways in which the false imprisonment claims were put and then deal with the third, which we describe as the "unlawful detention" argument. It was the last argument that occupied most time on appeal.

202 First, each appellant pleaded that his or her removal and detention by the Director of Native Affairs

> "*was unlawful beyond the power conferred by sections 6 and 16 of the* Aboriginals Ordinance, *alternatively [the appellant] was detained by the Director of Native Affairs for a period beyond that authorised by law.*"

In the case of Mr Gunner, the pleading relating to ss 6 and 16 of the *Aboriginals Ordinance* was confined to the period until 13 May 1957. Thereafter it was alleged that his continuing detention

> "*by the Director of Welfare purportedly under the* Welfare Ordinance *was unlawful and beyond the power conferred by section 17 of the* Welfare Ordinance, *alternatively [Mr Gunner] was detained for a period beyond that authorised by law*".

203 We have already extracted the first two "grounds" relied on in the pleadings to support these allegations (see [162] above). They indicate, and his Honour's judgment confirms, that the first way in which the appellants pleaded their case was that the successive Directors had purported to exercise their statutory powers in relation to each appellant, but that they had failed to exercise their powers lawfully. In other words, the appellants' principal claim was that the Directors' purported exercise of statutory powers had miscarried because the removals and detention resulted from an inflexible application of a general policy of removal of part-Aboriginal children from their Aboriginal parents without regard to their individual circumstances. It was also said that the exercises of power were unreasonable in the *Wednesbury* sense, that is, so unreasonable that no reasonable person could have so exercised the powers. The Commonwealth was alleged to be vicariously liable for the conduct of the Directors with respect to the removals and detention.

204 The second way in which the appellants pleaded their cases was to allege that the Commonwealth had actively promoted or caused their imprisonment. This way of putting the cases

appears to have been based on the principle stated by McDonald J in *Myer Stores Ltd v Soo* [1991] VicRp 97; [1991] 2 VR 597, at 629:

> "*[t]o be liable for false imprisonment it must be the act of the defendant or his agent that imprisons the plaintiff* ***or the defendant must be active in promoting and causing the imprisonment****.*"

It was said (among other things) that the Commonwealth had required the Directors to act in accordance with the policy of removal and detention of part-Aboriginal children, without regard to the individual circumstances of the case and that the removal and detention of each of the appellants was in pursuance of that policy.

205 The Commonwealth, by its further amended defences, denied the allegations made by the appellants. The defence to Mrs Cubillo's pleading included a denial that the Director had exercised the power under ss 6 and 16 of the *Aboriginals Ordinance* in relation to her removal and detention, except for the order made on 18 August 1953 committing her to the custody of the Retta Dixon Home until 8 August 1956. The defence to Mr Gunner's pleading included an assertion that "to the extent to which" the Director had exercised his power under s 17 of the *Welfare Ordinance*, the exercise of that power was valid.

206 The Commonwealth also pleaded that the powers and functions conferred on the Director of Native Affairs by ss 6 and 16 of the *Aboriginals Ordinance* and on the Director of Welfare by s 17 of the *Welfare Ordinance* were "independent statutory powers [and] functions". It was said that the Commonwealth could not be liable, vicariously or otherwise, for the exercise or discharge of such powers or functions. This defence invoked the so-called independent discretion rule, the effect of which was summarised by Dixon J in *Field v Nott* [1939] HCA 41; (1939) 62 CLR 660, at 675:

> "*When a public officer, although a servant of the Crown, is executing an independent duty which the law casts upon him, the Crown is not liable for the wrongful acts he may commit in the course of his execution. As the law charges him with a discretion and responsibility which rests upon him in virtue of his office or of some designation under the law, he alone is liable for any breach of duty. The Crown is not acting through him and is not vicariously responsible for his tort.*" (Citations omitted.)

207 At the time of their respective removals and detention Mrs Cubillo and Mr Gunner were infants, but it was neither pleaded nor submitted by the Commonwealth that infancy precludes a claim for false imprisonment: see *Murray v Ministry of Defence* [1988] UKHL 13; [1988] 1 WLR 692, at 701, per Lord Griffiths, suggesting that *Herring v Boyle* [1834] EngR 139; (1834) 1 CM&R 377; 149 ER 1126, was wrongly decided.

UNLAWFUL DETENTION ARGUMENT

208 It was not until the concluding submissions at trial that the appellants advanced the third way in which their case was put, which we have described as "the unlawful detention argument". They may have been prompted to take this course by concerns as to whether the primary Judge would find in their favour on the legal and factual issues presented by their two principal contentions. Indeed, on

one view, the appellants' argument based on the purported, but unlawful, exercise of statutory powers by the Directors carried with it the seeds of its own destruction. If the Commonwealth's defence based on the independent discretion rule was sound (as his Honour ultimately held), critical elements of the appellants' case were doomed to failure. Whatever their reasons, the appellants chose to change course, or at least supplement their argument, late in the trial.

209 The appellants' unlawful detention argument appeared to be straightforward, but concealed a range of factual issues that were not perhaps fully exposed in the argument before the primary Judge. The argument took as its starting point the proposition that the gist of the false imprisonment action is the mere imprisonment of the applicant by the respondent, or by some person for whom the respondent is liable. The applicant carries only the burden of establishing that he or she was imprisoned by the respondent. Once imprisonment is established, it is for the respondent to prove a lawful justification for the imprisonment: *Myer Stores v Soo,* esp at 611, per O'Bryan J; at 625, per McDonald J.

210 The appellants contended that each had been detained by the Director. It was said to follow that the burden fell on the Commonwealth to establish lawful justification for the appellants' detention. The Commonwealth had failed to discharge that burden in the case of Mrs Cubillo, at least from the time of her removal until the order committing her to the Retta Dixon Home was made on 18 August 1953. This followed, so it was argued, from the absence of evidence that the Director had exercised his powers under ss 6 or 16 of the *Aboriginals Ordinance* prior to 18 August 1953. Similarly, in Mr Gunner's case, there was no evidence of any action taken under the *Welfare Ordinance* to justify his detention at least after 13 May 1957. The Director of Native Affairs had made an order on 21 May 1956 committing Mr Gunner to the custody of St Mary's Hostel, pursuant to ss 6 and 16 of the *Aboriginals Ordinance.* But that order was spent on 13 May 1957 with the repeal of the *Aboriginals Ordinance.* Accordingly, so it was argued, there was no basis thereafter for his detention.

211 The Commonwealth submitted to the primary Judge that the appellants should not be permitted, at the close of the trial, to advance a fresh argument that depended on the proposition that there was no evidence that the Directors had exercised statutory powers in relation to the appellants. The Commonwealth contended that the appellants had impermissibly departed from their pleaded cases, since their primary submissions were founded on the proposition that the Directors **had** purported to exercise their statutory powers in relation to the appellants, albeit not validly.

212 The primary Judge took the view that it was sufficient for the appellants to plead that they had been unlawfully removed and detained. Once that was done, the onus was on the Commonwealth to refute the allegation. His Honour apparently did not consider that the Commonwealth would suffer significant prejudice if the appellants were permitted to rely on the unlawful detention argument. He also apparently took the view that the language of the pleadings was sufficiently broad to encompass that argument. It is fair to say that he did so notwithstanding that none of the specific "grounds" pleaded by the appellants to support their false imprisonment claims clearly foreshadowed the argument.

213 On the appeal, the Commonwealth criticised his Honour's decision to permit the appellants to advance the unlawful detention argument in the course of final addresses. Its written submissions in

reply characterised the appellants' change of position at trial as "fundamental" and suggested that the Commonwealth's objections ought not to have been dismissed. But we did not understand Mr Meagher QC, senior counsel for the Commonwealth, to invite us to hold that his Honour's ruling was erroneous, or that it should be overturned. There was certainly no notice of contention to this effect.

214 It is nonetheless appropriate to point out that the appellants' belated reliance on the unlawful detention argument created forensic difficulties for the Commonwealth and complications for the fact-finding process. The principal case advanced by the appellants heavily relied on the allegation that the Directors had purported to exercise their statutory powers, but that their attempts to do so lawfully had miscarried. One way in which the Commonwealth could and did meet that case was to deny that the Directors had purported to exercise their powers in the manner alleged and to put the appellants to proof that the Directors had indeed purported to exercise their powers. Another was by invoking the independent discretion rule to resist the claim that the Commonwealth was vicariously liable for any tortious acts of the Director. By belatedly relying on the unlawful detention argument, the appellants sought not only to take advantage of the manner in which the Commonwealth had defended their principal claims, but to secure the additional advantage of requiring the Commonwealth to bear the onus of establishing lawful justification for their detention. The Court itself was faced with the difficulty that the same evidence had to be assessed, for different purposes, by reference to different legal or evidentiary burdens: see *Cross on Evidence* (6th Aust ed), [705]-[715].

THE PRIMARY JUDGMENT ON FALSE IMPRISONMENT

The Reasoning

215 It must be said, with great respect, that it is not entirely easy to follow his Honour's reasoning on aspects of the false imprisonment claims. In part, this is because some findings of fact and legal conclusions critical to the outcome are made in other sections of the lengthy judgment and are not always incorporated expressly in the reasoning on false imprisonment. In part, too, it is because his Honour's analysis of central issues is sometimes expressed cryptically and therefore steps in the reasoning process are not always explicitly identified. In addition, the reasoning does not always clearly distinguish between the issue of prejudice to the Commonwealth and the primary Judge's conclusion on the appellants' substantive claims.

216 As we have pointed out, his Honour rejected the central allegation of the appellants' pleaded case that the Commonwealth had a general policy of removal of part-Aboriginal children from their families, without regard to their individual circumstances. He further found that even if, contrary to his view, there was such a policy, it had not been implemented as a matter of course in relation to Mrs Cubillo or Mr Gunner. These findings undercut much of the first contention pleaded on behalf of the appellants, namely that they had been removed and detained in consequence of the purported, but unlawful exercise of statutory powers by the Directors. It also tended to undercut the second contention, that the Commonwealth had actively promoted or caused their imprisonment.

217 The primary Judge found that it was possible that the Director of Native Affairs was purporting to act within the umbrella of s 6 of the *Aboriginals Ordinance* when he participated in Mrs Cubillo's removal from the Phillip Creek Settlement. However, he considered that there was no evidence upon

which the Court could rely to find that the Phillip Creek children were the subjects of an exercise of power that exceeded the boundaries of ss 6 or 16 of the *Aboriginals Ordinance.* Equally, there was "no evidence" that the Director had acted pursuant to those provisions in relation to Mrs Cubillo prior to 1953. On the other hand, Mrs Cubillo had failed to satisfy the Court that when the Director removed and detained her, he did not have the necessary opinion about her interests [1245].

218 In relation to Mr Gunner, the primary Judge found that the Director of Native Affairs did not participate in his removal from Utopia. If, contrary to that finding, the Director did participate it was possible that he was acting pursuant to s 6 of the *Aboriginals Ordinance.* The Director did, however, commit Mr Gunner to the care of St Mary's Hostel by an order made on 21 May 1956, pursuant to ss 6 and 16 of the *Aboriginals Ordinance.* As in the case of Mrs Cubillo, if the Director had removed and detained Mr Gunner, the latter had failed to satisfy the Court that the Director did not have the necessary opinion.

219 Although the Administrator declared Mr Gunner to be a ward under s 14 of the *Welfare Ordinance* on 13 May 1957, there was "no evidence" that the Director made an order for his continued detention pursuant to s 17 of the *Welfare Ordinance* [155]. A possibility was that the authorities thought that there was no need to invoke the powers under s 17 if (as the primary Judge found) Mr Gunner was an inmate of St Mary's at his mother's request [1235]. Even so, his Honour observed that the fact that there was no evidence that in 1957 the Director used any of his powers under s 17 was no justification for a finding that he had not used those powers [1252]. According to his Honour, it could just as easily be argued, perhaps in a "*de facto* sense", that the Director perpetrated his control over Mr Gunner by participating with St Mary's Hostel in detaining him in the institution. The primary Judge pointed out that the Director might have exercised his powers under s 17 without any documentary record being available, since s 17 did not require the exercise of the power to be recorded in writing [1254].

220 His Honour found that the order made on 18 August 1953, committing Mrs Cubillo to the Retta Dixon Home, provided complete protection to the Director and the Commonwealth in respect of Mrs Cubillo's detention between 1953 and 1956. He concluded, too, that s 16 of the *Aboriginals Ordinance* provided complete protection to the Commonwealth in respect of Mr Gunner's detention from 21 May 1956 to 13 May 1957 [1156]. There is no challenge to the first finding. The second is challenged on the appeal only to the extent that Mr Gunner argued that the order made on 21 May 1956 was ineffective on *Wednesbury* unreasonableness grounds.

221 His Honour rejected the appellants' claim that the Commonwealth promoted or caused their detention. He observed that [1158]:

> "*[f]or a finding in those terms to be made, it is incumbent on the applicants to prove that the Commonwealth was active in promoting and in causing the detentions. It is not enough to cause an authority to consider the matter, even though that may ultimately result in detention.*"

His Honour restated the findings to which we have referred (see [163] above) and concluded that they undermined the appellants' case that the Commonwealth imposed a blanket removal policy on those responsible for the administration of the *Aboriginals Ordinance* and, later, the *Welfare Ordinance* [1160].

222 His Honour noted that these conclusions did not bring the claims of false imprisonment to an end. He said this in relation to Mrs Cubillo [1160]:

> "*To establish imprisonment, it will be sufficient to prove that there was a constraint on an applicant's will that was so great as to induce him or her to submit to a deprivation of liberty; physical force need not be used. A mere taking and detaining will be sufficient and it can be effected as a result of the accumulation of the actions of two or more persons. Thus, it could be that the combined actions of Miss Shankelton and Mr Penhall might be the catalyst for the cause of action.*"

223 The primary Judge then continued [1162]:

> "*I have found that the Director of Native Affairs, Mr Moy, through his delegate, cadet patrol officer Penhall, was involved in the removal of Lorna Nelson along with the other children from Phillip Creek. It is possible that the director was acting in pursuance of his powers under the [Aboriginals] Ordinance, but there is no evidence of that fact. In other words, the evidence was sufficient to prove the taking, but the Commonwealth has not adduced any evidence sufficient to discharge an onus that the taking by the director was lawful; there was no evidence before the court that the director used or intended to use his powers under s 6 of the [Aboriginals] Ordinance. I am of the opinion that Mrs Cubillo has established, prima facie, the existence of a cause of action against the estate of Mr Moy, Mr Penhall, the estate of Miss Shankelton and the Aborigines Inland Mission for false imprisonment based on her removal from Phillip Creek. The critical question remains however; has she established a cause of action against the Commonwealth? Is the Commonwealth vicariously liable for the conduct of the director and Mr Penhall? Did the Commonwealth actively promote and cause the imprisonment? If the answer to any of these questions is yes, should she be granted an extension of time within which to prosecute her cause of action against the Commonwealth?*"

224 It will be seen that in this passage his Honour moves from the finding that the Director "was involved in the removal of" Mrs Cubillo to a finding that the Director (along with the others mentioned) had "taken" Mrs Cubillo, presumably from the Phillip Creek Settlement to the Retta Dixon Home. His Honour does not identify the precise nature of the Director's involvement that justifies the conclusion that the Director detained Mrs Cubillo during the removal. Was it the fact that Mr Penhall was physically present and drove the truck, even though his instructions were limited to acting as a transport officer? Was it the fact that the Director and Mr Penhall were involved in planning the move? If so, why was the nature of their involvement such that the Director was a joint tortfeasor with Miss Shankelton and the AIM, bearing in mind the finding that the AIM was the "dominant force" in the removal of the children?

225 The primary Judge then moved to Mrs Cubillo's detention at the Retta Dixon Home and asked whether she had been detained there by the Commonwealth or the Director. He thought it clear that she had been detained by the AIM. The involvement of the Commonwealth or the Director was, however, less clear. His Honour proceeded as follows [1163]:

> *"Mr Penhall drove the truck that transported Lorna to the Retta Dixon Home; his conduct would have been known to the Director. In other words the Director (who was her guardian) knew or ought to have known that Lorna was resident in Retta Dixon.* ***Although there is no other evidence available, I feel it is appropriate to draw an inference from the Director's involvement in her removal from Phillip Creek that he was also involved in placing Lorna in the Retta Dixon Home.*** *In other words, I infer that the Director detained Lorna in the institution from the time of her arrival."* *(Emphasis added.)*

226 This passage contains what we would regard as a substantial leap in the reasoning. His Honour inferred from the Director's "involvement" in Mrs Cubillo's removal from the Phillip Creek Settlement that the Director was also "involved in" placing her in the Retta Dixon Home. The latter involvement was regarded as sufficient to justify a conclusion that the Director had detained Mrs Cubillo from the time of her arrival, apparently until at least 1953. Again, his Honour does not identify the nature of the Director's involvement that justified the inference that the Director detained Mrs Cubillo for a period of six years. Was it the Director's participation in planning the removal? Was it the fact that the Director must have known that Mrs Cubillo was at the Retta Dixon Home? If so, why was that knowledge of itself sufficient to justify a finding of detention by the Director**,** bearing in mind the primary Judge's rejection of the appellants' claim that the Commonwealth actively promoted or caused Mrs Cubillo's imprisonment? Was it thought to be enough that Mr Penhall, on the instructions of the Director, caused Mrs Cubillo to be transported to and left at the Retta Dixon Home, albeit that before, during and after the removal she appears to have been in the *de facto* care, custody and control of the AIM?

227 The primary Judge identified the next question as whether the conduct of the Director of Native Affairs, in detaining Mrs Cubillo prior to 1953, was lawful. He repeated an earlier observation that it was possible that the Director was acting in pursuance of his statutory powers, but that there was no evidence to that effect. His Honour concluded as follows [1164]:

> *"[A]s with the removal of Lorna from Phillip Creek, so also with her detention until 1953, I am not satisfied that the Commonwealth has met the onus of proving that the detention was lawful."*

In reaching this conclusion, his Honour appears to have accepted that both the evidential burden (that is, the burden of adducing evidence to suggest that the Director had lawfully exercised his statutory powers) and the legal burden (that is, the burden of establishing on the balance of probabilities the facts required to prove a lawful exercise of the statutory powers) lay on the Commonwealth.

228 The primary Judge then turned to a submission by the Commonwealth, to the effect that the person who detained Mrs Cubillo at the Retta Dixon Home was Miss Shankelton. His Honour said this [1165]:

> *"Even though she [Mrs Cubillo] may have then come under the control or supervision of Miss Shankelton, it was still necessary for the Commonwealth to establish that the Director thereafter failed to play any part in her ongoing detention. It failed to do this. From 18 September 1953 onwards [apparently an erroneous reference to the date of the*

order committing Mrs Cubillo to the Retta Dixon Home], the position changed".

In this passage, his Honour appears to have attributed to the Commonwealth the burden of proving that it had not detained Mrs Cubillo after her placement in the Retta Dixon Home. In taking this course, his Honour may have inverted the true position, as Mrs Cubillo always bore the legal burden of proving, on the balance of probabilities, that the Commonwealth, either directly or by its servants or agents, detained her. It is possible that the passage was intended to bear some other meaning, but it is difficult to know what that might have been.

229 The primary Judge next considered the position of Mr Gunner. He pointed out that, following the repeal of the *Aboriginals Ordinance* on 13 May 1957, there had been an apparent failure by the Director of Welfare to formalise Mr Gunner's ongoing detention at St Mary's Hostel by a written notice or order. His Honour identified the claim advanced on Mr Gunner's behalf in respect of that period as being to the effect that, since there was no evidence that he had been detained under s 17 of the *Welfare Ordinance* after it had come into force, his continuing detention was unlawful and the Commonwealth was liable for that continuing unlawful detention. The position with respect to his detention from 21 May 1956 to 13 May 1957 was different, because of the order made on 21 May 1956 committing him to St Mary's Hostel. As to this Mr Gunner claimed that the order was vitiated by reason of *Wednesbury* unreasonableness.

230 His Honour did not state his findings in this section of the judgment concerning the detention of Mr Gunner. Later in the judgment [1233], he restated the finding that the Director had not removed Mr Gunner from Utopia Station, but that "the act of removal had occurred as a result of Topsy's decision to give her son a western education". He then said this:

> "*I have also concluded that the Director of Welfare subsequently detained him when the* Welfare Ordinance *came into force*".

231 In a key paragraph, his Honour stated his conclusion on the appellants' false imprisonment case [1167]:

> "***I have come to the conclusion that the applicants have each failed to establish that they have a cause of action against the Commonwealth for false imprisonment****. I do not accept that the Commonwealth actively promoted or caused the imprisonments; the evidence does not justify such a finding. The Director of Native Affairs was entitled, as a matter of law, to undertake `the care, custody or control' of a part-Aboriginal child; hence the removal of Lorna Nelson from Phillip Creek and the removal of Peter Gunner from Utopia (if contrary to my finding, the Director was legally involved in his removal) could have been lawful exercises of a statutory power unless the court concluded that the Directors, in so acting, did so without first forming the opinion that it was `necessary or desirable in the interests' of the child to do so. This makes the evidence of the Directors, particularly that of Mr Moy, vital for a proper consideration of the merits of the applicants' claims. Since neither director is available, the court is denied the opportunity of hearing what opinions (if any) they formed, for what reasons they formed them and on what information they formed those opinions. The absence of*

evidence on these subjects reflects back adversely on the applicants' attempts to prove that the Commonwealth directly participated in or promoted their imprisonment. There remains the question of the Commonwealth's vicarious liability. I have already decided that the utilisation by a director of his or her power under s 6 of the Aboriginals Ordinance cannot attract vicarious liability. However, in the unusual circumstances of Mrs Cubillo's claim, I have no way of knowing why Mr Moy participated in her removal and detention. If it was because he invoked his s 6 powers, then the Commonwealth is not vicariously liable for his conduct. However, if it was for some other reason then, depending on what power he purported to use, the Commonwealth might be at risk of being vicariously responsible for the director's conduct. The same difficulty arises with respect to Mr Gunner. If I am wrong in finding that the Director of Native Affairs did not participate in his removal from Utopia, the same question might arise. Under what power did the director purport to act. The answer to that question - if it is not s 6 - might lead to a finding of vicarious liability." (Emphasis added.)

232 His Honour then considered the question of prejudice. He said this [1168]:

"The applicants need an extension of time within which to prosecute their claims for false imprisonment. The prejudice to the Commonwealth that would arise if that extension were granted is obvious. If the Commonwealth is vicariously liable for the conduct of its Directors it would be deprived of the opportunity to have their evidence; it would also be deprived of Miss Shankelton's evidence. Finally, age and frailty have impaired the quality of the evidence of Mr Kitching and Mrs McLeod. I consider, at a later stage in these reasons whether the prejudice to the Commonwealth is sufficient to deny the applicants their extensions of time."

233 Finally, his Honour considered and rejected the appellant's contentions that any decision that the Director might have made to remove or to detain either of them during any period of time was unreasonable in the *Wednesbury* sense [1174].

Why Did the Primary Judge Reject the False Imprisonment Claims?

234 It was a somewhat curious feature of the appeal that counsel were ambivalent as to precisely why the appellants' false imprisonment claims failed at trial. Different submissions were put as to whether the unlawful detention argument failed because the primary Judge considered it could not be supported on the facts as found by him, or whether it failed because of the irremediable prejudice that the Commonwealth would sustain if the appellants were granted an extension of time in which to institute proceedings to pursue their false imprisonment claims.

235 The latter part of par [1167] of the judgment, when read with par [1168] suggests that the appellants failed because the Commonwealth would have suffered prejudice if required to defend the appellants' claims based on their unlawful detention and thus it was not appropriate to grant an extension of time in which to pursue those claims. But in the opening sentence of par [1167] and in at least one other passage in the judgment to which we have already referred (see [180] above), his Honour expressly stated that the appellants had each failed to establish that they had a cause of

action against the Commonwealth for false imprisonment. The context in which those statements were made, strongly supports the conclusion that the appellants failed on the unlawful detention claim, not only because his Honour refused to extend time to institute the proceedings but because the primary Judge considered that the claims were not sustainable in any event on the evidence presented to him.

236 This conclusion gives rise to a further question. On the findings made by the primary Judge, why did he conclude that the appellants had not made out their unlawful detention argument? We confess that we have not found this an easy question to answer. We think, however, that the steps in his Honour's reasoning can be identified.

237 In this connection, it is necessary to go back to the section of the judgment in which his Honour addressed the independent discretion rule. (The rule is stated at [172], [206] above.) He held [1122] that vicarious liability would not attach to the Commonwealth as a result of the removal of Mrs Cubillo from Phillip Creek to the Retta Dixon Home if the removal were purportedly effected in accordance with the provisions of the *Aboriginals Ordinance*. His Honour reached this conclusion because s 6 empowered the Director to undertake the care, custody and control of any "half-caste" if "*in his opinion it is necessary or desirable in the interests of the half-caste for him to do so*". His Honour took the view that these words imposed an independent discretionary function on the Director and that the Commonwealth could not be held vicariously liable for the consequence of a purported exercise of that discretion. He pointed out that Gibbs CJ in *Oceanic Crest Shipping Company v Pilbara Harbour Services Pty Ltd* [1986] HCA 34; (1986) 160 CLR 626, at 637, had referred to the independent discretion doctrine, first laid down in Australia in *Enever v The King* [1906] HCA 3; (1906) 3 CLR 969, as "firmly established as part of the common law of Australia".

238 The primary Judge said that he would have reached the same conclusion if Mr Gunner had been removed from Utopia Station and taken to St Mary's Hostel "in accordance with the provisions of s 6" (by which we take his Honour to mean "in purported exercise of the powers conferred by s 6", since the Commonwealth could not be held liable for a **valid** exercise of discretionary statutory powers regardless of the independent discretion rule). He expressed the same view in relation to any purported detention of Mr Gunner pursuant to s 17 of the *Welfare Ordinance.*

239 The primary Judge stated his conclusion this way [1132]:

> *"I have come to the conclusion that when a Director of Native Affairs or a Director of Welfare acted under s 6 of the* Aboriginals Ordinance *or s 17 of the* Welfare Ordinance *to remove a part-Aboriginal child from his or her family and place that child in an institution such as the Retta Dixon Home or St Mary's Hostel, the director was acting independently, free of any control by the Commonwealth. The Commonwealth would not, therefore, have been vicariously responsible for the actions of the directors. The directors who held office at the time of the removal and detention of Lorna and Peter would have been, in each case, fulfilling a responsibility that was cast on them by the law. If the conduct of Mr Moy, through his delegate, Mr Penhall, amounted to him undertaking the care, custody or control of Lorna Nelson and if, contrary to my finding, Mr Giese, through his delegate, Mr Kitching, undertook the care, custody or control of*

> *Peter Gunner, then I am of the opinion that both men were acting within the umbrella of `the independent discretion rule'.*"

240 The application of the independent discretion rule to the circumstances of the case was clearly central to his Honour's reasoning on the false imprisonment claims. It is also clear enough that his Honour took the view that the appellants' position would vary, depending on whether or not Mrs Cubillo and Mr Gunner had been detained in consequence of attempts by the Director to invoke the powers conferred by ss 6 and 16 of the *Aboriginals Ordinance* or s 17 of the *Welfare Ordinance.* If they had been detained pursuant to a valid exercise of such powers, no question of the Commonwealth's vicarious liability could arise. If they had been detained pursuant to a purported, but invalid exercise of those powers, the Commonwealth would not be vicariously liable because of the independent discretion rule. If, however, the appellants had been detained by the Directors independently of any attempted exercise of the statutory powers, the Commonwealth would be vicariously liable, provided that the Directors were acting within the scope of their employment.

241 In construing his Honour's reasons, it is necessary to bear in mind another principle adverted to in the judgment. The rationale for the independent discretion rule is that a Crown servant who is exercising an "independent discretion" conferred on him or her personally is not acting in the course of his or her employment with the Crown. In *Attorney-General (NSW) v Perpetual Trustee Co Ltd* [1952] HCA 2; (1952) 85 CLR 237, Fullagar J, after referring to the authorities, said this (at 283-284):

> "*The distinction taken in those cases seems to be in substance between an act or default of an officer in the course of his service under the Crown on the one hand, and an act or default in executing some independent duty cast upon him by the common law or by statute on the other hand. The distinction itself has been criticized.... But, whether the distinction has been soundly applied or not, it has turned, as it seems to me, not on the presence or absence of the relation of master and servant as such (though it may, of course, be loosely said that the servant is not a servant* quoad hoc*) but on the question whether the servant is acting in the course of his employment by the Crown.*"

(The decision of the High Court was affirmed by the Privy Council in *Attorney-General (NSW) v Perpetual Trustee Co Ltd* [1955] AC 457.) See, also, *Oceanic,* at 637, where Gibbs CJ pointed out that a distinction had to be drawn as to the source of the employees' authority: *viz* whether the officer who committed the tort was acting in the "performance of a duty imposed by law...or whether his authority to act was derived from his employment".

242 The particular factual difficulty presented by the case was that the gaps in the evidence meant that his Honour was simply unable to determine the reasons for the appellants' detention. He was therefore unable to make findings as to whether the Directors had or had not purported to exercise their statutory powers in relation to the detention of the appellants. For that reason, the location of onus of proof was important in determining whether the appellants had established the evidentiary foundation for their false imprisonment claims.

243 With this background, we think that the steps in his Honour's reasoning, leading to the conclusion that the appellants had failed to establish their claims, were as follows:

(i) On the evidence, the Director detained Mrs Cubillo and Mr Gunner when they were removed from their families and also during the periods in which they were inmates, respectively, of the Retta Dixon Home and St Mary's Hostel.

(ii) Subject to the possible operation of the independent discretion rule, the detention in each case could be sheeted home to the Commonwealth, thereby imposing on it the burden of establishing that the detention in each case was lawfully justified. (It is not clear why his Honour regarded detention by the Director as equivalent to that of the detention by the Commonwealth. It would seem, however, that it flowed from the fact (as he found) that the Director was an officer of the Commonwealth and from an implicit finding that the detentions occurred in the course of the Director's employment.)

(iii) It was possible that the Directors had validly exercised the statutory powers conferred by ss 6 and 16 of the *Aboriginals Ordinance* in relation to the detention of the appellants. It was also possible that the Director had validly exercised the powers conferred by s 17 of the *Welfare Ordinance* in relation to Mr Gunner. If the powers had been validly exercised, the Commonwealth could not be liable for false imprisonment, since the appellants' detention in those circumstances would have been lawfully justified.

(iv) The onus was on the Commonwealth to establish on the balance of probabilities that the Director had validly exercised his statutory powers so as to lawfully detain the appellants. The Commonwealth had failed to discharge this burden (that is, the legal burden of proving, on the balance of probabilities, the facts necessary to demonstrate that the Directors had lawfully exercised their statutory powers).

(v) It was also possible that the Directors had purported to exercise their statutory powers in relation to Mrs Cubillo and Mr Gunner, but in a legally improper manner. (This, after all, was the principal case advanced by the appellants to support their false imprisonment claims.) If that was so, the Commonwealth could not be vicariously liable for the Directors' detention of the appellants by reason of the independent discretion rule. To put the matter another way, the appellants would have failed to show that the source of the Directors' authority to act was derived from their employment, as distinct from a duty imposed on the Directors by law.

(vi) For the purposes of this aspect of the case, the onus was on the appellants to prove that the Directors' detention of the appellants was undertaken in the course of their employment. In the circumstances, this onus required the appellants to prove, on the balance of probabilities, that the Directors detained them otherwise than by actions taken in purported exercise of their statutory powers. (His Honour did not explicitly refer to the principles relating to the burden of proof, but he had addressed them in *Australian Competition and Consumer Commission v Golden Sphere International Inc* [1998] FCA 598; (1998) 83 FCR 424, at 449-451; see also *Clayton Robard Management Ltd v Siu* (1988) 6 ACLC 57 (NSWCA), at 64-65, per Kirby P.)

(vii) His Honour was not satisfied that the appellants had discharged this burden. They had therefore not negated the application of the independent discretion rule to the Directors' detention of the appellants. It followed that the appellants had not established that the Commonwealth was vicariously liable for the appellants' detention by the Directors.

THE APPELLANTS' PRIMARY CASE ON FALSE IMPRISONMENT

244 The appellants contested the primary Judge's rejection of their primary case on false imprisonment (that is, their case other than the unlawful detention argument) on only two grounds:

* First, they submitted that the primary Judge's findings that the Commonwealth had not actively promoted or caused the appellants' imprisonment were wrong and should be overturned.

* Secondly, Mr Gunner submitted that the order made on 21 May 1956, committing him to St Mary's Hostel, was vitiated by *Wednesbury* unreasonableness.

We deal with each of these contentions in turn.

The Finding that the Commonwealth did not Actively Promote or Cause the Appellants' Imprisonment

Mrs Cubillo

245 Mrs Cubillo contended at trial, in accordance with her pleadings, that the Commonwealth was liable for her removal and detention, because it had a policy that called for the removal of part-Aboriginal children without regard to their individual circumstances, and it imposed that policy on those who were responsible for the administration and implementation of the *Aboriginals Ordinance*. The Commonwealth, having imposed its policy on the Directors, thereby caused the Directors to refrain from acting in accordance with their own opinions, or to act without having regard to the interests of the children [1159]. In this way, so it was argued, the Commonwealth actively promoted or caused her imprisonment.

246 As we have noted, the appellants did not challenge his Honour's finding that they had established neither that there was any such policy of removal of part-Aboriginal children nor that, if there were such a policy, it had ever been implemented as a matter of course in respect of the appellants. It might have been thought that the absence of a challenge to these findings removed the foundation for Mrs Cubillo's argument that the Commonwealth actively promoted and caused her imprisonment. Especially is this so when she did not identify any error of principle in his Honour's reasoning on this issue.

247 Nonetheless, Mrs Cubillo submitted that his Honour ought to have found that the Commonwealth had actively promoted and caused her detention at the Retta Dixon Home. She relied on the following matters:

(a) at the time Mrs Cubillo was removed from Phillip Creek and until at least March 1950, it was the policy of the Native Affairs Branch, wherever possible, to remove "half-caste" children from their native mothers as soon as was reasonably possible after birth;

(b) the Commonwealth provided buildings, furnishings, rations and substantial financial assistance for the Retta Dixon Home;

(c) on 17 December 1947, the Administrator declared the Retta Dixon Home to be an Aboriginal institution under the *Aboriginals Ordinance* and appointed Miss Shankelton as the first Superintendent

of the Home;

(d) the Director of Native Affairs had extensive supervisory and regulatory powers over the Retta Dixon Home, although they did not extend to the hiring and firing of staff;

(e) Mr McCaffrey, the Acting Director in 1953, believed that the Administrator had a direct involvement in the control of children residing in the Home;

(f) the guardianship of the Director, the Director's duties of supervision and regulation, the licensing powers of the Administrator and the substantial funding assistance provided by the Administration, meant that the Director, the Administrator and the Commonwealth, in combination, were able to wield substantial influence over the institution, to such an extent that the Administration could have closed it down; and

(g) in any event, the Commonwealth could have used its financial aid as a lever to direct the Superintendent and the Home to take particular action.

248 The first of these matters identifies a policy different from that on which Mrs Cubillo unsuccessfully relied at first instance to support her claim. It is grounded in a memorandum of the then Director, Mr Moy, to the Administrator, dated 20 March 1950 [215]. The primary Judge said this about the memorandum:

> "*I see no reason why the contents of Mr Moy's memorandum of 20 March 1950 should not be accepted in these proceedings as some evidence of the* ***guidelines*** *that were used by the Director of Native Affairs and his officers when deciding whether or not the Branch should involve itself in the removal of part-Aboriginal children to an institution.*" (Emphasis added.)

249 The existence of **guidelines**, however, does not undermine the proper exercise of the discretionary powers of the Director. Nor does it suggest that the primary Judge's finding that the Commonwealth did not promote or cause Mrs Cubillo's removal and detention was erroneous. Similarly, none of the other matters relied on by Mrs Cubillo demonstrate any error on the part of the primary Judge. Those matters were simply consequences of the statutory scheme contained in the *Aboriginals Ordinance*.

250 As we have noted, to be liable for false imprisonment, it must be the act of the defendant (respondent), or his or her agent, that imprisons the plaintiff or "the defendant must be active in promoting and causing the imprisonment": *Myer Stores v Soo,* at 629, per McDonald J. A person who is active in promoting and causing the imprisonment is jointly and severally liable with the person who effects the imprisonment, ordinarily because their acts are done in furtherance of a common design: *Myer Stores v Soo*, at 617, per O'Bryan J. The matters relied on by Mrs Cubillo fall well short of establishing that the Commonwealth actively promoted or caused Mrs Cubillo's imprisonment, whether in furtherance of a common design with the AIM or Miss Shankelton, or otherwise. They certainly do not justify overturning his Honour's finding to the contrary.

Mr Gunner

251 The argument advanced on behalf of Mr Gunner was very similar to Mrs Cubillo's argument. It was said that the primary Judge ought to have found that the Commonwealth actively promoted or caused Mr Gunner's detention at St Mary's Hostel, by reason of the following matters:

(a) the 1952 principles, proposed by the Administrator and approved by the Minister for Territories, were in force at the time when Mr Gunner went to St Mary's and they showed that it was official policy to remove "half-caste" children from their families;

(b) from 19 December 1946, the Administrator licensed St Mary's Hostel as an Aboriginal institution under the *Aboriginals Ordinance* and appointed Sister Eileen Heath and, later, Father Smith as Superintendent of the institution;

(c) the financial cost of operating St Mary's was substantially subsidised by the Commonwealth;

(d) the Director of Native Affairs and the Director of Welfare had extensive supervisory and regulatory powers over St Mary's Hostel, although they did not extend to hiring and firing of staff;

(e) the Administration had substantial influence over the Hostel, in particular because of the financial aid without which it could not operate; and

(f) it was the Administrator in January 1957 who approved the declaration that Mr Gunner was an "Aboriginal" for the purposes of the *Aboriginals Ordinance* and it was the Director who in May 1957 declared Mr Gunner to be a ward under the *Welfare Ordinance*.

As with Mrs Cubillo, the first ground relies upon a different policy from that which was unsuccessfully relied upon at first instance. The "1952 principles" were the subject of extensive consideration by the primary judge. His Honour said in relation to those principles [237]:

> *"... the decision to remove is reserved to the Director of Native Affairs - not the Administrator, nor the Minister nor the Commonwealth; ... removal will only occur if the Director thinks it necessary in the interests of the child.... [T]he removal must be to a suitable institution."*

252 In view of his Honour's other findings, the application of the 1952 principles to Mr Gunner was consistent with the statutory scheme, and did not require a conclusion that the Commonwealth had actively caused or promoted his detention. The other matters relied upon by Mr Gunner could not sustain a conclusion to that effect. They simply reflected the practical application of the scheme established by the *Aboriginals Ordinance* and, after May 1957, the *Welfare Ordinance.*

Wednesbury Unreasonableness: Mr Gunner

253 The grounds on which Mr Gunner submitted that the primary Judge ought to have found that the committal order was vitiated by *Wednesbury* unreasonableness were these:

(a) the conditions at St Mary's were such that no one acting reasonably could conclude that Mr Gunner's interests could be promoted by committal to that institution;

(b) the Native Affairs Branch knew that a child of Mr Gunner's age and background was unlikely to

benefit from a standard European education; and

(c) the contemporary state of knowledge recognised that children who were institutionalised were likely to suffer harm.

254 In assessing this submission, it is necessary to bear in mind that a decision will be vitiated by *Wednesbury* unreasonableness, only if no decision-maker, acting reasonably, could have made that decision or if it is shown that the decision was so unreasonable that no reasonable person could have come to it. In applying this standard a court must proceed with caution lest it exceed its supervisory role by reviewing the decision on the merits: *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* [1986] HCA 40; (1986) 162 CLR 24, at 41-42, per Mason J; *Attorney-General (NSW) v Quin* (1990) 170 CLR 1, at 36-37, per Brennan J. It is not enough to show that another decision-maker might have reached a different result or even that the court takes the view that a different decision would have been more appropriate: *Minister for Immigration and Multicultural Affairs v Eshetu* (1999) 197 CLR 611, at 626-627, per Gleeson CJ and McHugh J; *Friends of Hinchinbrook Society Inc v Minister for Environment (No 2)* (1997) 69 FCR 28, at 59-65, per Sackville J. Moreover, Mr Gunner did not challenge his Honour's approach, which required the question of reasonableness to be assessed by reference to the standards of the time: see *Kruger,* at 36.

255 Mr Gunner's submission flies in the face of the primary Judge's findings. He found, for example, that on the basis of individual consideration of Mr Gunner's case the Director formed the view that it would be in Mr Gunner's best interests for him to go to St Mary's Hostel in order to attend school. He also pointed out that account had to be taken of the available alternatives [1535]:

> "*The conditions at St Mary's Hostel were very poor throughout most of the time that Peter Gunner was there. The buildings and other improvements in both places were primitive on today's standards but they should be compared with what existed in the Territory after the war. Cynical though it may be to some, the conditions at Retta Dixon home were preferable to those at the Phillip Creek Native Settlement, and St Mary's, bad as it was, was better than life in a camp at Utopia.*"

It is one thing to accept that conditions at St Mary's Hostel were less than satisfactory and that there were areas that required major improvement, even judged by contemporary standards. It is quite another to conclude that no decision-maker, acting in accordance with the standards of the time, could reasonably have formed the view that Mr Gunner should be placed at St Mary's Hostel in order to receive a European education. The difficulty of reaching such a conclusion is compounded by his Honour's finding that, although Mr Gunner was committed to St Mary's Hostel by an order of the Director, he became an inmate of the Hostel at the request and with the informed consent of his mother, Topsy Kundrilba.

256 In our opinion, none of the findings made by his Honour sustains Mr Gunner's challenge to the committal order. Nor is there any basis for our making findings that would support that challenge. The material to which we were referred merely indicated that other decision-makers at the time might have formed a different view as to whether Mr Gunner was likely to derive substantial benefits from a European education and whether the drawbacks likely to be associated with institutionalisation

outweighed the advantages. The evidence disclosed, for example, that it was "well-known that institutionalisation was not the `preferred option' for young children" [1470]. But as his Honour pointed out, each case had to be considered individually, having regard to the alternatives. The absence of evidence as to why the Director decided to place Mr Gunner in St Mary's Hostel made it impossible to characterise that decision as manifestly unreasonable.

T***HE UNLAWFUL DETENTION ARGUMENT: THE COMMONWEALTH'S NOTICE OF CONTENTION***

257 In general, the Commonwealth supported the primary Judge's reasoning for rejecting the appellants' unlawful detention argument, including the process of reasoning which we have attributed to the primary Judge. By its notice of contention, however, the Commonwealth challenged the factual foundation underlying the argument. Specifically, the Commonwealth contended that the primary Judge had erred in finding that the Director had detained

* Mrs Cubillo from the time of her removal from the Phillip Creek Settlement on 24 July 1947 until the order committing her to the Retta Dixon Home was made on 18 August 1953; and

* Mr Gunner from the date the order committing him to St Mary's Hostel expired (13 May 1953) until his release from the Hostel in 1963.

The Principles

258 Section 27 of the *Federal Court Act* provides as follows:

> *"In an appeal, the Court shall have regard to the evidence given in the proceedings out of which the appeal arose, and has power to draw inferences of fact and, in its discretion, to receive further evidence...".*

It has been authoritatively determined that an appeal to this Court is by way of rehearing: *CDJ v VAJ* (1998) 197 CLR 172, at 199, 201-202, per McHugh, Gummow and Callinan JJ; *Allesch v Maunz* [2000] HCA 40; (2000) 173 ALR 648, at 653-654, per Gaudron, McHugh, Gummow and Hayne JJ.

259 Where a party to an appeal challenges inferences drawn by the primary Judge from primary facts, the principles to be applied are those stated in *Warren v Coombes* [1979] HCA 9; (1979) 142 CLR 531: see *Minister for Immigration and Multicultural Affairs v Jia* (2001) 178 ALR 421 at 439, per Gleeson CJ and Gummow J (with whom Hayne J agreed); *News Ltd v Australian Rugby Football League Ltd* [1996] FCA 870; (1996) 64 FCR 410, at 423-424. In *Warren v Coombes,* the joint judgment said this (at 551-552):

> *"Shortly expressed, the established principles are, we think, that in general an appellate court is in as good a position as the trial judge to decide on the proper inference to be drawn from facts which are undisputed or which, having been disputed, are established by the findings of the trial judge. In deciding what is the proper inference to be drawn, the appellate court will give respect and weight to the conclusion of the trial judge, but, once having reached its own conclusion, will not shrink from giving effect to it.*
> *...*

> *The duty of the appellate court is to decide the case - the facts as well as the law - for itself. In so doing it must recognize the advantages enjoyed by the judge who conducted the trial. But if the judges of appeal consider that in the circumstances the trial judge was in no better position to decide the particular question than they are themselves, or if, after giving full weight to his decision, they consider that it was wrong, they must discharge their duty and give effect to their own judgment.*"

260 As the Full Court pointed out in *News Ltd v ARL,* at 423, this does not mean that an appellate court will necessarily interfere simply because it would not have been inclined to reach the same conclusion on the primary Judge. The Full Court cited with approval a passage from the judgment of Beaumont and Lee JJ in *Minister for Immigration, Local Government and Ethnic Affairs v Hamsher* [1992] FCA 184; (1992) 35 FCR 359, at 368-369:

> "*The material upon which his Honour made his findings consisted of documents, affidavits and uncontested oral testimony. This Court is as well placed as his Honour to draw inferences from that material. (See* Warren v Coombes *[1979] HCA 9; (1979) 142 CLR 531.)*
>
> ...
>
> However, the hearing of an appeal in this Court is neither a trial de novo nor a trial of the case afresh on the record (Duralla Pty Ltd v Plant [1984] FCA 146; (1984) 2 FCR 342) and the court is not obliged to proceed to make new findings of fact on all relevant issues and discharge the judgment appealed from if those findings differ from those of the trial judge and do not support the judgment. The court must be satisfied that the judgment of the trial judge is erroneous and it may be so satisfied if it reaches the conclusion that the trial judge failed to draw inferences that should have been drawn from the facts established by the evidence. The court is unlikely to be so satisfied if all that is shown is that the trial judge made a choice between competing inferences, being a choice the court may not have been inclined to make but not a choice the trial judge should not have made. Where the majority judgment in Warren v Coombes (at 552-553) states that an appellate court must not shrink from giving effect to its own conclusion, it is speaking of a conclusion that the decision of the trial judge is wrong and that it should be corrected. (See also Edwards v Noble [1971] HCA 54; (1971) 125 CLR 296 per Barwick CJ (at 304), per Menzies J (at 308-309) and per Walsh J (at 318-319)."

The Finding That the Director Detained Mrs Cubillo

261 We have explained his Honour's reasoning in relation to his finding that the Director detained Mrs Cubillo. We have pointed to what we regard, with respect, as gaps in the reasoning concerning the findings that the Director had taken Mrs Cubillo from the Phillip Creek Settlement to the Retta Dixon Home and had detained her there from the date of her admission. One difficulty in dealing with the Commonwealth's notice of contention is the absence of detailed findings of primary fact that would explain the ultimate finding on the question of detention.

262 The starting point is that Mrs Cubillo bore both the evidentiary onus of adducing evidence and

the legal burden of persuading the trier of fact that throughout the relevant period the Director had detained her. The key findings, so far as his Honour was concerned, were that the Native Affairs Branch had a "measure of involvement" in Mrs Cubillo's removal and "participated in the decision to remove and in the removal of the children" [508]. He characterised the removal as a "joint exercise" involving the AIM and the Native Affairs Branch, but did not explain the sense in which he used that expression. Nor did his Honour explain why the Director's "involvement" in the removal justified the finding that he had detained her during the transfer from the Phillip Creek Settlement to the Retta Dixon Home.

263 If his Honour intended to base the ultimate finding on Mr Penhall's participation in the move, the reasoning encounters the difficulty that, on his Honour's finding, Mr Penhall's involvement in the actual removal was "minimal" and his instructions were limited to acting as a transport officer. As we have pointed out (see [103]-[104] above), his Honour made an apparently inconsistent finding that Mr Penhall's involvement in the removal of the children could "not be dismissed as minimal", but this seems to have been based on the fact that arrangements had been made to provide a truck and rations for the journey. The fact that such arrangements had been made is at best equivocal on the question of detention, having regard to the other findings made by the primary Judge. Moreover, no findings were made as to whether Mrs Cubillo was being detained prior to her removal and, if so, by whom. It is not apparent why the limited form of assistance provided by Mr Penhall could justify the conclusion that the Director deprived Mrs Cubillo of her liberty when his Honour found that it was the AIM that had initiated the decision to move the children and had been the "dominant force" in the removal.

264 If his Honour intended to base his conclusion on the Director's involvement in planning the removal of the children, the conclusion is unsupported by any findings as to the extent of that involvement, other than that the authorities approved the move pursuant to s 15 of the *Aboriginals Ordinance.* Indeed, his Honour acknowledged that there was insufficient evidence to make concrete findings with respect to the reasons behind the Director's decision to participate. It is also difficult to see why the fact that approval was given under s 15 of the *Aboriginals Ordinance,* of itself, demonstrates that the Director had detained Mrs Cubillo during the move. The AIM required the approval of a Protector (the Director being one) for the move to the Retta Dixon Home (because the Phillip Creek Settlement and the Retta Dixon Home were located in different districts), even if the AIM were the body exclusively responsible for detaining Mrs Cubillo. Moreover, his Honour found that the details of any approval under s 15 were "wholly lacking" [502]. For all the evidence or findings reveal, the approval may have been granted on the basis that the AIM was responsible at all times for the custody and control of Mrs Cubillo, subject only to the potential exercise of the Director's statutory powers.

265 The difficulties are even greater with respect to the finding that the Director detained Mrs Cubillo after her arrival at the Retta Dixon Home. The basis for this finding appears to be an inference drawn by his Honour from the "Director's involvement in her removal from Phillip Creek" [1163]. But if the unspecified nature of that involvement is insufficient to justify the conclusion that the Director took Mrs Cubillo from the Phillip Creek Settlement to the Retta Dixon Home, it cannot support a finding that he detained her for a further six years at the Home. A passage in the judgment [1165], to which we

have referred (see [228] above), suggests that his Honour may have inverted the correct onus of proof on the detention issue. If he did, this would explain why he was prepared to infer, apparently so readily, that the Director had detained Mrs Cubillo after her admission to the Retta Dixon Home.

266 A further difficulty with the conclusion reached by the primary Judge is that he did not specifically direct attention to the position after 17 December 1947. On that date, the Retta Dixon Home was declared to be an Aboriginal institution for the purposes of the *Aboriginals Ordinance* and Miss Shankelton was appointed as the Superintendent. The effect of s 13(6) of the *Aboriginals Ordinance* was that thereafter every "half-caste child" for the time being an inmate of the Home came under the control and supervision of Miss Shankelton as Superintendent. Moreover, his Honour found that Miss Shankelton had day-to-day responsibility for the management of the Home and reported to the Director of the AIM. Neither Miss Shankelton nor other staff at the Home were the servants or agents of the Commonwealth and Miss Shankelton had "substantial independence" in exercising her powers. It is not easy to reconcile these findings with the conclusion that the Director detained Mrs Cubillo for a further five and a half years after the declaration of the Retta Dixon Home as an Aboriginal institution. We have not overlooked his Honour's comment, made in the course of considering whether Mrs Cubillo's detention was lawful, that he was "not persuaded that the position of the Director was overridden by the provisions of s 13(6)" [1164]. This somewhat equivocal comment appears not to have been concerned with the question of detention.

267 At one point in the judgment (under the heading "Statutory duty") his Honour referred to his finding that the Director "played some part in the detention" of the two appellants as being based in part upon the Director's legal role as her guardian [1186]. The judgment does not explain, however, how the Director's statutory role as Mrs Cubillo's guardian, either alone or in combination with other facts, leads to the conclusion that the Director detained her, bearing in mind the other findings concerning the circumstances in which she was removed from the Phillip Creek Settlement.

268 It is not clear whether his Honour inferred from the fact of guardianship a greater degree of involvement by the Director in the removal than his previous reasoning had suggested, or whether he thought that the fact of guardianship, as a matter of law, supported a finding that the Director had detained Mrs Cubillo. It is difficult to see how the legal guardianship contemplated by s 7 of the *Aboriginal Ordinance* can tip the scales in favour of a finding that the Director detained a child if other findings of fact do not support that conclusion. The legal guardianship of the Director was compatible with the care and control of a child being vested in another person (see [59]-[63] above).

269 In our view, at least in the absence of further findings of fact, his Honour was in error in concluding that it was the Director who detained Mrs Cubillo from the date of her removal from the Phillip Creek Settlement on 24 July 1947 until her release from the Retta Dixon Home in 1956, whether or not in conjunction with Miss Shankelton or the AIM. The consequence is that the foundation for Mrs Cubillo's unlawful detention argument is wanting.

270 Ordinarily, we would proceed to consider whether the case should be remitted to the primary Judge for further findings to be made, or whether this Court should reconsider for itself his Honour's finding on the detention issue. Ms Richards, who presented this aspect of Mrs Cubillo's case, did not invite us, in the event that we considered that the findings of fact did not support the conclusion that

the Director had detained her, to make additional findings of fact that might support the conclusion. If the matter were to be remitted, however, the primary Judge might make further findings of fact that would make it clear whether or not Mrs Cubillo was detained by the Director from the date of her removal until her departure from the Retta Dixon Home. Since we have concluded that Mrs Cubillo's appeal must be dismissed in any event (see [473]-[474] below), it is not necessary to determine whether the matter should be remitted to the primary Judge.

The Finding that the Director Detained Mr Gunner

271 It was common ground that the committal order of 21 May 1956, even though expressed to operate until Mr Gunner's eighteenth birthday on 19 September 1966, became spent on 13 May 1957, when the *Welfare Ordinance* came into force. The primary Judge concluded that the Director detained Mr Gunner on and after that date, but did not explain why he reached that conclusion. As we have observed (see [267] above), his Honour did make a passing reference to the Director's role as Mr Gunner's guardian as having played a part in his reasoning [1186], but did not expand on the part it played.

272 It is possible that his Honour was intending to say that, as the Director had committed Mr Gunner to the care of St Mary's Hostel on 21 May 1956, he was responsible for Mr Gunner's detention at all times thereafter and therefore must be taken to have been responsible for his continuing detention after 13 May 1957 notwithstanding that the force of the original order was spent on that date. Alternatively, he may have relied on the Director's role as Mr Gunner's guardian by virtue of the declaration of wardship made under s 14 of the *Welfare Ordinance* on 13 May 1957. Or there may have been some other basis for his Honour's conclusion.

273 It is not clear why the fact that the Director lawfully committed Mr Gunner to St Mary's Hostel on 21 May 1956, of itself, justifies the conclusion that the Director detained Mr Gunner after the order became spent on 13 May 1957. Particularly is this so given the findings that Mr Gunner was an inmate of St Mary's Hostel at the request of his mother, who wished to have him housed and educated at Alice Springs, and that the Director had not participated in Mr Gunner's removal. In the section on breach of statutory duty, his Honour referred in passing to correspondence culminating in the committal order made on 21 May 1956. But it is not clear how the correspondence advances Mr Gunner's case on detention in view of the unequivocal findings relating to the Director's lack of involvement in his removal. It may be that his Honour thought that the terms of the order, which was expressed to continue until Mr Gunner's eighteenth birthday, influenced Captain Steep to continue to detain Mr Gunner, but there is no finding to that effect. Similarly, it is not clear why the fact that the Director had become Mr Gunner's guardian sheeted home to the Director responsibility for Mr Gunner's detention at St Mary's Hostel. Perhaps his Honour inferred that the Director must have adverted to the correct legal position on or after 13 May 1957 and decided that Mr Gunner should nonetheless remain where he was. Again, no finding to this effect was made.

274 In our view, the findings of primary facts made by the primary Judge are insufficient to support his Honour's ultimate finding that the Director of Welfare detained Mr Gunner on or after 13 May 1957. As his Honour recognised in another context, the absence of evidence cannot be used as a basis to build a finding of liability against a Director or the Commonwealth [1263]. Ordinarily, we would think it

appropriate to remit the matter to the primary Judge to consider whether further findings of fact should be made, rather than attempt to resolve the factual question ourselves. As in the case of Mrs Cubillo, however, we have concluded that, in any event, Mr Gunner's claim must fail. We therefore need not take any further the challenge to the finding that the Director detained Mr Gunner.

THE APPELLANTS' CHALLENGE TO THE REJECTION OF THE UNLAWFUL DETENTION ARGUMENT

275 The appellants challenged his Honour's rejection of the unlawful detention argument on two grounds only.

276 First, the appellants submitted that the primary Judge had erred in failing to appreciate that at the trial there was "common ground" between the parties on certain important issues. In particular, Mrs Cubillo contended that it had been common ground at the trial that the Director did not exercise his powers under ss 6 or 16 of the *Aboriginals Ordinance* in relation to her until 18 August 1953. For his part, Mr Gunner contended that "all parties were agreed" that the then Director, Mr Giese, had not exercised his powers under s 17 of the *Welfare Ordinance* at any time after 13 May 1957 (the date on which the order committing Mr Gunner to St Mary's Hostel was spent). Ms Richards supported these submissions by reference to documentary evidence which (so she argued) established that the Director had exercised neither his power in relation to Mrs Cubillo under s 6 of the *Aboriginals Ordinance* prior to 18 August 1953 nor his power under s 17 of the *Welfare Ordinance* in relation to Mr Gunner after 13 May 1957.

277 Ms Richards submitted that the fact that these matters were common ground at trial ruled out any possibility that the independent discretion rule could apply to prevent the Commonwealth from being vicariously liable for the tortious acts of the Directors. Since there had been no issue before the primary Judge as to whether the Directors had exercised their statutory powers in relation to Mrs Cubillo and Mr Gunner (so it was argued), there was simply no foundation for the Commonwealth to invoke the independent discretion rule. To put the matter another way, to the extent that the appellants bore the onus of establishing facts necessary to displace the independent discretion rule, they had discharged that onus.

278 The appellants' submissions on this issue were important for another reason. The appellants contended that the Commonwealth could not have sustained prejudice in defending the unlawful detention case, at least in the manner found by the primary Judge, since the claimed prejudice related to issues that were not genuinely in dispute. His Honour had found, for example, that the Commonwealth had been prejudiced in defending Mrs Cubillo's unlawful detention claim by the deaths of Mr Moy, Miss Shankelton and Mr McCaffrey. Yet (so it was argued) it was never part of the Commonwealth's case that either Mr Moy or Mr McCaffrey, as Director and Acting Director respectively, had exercised their statutory powers in relation to Mrs Cubillo prior to 18 August 1953. Similarly, Mr Gunner asserted that the Commonwealth could not have been prejudiced by the inability of the then Director, Mr Giese, to give evidence as to whether he had exercised his powers under s 17 of the *Welfare Ordinance* after 13 May 1957, since it was never part of the Commonwealth's case that the Director had done so. We return to this question later.

279 The second challenge to his Honour's reasoning on the unlawful detention argument was that the

independent discretion rule did not apply to the exercise of powers by the Directors under s 6 of the *Aboriginals Ordinance* or s 17 of the *Welfare Ordinance.* Had his Honour recognised this, so it was said (at least implicitly), he would have found in favour of the appellants. This was so because he had found that it was possible that the Directors had purported to exercise their statutory powers in relation to Mrs Cubillo and Mr Gunner, but in a legally improper manner.

Was it Common Ground that the Directors had Not Exercised Their Statutory Powers?

280 As we have pointed out, it was Mrs Cubillo's pleaded case that her removal and detention resulted from a purported exercise by the Director of his powers under the *Aboriginals Ordinance,* but that the exercise of those powers miscarried. Under the heading "False Imprisonment" his Honour identified the submission made on behalf of the appellants as follows [1144]:

> "*Counsel for the [appellants] submitted that the existence of the policy (which counsel called `the removal policy') was relevant to the [appellants'] claims that the Commonwealth and its directors had breached their duties to the applicants. Its particular relevance was said to be that any exercise of the director's powers of removal and detention miscarried because the powers were exercised by applying the Commonwealth's removal policy without regard to the applicant's individual circumstances. As a result there was no lawful justification for the [appellants'] removal and detention.*"

281 The Commonwealth put Mrs Cubillo to proof of that case. On a number of occasions, the primary Judge referred to the fact that it was possible that, in removing and detaining Mrs Cubillo, the Director was acting in pursuance of his powers under the *Aboriginals Ordinance*, but that the evidence did not permit of a finding either way: see, for example, [503], [508], [1133], [1162], [1164]. These references demonstrate that the primary Judge was of the view that whether or not the powers under s 6 of the *Aboriginals Ordinance* had been exercised in relation to Mrs Cubillo was a live issue at the trial.

282 We have already explained that the appellants were permitted to rely on the unlawful detention argument in the course of closing submissions at the trial. By that stage it had doubtless become apparent that there was no affirmative documentary or oral evidence which suggested that the Director had exercised his powers under s 6 of the *Aboriginals Ordinance* in relation to Mrs Cubillo prior to 18 August 1953. The lack of evidence prevented his Honour from finding that the Director had purported to exercise his power in relation to Mrs Cubillo before 1953.

283 It does not follow from the paucity of evidence concerning the exercise of statutory powers, or from the Commonwealth's recognition that there was little or no affirmative evidence that the powers had been exercised, that the Commonwealth was to be taken as having conceded from the outset that the Directors had never purported to exercise their powers. There is a distinction between a matter not being an issue and the recognition by a party at the close of a case that there is no evidence to support a particular hypothesis. It must also be remembered that the Commonwealth's defence, which denied the exercise of power by the Director in the manner alleged by Mrs Cubillo, was filed in response to her pleaded case. The Commonwealth was never called on to plead specifically to the unlawful detention argument that the appellants were belatedly permitted to

advance.

284 In our view, whether the removal of Mrs Cubillo and her detention during the period up to 18 August 1953 resulted from a purported exercise of the Director's powers under s 6 of the *Aboriginals Ordinance* was a live issue at the trial. It was a live issue because the principal way in which Mrs Cubillo put her false imprisonment claim made it such. It remained a live issue for the unlawful detention argument because the possible exercise of the Director's statutory powers went to the question of lawful justification for any detention. It also went to the question of whether the conduct of the Director in detaining Mrs Cubillo was that of a person acting as agent of the Commonwealth, or was done in the exercise of an independent discretion cast upon him by law. If the latter were the case, the Commonwealth may have been entitled (as it pleaded) to rely on the independent discretion rule to avoid vicarious liability for the Director's actions.

285 For similar reasons, we conclude that whether Mr Gunner's detention after 13 May 1957 was referable to the exercise of the Director's powers under s 17 of the *Welfare Ordinance* was a live issue at the trial. The primary Judge made it clear that he considered the issue to be live [1252], [1254], even though he ultimately decided that the evidence did not enable a finding to be made one way or the other as to whether the powers had in fact been exercised. The paucity of evidence on the issue could not be converted into a concession by the Commonwealth that there had never been any dispute as to whether the Director had purported to exercise his powers under s 17.

286 We have not overlooked the documentary evidence to which the appellants referred. In the case of Mrs Cubillo the evidence consisted of documents dating from April and August 1953 which referred to the status of inmates at the Retta Dixon Home. On one view, the documents suggest that, at the time they were prepared, the view was held that no committal order had previously been made in respect of a number of inmates including Mrs Cubillo. In the case of Mr Gunner, the documents date from 1957 and indicate that consideration was being given to the legal position of children who had been committed to institutions by the Director of Native Affairs under the *Aboriginals Ordinance.* The documents fall well short of establishing that the Director made no committal orders in respect of Mrs Cubillo prior to 1953 or in respect of Mr Gunner from 1957 onwards. The primary Judge was not persuaded, after consideration of the whole of the evidence, including these documents, that he should make a positive finding that the Director had not exercised his powers at the relevant times. The documents to which we have referred do not demonstrate that the primary Judge was in error in that respect. They may explain, at least in part, why his Honour was unwilling to conclude that the Commonwealth had established that the Directors **had** exercised the powers. But they do not compel the contrary conclusion. Nor do they show that there was no issue as to the exercise of the Director's powers in relation to Mrs Cubillo and Mr Gunner.

287 For these reasons, we reject the first challenge to the primary Judge's conclusion that the appellants had failed to make out their unlawful detention claims. The possible exercise by the Directors of their statutory powers was in issue at the trial and thus the possible application of the independent discretion rule was also an issue.

The Independent Discretion Rule

288 We have outlined the reasoning of the primary Judge which led him to conclude that a purported

exercise by the Director for the time being of the powers conferred by s 6 of the *Aboriginals Ordinance* or s 17 of the *Welfare Ordinance* would have attracted the so-called independent discretion rule, so that the Commonwealth would not have been vicariously responsible for the actions of the Directors. In the course of his analysis, the primary Judge pointed out that the independent discretion rule has been the subject of "substantial criticism" and has been abrogated or modified by statute in a number of jurisdictions [1115]. His Honour also noted that, except where the rule had been affected by legislation, it remains entrenched as a principle which limits the vicarious liability of the Commonwealth for the torts of its servants [1117].

289 The appellants' written submissions addressed the application of the independent discretion rule to the present case. The submissions, on which Mr Dreyfus QC (who presented this section of the argument) did not elaborate, challenged neither the existence of the rule nor the primary Judge's formulation of it. So far as the false imprisonment claim is concerned, the attack on the primary Judge's findings was confined to a submission that his Honour was wrong to conclude that the statutory powers conferred on the Director by s 6 of the *Aboriginals Ordinance* and s 17 of the *Welfare Ordinance,* fell within the rule. This was said to follow from his Honour's finding that "the Director was to be subject to the control of the Commonwealth through the Administrator, in the exercise of his functions". In view of this finding, so it was argued, it was not open to the primary Judge to conclude that this control did not extend to the exercise of the powers conferred by s 6 of the *Aboriginals Ordinance* and s 17 of the *Welfare Ordinance.* On the proper construction of each *Ordinance,* and "from the evidence which shows the degree of Commonwealth control", it was submitted that the statutory powers were not to be regarded as independent discretions for the purpose of the rule.

290 It is not entirely clear what evidence the appellants were relying on to "show the degree of Commonwealth control" over the Directors. Presumably, they intended to invoke the evidence suggesting that the Commonwealth had imposed upon successive Directors a policy of forced removal and detention of part-Aboriginal children that did not take into consideration the interests of the children or the wishes of their families. As we have noted, his Honour declined to find that the appellants had established that any such policy had been imposed on the Directors. The appellants do not challenge that finding. It follows that their attack on the primary Judge's conclusion with respect to the independent discretion rule is necessarily confined to an argument based on the proper construction of *Aboriginals Ordinance* and the *Welfare Ordinance.*

291 The primary Judge took the view that the direction in both *Ordinances* that the Director was to be "under the Administrator" did not detract from the clear words of s 6 of the *Aboriginals Ordinance* and s 17 of the *Welfare Ordinance.* His Honour said this [1084]:

> *"In my opinion, there was no magic in that expression `under the Administrator'. It should be given its ordinary, everyday meaning. Although s 6 of the [*Aboriginals Ordinance*] nominated the Director as the individual who was required to form the relevant opinion, the Director was, nevertheless, to carry out his duties and perform his functions in accordance with the lawful directions of, and under the supervision and control of, the Administrator. Subject to what follows, those words point to the Administrator being in a position of control over the Director. The qualification to that statement is the language of s 6 in the [*Aboriginals Ordinance*] which gave power to the*

Director to undertake the care, custody or control of a part Aboriginal child in those cases where, in the opinion of the Director, it was necessary or desirable in the interests of the part Aboriginal child to do so. That opinion had to be the opinion of the Director; it was not the opinion of the Administrator, nor was it the opinion of the Minister. As a matter of law, that meant that the Director would have been able to act, on the basis of his opinion, in a manner that was contrary to the express instruction of the Administrator or the Minister. In particular, it would mean that, notwithstanding the existence of some policy, guideline or direction to the contrary, the Ordinance would not permit the Director to remove and detain a child unless he had first come to the decision that it was necessary or desirable in the interests of the child to do so."

292 In our view, his Honour's construction of the relevant provisions is correct. As his Honour said, there is no magic in the words "under the Administrator". They mean that the Director is to carry out his duties and functions in accordance with the **lawful** directions of the Administrator. They do not qualify the plain words of s 6 of the *Aboriginals Ordinance* or s 17 of the *Welfare Ordinance.* Under those provisions, the Director could not lawfully exercise the powers conferred on him unless he formed the opinion required by the legislation. He could not be directed by the Administrator to form that opinion.

293 This conclusion is consistent with the reasoning of the High Court in *Kruger v The Commonwealth,* to which we referred earlier (see [54]-[59] above). There was no issue in that case concerning the application of the independent discretion rule. But several of the judgments plainly proceed on the assumption that it was the Director who was to form his own opinion as to whether it was necessary or desirable in the interests of an "aboriginal or half-caste" to undertake the care, custody or control of that person. So much emerges from the extracts quoted with approval from the judgment of Fullagar J in *Waters v The Commonwealth:* see *Kruger v The Commonwealth,* at 37-38, per Brennan CJ; at 52, per Dawson J (with whom McHugh J agreed). None of the other judgments suggests anything to the contrary.

294 It follows that this challenge by the appellants to his Honour's rejection of the unlawful detention argument fails.

THE FINDING OF PREJUDICE

295 As we have noted, the primary Judge ultimately rejected the appellants' applications for an extension of time in which to institute proceedings in respect of their common law claims, including the claims founded on false imprisonment. His Honour accepted the Commonwealth's defence that it had suffered "irreparable prejudice" through the absence of material witnesses and the infirmities of others [1420].

296 The primary Judge's rejection of the applications for an extension of time turned, in part at least, on his finding that the Commonwealth had sustained irremediable prejudice in defending the false imprisonment claims, including the unlawful detention argument. In relation to Mrs Cubillo's case, the primary Judge said this [1423]:

"*Mrs Cubillo, having led evidence of her taking, has established a prima facie case of*

> *imprisonment; there is therefore an onus on the Commonwealth (putting to one side the question of vicarious liability) to satisfy the court that the taking was lawful. How can the Commonwealth do that? Every person who was in authority, such as Mr Moy, is dead; no writings on the removal of the children have been located. The Commonwealth has no chance whatsoever of defending the actions of the Director of Native Affairs in 1947.*"

In the case of Mr Gunner, although the Commonwealth had been able to answer some of his claims on the merits [1425]

> "*it lacked the evidence of Mr Giese; and the evidence of Mr Kitching and Mrs McLeod was materially impaired through age, infirmity, confusion and loss of memory*".

297 These findings were consistent with his Honour's repeated references to gaps in the evidence on critical questions. For example, he noted that there was a "void in the evidence" that prevented any finding being made as to why the Director decided (if he did) to place Mrs Cubillo in the Retta Dixon Home or agreed to her going to the Home. As his Honour said [1539]:

> "*So much time has passed, so many people have died, so many documents are missing that it is not now possible to know what motivated the Director of Native Affairs to participate in the removal and detention of* [Mrs Cubillo] *and the children from Phillip Creek.*"

Similarly, he found that although it was possible that the Director, Mr Moy, had purported to act within the umbrella of s 6 of the *Aboriginals Ordinance* in removing Mrs Cubillo from the Phillip Creek Settlement, there was no evidence that he had done so. His Honour considered that the absence of evidence was due to the deaths of potential witnesses, especially Mr Moy and Miss Shankelton, and the loss of contemporaneous documentation. Yet had such evidence been available, it may have afforded the Commonwealth a complete defence to any claim founded on the vicarious liability of the Commonwealth for the acts of the Director.

298 Again, his Honour found that the then Director, Mr Giese, might have acted under s 17 of the *Welfare Ordinance* in relation to Mr Gunner, but that there was no evidence, one way or the other, to determine that he had. The absence of evidence was plainly due to the inability of Mr Giese to give evidence at the trial. It was common ground that the director could have invoked the powers under s 17 of the *Welfare Ordinance* without any written order. In these circumstances it is fair to describe the prejudice to the Commonwealth caused by Mr Giese's inability to give evidence as "obvious".

299 The appellants endeavoured to meet his Honour's finding that the Commonwealth had sustained irremediable prejudice in defending the false imprisonment claims, by submitting that whether the Directors had purported to exercise their statutory powers in relation to the appellants had never been live issues at the trial. For the reasons we have given (see [284]-[285] above), we consider that they were live issues. It follows that the observations of the primary Judge, as to the irremediable prejudice which the Commonwealth would suffer if an extension of time were granted to institute proceedings in respect of the false imprisonment claims, retain their full force. The appellants did not submit that there was any other reason to set aside his Honour's findings.

300 Other factors add weight to the finding that the Commonwealth suffered irremediable prejudice in the conduct of its defence to the false imprisonment claims. His Honour found that the AIM regarded the part-Aboriginal children at the Phillip Creek Settlement, including Mrs Cubillo, as being in its care and that the AIM was the "dominant force" in the decision to move the children to the recently opened Retta Dixon Home [502]. There was no finding, however, as to how the children came within the care of the AIM. This may have come about as a result of assent or acquiescence on the part of a family member or members, or the children may have come into the care of the AIM in consequence of abandonment by their parents, or perhaps in other ways. It is impossible to know.

301 On one view of the case, Mrs Cubillo was transferred by the AIM from one location operated by it to another, with the limited assistance of Mr Penhall and with the approval of the Director under s 15 of the *Aboriginals Ordinance*. The primary Judge appears to have accepted this as an available interpretation of events (even though the Native Affairs Branch had a deep financial involvement in the Phillip Creek Settlement which was regarded, at least for some purposes, as a "departmental settlement"). On this approach, Mr Penhall's involvement and the approval under s 15 of the *Aboriginals Ordinance* did not disturb the *de facto* custodial relationship which existed between the AIM and Mrs Cubillo. The details of the arrangements made between the Director, on the one hand, and Miss Shankelton and the AIM, on the other, might have shed light on the nature and extent of the involvement of the Native Affairs Branch in the removal of the children. We have pointed to the significance of the evidentiary gaps on the issue of whether the Director detained Mrs Cubillo between 1947 and 1953. Evidence from the missing or infirm witnesses might have made it clear that the Director had not detained Mrs Cubillo, either at all or after her arrival at the Retta Dixon Home. The evidence of those arrangements was simply not available to the Commonwealth or to the Court. The absence of Mr Moy, Miss Shankelton, Maisie Nampijimpa and contemporaneous documentation, made a fair trial on the issue of whether the Director detained Mrs Cubillo on and after her admission to the Retta Dixon Home impossible.

302 The primary Judge also found that the Commonwealth had been substantially prejudiced by being denied the opportunity of calling witnesses who might have given evidence that the movement of children from the Phillip Creek Settlement to the Retta Dixon Home was arranged with the consent of their families [442]. He pointed out that the most significant potential witnesses - Mr Moy, Miss Shankelton, Mr Thomas, Mrs Thomas and Mr Colley - had all died. There was also a total absence of documentary records relating to the children's removal, although it was not clear whether they had been lost, destroyed or never existed. As his Honour observed [443]:

> "*This episode shows the difficulties that were faced by both the applicants and the Commonwealth. So much time has passed: so many witnesses are dead, that it is not possible to proceed with confidence.*"

303 The position is much the same as far as Mr Gunner is concerned. Independently of the other difficulties created by the unavailability of Mr Giese to give evidence, the Commonwealth was prejudiced in its defence to Mr Gunner's claim that he had been detained by the Director of Welfare after 13 May 1957. In the absence of Mr Giese, or others who might have explained the circumstances in which Mr Gunner continued to be an inmate of St Mary's Hostel, the Commonwealth was deprived

of the possibility of demonstrating that the Director had not detained Mr Gunner. Had a finding been made that the Director of Welfare did not detain Mr Gunner after 13 May 1957, the foundations for his false imprisonment claim would have been removed.

THE BREACH OF DUTY CLAIMS

304 Mrs Cubillo alleged that her removal from the Phillip Creek Settlement and her subsequent detention in the Retta Dixon Home gave rise to a claim in negligence against the Commonwealth. A similar allegation was made in relation to the removal of Mr Gunner from Utopia Station and his subsequent detention in St Mary's Hostel.

305 As we have explained, the issues canvassed on the appeal were much narrower and in significant respects different from those dealt with by the primary Judge. An important question which must be resolved is whether the appellants have sought impermissibly to reformulate their breach of duty claims. The Commonwealth contends that the appellants have done precisely that in order to accommodate adverse findings of fact made by the primary Judge which were not challenged on the appeal. In order to determine this issue, it is necessary to consider the manner in which the appellants' claims for breach of duty were pleaded and presented at the trial.

THE PLEADED CASE

306 Mrs Cubillo and Mr Gunner each alleged that the Commonwealth was under a legal duty of care to protect them from physical and emotional harm. Mrs Cubillo pleaded that the Commonwealth owed her a duty of care by reason of both her relationship with the Director of Native Affairs and the role played by servants and agents of the Commonwealth in her removal and detention. She also relied upon the rights and duties conferred or imposed by the *Aboriginals Ordinance* upon the Director and the Administrator of the Northern Territory and the Administrator's duty to administer the Territory on behalf of the Commonwealth in accordance with the instructions of the relevant Minister. Similar allegations were made by Mr Gunner.

307 Mrs Cubillo pleaded that her "removal and detention" were in breach of that duty. The particulars of breach provided on behalf of Mrs Cubillo included the following (the same particulars were relied on by Mr Gunner):

> "*(a) Failing to have regard to, and to act in, the best interests of the applicant by failing to take into account her individual circumstances and in particular her relationship with her mother, family and community.*
> *(b)* Acting in accordance with a policy of removal and detention of half-caste children the purpose of which was to destroy the associations and connections of the applicant with her Aboriginal mother, family and culture and to assimilate the applicant into non-Aboriginal society without regard to her particular circumstances.
>
> *(c)* Failing to fulfil the role and duties of
>
> *(i)* legal guardians as referred to in paragraphs 32-33, or
>
> *(ii)* a person in the position in loco parentis of the applicant,

while she was detained in an institution having regard to her particular needs and interests, and to the capacity of the respondent to review and consider those needs and interests.

(d) Failing to supervise the institutions in which the applicant was detained properly or at all in the performance of their obligations to the applicant.

(da) Having delegated the role and duties

(i) of legal guardian as referred to in paragraphs 32-33; or

(ii) a person in the position of the applicant's parent,

to the institutions in which she was detained, failing to supervise the institutions properly or at all in the performance of their obligations to the applicant.

(e) Permitting the institution in which the applicant was detained to maltreat her and to treat her in a cruel demeaning and degrading manner.

(f) Depriving the applicant of her family, cultural and spiritual heritage, and in particular -

(i) causing the applicant fear, anxiety, profound emotional distress, and psychological harm by forcibly removing her from her mother and family,

(ii) causing the applicant fear, anxiety, profound emotional distress, and psychological harm by detaining her and keeping her from contact or communication with her mother and family,

(iii) depriving the applicant of contact and meaningful relationship with her Aboriginal family, kin, home, land, culture, religion and heritage.

...

(g) Failing to have any or any proper system to enable the applicant and her mother to maintain contact with each other following the removal and during and following the detention of the applicant.

(h) Failing to maintain any or any proper system of records in respect of the applicant to enable the applicant and her mother to maintain contact with each other following the removal and during and following the detention of the applicant.

(i) Knowing that the matters set out in sub-paragraphs (a)-(h) herein were likely to cause the applicant fear, anxiety, grief, profound mental and emotional distress and anguish, and psychological harm, nevertheless engaging in such activities.

(j) Failing to make reasonable attempts to ensure that the applicant would enjoy equal opportunity compared to non-aboriginal or non-half-caste children in the society which the respondent intended the applicant to become a part of, being the non-aboriginal community of Australia

...

> *(l)* Failing to provide, adequately or at all, for the custody, maintenance and education of the applicant.
>
> *(m)* Failing to exercise adequately or at all, a general supervision and care over all matters affecting the applicant's welfare and to protect her, adequately or at all, against immorality, injustice, imposition and fraud."

308 The reference in pars (c)(i) and (da)(i) to "paragraphs 32-33" requires some explanation. Those paragraphs appear in the pleading under the heading "Breach of Duty as Guardian". They alleged that the Director was, by reason of s 7 of the *Aboriginals Ordinance*, Mrs Cubillo's legal guardian. They also alleged that, as her legal guardian, the Director had a duty to protect her from "physical, mental and emotional harm, and to act in her best interests". Finally, they alleged that her removal and detention was in breach of that duty. The particulars of that breach were essentially the same as those set out above. (They were replicated in Mr Gunner's pleading). These particulars were also repeated in the context of the claims for breach of fiduciary duty.

309 It is curious that Mrs Cubillo and Mr Gunner should set out essentially the same allegations twice, once under the heading "Breach of Duty as Guardian", and later under the general rubric of "Breach of Duty of Care". The claims for "Breach of Duty as Guardian" were described in the pleadings as separate causes of action. The primary Judge questioned why the pleadings were framed in this way. He was told that the allegations made under the heading "Breach of Duty as Guardian" were to be regarded merely as part of the allegations of breach of statutory duty, breach of fiduciary duty and breach of common law duty of care pleaded elsewhere. They were not relied upon for any other purpose.

THE PRIMARY JUDGMENT

Understanding the Case Pleaded

310 The primary Judge said that the appellants had based their claims for breach of duty upon the allegation that there had been a general policy of removal and detention of "half-caste" children from their Aboriginal parents, without regard to their individual circumstances. That allegation had been repeated throughout the entirety of their pleadings in relation to all of the causes of action upon which they relied. The general policy, allegedly implemented by successive Directors, formed the basis for the contention that the Commonwealth had undertaken and accepted responsibility for part-Aboriginal children [1194].

311 As we have pointed out (see [186] above), his Honour rejected the existence of any such policy and that finding was not challenged before us. It might have been thought that his Honour's finding would have resulted in the rejection of the appellants' claims for breach of duty. His Honour determined, however, that he would consider these claims upon a different basis. While the appellants had not established that the Commonwealth had undertaken responsibility for all part-Aboriginal children

> "*the case for the [appellants] can and should be considered upon the premise that, in removing and detaining any part-Aboriginal child, the Commonwealth arguably*

> *undertook and accepted responsibility for that part-Aboriginal child. Although counsel for the [appellants] then submitted that the application of any existing policy would form part of the circumstances surrounding the treatment of each child, and, in that sense, may be relevant to a determination whether a duty of care was breached, they disavowed any suggestion that the [appellants'] claim for a common law duty of care relied on the `implementation of a policy that was not authorised' or a `misuse or abuse of statutory power for the implementation of an improper purpose'.*" [1194]

312 His Honour therefore regarded the appellants' pleadings as encompassing two quite separate claims for breach of duty. The first was that the removal and detention of the appellants by the Directors of Native Affairs had occurred under the dictate of the general policy alleged in the pleadings. The second was that the Commonwealth was liable to the appellants by reason of its involvement, through the actions of its servants and agents, in their removal and detention. It was said that the Commonwealth had assumed responsibility for their welfare and had therefore come under a duty of care to ensure their well-being.

313 The primary Judge emphasised, however, that

> *it was only the removal and the detention that were identified by Mrs Cubillo as the alleged breaches of duty; **she did not allege that the adverse conditions at the Retta Dixon Home or the conduct of Mr Walter were breaches of the Commonwealth's duty of care to her**; these matters were listed as particulars of those breaches. With changes, because of the application of the Welfare Ordinance and because of St Mary's and Mr Constable, the same allegations were reflected in...Mr Gunner's further amended statement of claim.*" *[1106]* (Emphasis added.)

Duty of Care

314 In order to determine whether or not the Commonwealth owed a duty of care to the appellants, his Honour referred to English, New Zealand and Australian decisions [1224]-[1230]. He also referred to the key elements of the common law duty of care owed by statutory authorities or public bodies, that had been identified by McHugh J in *Crimmins v Stevedoring Industry Finance Committee* [1999] HCA 59; (1999) 200 CLR 1, at 39-49. McHugh J there formulated six questions designed to determine, in a novel case, whether a statutory authority owed the plaintiff a common law duty of care to exercise its statutory powers:

> *"1. Was it reasonably foreseeable that an act or omission of the defendant, including a failure to exercise its statutory powers, would result in injury to the plaintiff or his or her interests? If no, then there is no duty.*
> *2. By reason of the defendant's statutory or assumed obligations or control, did the defendant have the power to protect a specific class including the plaintiff (rather than the public at large) from a risk of harm? If no, then there is no duty.*
>
> *3. Was the plaintiff or were the plaintiff's interests vulnerable in the sense that the plaintiff could not reasonably be expected to adequately safeguard himself or herself or*

those interests from harm? If no, then there is no duty.

4. Did the defendant know, or ought the defendant to have known, of the risk of harm to the specific class including the plaintiff if it did not exercise its powers? If no, then there is no duty.

5. Would such a duty impose liability with respect to the defendant's exercise of "core policy-making" or "quasi-legislative" functions? If yes, then there is no duty.

6. Are there any other supervening reasons in policy to deny the existence of a duty of care (eg, the imposition of duty is inconsistent with the statutory scheme, or the case is concerned with pure economic loss and the application of principles in that field deny the existence of a duty)? If yes, then there is no duty.

If the first four questions are answered in the affirmative, and the last two in the negative, it would ordinarily be correct in principle to impose a duty of care on the statutory authority."

315 Later in his judgment McHugh J said at (42-43):

"It can seldom be the case that a person, who controls or directs another person, does not owe that person a duty to take reasonable care to avoid risks of harm from that direction or the effect of that control. The police officer who directs traffic, the gaoler who has the custody of the prisoner and the helpful bystander, who obligingly points the way to the traveller seeking guidance, all owe a duty to take care that their directions or control do not lead to harm."

316 The primary Judge considered that he should approach the question of whether the Commonwealth (as distinct from the Directors) owed the appellants a duty of care in accordance with these principles [1230]. He found that the first two questions and the fourth question posed by McHugh J in *Crimmins* had to be answered in the negative.

"There was no act or omission by the Commonwealth; the Commonwealth was not invested with the power of removal and detention. The [appellants'] interests were vulnerable but it has not been established that the Commonwealth knew of the risk of harm to the [appellants]. Some of the earliest writings showed that the authors were aware of the hardship and the hurt that would be occasioned by separating mother and child; other writings showed that there were sections of the community that were opposed to the policy of removing part Aboriginal children into institutions. But, in the main, it can be said of the writings that were tendered in the trial that the authors of those writings (who were senior public servants or Ministers of the Crown) never professed an awareness that there was a risk of harm to the children who were removed. Even if I am wrong in these particular conclusions, opposite answers could only apply to the Directors - not to the Commonwealth. It is obvious that the interests of Mrs Cubillo and Mr Gunner were vulnerable in the sense that neither of them could have safeguarded herself or himself or their interests from harm but to impose a liability on

> *either the Directors or the Commonwealth out of a use of the Directors' discretionary powers under s 6 of the 1918 Ordinance would, arguably challenge the "core policy-making" function of the legislation. The Welfare nature of the policy as found in the* Aboriginals Ordinance*, the difficulties through distance, remoteness, language and contrasting cultures in implementing the policy together with the subjective views of a Director in forming an opinion about what was necessary or desirable in the interests of a particular child do not favour the imposition of any duty.*" [1230]

317 His Honour continued at [1233]:

> *"I have already discussed the issue of vicarious liability and I have concluded that the Commonwealth was not responsible for the conduct of the Director when Mrs Cubillo was removed from Phillip Creek and detained at the Retta Dixon Home. In the case of Mr Gunner, I have concluded that it was not the Director of Native Affairs who removed him from Utopia Station; that act of removal occurred as a result of Topsy's decision to give her son a western education. However, the Director did commit Peter to St Mary's Hostel and, as a consequence, he did detain him there both during the legal life, at least, of the committal order. I have also concluded that the Director of Welfare subsequently detained him when the Welfare Ordinance came into force. If contrary to my finding, however, the Director did remove Peter from Utopia, I am of the opinion, for the reasons that I have earlier given when discussing vicarious liability, that the Commonwealth was not responsible for that conduct. I am also satisfied that the Commonwealth is not liable for the detention of Peter at St Mary's Hostel, first by the Director of Native Affairs and, later, by the Director of Welfare.*"

318 The primary Judge noted Mrs Cubillo's claims that she had been removed and detained "by the Director of Native Affairs or other servants or agents" of the Commonwealth "purportedly pursuant to s 6 of the *Aboriginals Ordinance*". He said [1197]:

> "*The difficulty with the [appellants'] pleadings was that there were no statutory powers vested in the Commonwealth; the position of guardian and the power to remove and detain belonged to the Director. What the [appellants] were striving to achieve can only be classified as an attempt to sheet home against the Commonwealth a finding of liability that was based on the principle of vicarious liability. Both the* Aboriginals Ordinance *and the* Welfare Ordinance *specifically imposed duties upon the Director as to the manner in which he was to exercise his powers under the Ordinances, albeit that those duties were of a public nature only.*"

His Honour considered that it would be unjust to impose a duty of care upon the Commonwealth where it had no statutory power to act nor any power to direct others to act. The Commonwealth's capacity to intervene was essentially limited to legislative change, withdrawal of funding and to the formulation of general policies. It neither had control over the institutions, nor the power to protect the appellants from danger [1198].

319 The primary Judge went on to consider the policy implications of imposing a duty of care upon

the Commonwealth in relation to the removal or failure to remove a child from his or her family. He dealt with a number of authorities which considered whether a statutory authority in whose custody a child is placed owes a duty of care arising out of that child's removal and detention. In particular, in *X (Minors) v Bedfordshire County Council* [1995] UKHL 9; [1995] 2 AC 633 ("*X (Minors*)"), the House of Lords held that the plaintiffs could not maintain an action for damages, either for breach of statutory duty or for common law negligence, against a local authority for steps taken (or not taken) by that authority as the responsible body in relation to children in need of care. His Honour considered that *X (Minors)* established that a decision by a local authority to take a child into care could be subject to judicial review, but would not be amenable to a claim in damages. He noted in particular the concerns expressed by Lord Browne-Wilkinson that to impose common law liability upon the performance of statutory duties might result in the authorities taking a "more cautious and defensive approach to their duties" [1210].

320 The primary Judge also referred to *Barrett v Enfield London Borough Council* [1999] 3 WLR 79. In that case, the House of Lords declined to strike out a statement of claim in which the plaintiff sued a local authority for damages for personal injuries allegedly sustained by reason of its negligence in having failed to make appropriate arrangements for his care and education. His Honour observed that in that regard their Lordships had adopted "a more cautious approach" than had been shown in *X (Minors)* [1211].

321 The primary Judge concluded that despite the difficulties in reconciling some of the views in *Barrett* with the remarks of Lord Browne-Wilkinson in *X (Minors)* two broad propositions could be extracted from the decisions [1222]:

> "*In the first place, the ability of a court to review a policy decision will only be available in rare cases. In the application of that proposition to Mrs Cubillo and Mr Gunner, I would consider that decisions to remove them from their families (if such decisions had been made) would have the potential to be policy decisions that were exercised pursuant to a statutory power and in pursuit of the policy of welfare and care that was to be found in the 1918 Ordinance. I am forced to say that they had `the potential to be policy decisions' because, in the case of Mrs Cubillo there was no evidence upon which a relevant finding could be made and because, in the case of Mr Gunner, I have found, as a fact, that the Director did not make a decision that he (the Director) would remove him. On the other hand, when Lorna and Peter became children who were in the care of the Director, the Director had thereby assumed positively the responsibility for their safety and their well-being. When a child goes into care as Lorna and Peter did, I see no problem with proximity or with foreseeability.*"

It will be seen from this passage that his Honour accepted that once Mrs Cubillo and Mr Gunner came into the care of the Director, a duty of care arose to ensure their safety and well being. That duty, however, was imposed upon the Director and not upon the Commonwealth [1268].

322 Finally, his Honour turned to consider the question whether the Commonwealth owed a duty of care in relation to the assaults committed upon Mrs Cubillo and Mr Gunner. He said [1255]:

"Neither in the case of Mrs Cubillo nor in the case of Mr Gunner did the Commonwealth or the Director know of the assault. Indeed, both applicants conceded that they told no one in authority of the incidents. Actual knowledge of conduct, or of predilection to such conduct, has not been proved and in neither case were the circumstances such that it could be said that either the Director or Commonwealth ought to have known of the assaults or of the assailants' propensities to commit the assaults.... I am satisfied that an incident in the car occurred [when she was with Mr Walter] and that it so frightened her that she started to cry. I am also satisfied that corporal punishment was administered to her and other children at the Retta Dixon Home. I am not satisfied that "flogging" is, however, an apt description.... Whatever cause of action Mrs Cubillo might have had against the Aborigines Inland Mission and members of its staff, that cause of action does not extend, in negligence, to the Director or the Commonwealth. The conclusion at which I have arrived with respect to Mrs Cubillo also applies to Mr Gunner. The conduct of Mr Walter and that of Mr Constable might have led to an award of damages against each of them and their respective employers, but not against the Directors. Apart from his indirect involvement in the appointment of the Superintendent of an institution, the Director had no involvement in the choosing of staff. That was the sole responsibility of the mission and the mission alone, to the exclusion of the Director, would have borne the consequences of an employee's misconduct. The Commonwealth is further removed from risk because neither applicant has pleaded that it was liable in respect of any tort that had been committed by Mr Walter or Mr Constable."

323 In summary, then, his Honour concluded that the Commonwealth did not owe Mrs Cubillo or Mr Gunner a duty of care. There was no general policy of removal and detention of half-caste children from their Aboriginal parents without regard to their individual circumstances. The Commonwealth was not in a position to control decisions taken by the Directors relating to the removal and detention of the appellants. It had not, accordingly, assumed responsibility for their welfare, as had been alleged. Moreover, there were sound policy reasons for rejecting the existence of a duty of care on the part of the Directors in relation to the appellants' removal and detention.

Vicarious Liability

324 The appellants' claims for breach of duty against the Commonwealth were not based upon the doctrine of vicarious liability. Nevertheless, his Honour appears to have considered these claims upon the hypothesis that the Commonwealth might be vicariously liable for the actions of the Directors in having removed and detained the appellants. This hypothesis was contrary to his earlier finding that the independent discretion rule rendered that doctrine inapplicable. It will be recalled that his Honour held that s 6 of the *Aboriginals Ordinance* conferred upon the Director a discretion which was extremely broad in scope and was personal to the individual holding the office. In exercising powers under that section, the Director acted independently, free of any control by the Commonwealth. Apparently for these reasons, his Honour concluded [1269] that if the Directors had owed Mrs Cubillo or Mr Gunner a duty of care with respect to their removal and detention and if that duty had been breached, the Commonwealth was not vicariously liable for any such breach of duty.

Breach of Duty

325 The primary Judge concluded that, even if contrary to his earlier finding, the appellants had established a duty of care on the part of the Commonwealth as pleaded by them, neither appellant had established any breach of that duty [1263].

326 In the case of Mrs Cubillo, his Honour found that there was no evidence relating to the circumstances which preceded her removal from Phillip Creek. It was not known what opinion, if any, was formed, in relation to the need for her to be removed, who had formed it, or why it was formed. His Honour said that he could not make an assumption, or draw an inference, in her favour out of sympathy for what had happened to her [1264]. His Honour also found that ss 6 and 16 of the *Aboriginals Ordinance* gave a statutory power to the Director which, if exercised, would have authorised him to place her in the Retta Dixon Home, and keep her there during the period of his guardianship. Whether and why the Director had decided to exercise his statutory powers was not known. The only two people who could have answered that question, Mr Moy and Miss Shankelton, were dead.

327 The primary Judge found that the Director had not breached his duty of care to Mrs Cubillo in relation to the conditions at the Retta Dixon Home [1269]. He said this [1267]:

> "*The facilities and amenities at the Retta Dixon Home were not good but they were not so bad as to create a cause of action. Having regard to the evidence that was given, Darwin was still recovering from the aftermath of the war; money was scarce; the conditions at Retta Dixon Home were, at the least, better than those at Phillip Creek and Mrs Cubillo did not make any complaint with respect to the Phillip Creek conditions.*"

328 Mr Gunner's position was entirely different. He had not been removed by the Director in the exercise of his statutory powers. He had been taken from his family at Utopia Station at the request of his mother so that he might be housed and educated at St Mary's Hostel. Accordingly, the Commonwealth was not responsible for his removal and detention and had never assumed responsibility for his welfare [1265].

329 The primary Judge was satisfied, in relation to Mr Gunner, that both the Director of Native Affairs and the Director of Welfare had failed to ensure that reasonable standards were maintained at St Mary's Hostel [1268]. It followed that the persons occupying these positions might have been liable in negligence had Mr Gunner brought proceedings against them (or their estates). However, that finding was of no assistance to Mr Gunner in his claim against the Commonwealth because it had not been contended that the Commonwealth was vicariously liable for any such breach of duty (although in fact his Honour had considered and rejected that contention).

330 Finally, his Honour considered the position of the Commonwealth in relation to the assaults. He noted that it had not been suggested on behalf of Mrs Cubillo that she should not have been placed in the Retta Dixon Home because of Mr Walter's presence there. Mr Walter had arrived at the home long after she did. Moreover, it had not been suggested that Mrs Cubillo should have been removed from the home immediately after Mr Walter's arrival [1251]. The contention was that since the Retta Dixon Home was located within the Bagot Aboriginal Reserve, and since s 19 of the *Aboriginals*

Ordinance provided that only persons prescribed and authorised could enter and remain on that Reserve, the Commonwealth could have removed Mr Walter from the Retta Dixon Home had it wished to do so. No explanation had been proffered as to why that course had not been taken. That suggested, so it was argued, that the Commonwealth had failed to take reasonable care to protect Mrs Cubillo and that it ought to be liable for the consequences.

331 In a passage already quoted (see [125] above), his Honour found that there was no evidence that either the Director of Native Affairs, or the Director of Welfare, was ever told about the assaults upon the appellants. Mrs Cubillo and Mr Gunner conceded that they had never told anyone in authority about what had occurred. His Honour concluded, in these circumstances, that there was no evidence that anyone in authority knew, or ought to have known, of the assailants' propensities to such conduct. (We interpose this comment. We have referred to a number of documents in the files of the Native Affairs Branch which made it clear that concerns had been expressed in 1954 about Mr Walter's propensity for violence (see [126]-[128] above). Although his Honour did not overlook these documents, there may be some difficulty with his finding that there was no evidence that the Commonwealth knew, or ought to have known, that Mr Walter was prone to violence towards children.)

332 The primary Judge pointed out that the Commonwealth had ensured that Mr Matthews, who had a similar reputation for violence to that of Mr Walter, had been swiftly removed from the Retta Dixon Home after his conduct first came to light. There had been no explanation as to why the same course had not been followed in relation to Mr Walter. However, the only persons who might have provided such an explanation were now dead. His Honour was not prepared, in these circumstances, to conclude that the Director had been negligent in failing to have Mr Walter removed from the Home.

333 With regard to Mr Gunner, the finding that no one in authority knew, or ought reasonably to have known, of Mr Constable's sexual proclivities meant that this aspect of Mr Gunner's claim could not succeed [1255].

Causation and Remoteness of Damage

334 The primary Judge found that Mrs Cubillo and Mr Gunner had both suffered trauma and shock when they were removed from their families. He concluded that the harm which they had sustained had continued throughout the periods of their institutionalisation and that they had suffered psychiatric injury as a result. However, the harm was attributable to the removal and detention, not to the conditions under which they were forced to live.

335 His Honour said [1247]:

> *"I think that it is important to stress at the outset that I am satisfied that each applicant suffered severely during the periods that they were institutionalised. However, it was the removal and the detention - more than the conditions of the detention - that were the cause of their sufferings. Putting to one side the conduct of Mr Walter, I believe that Mrs Cubillo's sense of loss for her Aboriginal community and family would have been much the same irrespective of the physical conditions of the Retta Dixon Home. I do not think that overcrowding or unsatisfactory aspects of hygiene caused or contributed to her*

sense of loss. That loss came from the severing of her ties with her family and the loss of her language, culture and her relationship with the land. And, save for the conduct of Mr Constable, I believe that it is appropriate, as a generalisation, to make the same comment about Mr Gunner. The conditions at St Mary's as reported from time to time by Mrs Ballagh and others, were bad. However, despite that condemnation of those responsible, the legal issue is to determine (if one assumes that there was a breach of a duty of care) how, or to what extent, those dreadful conditions contributed to his loss. My answer is that I do not think that they did. There was no evidence that pointed to Peter suffering ill-health because of the unsanitary conditions. There was no evidence, for example, that he suffered trachoma because of unhygienic conditions at St Mary's. There was, of course, the evidence of children rummaging through rubbish bins for food. However, was that because St Mary's was guilty of failing to feed the children properly or was it an occasional example of the predilection of young children to entertain themselves? The answer is that the evidence was not sufficiently detailed to justify a finding one way or the other."

336 He continued [1250]:

> *"Mrs Cubillo's loneliness and despair came from her detention - not from the inadequacies that existed at Retta Dixon. ... I am sure that Mrs Cubillo felt a lack of love and affection but I am not sure that she was justified. I do not consider that either applicant has been able to point to loss or damage that flowed from the conditions of the institutions.*"

In his Honour's view, the Commonwealth could not be held responsible for Mrs Cubillo's "very hard" life after leaving the Retta Dixon Home.

THE APPELLANTS' CASE ON APPEAL

The Appellants' Written Submissions

337 By their notices of appeal the appellants claimed that the primary Judge had erred in finding that the circumstances of their removal and detention had not given rise to a duty of care on the part of the Commonwealth. In their written submissions, the appellants argued as follows:

* The Commonwealth's involvement, through the acts of its servants or agents, in the removal and subsequent detention of the appellants, gave rise to a duty of care.

* So, too, did the vulnerability of the appellants to the exercise by the Commonwealth of its power and control over their lives.

* The Commonwealth had sufficient power to enable it to have protected the appellants from the actions of Mr Walter and Mr Constable.

* The primary Judge had approached the question whether a duty of care should be imposed upon the Commonwealth on the basis that it turned upon whether its servants or agents had failed to exercise statutory powers conferred upon them. It did not. The appellants' case was that the

Commonwealth owed them a duty of care because of the positive acts which had been undertaken by its servants or agents. His Honour's reliance upon the principles enunciated by McHugh J in *Crimmins* had been misplaced. Those principles were directed towards a failure to exercise statutory powers and were not applicable to the performance of positive acts.

* The primary Judge had confused the role played by public law concepts when determining that no duty of care existed. It made no difference whether or not the Director had formed an opinion as to the best interests of the child before ordering that the child be removed. A decision taken lawfully could still give rise to a breach of a common law duty of care. By using phrases such as "core area of policy making" [1230] and "statutory discretion that involves policy considerations" [1207] his Honour had employed public law concepts that were in no way relevant to whether or not the Commonwealth was under a duty of care to the appellants.

* The primary Judge had erred in holding that the fact that the decision to remove each appellant had the "potential" to be "a policy decision", exercised in pursuit of welfare considerations, meant that the courts were not fit to assess that decision [1222]. A common law duty of care may exist even where a public authority performs acts which it is permitted by statute to carry out: see *Crimmins* at 36, per McHugh J.

* The reasoning of the primary Judge had been significantly influenced by the "policy operational distinction" referred to in *X (Minors)* at 738-739. That formulation by Lord Browne-Wilkinson had been rejected by a majority of the House of Lords in *Stovin v Wise* [1996] UKHL 15; [1996] AC 923, at 951, while in *Pyrenees Shire Council v Day* [1998] HCA 3; (1998) 192 CLR 330*,* Toohey J (at 358) and Gummow J (at 393-394) had expressed the view that the distinction was unhelpful on the facts of that case.

* The primary Judge had failed to consider whether the appellants had made out a cause of action for breach of duty against the Commonwealth in those areas where his Honour had found that the Commonwealth had had "a fair trial". There were several such areas including, in particular, the allegations of assault against Mr Walter and Mr Constable [1423].

The Commonwealth's Written Submissions

338 In its written submissions, the Commonwealth emphasised the limited nature of the case relied on by the appellants. In particular, they had alleged only that the Commonwealth, not any other person or officer, had breached a duty owed to them. Moreover, the pleadings had alleged that the breach had centred around the removal and detention of the appellants in conformity with a general policy which paid no regard to their individual circumstances. The factual underpinnings of that case had been rejected.

339 The Commonwealth's submissions continued as follows:

* Although the appellants sought to rely upon "the close involvement" of the Commonwealth, by its servants or agents, in their removal and detention, the primary Judge had found that the Director of Native Affairs had no involvement in the removal of Mr Gunner from Utopia Station [1133], [1265]. Mr Kitching, in transporting Mr Gunner to St Mary's Hostel (assuming that he did so) was acting at the request of Topsy and on her behalf. There was, therefore, no "close involvement" of the

Commonwealth in Mr Gunner's removal.

* The finding that Mr Moy was involved (jointly) with the AIM in Mrs Cubillo's removal was erroneous. It was, in any event, a finding made in relation to an issue upon which the Commonwealth had been denied a fair trial.

* The primary Judge had correctly regarded the element of "control", as discussed by McHugh J in *Crimmins,* as central to the issue of whether the Commonwealth owed the appellants a duty of care. His Honour had found that the Commonwealth did not have the power to make the decision to remove a child. It was the Director who had that power. As his Honour observed, the Commonwealth "had no statutory power to act nor any power to direct others to act" [1198]. Neither the Administrator, the Minister nor the Commonwealth could tell the Directors how to perform their duties [1084], [1122].

* There were strong policy considerations militating against the imposition of a duty of care upon the Commonwealth: see, for example, *Crimmins* at 19 per Gaudron J. Section 6 of the *Aboriginals Ordinance* required the Director of Native Affairs to be able to act quickly in the interests of a child. In that climate mistakes were bound to occur, and it would be contrary to the intent of the legislative scheme to impose a duty of care. To do so might cause the Native Affairs Branch to "adopt a ... cautious and defensive approach" in circumstances where a child might be at risk. If no duty of care was imposed upon the Director in relation to the decision to remove a child, it had to follow that no duty of care could be imposed upon the Commonwealth in relation to any involvement which it may have had in that decision. The Commonwealth relied on *X (Minors),* which had been followed by the New Zealand Court of Appeal in *Attorney-General v Prince* [1998] 1 NZLR 262; *B v Attorney-General* [1999] 2 NZLR 296 and *W v Attorney-General* [1999] 2 NZLR 709 and referred to with apparent approval by McHugh J in *Crimmins,* at 50. *X (Minors)* had also been followed by the Supreme Court of South Australia in *Hillman v Black* [1996] SASC 5941; (1996) 67 SASR 490 at 495, 508 and 515, and more recently by the House of Lords in *Phelps v Hillingdon London Borough City Council* [2000] UKHL 47; [2000] 4 All ER 504, at 515-517.

* Contrary to the suggestion made by the appellants, the primary Judge did not hold that, if an authority acts within the limits of its statutory discretion, it cannot be held liable for negligence. Rather, he had found that the decisions by the Director to remove the appellants (assuming that such decisions were made) "would have the potential to be policy decisions that were exercised pursuant to a statutory power and in pursuit of the policy of welfare and care that was to be found in the 1918 Ordinance" [1222]. That potential existed because a decision to exercise the statutory powers in furtherance of the duty to provide for the education of Aboriginal children may have involved policy considerations, including whether there were alternatives (such as establishing a school at Utopia Station) and if so, whether those alternatives were feasible.

The Oral Submissions

340 Clearly enough, the appellants faced several major difficulties had they persisted with their written submissions. For one thing, the basic factual contention underlying their case at trial had been rejected by the primary Judge and the written submissions did not challenge that finding. For another, the primary Judge found, contrary to Mrs Cubillo's contentions, that the Commonwealth was not responsible for any decision by the Director to remove her and had not promoted or caused her

detention. He had also found that neither the Commonwealth nor the Director of Native Affairs was responsible for the decision to remove Mr Gunner, and that the Commonwealth was not responsible for his detention. In their written submissions, the appellants challenged the conclusion that the Commonwealth had not been responsible for their removal and detention. But it is plain that the ordinary principles of appellate review governing findings of fact would have made it difficult to overturn these findings on appeal.

341 A second problem facing the appellants was that the primary Judge found that even if the Director had owed Mrs Cubillo a duty of care, that duty had not been breached. His Honour had also found that, while the Director may have breached the duty of care he owed to Mr Gunner, any breach could not be sheeted home to the Commonwealth. A challenge to these findings of fact would also have faced considerable obstacles. And the findings on causation and remoteness of damage created yet further difficulties for the appellants.

342 A third obstacle was created by his Honour's conclusion that the Commonwealth owed no duty of care to the appellants. A consideration of the correctness of that conclusion would have entailed a careful analysis of the circumstances in which a duty of care may be imposed upon a statutory authority or other public body. It would also have raised the vexed question of the potential liability of local authorities in relation to the removal and detention of children upon welfare grounds. It may have been necessary to examine the "salient features" of the relationship between the appellants and the Commonwealth (in accordance with the principles laid down by the High Court in *Perre v Apand Pty Ltd* [1999] HCA 36; (1999) 198 CLR 180), in order to determine whether the combination of reasonable foreseeability of the likelihood of harm, the existence of an ascertainable class of vulnerable persons unable to protect themselves from that harm and the fact that the damage flowed from activities within the Commonwealth's control gave rise to a duty of care. A further question would have been whether his Honour erred by according too much weight to the factor of "control" (as emphasised by McHugh J in *Crimmins*) and whether he correctly had regard to the policy considerations identified by Lord Browne-Wilkinson in *X (Minors)*.

343 Perhaps because Mr Rush recognised the problems created for the appellants by the primary Judge's findings of fact, his oral submissions on the appeal were framed quite differently from the written submissions. The arguments presented were not only much narrower, but raised contentions that had not been addressed by the primary Judge.

344 Mr Rush began by submitting that the appellants had been owed a duty of care by the Commonwealth because of the involvement of its servants or agents in their removals which, even had they been lawful, had been carried out in a negligent manner. That proposition provoked sustained questioning from the Court because the primary Judge had not, at any stage in his reasons for judgment, addressed that issue. Moreover, the Commonwealth had filed lengthy submissions, extending over 165 closely typed pages, but had barely alluded to the circumstances surrounding the removals. Yet Mr Rush maintained that their claims relating to the manner of their removal had always been pleaded and had been fairly raised at the trial.

345 The debate concerning this issue and other contentions which did not seem to be addressed in the primary Judgment prompted the Court to ask Mr Rush to formulate exactly how the appellants'

claims for breach of duty were being put on the appeal. He summarised those claims as follows:

* The Commonwealth owed Mrs Cubillo a duty to take reasonable care, when removing her from Phillip Creek, not to cause her unnecessary or avoidable physical or mental harm. That duty existed regardless of whether the removal was authorised by law. It arose, *inter alia*, because the Commonwealth had control over her welfare as a part-Aboriginal child. The Commonwealth was, or should have been, aware that harm could be caused by the use of excessive force or a failure to act with appropriate sensitivity when removing a child from an Aboriginal community.

* The Commonwealth owed Mrs Cubillo a duty to take reasonable care while she was detained at the Retta Dixon Home to ensure that she was able to maintain contact with her extended family at Phillip Creek because it knew, or ought to have known, of the serious consequences of the severing of ties between Mrs Cubillo and her family.

* The Commonwealth owed Mrs Cubillo a duty to take reasonable care to ensure that she would not be subjected to physical or sexual assault by her carers at the Retta Dixon Home.

* The Commonwealth owed Mrs Cubillo a duty to take reasonable care because it was aware (before the relevant incidents) that Mr Walter had a propensity for violence. The Director had it within his power to remove Mr Walter from the Retta Dixon Home given that it was located on an Aboriginal reserve.

346 Mr Rush contended that the Commonwealth had failed to meet its obligations to Mrs Cubillo because it:

* had not taken reasonable steps to ensure that her removal from Phillip Creek was carried out in a manner which did not cause her unnecessary physical or mental harm;

* had not taken reasonable steps to ensure that she maintained contact with her extended family after she was placed in the Retta Dixon Home and, to some extent, because it actively took measures to reduce the chances of contact being maintained; and

* had been on notice well before the physical and sexual assaults by Mr Walter took place that he was a particularly brutal individual unsuited to a home at which Aboriginal (or indeed any) children resided and ought to have ensured that he was removed.

347 Similarly, Mr Gunner's claim for breach of duty was reformulated in the following way:

* The Commonwealth owed Mr Gunner a duty to take reasonable care, when removing him from Utopia Station not to cause him unnecessary or avoidable physical or mental harm. That duty existed regardless of whether the removal was authorised by law. The duty also existed notwithstanding that the primary Judge specifically found that he was removed at the request and with the informed consent of his mother, a finding which was not challenged on appeal.

* The Commonwealth owed Mr Gunner a duty not to procure his mother's consent to his removal without having taken appropriate steps to ensure that she was properly apprised of all matters necessary to enable her to make a fully informed decision.

* The Commonwealth owed Mr Gunner a duty to take reasonable steps to ensure that, coming from a

healthy, happy and secure environment, he was not removed from Utopia Station to an institution unsuitable for a part-Aboriginal child of his age, and with his background.

* The Commonwealth owed Mr Gunner a duty to take reasonable care while he was detained at St Mary's Hostel to ensure that he was able to maintain contact with his extended family at Utopia Station.

* The Commonwealth owed Mr Gunner a duty to take reasonable care to ensure that he would not be subjected to sexual assaults by staff at St Mary's Hostel.

348 Mr Rush contended that the Commonwealth had failed to meet its obligations to Mr Gunner in ways that largely replicated the allegations made on behalf of Mrs Cubillo. However, it was also said in relation to Mr Gunner that the Commonwealth had either been aware, or ought to have been aware, prior to his removal to St Mary's Hostel, that it was an unsuitable institution for the placement of a part-Aboriginal child of his age and background.

349 Mr Rush's responses to questioning from the Court confirmed that the appellants accepted that the contentions we have set out above, represented a "satisfactory summary" of the case they put on appeal (T 221) and that, accordingly, the appellants intended their oral submissions to replace their written submissions. Mr Rush disputed, however, that the reformulated submissions were new contentions designed to accommodate a series of unfavourable factual findings made by the primary Judge. He submitted that the arguments were advanced at the trial and that his Honour must simply have overlooked these claims in his reasons for judgment.

350 For its part, the Commonwealth submitted that the appellants' submissions in relation to breach of duty had been substantially modified in order to enable the appellants to circumvent findings made by the primary Judge which were fatal to their claims as originally pleaded. Mr Meagher submitted that the appellants should not be permitted to present a different case on the appeal to the one presented and dealt with at trial. It is therefore necessary to determine whether the manner in which the appellants sought to argue these claims at the hearing of the appeal constitutes a significant departure from the way in which their case was presented at trial.

WAS THE CASE ON APPEAL PUT AT TRIAL?

The Manner of Removal

351 Mr Rush noted that the primary Judge had set out in considerable detail the evidence relating to the manner in which Mrs Cubillo and Mr Gunner had been removed. His Honour had found that they had sustained physical and emotional harm by reason of the removals. However, he had made no finding as to whether that harm could have been avoided, in particular by reference to the manner of their removal. According to Mr Rush, this was because his Honour had overlooked the fact that the appellants' claims for breach of duty had been based, at least in part, upon the manner of their removal. It was submitted that the appellants had maintained, both by their pleadings and at the trial, not merely that their removals had been unlawful, but that they had been carried out in a manner which was inappropriate. In particular, more force had been used than was reasonably necessary.

352 In support of these submissions, the appellants first drew attention to their pleadings. They

accepted that the breach of duty pleaded in each case was "the removal and detention of the applicant". They submitted, however, that it was implicit within that allegation that a claim was being made that the removals had been carried out negligently. The appellants relied in particular on par (f) of the particulars of breach of duty which, for convenience, we set out again:

> "*(f) Depriving the applicant of* [his/her] *family, cultural and spiritual heritage, and in particular -*
> *(i)* causing the applicant fear, anxiety, profound emotional distress, and psychological harm by **forcibly** removing [him/her] from [his/her] mother and family ...". (Emphasis added.)

They submitted that the use of the word "forcibly" made it clear that they complained not just about the fact that they had been removed, but also the manner in which the removals had been carried out.

353 It was next submitted that, irrespective of whether a claim concerning the manner of their removal had been adequately pleaded, the trial had been conducted upon the basis that the Commonwealth should be held liable for having failed to ensure that they did not sustain harm which could reasonably have been avoided. We were referred to several passages in the appellants' written submissions to the primary Judge which were said to support that contention. For example, one passage included the following:

> "***The removal itself was carried out in the most distressing of circumstances.*** *It involved*
> (i) a lack of proper consultation with family and the children at Phillip Creek by the Commonwealth;
>
> (ii) mothers and family mourning as if a death had occurred;
>
> (iii) scenes that were so distressing that a most experienced patrol officer (Penhall) did not want to see the like of that removal again;
>
> (iv) a journey into strange country that was frightening and distressing for the children, during which Lorna Cubillo had responsibility for a baby who was ill.
>
> (v) a great potential for psychiatric injury, that was recognised by the Commonwealth." (Emphasis added.)

Another passage said this:

> "***The circumstances of the removal*** *and detention were such that they caused injury to Lorna Cubillo. The Commonwealth should have been aware of this at the time.*" (Emphasis added.)

354 We were also referred to the closing address of senior counsel for the appellants at the trial, in the course of which he said:

> "*We conclude, your Honour, by reiterating that that removal* ***and the way in which it***

> ***was carried out*** *was unacceptable on the standards of the day. We reiterate, your Honour, that it's unacceptable even if your Honour could not make a finding as to consent or lack of consent. We say, your Honour, on the issue of foreseeability of injury, that that event* ***and the manner of that removal*** *was totally unsatisfactory and a breach of the duty of care which was owed by the Native Affairs Branch, the Commonwealth, to Lorna Cubillo.*" (T 7635-7636) (Emphasis added.)

355 The appellants also maintained that their written submissions on the appeal contained references to the manner in which the removals had been carried out and that these should have alerted the Commonwealth to the manner of removal issue. Members of the Court indicated, during the course of argument, that these references had been understood by them as merely ancillary to the appellants' submission that the primary Judge had erred in finding that the Commonwealth had not been responsible for their removal and detention. Mr Rush maintained that the appellants intended to argue that the Commonwealth had been responsible, through the conduct of Mr Penhall and Mr Kitching respectively, for the manner in which the removals had been carried out.

356 The Commonwealth strongly disputed that the manner in which the appellants had been removed had ever been regarded as a basis upon which the Commonwealth might be held liable to them. It submitted that the appellants were seeking to put forward for the first time on the appeal a case which had never been pleaded or advanced at trial. Mr Meagher emphasised that the breach of duty relied upon in the appellants' pleadings was their "removal and detention". He submitted that this meant that the Commonwealth was liable for having brought about that "removal and detention" from which harm allegedly flowed, not that it was liable for the manner in which the appellants had been removed. He said that the Commonwealth had not objected at the trial to evidence being led regarding the circumstances surrounding the removals because that evidence was relevant to the appellants' allegations that they had been removed without the consent of family members. The evidence had not been adduced in support of any separate claim for breach of duty founded on the manner of the appellants' removal.

357 The Commonwealth emphasised the primary Judge's observation that it was only the removal and detention that were identified by Mrs Cubillo as the alleged breach of duty [1196]. It noted that no evidence had been led at the trial as to whether Mr Penhall could, or should, have done anything differently. Witnesses to the Phillip Creek removal had given evidence of the grief displayed at the children leaving, but were not asked anything about the extent of force used in their removal. There was no finding by the primary Judge that Mrs Cubillo had suffered injury as a result of the use of excessive force. Indeed, the primary Judge had remarked that:

> "*It was the removal and detention as distinct from the manner of the removal and the manner of the detention that were the causes of the injuries that each of them suffered* [1563]."

358 The Commonwealth submitted that the case now put on behalf of Mr Gunner was, if anything, more tenuous than that put on behalf of Mrs Cubillo. Mr Kitching had no recollection of having been involved in his removal. Mrs McLeod said that it was she and her husband who had taken him to Alice Springs. Even assuming that Mr Kitching had driven the vehicle containing Mr Gunner, his Honour had

found that he did so as Topsy Kundrilba's agent. In these circumstances, it was submitted, the Commonwealth could not conceivably be liable for any breach of duty arising out of the manner of Mr Gunner's removal.

359 The Court raised with Mr Rush the primary Judge's apparent failure to make findings relevant to the contentions that excessive force had been used in the appellants' removals or that the removals had been carried out otherwise inappropriately. The transcript records the following exchange:

> *"SACKVILLE J: That's what I want to be clear about. You say, do you, that the case on duty of care was put that if the removal of Mrs Cubillo in 1947 from Phillip Creek was lawful, there was a duty nonetheless to exercise reasonable care to ensure that she did not suffer unnecessary physical or emotional injury by reason of a failure to carry out the lawful removal in an appropriately, for want of a better word, sensitive, way. That was put specifically to his Honour, was it?*
> *MR RUSH: Yes, your Honour.*
>
> *...*
>
> *SACKVILLE J: Is there any reason that you can point to then that his Honour did not make findings, as I think you've accepted, relevant to this contention [?] [I]n particular his Honour apparently made no findings as to whether the manner of carrying out this removal so departed from reasonable standards of the day that it could be characterised as a breach of this duty that you have identified to Mrs Cubillo. Is there some reason why his Honour didn't make those findings or was this just overlooked?*
>
> *MR RUSH: I think primarily his Honour's decision came down to a matter of not accepting that the Commonwealth had any independent duty of care to Mrs Cubillo in the context of Mr Penhall.*" (T 40)

360 Mr Rush argued that notwithstanding the absence of any findings concerning the manner in which she was removed, Mrs Cubillo's claim should be addressed on the appeal. That was because the evidence led at the trial concerning the manner of her removal had been largely uncontroverted. It was submitted that the only conclusion capable of being drawn from that evidence was that a child, removed in those circumstances, would be likely to suffer lasting psychological damage. When pressed to identify the uncontroverted facts which demonstrated that Mrs Cubillo's removal had been carried out negligently, Mr Rush referred to Mr Penhall's use of an open truck, the fact that sixteen children were taken at once, and the highly distressing scenes graphically described by those who had witnessed the event. It was also said that this evidence had to be considered against the background of contemporaneous documents tendered at the trial which showed that in 1947 it was well known that the removal of a child in such circumstances could affect the psychological health of that child. It was submitted that although the forcible removal of a young child from its family would inevitably have been traumatic, the manner in which Mrs Cubillo had been removed had greatly exacerbated the harm which she had suffered.

361 Mr Meagher responded that Mrs Cubillo had not identified what steps could have been taken to avoid the harm now said to have been occasioned by the manner of her removal. It had been

suggested that perhaps a different form of transport should have been used. However, there was no evidence that other transport was available. It had been suggested that a closed truck would have been less traumatic than an open truck. But there was no evidence that this would have been so. It had been suggested that Mr Penhall should not have taken Ms Shankelton at her word when she told him that the children's families had consented to their removal. However, that suggestion had scarcely been mentioned at the trial. It had been suggested that the children should not have been moved in a group of sixteen, but in a smaller group, or as individuals. Yet there was no evidence that this would have been less traumatic so far as Mrs Cubillo was concerned.

362 We are unable to accept the submission that the appellants' pleadings implicitly claimed that they had suffered injury as a result of the failure of the Commonwealth, when removing them, to ensure that they did not sustain avoidable physical or mental harm. There was nothing in either pleading to suggest that a claim of this nature was being made. The allegation that there was a breach of duty on the part of the Commonwealth by "the removal and detention" of each appellant was, in our view, a complaint about the fact that they had been removed and detained, and not about the manner in which the removals were carried out. It must be remembered that the primary case pleaded on behalf of the appellants was that their removals were carried out pursuant to a general policy which rendered them unlawful. The allegation in one of the particulars that the removals were carried out "forcibly" must be read against that background. The word "forcibly" was clearly intended to connote a non-consensual removal, and not one carried out in a manner which involved the use of excessive force.

363 The trial was conducted upon the further amended statements of claim. There was never any application to amend the pleadings to accommodate the argument advanced on the appeal. While it may reasonably be accepted that technical defects in a pleading which cause no confusion and do not raise issues of substantive principle can readily be dealt with by the provision of particulars or amendment, it remains the case that pleadings define the issues and inform the parties in advance of the case they have to meet. Pleadings continue to occupy an integral role in present day litigation, and are not to be treated as pedantry or mere formalism: *Banque Commerciale SA En Liquidation v Akhil Holdings Ltd* (1990) 169 CLR 279 at 286-287 per Mason CJ and Gaudron J; *Mitanis v Pioneer Concrete (Vic) Pty Ltd* [1997] FCA 1040; (1997) ATPR 41-591, at 44,151ff per Goldberg J.

364 We have also considered the appellants' submission that, even if the "manner of removal" issue had not been pleaded, nonetheless it became a live issue at the trial. We have borne in mind the observations in *Water Board v Moustakas* [1988] HCA 12; (1988) 180 CLR 491, at 497, per Mason CJ, Wilson, Brennan and Dawson JJ:

> *"In deciding whether or not a point was raised at trial no narrow or technical view should be taken. Ordinarily the pleadings will be of assistance for it is one of their functions to define the issues so that each party knows the case which he is to meet. In cases where the breach of a duty of care is alleged, the particulars should mark out the area of dispute. The particulars may not be decisive if the evidence has been allowed to travel beyond them, although where this happens and fresh issues are raised, the particulars should be amended to reflect the actual conduct of the proceedings. Nevertheless, failure to amend will not necessarily preclude a verdict upon the facts as they have emerged ...*

It is necessary to look to the actual conduct of the proceedings to see whether a point was or was not taken at trial, especially where a particular is equivocal."

365 Once again, we cannot accept this submission. It is true that a substantial body of evidence was led relating to the circumstances in which the appellants were removed from the Phillip Creek Settlement and Utopia Station, respectively. That evidence was relevant on the critical question of whether the removals were consensual or otherwise. The fact that evidence is received on an issue squarely raised on the pleadings does not mean that a separate question, to which some of the evidence might have been relevant, was also raised at the trial. Nor does it mean that the evidence can be relied on in an appeal to agitate that separate issue.

366 We have carefully examined the references in the written and oral submissions at trial that are said to have raised the contention that the Commonwealth had breached its duty to take reasonable care when removing the appellants, so as not to cause them unnecessary or avoidable physical or mental harm. In our view, the scattered references, taken in the context of the pleadings and the factual issues explored at length at the trial, could not reasonably have been understood as intended to raise that issue. Had the references been so understood, we have no doubt that the Commonwealth would have addressed the issue, both in evidence and in submissions.

367 It must also be borne in mind that the primary Judge gave scrupulous attention to the issues debated before him. While we have criticised aspects of his Honour's reasoning, it can hardly be disputed that he was concerned to identify and address each of the appellants' arguments, often at considerable length. Had the manner of removal issue been raised at trial, as the appellants claimed, it is inconceivable that his Honour would have overlooked the issue entirely. In our view he did not overlook it; the point was never raised.

368 As a last resort, the appellants invited us to address the "manner of removal" issue by reference to the evidence before the primary Judge. The principle to be applied is that stated by the joint judgment in *Water Board v Moustakas,* at 497:

"*More than once it has been held by this Court that a point cannot be raised for the first time upon appeal when it could possibly have been met by calling evidence below. Where all the facts have been established beyond controversy or where the point is one of construction or of law, then a court of appeal may find it expedient and in the interests of justice to entertain the point, but otherwise the rule is strictly applied.*"

We think it highly likely that, if the issue had been raised at trial, the Commonwealth would have sought to address the manner of the appellants' removal by cross-examining witnesses and by adducing further evidence, for example, on the questions of whether any force used was avoidable or whether alternative means of transporting the children were available. The Commonwealth certainly would have asked the primary Judge to find (as his Honour did on other issues) that it was unable to receive a fair trial on the manner of removal issue. Since his Honour was not asked to address that question, we do not have the benefit of a finding on it.

369 In our view, the appellants should not be permitted to raise for the first time on appeal the contention that they suffered harm by reason of the manner of their removal. Had this issue been

raised before the primary Judge, it would almost certainly have been the subject of further evidence. Furthermore, his Honour would have been invited to make findings, not only on the substance of the contentions but on the critical question of the prejudice that the Commonwealth would have encountered in defending this claim so many years after the relevant events occurred. In short, the appellants' contentions, as reformulated on the appeal, are not founded on facts established beyond controversy or on pure questions of law. It would not be in the interests of justice for the appellants to be permitted to recast their case on the appeal.

The Failure to Maintain Contact

370 Mr Rush submitted that although the primary Judge had not made any findings regarding the failure of the Commonwealth to ensure that the appellants were able to maintain contact with their extended families, that issue had been raised both in their pleadings and at trial. It was also submitted that it was open to this Court, on the appeal, to make any findings necessary to enable that claim to be determined.

371 The primary Judge found that any failure by Mrs Cubillo to maintain contact with her family was not the fault of the Retta Dixon Home. His Honour said that he was not prepared to find that the Home had an active policy that would have prevented Mrs Cubillo's mother, Maisie Nampijimpa, from visiting her [637]. He also found that it would be equally unfair to hold that Maisie Nampijimpa did not visit Mrs Cubillo because she had simply lost interest in maintaining contact.

372 It was submitted on behalf of Mrs Cubillo that in her further amended statement of claim she had pleaded that the Commonwealth had failed in its duty to ensure that she maintained contact with her extended family. We were referred to par (g) of the particulars which, for convenience, we again set out:

> "*(g) Failing to have any or any proper system to enable the applicant and her mother to maintain contact with each other following the removal and during and following the detention of the applicant.*"

A similar particular was provided on behalf of Mr Gunner.

373 The Commonwealth submitted that par (g) had been nothing more than one of the particulars of the breach of duty alleged, namely Mrs Cubillo's "removal and detention". The appellants were seeking to unfairly elevate par (g) to an allegation of breach of a separate duty, to the effect that the Commonwealth had to take reasonable care while she was detained at the Retta Dixon Home to ensure that she was able to maintain contact with her extended family. Moreover, a breach of duty of the kind put forward on the appeal had never been a live issue at the trial.

374 In our view, this issue was neither pleaded nor raised at the trial. We agree with the Commonwealth that par (g) of the particulars was no more than a particular of the breach of the duty of care alleged in the pleadings and which was the focus of attention at the trial. Once again, the primary Judge did not address the claim as formulated before us. In particular, he made no findings concerning the responsibility of the Commonwealth for the loss of contact between the appellants and their families. For example, in relation to Mrs Cubillo, the only findings he made concerned the

Retta Dixon Home. The reason his Honour did not address the issue of the Commonwealth's alleged duty to ensure the appellants could maintain contact with their families was because the issue was not raised at the trial. There were clearly factual issues that would have been explored at the trial had this alleged breach of duty been raised as a discrete question. We therefore do not think it appropriate that the issue be raised for the first time on the appeal.

375 In any event, the appellants would have faced formidable difficulties in establishing that the Commonwealth breached any duty that it might have owed them. The finding made by the primary Judge, to the effect that the Retta Dixon Home was not responsible for Mrs Cubillo's failure to maintain contact with her mother after the removal from the Phillip Creek Settlement, obviously presents a major obstacle. Similarly, as the Commonwealth pointed out, Mrs Cubillo's claim presupposed a desire on her part and that of her family to maintain contact. As we have noted, the primary Judge found that the evidence did not enable him to determine whether or not Maisie Nampijimpa wished to visit Mrs Cubillo at the Retta Dixon Home [637].

376 Moreover, there were substantial gaps in the evidence. It seems to have been suggested on Mrs Cubillo's behalf that the Commonwealth should have arranged for her to visit the Phillip Creek Settlement or, alternatively, for her family to visit Darwin. But if such visits were to be arranged they presumably would have had to be arranged for all of the children at the Retta Dixon Home. The evidence appears not to have addressed the question of whether sufficient resources were available to arrange such visits. Nor did it address whether resources were available to enable Mrs Cubillo to keep up her own language while at the Retta Dixon Home. To the extent that it was suggested that Mrs Cubillo should have been encouraged to keep in touch with her family by letter or telephone, there was no evidence that either of these means of communication was available to her family. In this state of the evidence, it is difficult to see how this Court could make findings in Mrs Cubillo's favour.

377 The position regarding Mr Gunner's claim is much the same. The only additional matter relevant in his case is that an undertaking was given to his mother that he would be permitted to return to Utopia Station each Christmas. For reasons which were never made clear, that undertaking was not honoured. The primary Judge found that it had not been established that this breach of undertaking was the fault of the Welfare Branch [891].

378 We consider that the claims made by Mrs Cubillo and Mr Gunner concerning the Commonwealth's failure to ensure that contact was maintained with their families cannot be advanced on the appeal. In any event, it is difficult to see how they could be sustained having regard to the primary Judge's findings and the gaps in the evidence.

Liability for Physical and Sexual Assault

379 It was submitted on behalf of the appellants that the Commonwealth should be held liable for breach of duty for having failed to protect them from physical and sexual assault.

380 In Mrs Cubillo's case it was accepted that she could not succeed upon this claim unless the Court overturned the primary Judge's finding at [1255] that:

> "*Actual knowledge of conduct,* ***or of predilection to such conduct****, has not been*

proved and in neither case were the circumstances such that it could be said that either the Director or Commonwealth ought to have known of the assaults or assailants' propensities to commit the assaults." (Emphasis added.)

381 In Mr Gunner's case the argument was put on a somewhat different basis. It was acknowledged on his behalf that his claim against the Commonwealth in relation to the assault committed by Mr Constable was more difficult to sustain. The primary Judge found that neither the Director of Welfare nor the Commonwealth was in a position to have known of Mr Constable's propensity to molest young children [1255]. That finding was not challenged on appeal. That meant that Mr Gunner's claim was reduced to the contention that St Mary's Hostel was an institution that was so obviously unsuitable for part-Aboriginal children of his age and with his background that, had he not been sent there in the first place, he would not have been assaulted. We return to this argument shortly.

382 Mr Rush argued that the evidence before the primary Judge showed that the Commonwealth had been aware of the fact that Mr Walter had a propensity for violence towards young children many months before he assaulted her. Despite that knowledge, the Commonwealth, so it was argued, had failed to take steps to have him removed from the Retta Dixon Home. In support of that submission we were referred to:

* the report of Mr Dentith, the Superintendent of the Bagot Reserve, to Mr McCaffrey the Acting Director of Native Affairs, dated 27 July 1954 which concerned young boys who had been flogged by Mr Matthews and Mr Walter several days earlier;

* the report of Mr McCaffrey to the Administrator under cover of a memorandum dated 28 July 1954 concerning the conduct of Mr Matthews and Mr Walter (with a handwritten notation of the Administrator on that memorandum); and

* the report of Mr Dentith to the District Superintendent, Native Affairs Branch dated 27 October 1954 concerning an attack by Mr Walter upon another young boy. (See [126]-[129] above.)

It was said that these reports showed that the Commonwealth had been made aware, through Mr McCaffrey and the Administrator, that Mr Walter was prone to extreme violence towards children. Because the Retta Dixon Home was located on the Bagot Reserve, the Commonwealth could have required his removal. In stark contrast to the way in which it dealt with Mr Matthews, the Commonwealth had taken no steps to remove Mr Walter from the Retta Dixon Home.

383 Once again, the appellants' arguments on appeal reflect a case that was neither pleaded nor put to the primary Judge. The evidence relating to the assaults on Mrs Cubillo and Mr Gunner was admissible because it was relevant to the extent of any loss or damage which they had sustained by reason of their having been unlawfully removed and detained or having been removed and detained in breach of duty. The primary Judge's finding that the Commonwealth had received a fair trial in the "area" of the assaults [1423] (assuming that finding to be correct) falls far short of establishing that there was no occasion for further exploration of the evidence in relation to the claim that the Commonwealth should have acted to prevent the assaults occurring or in relation to any prejudice it had sustained by reason of the delay in making such a claim.

384 Had these breach of duty claims been pleaded and argued at the trial it would have been necessary to explore further factual issues. For example, even assuming a breach of duty could be established, it would have been necessary for Mrs Cubillo to show loss or damage flowing from the only assault that the primary Judge appeared to regard as being of any consequence. His Honour was not asked to and did not make any finding on this question. Moreover, the Commonwealth undoubtedly would have contended that it had been denied a fair trial on the question of its liability for failing to prevent the assault on Mrs Cubillo. The Commonwealth pointed out that a number of witnesses whose evidence would have been relevant to the assault issue were not available to give evidence at the trial. Mr Dentith had died in 1960, Mr McCaffrey in 1991, Miss Shankelton in 1990 and Mr Wise in 1986. On 25 November 1954, Mr McCaffrey had been succeeded by Mr Giese as Director of Native Affairs. Mr Giese was very ill at the time of the trial, and died whilst judgment was reserved. Mr Giese's evidence on the assault issue would have been very important.

385 There was documentary evidence that Mr Giese had been a long standing opponent of corporal punishment, and that he had attempted to ban the practice. On 3 February 1956, he sent a telegram to the AIM confirming that corporal punishment was not to be inflicted on his wards in any circumstances [700]. From that evidence, as the Commonwealth submitted, it might well be inferred that Mr Giese must have spoken to Ms Shankelton about Mr Walter and instructed her to take steps to ensure that he administered no further beatings. However, what if anything was said between them, and what arrangements, if any, were made could not be known. Evidence of what passed between Mr Giese and Ms Shankelton would plainly be material to the Commonwealth's contention (as developed on the appeal) that it had discharged any duty that it may have owed to Mrs Cubillo to ensure that she was adequately protected from physical violence. The absence of such evidence is an obvious source of prejudice to the Commonwealth.

386 In our view, Mrs Cubillo should not be permitted to pursue the claims founded on a breach of duty in failing to protect the appellants from physical or sexual assault for the first time on the appeal. It is therefore not appropriate for us to consider whether his Honour erred in finding that the Commonwealth neither knew nor ought to have known of Mr Walter's predilection to violence.

The Unsuitability of St Mary's Hostel

387 As we have pointed out, Mr Gunner did not dispute the primary Judge's finding that the Commonwealth was not in a position to have known that Mr Constable had a propensity to molest children in his care. His submission was that the Commonwealth had breached its duty of care to him simply by sending him to St Mary's Hostel because it was an institution known to be unsuitable for someone of his age and background.

388 This, too, was a claim that was neither pleaded nor argued before the primary Judge. The contention advanced by Mr Gunner at trial was not that conditions at St Mary's Hostel were so bad that he should not have been sent there, but that the conditions were such that at some stage he should have been removed. It was for this reason that the primary Judge did not address the contention put on the appeal and, consequently, made no findings capable of sustaining it. Had the issue been raised at trial, a number of factual questions would have required investigation. For example, as the Commonwealth pointed out, there was no evidence concerning the conditions in

other institutions in Alice Springs or elsewhere in the Northern Territory that might have been alternatives to St Mary's Hostel.

389 As with other contentions advanced on behalf of the appellants, the Commonwealth undoubtedly would have sought to establish that it had suffered, by reason of delay, irremediable prejudice in defending the allegation. His Honour made no specific finding as to prejudice in relation to this particular claim because the claim was never put to him. To address the question of prejudice he would have had to consider the significance of the evidence of potential witnesses who were dead or otherwise unavailable and who might have been able to shed light on the measures, if any, available to the Commonwealth to counter the unsatisfactory conditions at St Mary's Hostel.

390 Had Mr Gunner's claim been pleaded along the lines of the argument put on appeal, it would have been open to the Commonwealth to call evidence as to whether, at the time, there were any practical alternatives to St Mary's Hostel. We were reminded that his Honour found that conditions at St Mary's Hostel, bad as they were, were better than life in a camp at Utopia Station [1535]. It would also have been necessary to consider what, if any, harm was caused to Mr Gunner by reason of the assault by Mr Constable (as distinct from any other hardship he faced).

The Failure to Ensure that Mr Gunner's Mother was Properly Informed

391 Mr Gunner contended that the Commonwealth was liable for having failed to ensure that his mother was properly informed about conditions at St Mary's Hostel before procuring her consent to his removal and detention. It was submitted on behalf of the Commonwealth that this was a circuitous attack upon the primary Judge's finding that Mr Gunner's mother had consented to his removal and transfer to St Mary's Hostel.

392 The submission made on behalf of Mr Gunner on the appeal was never included in his pleadings. There is nothing remotely resembling it even in the particulars. His Honour was asked to find that Mr Gunner had been taken from his mother without her consent. He instead found that Topsy Kundrilba had consented to his being sent to St Mary's Hostel. In light of the way in which Mr Gunner's case was put at trial, it is perhaps not surprising that the submission that his mother was not properly informed about conditions at St Mary's Hostel first surfaced during oral argument on the appeal. The submission attracts the general rule that a point not taken at trial cannot be raised on appeal in a case where, if the point had been taken at trial, evidence could have been given which might have prevented it from succeeding. It would be inappropriate to entertain the argument.

THE FINDING OF PREJUDICE

393 The primary Judge rejected the appellants' claims for breach of duty on the evidence presented to him. As we have explained, he did so because he held that they had failed to establish the existence of a duty of care on the part of the Commonwealth or, if he was wrong about that, because they had failed to establish that there had been a breach of any duty. As we have explained, his Honour also rejected the claims for breach of duty because he refused to grant the appellants' application for an extension of time in which to institute proceedings in respect of their common law claims.

394 In a sense, there was no issue on the appeal concerning the primary Judge's finding that the

Commonwealth had made out its defence that it had suffered irremediable prejudice in relation to the common law claims, including the claims founded on breach of duty. The appellants accepted that it was open to his Honour to find that the Commonwealth had sustained significant prejudice in defending the proceedings. By reformulating their cases on appeal in the manner we have described the appellants did not challenge, but rather sought to bypass, the findings made by the primary Judge on the case presented to him.

395 We have referred elsewhere in the judgment to specific findings made by the primary Judge on the question of prejudice. Many of these are of course directly relevant to the breach of duty case presented at trial but not pursued on appeal. For example, the finding that so much time had passed that it was not possible to know what motivated the Director to participate in the removal and detention of Mrs Cubillo had a direct bearing on the Commonwealth's defence to the claim that Mrs Cubillo's removal and detention was in breach of its duty to her. Similarly, the absence of evidence, by reason of Mr Giese's infirmity, as to whether he had invoked powers under s 17 of the *Welfare Ordinance* was directly relevant to the question of whether the Commonwealth had been prejudiced in defending the breach of duty claims brought by Mr Gunner. We quote later in the judgment a passage in which his Honour expressed serious concern about the loss of senior public servants who would have been able to give evidence not only about government policy with respect to the institutionalisation of part-Aboriginal children, but also the manner in which that policy was implemented (see [411] below)**.**

396 Since the case presented on appeal was different to that at trial, the primary Judge could not have made specific findings on the prejudice sustained by the Commonwealth in defending that reformulated case. Indeed that is one of the reasons for refusing to permit the appellants to make a new case on appeal. Even so, it is clear that some of his Honour's findings apply to the appellants' reformulated case.

397 For example, his Honour found that Miss Shankelton's absence was a "huge gap". Mr Thomas, the missionary in charge of the Phillip Creek Settlement, and Mr Colley, the school teacher, had died. The primary Judge regarded the loss of these witnesses, together with the total absence of documentary records, as creating "substantial prejudice" to the Commonwealth on the issue of whether the removal was consensual [442]. The same considerations would apply with at least as much force if the Commonwealth had to defend the "manner of removal" claim sought to be advanced by Mrs Cubillo on the appeal. Similarly, Mr Kitching and Mrs McLeod were both personally involved in the events surrounding the removal of Mr Gunner from Utopia Station but, as his Honour found, their memories did not extend back to these events. His Honour considered that their impaired memories had a potential adverse effect on the Commonwealth in the preparation of its defence [1404], a finding that must apply to Mr Gunner's manner of removal claim.

398 We have referred to the fact that the appellants invited this Court to make findings upholding the reformulated breach of duty claims insofar as they related to the assaults on Mrs Cubillo and Mr Gunner. They relied in part on his Honour's finding that the Commonwealth had received a fair trial on the issue of whether the assaults had taken place. But if the appellants were to succeed on this aspect of their reformulated case, they would have to establish that the Commonwealth was or should have been aware of the risk created by the presence of Mr Walter (in the case of Mrs Cubillo)

and Mr Constable (in the case of Mr Gunner). Moreover, they would have to establish that the Commonwealth had failed to take reasonable steps to avoid the risk. The absence of the Directors and other officers who might have shed light on these questions, especially the response to the complaints about Mr Walter's conduct, would constitute another clear source of prejudice to the Commonwealth.

399 The findings of prejudice to the Commonwealth made by his Honour were clearly open to him. They applied to the breach of duty claims advanced by the appellants at the trial. Some of these findings also plainly would apply to the reformulated breach of duty claims if the appellants (contrary to our holding) were permitted to put them forward.

EXTENSION OF TIME

400 The primary Judge rejected the appellants' applications, made pursuant to s 44(1) of the *Limitation Act,* for extensions of time in which to institute their respective actions against the Commonwealth. His Honour's rejection of these applications was fatal to the appellants' claims except insofar as they were founded on breach of fiduciary duty. The appellants challenged, as they were bound to do, his Honour's refusal to exercise in their favour the discretion conferred by s 44(1) of the *Limitation Act.* (Of course, as we have explained this was not the only basis on which the appellants failed.)

401 We have already addressed some of the issues raised by the appellants' challenge to the primary Judge's refusal to make orders for extensions of time. We have noted the application of the *1866 Act* and the *Limitation Act* to the various causes of action relied on by the appellants and identified the dates on which those causes of action became statute-barred (see [81]-[90] above)**.** We have also addressed and rejected the appellants' contentions that the primary Judge should not have found that the Commonwealth had been seriously prejudiced in defending the claim founded on false imprisonment (see [295]-[303] above). We have also referred to the findings of prejudice in the context of the appellants' original and reformulated breach of duty claims (see [393]-[399] above). In this section, we deal with other aspects of the appellants' challenge to his Honour's refusal to extend time for the institution of proceedings, although it will be necessary to refer back to our discussion of the primary Judge's findings on prejudice. We have pointed out that his Honour approached the applications for extensions of time upon the premise, contrary to his findings, that each appellant had sustainable causes of action against the Commonwealth. He therefore assumed, in favour of the appellants, that they had a strong case on the merits.

THE PRIMARY JUDGMENT ON EXTENSION OF TIME

402 The primary Judge first considered whether the appellants had each satisfied the relevant precondition for an extension of time specified in s 44(3)(b)(i) of the *Limitation Act,* namely that

> *"facts material to the plaintiff's case were not ascertained by him until some time within 12 months before the expiration of the limitation period or occurring after the expiration of that period, and that the action was instituted within 12 months after the ascertainment of those facts by the plaintiff".*

His Honour accepted that, unless the precondition was satisfied, the Court had no power to grant an extension of time. On the other hand, satisfaction of the precondition merely empowered the Court to grant the extension and did not of itself require that time be extended. It was therefore necessary for each of the appellants to establish, as a separate matter, "that in all the circumstances of the case, it is just to grant the extension of time": s 44(3)(b).

403 The primary Judge made the following factual findings:

* Mrs Cubillo did not become aware that she was suffering from post-traumatic stress syndrome and psychiatric injury as the result of her removal and detention until she was informed of the fact after a medical consultation in Darwin in about October 1996 [1373]. She became aware of this fact very shortly before she commenced proceedings on 30 October 1996.

* Mr Gunner did not become aware that he had suffered psychiatric injury as a consequence of his removal from his family and culture until November 1996 [1340]. He therefore acquired this knowledge **after** he had commenced proceedings against the Commonwealth on 31 October 1996.

404 His Honour held that a fact does not need to have a bearing on a party's decision to commence proceedings in order to be "material" for the purposes of s 44(3)(b)(i) of the *Limitation Act*. He applied a test derived from *Sola Optical Australia Pty Ltd v Mills* [1987] HCA 57; (1987) 163 CLR 628, a case concerned with the *Limitation of Actions Act 1936* (SA). In that case, the Court said (at 636) that a

> *"fact is material to the plaintiff's case if it is both relevant to the issues to be proved if the plaintiff is to succeed in obtaining an award of damages sufficient to justify bringing the action and is of sufficient importance to be likely to have a bearing on the case".*

The primary Judge considered that the information conveyed to the appellants in October and November 1996, respectively, satisfied this test.

405 The primary Judge held that the somewhat peculiar circumstance that Mr Gunner did not acquire knowledge of his psychiatric condition until the month **after** he had instituted proceedings made no difference. His Honour followed the reasoning of Asche CJ, with whom Gallop J agreed, in *Ward v Walton* (1989) 66 NTR 20, at 24-25:

> *"the requirement of s 44(3)(b)(i) [of the* Limitation Act*] that an action be instituted `within twelve months after' the ascertainment of material facts by the applicant is properly met by showing that the action was instituted at a time not later than 12 months after the ascertainment of those facts by the applicant."*

On this approach, it did not matter that the action was instituted before Mr Gunner acquired knowledge of the material fact. Section 44(3)(b)(i) merely marked the outer limit for the institution of proceedings and the action had been brought within that limit.

406 Having concluded that each appellant had satisfied the precondition specified in s 44(3)(b)(i) of the *Limitation Act*, the primary Judge considered whether he should exercise the "broad discretion" conferred by s 44(3)(b) in their favour. His Honour referred at length to the decision of the High Court in *Brisbane South Regional Health Authority v Taylor* [1996] HCA 25; (1996) 186 CLR 541. He rejected

the Commonwealth's submission that the effect of *Brisbane South v Taylor* was that, if a respondent demonstrates actual prejudice, an application for an extension of time must be dismissed. His Honour accepted [1383] that actual prejudice is a

> "*most important consideration but, despite its importance, it is but one of several factors that are to be assessed*".

So far as the proof of prejudice was concerned, the primary Judge said this [1391]:

> "*[T]he Commonwealth need only prove that material witnesses are no longer available to give evidence in order to discharge its evidentiary onus of establishing actual prejudice. However, the matter does not end there. In order to determine the significance of the prejudice, specifically its impact on a fair trial, it is necessary to consider the evidence that those witnesses might have given, its relevance to the issues and the availability of other evidence to `fill the gaps'.*"

His Honour continued [1393]:

> "*The exercise of a discretion to extend time involves more complex considerations than simply balancing any prejudice suffered by the respondent by reason of the passage of time, against the inevitable prejudice an applicant will suffer if the application is refused. Where a respondent has demonstrated that it will suffer significant prejudice as a result of delay, an applicant is unlikely to be granted an extension of time merely because a good cause of action will be lost. On the other hand, it is relevant to consider the nature and strength of an applicant's claim and the injustice to an applicant where a time bar is the only defence to a good cause of action. Those matters are to be taken into account, together with all the other considerations relevant to the exercise of the discretion.*"

407 The primary Judge identified the grounds on which Mrs Cubillo maintained that an extension of time was appropriate in her case [1394]. These included the following:

* She first became aware of her entitlement to take action against the Commonwealth in December 1997. (His Honour thought that October 1996 was more likely, but considered that nothing turned on this.)

* She lacked the financial means to bring the proceedings earlier. (His Honour did not consider that this was a relevant consideration as there was no evidence that she would have brought proceedings even if she had the means to do so.)

* She had not delayed unreasonably in claiming the relief.

* The psychological effects of her detention had been substantial.

* The Commonwealth had failed to ensure that she had access to legal advice.

* Any prejudice suffered by the Commonwealth by reason of the passage of time was not sufficient to deny it a fair trial.

408 The primary Judge considered that the most important part of Mrs Cubillo's case was the act of removing her from the Phillip Creek Settlement to the Retta Dixon Home. The Commonwealth had particularly pointed to the absence of Ms Shankelton as the person who played the pivotal role in Mrs Cubillo's removal and who might have refuted the claim that she had been removed without the consent of her family. His Honour recognised that the Commonwealth was not in a position to say what evidence Miss Shankelton and other deceased witnesses would have given [1395]. It was, however, in his view sufficient for the Commonwealth

> "*to prove that they would have been, more likely than not, material witnesses and that they are no longer available to give evidence because of the delay on the part of Mrs Cubillo in the institution of her proceedings.*"

409 Mrs Cubillo had also alleged that, following her removal, she had been detained and kept away from her family by the Director of Native Affairs. She had further alleged that the Commonwealth had pursued a general policy of removal and detention of half-caste children without regard to the circumstances of the particular child. Yet all the Directors other than Mr Giese had died, while Mr Giese had been too infirm to give evidence. His Honour noted that the Commonwealth claimed that it had been denied the opportunity to question potential witnesses and to determine the extent to which they could have assisted the Commonwealth to present its defences.

410 The primary Judge then addressed a submission made on behalf of the Commonwealth that the absence of Australian Prime Ministers from 1932 to 1966 and of Commonwealth Ministers whose portfolios included the Northern Territory and Aboriginal Affairs had occasioned prejudice. His Honour rejected that submission. It was not necessary to the Commonwealth's defence to call any of the persons concerned, with the possible exception of Sir Paul Hasluck (Minister for the Territories from 1951 to 1963). Sir Paul's writings were, however, in evidence and it was not apparent that his writings needed amplification.

411 The primary Judge considered [1400] that the greatest difficulty confronting the Commonwealth in the preparation of its defences

> "*was its loss of senior public servants who would have been able to give evidence, not only about government policy with respect to the institutionalisation of part-Aboriginal children, but, more importantly, about the manner in which that policy was implemented. Based on this view I am less concerned by the absences of departmental secretaries who were based in Canberra, but I am very concerned by the absences of the Directors and Acting Directors of Native Affairs and Directors of Welfare and, to a lesser extent, the Administrators of the Territory.*"

His Honour then pointed out the significance of the absence of key potential witnesses, notably Mr Moy, Mr McCaffrey, Miss Shankelton and Mr Giese, by reference to the issues on which their evidence might have been valuable. We have already referred to these passages in the judgment (see [30] above).

412 Next, the primary Judge addressed evidence given on behalf of the appellants concerning some

45 persons who (so it was argued) could have been called for the Commonwealth and, if called, would have overcome some of the prejudice it sustained by reason of the delay in commencing the proceedings. His Honour considered that, with one exception, none of these persons would have made a material difference. The exception was Mr Marsh, who held senior positions within the Northern Territory Administration from 1953 to 1962. There was evidence that Mr Marsh was 93 at the time of the trial and not in good health. Nonetheless, the primary Judge found that, in the absence of medical evidence, Mr Marsh was available to be called as a witness. His Honour considered that Mr Marsh's absence made "one question the depth of [the Commonwealth's] complaint" [1413]. On the other hand, when a final balance was taken, his Honour was "unable to see how Mr Marsh could have possibly made up for the absence of Mr Moy, Mr McCaffrey, Mr Giese and Miss Shankelton".

413 The primary Judge observed that the Commonwealth's case had been dominated by the claim that so much time had gone by and so many material witnesses were dead that it had not been possible for the Commonwealth to present its case adequately. His Honour considered that the strength of the Commonwealth's claims, based on the decisions in *Brisbane South v Taylor* and *Paramasivam v Flynn,* was "overwhelming" and had to prevail [1420].

414 His Honour accepted that were it not for the "irremediable prejudice" that the Commonwealth would suffer, there would be much to be said in Mrs Cubillo's favour. He identified the following matters [1421]:

> "***?*** *in the first place, a refusal to exercise a discretion in her favour will bring her causes of action to end; the hardship that she will suffer will be total; she will have no other remedy at law;*
> * the nature of this case was so huge, complex and time-consuming that a person in Mrs Cubillo's position could not possibly have understood, without the benefit of legal advice, that she had - or may have had - causes of action against some person or institution or statutory office holder or government;
>
> * a person in her position could not be expected to commence and prosecute litigation of this magnitude without substantial assistance;
>
> * following in the footsteps of X (Minors) v Bedfordshire County Council [1995] UKHL 9; [1995] 2 AC 633, Barrett v Enfield London Borough Council [1999] UKHL 25; [1999] 3 All ER 193, the New Zealand cases and some Australian cases such as Williams v Minister, Aboriginal Land Rights Act 1983 (No 2) [1999] NSWSC 843; (1999) 25 Fam LR 86, these proceedings are entering a new domain where social welfare legislation and its implementation is being challenged; and
>
> * there has been a very long delay but that has been explained through lack of knowledge of the existence of legal rights and remedies."

415 The appellants had urged the Court to conclude that the prejudice identified by the Commonwealth had not been such as to deny it a fair trial. They had pointed out, for example, that Mr Penhall had given evidence of Mrs Cubillo's removal. His Honour characterised this as a "potentially dangerous submission" because Mr Penhall's understanding (which his Honour did not share) was

that Miss Shankelton had obtained the consents of the Aboriginal mothers to the removal of the children from the Phillip Creek Settlement [1422]. He considered that the hardship the Commonwealth faced was best illustrated by reference to the cause of action for false imprisonment [1423]:

> "*Mrs Cubillo, having led evidence of her taking, has established a* prima facie *case of imprisonment; there is therefore an onus on the Commonwealth (putting to one side the question of vicarious liability) to satisfy the Court that the taking was lawful. How can the Commonwealth do that? Every person who was in authority, such as Mr Moy is dead; no writings on the removal of the children have been located. The Commonwealth has no chance whatsoever of defending the actions of the Director of Native Affairs in 1947. There are important areas where the Commonwealth has had a fair trial. It has not been embarrassed in the preparation of its defence to the accusations against Mr Walter and Mr Constable. However, important though those matters were, they were only adjuncts to the basic claims which, in each case, was the claim of unlawful removal and unlawful detention.*"

416 The primary Judge next considered whether the Court should exercise its discretion in favour of Mr Gunner. The factors favouring Mrs Cubillo also existed in his favour. It was necessary to proceed on the basis that, contrary to his Honour's findings, each appellant had sustainable causes of action against the Commonwealth. But in each case the Commonwealth had been denied the opportunity to mount a defence on the merits. The Commonwealth's position was even stronger in relation to Mr Gunner than in relation to Mrs Cubillo [1425]:

> "*It had several documents that tended to favour it mounting a successful defence but it lacked the evidence of Mr Giese; and the evidence of Mr Kitching and Mrs McLeod was materially impaired through age, infirmity, confusion and loss of memory. Far from saying that the Commonwealth's only defence was the statute of limitations, the evidence that was led by the Commonwealth in answer to Mr Gunner's claims showed that the Commonwealth had a defence on the merits to his allegation that it was responsible for his removal from Utopia.*"

417 In the result, his Honour dismissed each application for an extension of time under s 44(1) of the *Limitation Act*.

THE APPELLANTS' SUBMISSIONS

418 The appellants' written submissions on the appeal expressly conceded that the primary Judge's analysis of the legal principles governing an application for an extension of time under s 44(1) of the *Limitation Act* disclosed no error. In their submissions in reply, the appellants emphatically reaffirmed that the primary Judge's "exposition of the applicable law at [1375] to [1393] is entirely correct". Moreover, Mr Rush, in the course of oral argument, specifically accepted that "there could reasonably be a finding [by the primary Judge] that there was significant prejudice [to the Commonwealth]" (T 308).

419 It might be thought that these concessions were not a promising start for a submission that the

primary Judge's discretion in relation to the refusal to extend time had miscarried. Nevertheless, Mr Rush submitted that the appellants' concessions did not end the argument. He contended, by way of assertion rather than argument, that it had been incumbent on the primary Judge to examine the evidence separately in relation to each cause of action to determine whether the Commonwealth had sustained prejudice. Since this had not been done, the primary Judge's exercise of discretion was infected by an error of principle.

420 The appellants' written submissions in chief appeared to assume the correctness of their contention that the primary Judge should have approached the application for extensions of time by reference to each pleaded cause of action. The submissions addressed the extension of time issue separately in Section 3 ("Duty of Care") and Section 4 ("False Imprisonment"). The thrust of these rather sketchy written submissions was that the primary Judge had failed to examine the evidence adequately to determine whether the Commonwealth had received a fair trial and that his Honour, in certain respects, had misunderstood the nature of the appellants' case.

421 The appellants submitted that the primary Judge had failed to appreciate that their breach of duty claims did not rest exclusively on unlawful conduct by the Commonwealth or its agents. They had also alleged that the Commonwealth had failed to take reasonable care for the well-being of the appellants quite independently of any question of unlawfulness. In particular, the appellants contended that his Honour had failed to appreciate that they were alleging that the **manner** of their removal from their respective families involved a breach of the Commonwealth's duty to exercise reasonable care to preserve their well-being.

422 Mr Rush contended that, since the primary Judge had made strong findings concerning the traumatic nature of Mrs Cubillo's removal from the Phillip Creek Settlement, the breach of duty claims based on the circumstances of her removal should have been considered as a "discrete area" from the point of view of prejudice to the Commonwealth. Furthermore, the primary Judge had found that the Commonwealth had received a fair trial in relation to the assault committed on Mrs Cubillo by Mr Walter. His Honour should therefore have considered whether or not to grant an extension of time to institute proceedings in relation to that assault. Similarly, insofar as Mrs Cubillo's case rested on the loss of her Aboriginal language and culture whilst at the Retta Dixon Home, the Commonwealth had not been prejudiced in the conduct of the trial as the facts were not substantially in dispute. So far as Mr Gunner's case was based on the Commonwealth's failure to exercise reasonable care in relation to the conditions at St Mary's, the evidence was "overwhelming" that conditions were substandard. It followed that any prejudice to the Commonwealth could not be such as to deny it a fair trial.

423 Mr Rush disputed the primary Judge's finding that the Commonwealth had been prejudiced on the issue of its involvement in Mrs Cubillo's removal from the Phillip Creek Settlement. He also submitted that the Commonwealth could not have sustained prejudice on the question of whether the Director had exercised his powers under the *Aboriginals Ordinance* in relation to Mrs Cubillo at any time prior to 1953, since it had been common ground that the Director had not in fact purported to exercise those powers. In relation to Mr Gunner, Mr Rush maintained that it had been common ground that the Director had not exercised his powers under the *Welfare Ordinance* at any time after 13 May 1957 and so the Commonwealth could not have sustained prejudice in relation to his cause of action founded on false imprisonment. The legality of his detention depended on events that had

been well-documented.

THE COMMONWEALTH'S SUBMISSIONS

424 The Commonwealth submitted that the appellants had failed to establish any error in the primary Judge's exercise of discretion pursuant to s 44(1) of the *Limitation Act.* His Honour had made clear and repeated findings that the Commonwealth had been seriously prejudiced in the conduct of the proceedings. These findings had been made by reference to the principal allegations made by the appellants, notably that they had been removed and detained unlawfully or in breach of a duty of care owed to them by the Commonwealth. There was ample evidence to support the findings of prejudice, as the appellants had effectively conceded.

425 According to the Commonwealth, the task of the primary Judge was not to examine each cause of action pleaded, by reference to every particular, in order to determine the effect of the conceded prejudice. Prejudice relates to evidentiary issues in the conduct of a trial. Thus what was required was for the primary Judge to identify the critical events on which the causes of action were said to have been based and to determine whether the appellants had established that the Commonwealth could receive a fair trial in relation to the factual allegations. His Honour had undertaken that task and, save for certain aspects of the allegations against Mr Walter and Mr Constable, had found that the Commonwealth had sustained irremediable prejudice.

426 The Commonwealth also raised several issues by way of notice of contention. It submitted as follows:

(i) The evidence was insufficient to justify the primary Judge finding that the appellants had proven that they had ascertained a material fact (being the ascertainment of the causal relationship between their respective illnesses and their removal and detention), only shortly (or, in Mr Gunner's case, shortly after) proceedings had been instituted.

(ii) The primary Judge had erred in following the majority decision in *Ward v Walton,* which had held that ascertainment of material facts by an application **after** the institution of proceedings was capable of satisfying s 44(3)(b)(i) of the *Limitation Act.* According to Mr Meagher, this construction of the paragraph was incompatible with the clear terms of the provision. It followed that Mr Gunner, who had relied on the ascertaining of a material fact after the proceedings had been instituted, could not satisfy the threshold requirements of s 44 of the *Limitation Act.*

(iii) The *ratio* of *Brisbane South v Taylor* is that proof of material and actual prejudice (from which it must follow that a fair trial cannot be held) must result in a refusal to grant an extension of time. So much had been held by the majority of a five member Court of Appeal in *Holt v Wynter* [2000] NSWCA 143; (2000) 49 NSWLR 128. Accordingly, once the primary Judge found that the Commonwealth had been materially prejudiced by reason of the appellants' delay in instituting proceedings, his Honour had no residual discretion to grant an extension of time.

REASONING

The Principles

427 We approach the appellants' contentions on the basis that the primary Judge exercised adversely to the appellants the discretion conferred by s 44(1) of the *Limitation Act.* It is therefore necessary for the appellants to demonstrate an error of the kind identified in *House v The King* [1936] HCA 40; (1936) 55 CLR 499, at 504-505, per Dixon, Evatt and McTiernan JJ:

> "*It is not enough that the judges composing the appellate court consider that, if they had been in the position of the primary Judge, they would have taken a different course. It must appear that some error has been made in exercising the discretion. If the judge acts upon a wrong principle, if he allows extraneous or irrelevant matters to guide or affect him, if he mistakes the facts, if he does not take into account some material consideration, then his determination should be reviewed and the appellate court may exercise its own discretion in substitution for his if it has the materials for doing so.*"

428 It is also necessary to bear in mind the well-known observations of Kitto J in *Lovell v Lovell* [1950] HCA 52; (1950) 81 CLR 513, at 532:

> "*It may be, as Jordan CJ said in* Re Will of Gilbert *[1946] NSWStRp 24; (1946) 46 SR (NSW) 318 at 323, that the restraint to which a court of appeal should submit itself is less stringent where the exercise of discretion is determinative of legal rights than it is where the discretion relates to points of practice or procedure. But even in the former case the court of appeal must guard against reversing a discretionary decision merely because it would itself have decided the matter differently; it is not justified in substituting its own judgment for that of the primary judge unless it is clearly satisfied that his judgment was erroneous.*"

See also *Brisbane South v Taylor* at 556, per McHugh J (with whom Dawson J agreed).

429 It is important to appreciate that not all limitations legislation takes the same form: see *Sydney City Council v Zegarac* (1998) 43 NSWLR 195, at 197, per Mason P; *Holt v Wynter* [2000] NSWCA 143; (2000) 49 NSWLR 128, at 135, per Priestley JA. Section 44(1) of the *Limitation Act* applies, *inter alia,* where any Act prescribes or limits the time for instituting an action. In such a case the court may extend the time so prescribed or limited to such an extent and upon such terms as it thinks fit. The section does not empower a court to extend a limitation unless the precondition specified in s 44(3)(b)(i) is satisfied. The court also has to be satisfied that in all the circumstances of the case it is just to grant an extension of time. The structure of s 44 of the *Limitation Act,* is very similar although not identical to the Queensland provision considered in the leading authority on the exercise of discretion to extend time, *Brisbane South v Taylor.*

430 In that case, a majority of the High Court (Dawson, Toohey, McHugh and Gummow JJ, Kirby J dissenting) allowed an appeal from the Queensland Court of Appeal and reinstated an order of the District Court dismissing an application by the respondent under s 31(2) of the *Limitation of Actions Act 1994* (Qld) for an extension of time in which to bring proceedings against the appellant. The respondent sought damages for what she alleged was a negligently carried out hysterectomy. The operation took place in 1979, some seventeen years before she made her application to the District Court.

431 The appellants and the Commonwealth accepted that his Honour had correctly regarded the principles stated in *Brisbane South v Taylor* as applicable to s 44 of the *Limitation Act.* It follows, therefore, that, as Toohey and Gummow JJ said (at 547):

> "*The discretion conferred by the sub-section is to order an extension of the limitation period. It is a discretion to grant, not a discretion to refuse, and on well established principles an applicant must satisfy the court that grounds exist for exercising the discretion in his or her favour. There is an evidentiary onus on the prospective defendant to raise any consideration telling against the exercise of the discretion. But the ultimate onus of satisfying the court that time should be extended remains on the applicant. Where prejudice is alleged by reason of the effluxion of time, the position is as stated by Gowans J in* Cowie v State Electricity Commission (Vict) *[1964] VicRp 103; [1964] VR 788, at 793:*
> `It is for the respondent to place in evidence sufficient facts to lead the Court to the view that prejudice would be occasioned and it is then for the applicant to show that these facts do not amount to material prejudice.'"

The satisfaction of the precondition in s 44(3)(b)(i) enlivens the exercise of the discretion conferred by s 44(1), but does not give an applicant a presumptive right to the exercise of discretion: at 554, per McHugh J. The court must be satisfied that in all the circumstances it is just to grant an extension of time.

432 McHugh J's judgment in *Brisbane South v Taylor* has generally been taken as accepting that "significant prejudice to the potential defendant [is] decisive": *Holt v Wynter,* at 146, per Sheller JA (with whom Meagher, Handley JJA and Brownie AJA agreed). McHugh J pointed out (at 552) that the effect of delay on the quality of justice is undoubtedly one of the important influences motivating legislatures to enact limitations legislation. His Honour identified "four broad rationales" for the enactment of limitation periods:

> "*First, as time goes by, relevant evidence is likely to be lost. Second, it is oppressive, even `cruel', to a defendant to allow an action to be brought long after the circumstances which gave rise to it have passed. Third, people should be able to arrange their affairs and utilise their resources on the basis that claims can no longer be made against them. Insurers, public institutions and businesses, particularly limited liability companies, have a significant interest in knowing that they have no liabilities beyond a definite period....*
> *The final rationale for limitation periods is that the public interest requires that disputes be settled as quickly as possible.*"

McHugh J later said this (at 555):

> "*Legislatures enact limitation periods because they make a judgment, inter alia, that the chance of an unfair trial occurring after the limitation period has expired is sufficiently great to require the termination of the plaintiff's right of action at the end of that period. When a defendant is able to prove that he or she will not now be able to fairly defend*

> *him or herself or that there is a significant chance that this is so, the case is no longer one of presumptive prejudice. The defendant has then proved what the legislature merely presumed would be the case. Even on the hypothesis of presumptive prejudice, the legislature perceives that society is best served by barring the plaintiff's action.* ***When actual prejudice of a significant kind is shown, it is hard to conclude that the legislature intended that the extension provision should trump the limitation period. The general rule that actions must be commenced within the limitation period should therefore prevail once the defendant has proved the fact or the real possibility of significant prejudice. In such a situation, actual injustice to one party must occur. It seems more in accord with the legislative policy underlying limitation periods that the plaintiff's lost right should not be revived than that the defendant should have a spent liability reimposed upon it. This is so irrespective of whether the limitation period extinguishes or merely bars the cause of action****."* (Emphasis added.)

Dawson J agreed generally with McHugh J and added this observation (at 544):

> "*The onus of satisfying the court that the discretion should be exercised in favour of an applicant lies on the applicant.* ***To discharge that onus the applicant must establish that the commencement of an action beyond the limitation period would not result in significant prejudice to the prospective defendant.*** (Emphasis added.)

433 The joint judgment of Toohey and Gummow JJ does not use the same language. Their Honours said this (at 549-550):

> *"In one obvious sense the prejudice to the present respondent is absolute if her application is refused. She can never litigate her claim. But that cannot be enough of itself to warrant an extension of time; in truth there would be no discretion to be exercised. For that reason we do not accept the respondent's argument that the District Court fell into error in failing to balance the prejudice to the appellant against the prejudice against the respondent.... The real question is whether the delay has made the chances of a fair trial unlikely. If it has not there is no reason why the discretion should not be exercised in favour of the respondent."*

434 In *Sydney City Council v Zegarac* Mason P (at 199) perceived a distinction between the notion of "significant prejudice" (Dawson and McHugh JJ) and delay that makes "the chance of a fair trial unlikely" (Toohey and Gummow JJ). His Honour interpreted the joint judgment in *Brisbane South v Taylor* as representing "a clear indication that mere proof of actual prejudice will not dictate the rejection of an application to extend time". More recently, in *Holt v Wynter* the majority of a five member Court of Appeal construed the judgment of Toohey and Gummow JJ as expressing the same view as McHugh J. Sheller JA, with whose judgment three other members of the Court agreed, considered (at 147) that

> "*the effect of the decision of the High Court in* Brisbane South Regional Health Authority

is that an application for an extension of time under limitation legislation should be refused if the effect of granting the extension would result in significant prejudice to the potential defendant."

As we have noted, the Commonwealth relied on *Holt v Wynter* to support its contention that once the primary Judge found that it had sustained significant prejudice in the conduct of the trial that was the end of the appellants' application for an extension of time. The primary Judge rejected that submission. He held that although actual prejudice to a respondent is a "most important consideration" it is but one of several factors that are to be assessed.

435 There is considerable force in the Commonwealth's contention that, once the primary Judge found that the delay in instituting proceedings had materially prejudiced it in defending those proceedings, the effect of *Brisbane South v Taylor* is that the applications for extensions of time had to be dismissed. This was the view of a majority of the New South Wales Court of Appeal in *Holt v Wynter.* The earlier Court of Appeal decision in *Sydney City Council v Zegarac,* on which the primary Judge placed some reliance to support his view that a finding of material prejudice was not decisive, reflected the particular language of s 60E(1) of the *Limitation Act 1969* (NSW). On the other hand, it is arguable that there is at least a difference of emphasis between the approach of Dawson and McHugh JJ in *Brisbane South v Taylor* and that taken by Toohey and Gummow JJ. A Full Court of this Court in *Paramasivam v Flynn* (at 510), for example, appears to have considered that, on the reasoning of Toohey and Gummow JJ, a finding that a respondent would suffer great prejudice by reason of delay does not necessarily foreclose the exercise of the discretion to extend time in favour of an applicant (although the Court upheld the trial Judge's refusal to extend time).

436 It is not necessary for us to resolve the question of whether a finding of significant prejudice to a respondent is fatal to an application to extend time under a provision such as s 44(1) of the *Limitation Act.* We are content to proceed on the same basis as the primary Judge, namely that a finding of material prejudice does not of itself foreclose an exercise of discretion in the appellants' favour.

The Cause of Action Argument

437 The appellants' first complaint was that the primary Judge had failed to assess prejudice to the Commonwealth by reference to each cause of action relied on by the appellants. Mr Rush frankly admitted that a submission to this effect had never been put to the primary Judge on behalf of the appellants. Regardless of the significance of that omission, we think that the submission is without foundation.

438 The appellants cited no authority that establishes the proposition that a Judge exercising a discretion such as that conferred by ss 44(1) of the *Limitation Act* must examine prejudice by reference to each pleaded cause of action, as distinct from considering the consequences of delay on the ability of the respondent to contest the material factual allegations relied on by an applicant. The absence of any such authority is not surprising. The significance of prejudice occasioned by a delay in instituting proceedings, as the judgments in *Brisbane South v Taylor* make clear, is that the respondent is or may be denied a fair trial. The respondent is prejudiced if, in the words of McHugh J (at 555), he or she is "now not...able to fairly defend him or herself or...there is a significant chance

that this is so. In order to determine whether a respondent has suffered prejudice in this sense, it is ordinarily necessary to examine the consequences of delay in instituting proceedings on his or her ability to adduce evidence on material questions of fact.

439 This was the approach taken by the High Court in *Brisbane South v Taylor.* There the trial Judge took the view, in a medical negligence case, that the inability of the defendant Authority to trace the treating doctor prejudiced the Authority's ability to defend the proceedings. This was so because the Authority would be deprived of a key witness on what Toohey and Gummow JJ described as "the crucial issue" in the case, namely the terms of a conversation between the respondent (the patient) and the doctor prior to the operation. The majority of the High Court considered that there had been no error in the way in which the trial Judge dealt with the question of prejudice: at 550, per Toohey and Gummow JJ; at 556, per McHugh J.

440 That the assessment of prejudice is ordinarily to be undertaken by reference to the factual issues in a case is consistent with the functions of pleadings. Pleadings must contain, and contain only, a statement in a summary form of the material facts on which a party relies: *FCR* O 11 r 2(a). If a pleading discloses facts, proved at the trial, which entitle a party to succeed, it does not matter that the pleader may not have realised that those facts disclosed a cause of action or defence other than the one to which they were directed: *Ravinder Rohini Pty Ltd v Krizaic* [1991] FCA 318; (1991) 30 FCR 300, at 314, per Wilcox J (with whom Miles J agreed). The reason why this is so is that a failure to identify a cause of action, as distinct from the facts supporting it, is unlikely to occasion irremediable prejudice to the other party.

441 The primary Judge assessed prejudice to the Commonwealth by reference to the critical factual issues identified in the pleadings. Moreover, he did so in very considerable depth. His Honour correctly considered the question of prejudice by reference to the principal allegations made by the appellants, namely that they had been removed and detained by or on behalf of the Commonwealth unlawfully and beyond the powers conferred by ss 6 and 16 of the *Aboriginals Ordinance.* In addition, his Honour made findings as to prejudice by reference to other aspects of the appellants' pleaded cases, for example the standards and operations of the Retta Dixon Home during Mrs Cubillo's stay there [1402], [1403]. His Honour was entitled to take this course. Indeed, it is difficult to see what other approach he could have adopted.

442 Just as the primary Judge was not bound to give independent consideration to the prejudice sustained by the Commonwealth in relation to each cause of action (as distinct from the material facts relied on by the appellants), so his Honour was not bound to grant an extension of time because the Commonwealth had received a fair trial on particular factual issues, such as Mr Walter's assault of Mrs Cubillo and Mr Constable's improper conduct towards Mr Gunner. As his Honour correctly observed [1425], these were "adjuncts" to the basic claims founded on unlawful removal and detention. In any event, the findings relating to the assault and improper conduct did not of themselves establish that the Commonwealth was liable to the appellants, whether for false imprisonment, breach of duty or otherwise. To establish liability on the basis of breach of duty, for example, the appellants would have had to establish, at the least, that the Commonwealth or the Director knew or ought to have known of the propensities of Mr Walter and Mr Constable to act in this way. On these issues the primary Judge found against the appellants [1255]. On the assumption,

contrary to these findings, that the appellants had a "sustainable case" that the Commonwealth should have been aware of the risk, the prejudice to the Commonwealth in not having available the evidence of the relevant Directors is obvious.

The Findings of Prejudice

443 In deference to the submissions made by the appellants, we have considered the primary Judge's findings on prejudice in the context of our discussion of the appellant's false imprisonment and breach of duty claims (see [295]-[303], [393]-[399] above). It is unnecessary to repeat that discussion here. It is enough to say that his Honour's finding that the Commonwealth had sustained irremediable prejudice in defending the proceedings was amply justified on the evidence.

Exercise of Discretion

444 If the appellants intended to suggest that his Honour's exercise of discretion had miscarried notwithstanding his findings on prejudice, it is not clear what the basis for that submission was. It was not submitted that the primary Judge had misunderstood the question that had to be addressed. Nor was it suggested that he had taken irrelevant considerations into account or that he had failed to take relevant considerations into account. Indeed, his Honour acknowledged that there was much to be said in favour of the orders extending time, especially in Mrs Cubillo's case.

445 The case has an unusual feature in that, as a consequence of the primary Judge's rulings in the interlocutory judgment, he had the advantage of hearing all the evidence adduced by each party on the substantive cases. His Honour approached the exercise of discretion on the basis contrary to his findings, that each appellant had a sustainable cause of action against the Commonwealth. He nonetheless declined to extend time having regard to the irremediable prejudice encountered by the Commonwealth in defending each proceeding. In short, he took the view that the fact that a very long time had elapsed since the critical events rendered it impossible for the Commonwealth to receive a fair trial. It was plainly open to the primary Judge to reach this conclusion.

The Notice of Contention

446 It is not necessary to address the other questions raised by the Commonwealth's notice of contention relating to the primary Judge's refusal to extend time.

FIDUCIARY DUTIES

THE APPELLANTS' CLAIMS

447 The appellants contended at first instance that a fiduciary relationship existed between each of them and the Commonwealth. In the alternative, they contended that a fiduciary relationship existed between each of them and the Directors and that the Commonwealth knowingly participated in the Directors' breaches of their fiduciary duties. Notwithstanding the statements by the primary Judge to the contrary [1270], it was not part of the appellants' case at first instance that the Commonwealth had "a vicarious liability" for any breach of fiduciary duty on the part of the Directors. Nor was any such contention put on appeal.

448 The relief sought by the appellants included declarations that "acts committed by or on behalf of

[the Commonwealth]" were in breach of fiduciary obligations owed to them. The appellants each claimed equitable compensation. It does not seem to have been suggested to the primary Judge that the principles of equitable compensation would be more favourable to the appellants than an award of compensatory damages under the general law. Nor was any such suggestion made on the appeal. Indeed, the appellants' submissions on the appeal did not address the assessment of equitable compensation.

449 The appellants pleaded that the fiduciary relationship between them and the Commonwealth arose from a variety of circumstances. The primary Judge summarised the circumstances relied on by the appellants as follows [1276]:

> "*The fiduciary relationship...was said to arise because of the role and functions of the Commonwealth's servants and agents in the removal and detention of the [appellants] and because of the Commonwealth's powers over, and its assumption of responsibility for, Aboriginal people in the Northern Territory. It was also said to arise because of the powers, obligations and discretions of the Directors and the vulnerability of each [appellant] to the exercise of those powers and discretions...*".

450 The appellants identified the fiduciary duties allegedly owed to them by the Commonwealth in general terms. The duties were said to include a duty properly to supervise any institution or person into whose care the appellants were placed and a duty to advise the appellants to obtain independent legal advice.

451 The appellants pleaded that the Commonwealth, in removing and detaining them, had acted in breach of its fiduciary duties. The particulars of breach largely reproduced the particulars of the breaches of duty of care alleged against the Directors in their capacity as guardians of the appellants. In addition, however, the appellants contended that the interests of the Commonwealth conflicted with the appellants' interests, in two respects:

(i) The interests of the Commonwealth in destroying the appellants' family and cultural associations and connections, providing domestic and manual labour for the European community and breeding out "half-caste" Aboriginal people conflicted with the appellants' interests in maintaining their association with their families and culture, achieving recognition of traditional land rights and avoiding psychological harm.

(ii) The interests of the Commonwealth in not being exposed to legal action by the appellants conflicted with the appellants' interests in being in a position to pursue legal or equitable remedies against the Commonwealth.

452 The appellants also pleaded that the Directors owed them fiduciary duties. The fiduciary relationship was said to arise, *inter alia,* from the role performed by the Directors of Native Affairs and Welfare as legal guardians of the appellants to s 7 of the *Aboriginals Ordinance* and s 24 of the *Welfare Ordinance.* The appellants alleged that the Directors breached their fiduciary obligations to the appellants in substantially the same respects as the Commonwealth. Of course, the Directors were not parties to the proceedings, but the Commonwealth was alleged to have knowingly participated in the Directors' breaches of fiduciary duty.

THE PRIMARY JUDGMENT ON FIDUCIARY DUTIES

453 The primary Judge found that the first ground of alleged conflict of interest (in which the Commonwealth was said to have an interest in destroying the appellants' cultural and family associations) lacked evidentiary support [1305], [1306]. There is no appeal from that finding.

454 His Honour rejected the second ground of alleged conflict of interest (based on the failure of the Commonwealth or the Directors to advise the appellants of their legal rights). He said that this argument had fallen by the wayside because of his "factual findings that the [appellants had] failed to prove that any of their rights were infringed" [1289].

455 So far as the existence of fiduciary duties was concerned, the primary Judge observed that in *Bennett v Minister of Community Welfare* [1992] HCA 27; (1992) 176 CLR 408 at 411, Mason CJ, Deane and Toohey JJ had recognised that the relationship of guardian and ward created a fiduciary relationship. Similarly, he referred to the observation of the Full Court in *Paramasivam v Flynn,* at 504, that:

> *"[a] relationship such as that of...guardian and ward may give rise to duties typically characterised as fiduciary - not to allow duty and interest to conflict and not to make an unauthorised profit within the scope of the relationship...".*

His Honour concluded, however, that it would be inappropriate for a Judge at first instance to expand the range of fiduciary relationships to accommodate conflicts of interest which did not include "an economic aspect". He pointed out that in *Paramasivam v Flynn* the Full Court had rejected a contention that alleged sexual assault on a ward by a male guardian could constitute a breach of fiduciary duty. The Court had taken this view because the interest the former ward sought to vindicate was non-economic in character [1307].

456 Since the primary Judge had rejected the appellants' substantive claims insofar as they were founded on breach of fiduciary duty it was not strictly necessary for him to address the Commonwealth's contention that the appellants' claim for equitable compensation for breach of fiduciary duty had been barred by the equitable defence of laches. Nevertheless, consistently with his Honour's approach to the appellants' applications for extensions of time in relation to the common law causes of action, the primary Judge did address the question of laches. In this respect, it was common ground that the Northern Territory limitations legislation, unlike the law in some other jurisdictions, does not prescribe a limitation period for a claim for equitable compensation founded on breach of fiduciary duty: cf s 11(1) of the *Limitation Act 1985* (ACT), discussed in *Paramasivam v Flynn,* at 501.

457 His Honour commenced his relatively brief analysis of laches by quoting from the leading authority, *Lindsay Petroleum Co v Hurd* (1874) LR 5 PC 221. That case had been recognised by Deane J in *Orr v Ford* [1989] HCA 4; (1989) 167 CLR 316, at 341, as establishing the "ultimate test"

> *"whether the plaintiff has, by his inaction and standing by, placed the defendant or a third party in a situation in which it would be inequitable and unreasonable `to place him if the remedy were afterwards to be asserted'."*

458 His Honour accepted that, since the Northern Territory legislature had not prescribed a limitation period for equitable relief, considerations such as the public interest in bringing litigation to an end within a specified time did not have the same significance as they might in connection with an application to extend time for the institution of proceedings to establish common law claims. He also rejected the Commonwealth's contention that it had been prejudiced by knowing delay or neglect on behalf of the appellants, as distinct from delay attributable to their ignorance of material facts and of their legal rights.

459 The primary Judge said that the question was one of doing justice between the parties. If, contrary to his findings, there were fiduciary relationships between the Commonwealth or the Directors and the appellants and if (also contrary to his findings) the appellants had claims for equitable relief against the Commonwealth, his Honour considered that

> "*it would be grossly unfair to let that case proceed. In the case of Mrs Cubillo, the Commonwealth does not have access to the witnesses and the evidentiary material it would need to mount its defence. In the case of Mr Gunner, three of the Commonwealth's most important witnesses, Mr Giese, Mr Kitching and Mrs McLeod were either not available or their memories were badly affected by the passage of time*" [1433].

For these reasons, the primary Judge would have barred the appellants' claims for equitable relief.

THE SCOPE OF FIDUCIARY DUTIES

460 As the primary Judge recognised, the Director owed fiduciary obligations to the appellants by virtue of his statutory role as their legal guardian. His Honour was correct to do so. In *Clay v Clay* [2001] HCA 9; (2001) 178 ALR 193, judgment in which was delivered after the primary judgment in this case, the High Court characterised (at 205) the relationship of guardian and ward as "a fiduciary relationship with particular characteristics". See *Countess of Bective v Federal Commissioner of Taxation* [1932] HCA 22; (1932) 47 CLR 417, at 420-421, per Dixon J. The fact that the Director became the legal guardian of the appellants by virtue of statute is no obstacle to the creation of a fiduciary relationship: *Wik Peoples v Queensland* (1996) 187 CLR 1, at 90, per Brennan CJ.

461 The Commonwealth was not, however, the appellants' guardian. Whether or not the Commonwealth owed fiduciary duties to the appellants, as their pleadings acknowledged, depended on other considerations. The primary judge appears not to have made a finding as to whether there was a fiduciary relationship between the Commonwealth and the appellants. Although there are statements in the section of the judgment dealing with laches that suggest that his Honour had found that there was no such relationship, it is clear enough that this was not the effect of his earlier reasoning. The primary Judge proceeded on the basis that, if there was a fiduciary relationship between the Commonwealth and the appellants, the Commonwealth had not breached its fiduciary duties.

462 Even if the Commonwealth did owe fiduciary duties to the appellants, that was merely the beginning of the inquiry. The point emerges from the reasoning of the joint judgment (McHugh, Gummow, Hayne and Callinan JJ) in *Pilmer v Duke Group Ltd (in liq)* [2001] HCA 31; (2001) 180 ALR

249, a case involving an alleged breach of fiduciary duty by an accounting firm in respect of a valuation. Their Honours explained the distinctive character of the fiduciary obligation which sets it apart from contract and tort by approving the analysis of McLachlin J in *Norberg v Wynrib* [1992] 2 SCR 226, at 272:

> "*The foundation and ambit of the fiduciary obligation are conceptually distinct from the foundation and ambit of contract and tort. Sometimes the doctrines may overlap in their application, but that does not destroy their conceptual and functional uniqueness. In negligence and contract the parties are taken to be independent and equal actors, concerned primarily with their own self-interest. Consequently, the law seeks a balance between enforcing obligations by awarding compensation when those obligations are breached, and preserving optimum freedom for those involved in the relationship in question. The essence of a fiduciary relationship, by contrast, is that one party exercises power on behalf of another and pledges himself or herself to act in the best interests of the other.*"

The joint judgment in *Pilmer v Duke Group* also endorsed (at 271) a passage from the judgment of Frankfurter J in *Securities and Exchange Commission v Chenery Corporation* [1943] USSC 32; 318 US 80 (1943), at 85-86:

> "*But to say that a man is a fiduciary only begins analysis; it gives direction to further inquiry. To whom is he a fiduciary? What obligations does he owe as a fiduciary? In what respect has he failed to discharge these obligations? And what are the consequences of his deviation from duty?*"

It follows that the fact that one person is in a fiduciary relationship with another does not mean that all aspects of their relationship are necessarily governed by equitable principles: *Breen v Williams* (1996) 186 CLR 71, at 92, per Dawson and Toohey JJ.

463 On the appellants' case, the fiduciary duties owed by the Commonwealth and the Directors were largely co-extensive with the scope of the Commonwealth's duty of care to the appellants. So, too, the alleged breaches of fiduciary duty were largely co-extensive with the alleged breaches of the Commonwealth's duty of care. Indeed, the appellants conceded that the evidence they relied on to establish breaches of fiduciary duty was "essentially...the same evidence as [was] relied on for the breaches of the duty of care". As the reasoning in *Pilmer v Duke Group* suggests, Australian law has set its face firmly against the notion that fiduciary duties can be imposed on relationships in a manner that conflicts with established tortious and contractual principles.

464 In *Breen v Williams,* one issue was whether the doctor-patient relationship imposed a fiduciary duty on the doctor to grant the patient access to his or her medical records. Dawson and Toohey JJ said this (at 93):

> "*[T]he duty of the doctor is established both in contract and in tort and it is appropriately described in terms of the observance of a standard of care and skill rather than, inappropriately, in terms of the avoidance of a conflict of interest.... The concern of the*

> *law in a fiduciary relationship is not negligence, or breach of contract. Yet it is the law of negligence and contract which governs the duty of a doctor towards a patient. This leaves no need, or even room, for the imposition of fiduciary obligations.*"

Gaudron and McHugh JJ also rejected (at 110) the contention that the doctor owed the patient (Mrs Breen) a fiduciary duty to give her access to the medical records:

> "*She seeks to impose fiduciary obligations on a class of relationship which has not traditionally been recognised as fiduciary in nature and which would significantly alter the already existing complex of legal doctrines governing the doctor-patient relationship, particularly in the areas of contract and tort. As Sopinka J remarked in* Norberg v Wynrib *[1992] 2 SCR 226, at 272: `Fiduciary duties should not be superimposed on these common law duties simply to improve the nature or extent of the remedy'.*"

(The passage from Sopinka J's judgment was again quoted with approval in *Pilmer v Duke Group,* at 270.) Gaudron and McHugh JJ also made this observation in *Breen v Williams* (at 113):

> "*In this country, fiduciary obligations arise because a person has come under an obligation to act in another's interests. As a result, equity imposes on the fiduciary proscriptive obligations - not to obtain any unauthorised benefit from the relationship and not to be in a position of conflict. If these obligations are breached, the fiduciary must account for any profits and make good any losses arising from the breach. But the law of this country does not otherwise impose positive legal duties on the fiduciary to act in the interests of the person to whom the duty is owed.*"

(This passage, too, was quoted with approval in *Pilmer v Duke Group,* at [74].)

465 Breen v Williams was applied by a Full Court of this Court in *Paramasivam v Flynn.* In that case, the appellant sought an extension of time to commence proceedings against the respondent, formerly his guardian, in respect of sexual assaults said to have occurred when he was a child. His statement of claim pleaded that the assaults were committed in breach of the respondent's fiduciary duties to him. The Full Court concluded (at 507) that the fiduciary claim was "most unlikely to be upheld by Australian courts". One reason given for this conclusion was that the appellant's claim was encompassed by tortious principles (at 505):

> "*To say of a claim that it is a novelty is not necessarily to condemn it or to require the conclusion that it cannot succeed.... But an advance must be justifiable in principle. Here, the conduct complained of is within the purview of the law of tort, which has worked out and elaborated principles according to which various kinds of loss and damage, resulting from intentional or negligent wrongful conduct, are to be compensated. That is not a field on which there is any obvious need for equity to enter and there is no obvious advantage to be gained from equity's entry upon it. And such an extension would, in our view, involve a leap not easily to be justified in terms of conventional legal reasoning.*"

Insofar as the appellants' case on fiduciary duties is co-extensive with their case on breach of duty of care, it faces two insurmountable obstacles. The first is that the primary Judge made findings adverse to the appellants which undercut their claims. For example, the primary Judge was not satisfied that the removal and detention of Mrs Cubillo was not authorised by the *Aboriginals Ordinance.* Any fiduciary obligation must accommodate itself to the terms of statute. In particular, a fiduciary obligation cannot modify the operation or effect of statute: to hold otherwise, would be to give equity supremacy over the sovereignty of Parliament: *Tito v Waddell (No 2)* [1977] Ch 106, at 139. It follows that if the removal and detention of Mrs Cubillo had been authorised by the *Aboriginals Ordinance,* no fiduciary obligation could forbid what the legislation permitted. In the case of Mr Gunner, the primary Judge found that he had been removed from Utopia Station at the request and with the informed consent of his mother and that the Director had not participated in the removal. This finding leaves no room for Mr Gunner's claim that his removal was in breach of fiduciary duties owed to him by the Commonwealth.

466 The second obstacle is that, in any event, the appellants' claims are, to use the language of *Paramasivam v Flynn,* within the purview of the law of torts. As the High Court has held, there is no room for the superimposition of fiduciary duties on common law duties simply to improve the nature and extent of the remedies available to an aggrieved party. If it had been the case that the removal and detention of the appellants were not authorised by the *Ordinances* (or otherwise justified by law), those who caused the removal or detention would be guilty of tortious conduct and liable at common law. There would be no occasion to invoke fiduciary principles.

THE ALLEGED CONFLICT OF INTEREST AND DUTY

467 The only instance of conflict of interest and duty relied on by the appellants in the appeal was the alleged failure of the Commonwealth to advise the appellants of their legal rights or to advise them to obtain independent legal advice in relation to their rights. The appellants submitted that the primary Judge's dismissal of this argument, by reason of his factual findings that the appellants had failed to prove that any of their legal rights had been infringed, "misconceive[d] the nature of the breach".

468 Yet the appellants appeared to concede that if the primary Judge was correct in concluding that no rights were infringed, the consequence would be that any breach of fiduciary duty would have caused the appellants no loss. Since we have upheld his Honour's findings rejecting the appellants' claims based on breach of duty and false imprisonment, it follows that his Honour was correct in concluding that any breach of fiduciary duty could not have caused the appellants any loss that could be the subject of equitable compensation.

469 The appellants did not address argument in support of the proposition that, despite the fact that the particular breach of fiduciary duty caused no compensable loss, declaratory relief should nonetheless be granted. No such relief was sought or foreshadowed on the Notices of Appeal. In these circumstances, there is no basis for granting any relief in respect of this alleged breach of fiduciary duty.

LACHES

470 The appellants did not challenge the primary Judge's statement of the test to determine whether

a claim for equitable compensation for breach of fiduciary duty is barred by the equitable defence of laches. Their submissions were confined to a challenge to his Honour's finding that if, contrary to his views, the appellants had a claim for breach of fiduciary duty it would be "grossly unfair" to allow the claim to proceed. That challenge was made simply by way of assertion and was not developed.

471 The primary Judge dealt relatively briefly with the question of prejudice in the context of laches because he had addressed the issues at length earlier in his judgment. Since the claims founded on breach of fiduciary duty were largely co-extensive with the other claims, the findings of prejudice were directly relevant to the question of whether the equitable claims had been barred [1432]. We see no error in his Honour's approach.

DAMAGES

472 Submissions were made on behalf of the appellants that the primary Judge's assessment of damages in each case, assuming liability to have been established, was too low. It is not necessary for us to address those submissions.

CONCLUSION

473 The primary Judge dismissed the appellants' claims on two principal alternative bases. First, he rejected their common law, statutory and equitable claims on the evidence presented to him. Secondly, having regard to the prejudice sustained by the Commonwealth having to defend the proceedings so many years after the relevant events occurred, he declined to grant the extension of time the appellants required in order to commence the proceedings to pursue their common law claims. He also upheld the Commonwealth's defence to the appellants' equitable claims on the basis of laches.

474 As we have explained, the case presented by the appellants on the appeal was more limited and, in some respects, quite different from the contentions put to the primary Judge. Although we have not agreed with all aspects of the primary Judge's reasoning, we have found no appellable error in the conclusions he reached. We have also taken the view that the appellants should not be permitted to recast their breach of duty claims on appeal. To do so would be unjust. Accordingly, the appeals must each be dismissed.

475 We were asked by the parties to reserve the costs of the appeal. Accordingly, we shall give the parties an opportunity to make submissions as to costs.

I certify that the preceding four hundred and seventy five (475) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices SACKVILLE, WEINBERG & HELY .

Associate:

Dated: 31 August 2001

Counsel for the Appellants:	Mr J T Rush QC with Mr M A Dreyfus QC and Ms M Richards

Solicitors for the Appellants:	Holding Redlich
Counsel for the Respondent:	Mr D R Meagher QC with Dr M Perry and Ms C Beaton-Wells
Solicitor for the Respondent:	Australian Government Solicitor
Dates of Hearing:	15, 16, 17, 18, 21 and 22 May 2001
Date of Judgment:	31 August 2001