

STOLEN WAGES: SETTLING THE DEBT

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I Overview

The focus of this paper is Indigenous stolen wages: the withholding by governments across Australia under a 'trust' arrangement of the wages and other entitlements of Indigenous people and the exploitation of Indigenous labour. Note the use of the word 'stolen' – it is not coincidental. There is a strong link between stolen wages and the removal of Indigenous children from their families known as the Stolen Generations. Both are premised on an appallingly paternalistic view of Indigenous Australians: the view that Indigenous Australians were not able to properly care for their children or for their money. In both cases, the removal was done by the state – State governments or, in the case of the Territories, the Commonwealth Government – or its agents, and was done with little or no consideration of the short- and long-term consequences. Furthermore, the withholding of wages in 'trust' particularly affected the Stolen Generations, those Indigenous children and young adults who were removed from their families and placed into institutions. It is impossible and inappropriate to treat these two issues as separate. To do so does a further gross injustice to the lives of those who lived through these policies.

The challenge of creating an appropriate model to deal with the policies and their consequences in a legal or quasi-legal context in both cases faces similar difficulties. These include:

- a lack of documentary evidence;
- the need to deal with events that occurred over a long period and, for some people, a long time ago;
- the difficulty of raising almost inevitably traumatic memories; and

- the need to design tests for entitlement that adequately and fairly address the particularities of the injustices suffered.

This paper begins by looking at the work done by the Public Interest Advocacy Centre ('PIAC'), which I work for, in relation to the Stolen Generations and Indigenous stolen wages. It then considers the New South Wales scheme for repayment of the withheld trust monies, the Aboriginal Trust Funds Repayment Scheme ('ATFRS'). The paper looks briefly at the scheme implemented in Queensland, details the strengths and weaknesses of the different schemes and proposes areas that need to be reconsidered in relation to the implementation of the ATFRS and future schemes.

It is hoped that the renewed focus on the impacts of removal of Indigenous children and of the exploitation of Indigenous labour in Australia will result in real justice for Indigenous Australians that properly acknowledges and remedies their lived experience of removal, and wage and labour exploitation.

II PIAC's Work on the Stolen Generations

In 1996, PIAC and the Public Interest Law Clearing House ('PILCH') coordinated legal advice and assistance to Aboriginal people making submissions to the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, which was eventually to publish *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families* ('*Bringing Them Home Report*').¹ Since then, PIAC has provided legal representation for some members of the Stolen Generations, including for Mrs Valerie

Linow, who made a successful claim in the New South Wales Victims Compensation Tribunal for crimes committed against her while she was a state ward.²

In 2000, PIAC developed a national proposal for a Stolen Generations Reparations Tribunal to provide full reparations for the forcible removal of Aboriginal children.³ The proposal was developed to address the failure of governments and churches to provide reparations as recommended by the *Bringing Them Home* Report. The tribunal proposal gained support from the Australian Labor Party and Australian Democrats members of the Senate Legal and Constitutional References Committee Inquiry into the Stolen Generation in 2000.⁴

In 2001, PIAC sought the views of Aboriginal and Torres Strait Islander people about the proposal through a national consultation project, funded by the Myer Foundation, Rio Tinto Aboriginal Foundation, and the Reichstein Foundation, culminating in the 2002 report, *Restoring Identity: Final Report of the Moving Forward Consultation Project*.⁵

While the nature and purpose of the proposed Stolen Generations Reparations Tribunal is significantly different to that of the ATFRS in New South Wales, PIAC's expertise in designing the former has nevertheless been of great value in considering appropriate principles, tests for entitlement and procedures for the latter. This is because, as detailed above, many of the issues faced in proposing an effective scheme for both are similar.

III PIAC's Work on Indigenous Stolen Wages

PIAC's work with Indigenous communities led it to investigate the claims of clients who were denied access to wages, allowances and other entitlements held on trust by the New South Wales Aborigines Protection Board, then the New South Wales Aborigines Welfare Board (together 'the Boards'), and subsequently the New South Wales Government.

PIAC's involvement in Indigenous stolen wages commenced in 2003, when it obtained documents from the New South Wales Department of Community Services ('DoCS') under the *Freedom of Information Act 1989* (NSW). The documents revealed that DoCS had previously considered implementing a scheme to repay Aboriginal people the trust fund monies that had been retained by the New South Wales Government.

The draft DoCS scheme, developed in 1998, appears to have formed the basis of a draft Cabinet minute dated 12 April 2001 titled 'Aboriginal Trust Funds Payback Scheme Proposal'.⁶ The minute sought Cabinet's endorsement for the establishment of a scheme to reimburse Aboriginal trust funds monies to rightful claimants at fair value in contemporary currency.

Following the disclosure to PIAC of documents requested under the freedom of information application, and examination of the Cabinet minute, PIAC requested an urgent meeting with the Director-General of DoCS to discuss the reasons that the scheme proposed by DoCS had not been implemented. PIAC also sought to advocate for the urgent implementation of a repayment scheme in light of the position of PIAC's clients and the potential for expensive and protracted litigation if the New South Wales Government did not properly address the issue. The Director-General proposed a meeting with staff of the Minister for Community Services.

Subsequently, in early March 2004, PIAC met with senior staff of the Minister for Community Services and advocated for comprehensive consultation with the Aboriginal community directed towards the implementation of a scheme similar to that proposed by DoCS in 1998. PIAC emphasised the importance of an expeditious scheme with fair criteria for eligibility and proof of claims, a commitment to compensating heirs and an appeals process.

The culmination of this lobbying was a formal apology by then Premier the Hon Bob Carr MP on the 11 March 2004 and a commitment to repaying monies:

In [the] spirit of facing hard truths and making amends, I invite the House to turn its attention to another legacy of misguided paternalism – the fate of Aboriginal trust funds. ... Those funds were held in trust, and our predecessors failed that trust.

When in the years up to 1969 Aboriginal people sought to gain access to their accounts they were rarely paid. After 1969 payments ceased completely. For those reasons I take this opportunity to formally apologise to the Aborigines affected and offer the assurance that any individual who can establish they are owed money will have it returned. To that end, last month the State Cabinet agreed to develop a scheme to identify and reimburse the people who are owed the money. Over the coming months we will consult with

Aboriginal communities to find out how the scheme can best work.

Two things are required: first, criteria for establishing the payment of funds, given the miserable nature of the records that have been left to us; and, second, the mechanism to adjudicate what amount should be paid and whether the criteria are met. That will not be without its challenges because, as I indicated, the records are inconsistent and incomplete, and many of the beneficiaries are now dead.⁷

The scheme referred to by Premier Carr initially involved the establishment of a panel to consult with Aboriginal communities and organisations on how the trust fund repayment scheme should operate.⁸ That initial panel completed its work the same year, presenting a report to the New South Wales Government in October 2004.⁹ As a result, the Government established the ATFRS, which commenced operation in February 2005.

PIAC has provided advice to hundreds of claimants who believe that the New South Wales Government owes them, or members of their family, unpaid entitlements. PIAC has assisted a number of its clients to make applications to the New South Wales scheme. It has also established, with PILCH, the Stolen Wages Referral Scheme to link applicants under the scheme with PILCH members willing to assist with the application process on a pro bono basis. The lawyers involved in the referral scheme have been provided with training both on Indigenous cultural issues, particularly relating to the impact of removal of children and withholding of wages and other entitlements, and on the ATFRS's Guidelines¹⁰ and procedures. Those involved in the referral scheme meet regularly to discuss the processes, how to best assist applicants and what other work needs to be done to ensure all of the debt is repaid, rather than simply the debt repayable within the narrow guidelines of the scheme.

PIAC's direct work with claimants and the ATFRS informed its submission to the Senate Legal and Constitutional Affairs Committee Inquiry into Stolen Wages ('Senate Inquiry into Stolen Wages') in September 2006.

In late 2007, PIAC began working with individuals and organisations across Australia on strategies to ensure an effective national response to Indigenous stolen wages.

IV How the ATFRS Operates in New South Wales

A Structure of the ATFRS

The ATFRS comprises both the Aboriginal Trust Fund Repayment Scheme Unit ('ATFRS Unit') and the Aboriginal Trust Fund Repayment Scheme Panel ('ATFRS Panel').

The ATFRS Unit is essentially the administrative arm of the ATFRS and is responsible for:

- receiving and processing applications made pursuant to the Scheme;
- investigating the applications and compiling all relevant information; and
- preparing an interim assessment in relation to each application.¹¹

The role and responsibilities of the ATFRS Panel are to:

- provide advice on the operation of an evidence-based repayment scheme;
- endorse or reject the ATFRS Unit's interim assessments for payment of claims where there is certainty, strong evidence or strong circumstantial evidence of money paid into trust fund accounts and no evidence, or unreliable evidence that money was paid out;
- have discretion to review the facts in each case using all available evidence, including oral evidence;
- review decisions of the ATFRS Unit at the request of claimants; and
- contribute to a review of the operations of the ATFRS after three years including reporting to the New South Wales Government the extent to which unclaimed trust fund monies have been identified where there is no living claimant and recommend a means of addressing the issue, if it arises.¹²

B How the Claims Process Works

The ATFRS has an eight-stage process. Set out below is the process as it applies to direct claimants, that is, Aboriginal people who believe that money was held in trust by the New South Wales government on their behalf.

1. A claimant completes an application form and lodges it with the ATFRS.

2. The ATFRS Unit registers the application and allocates the claimant a file number.
3. The ATFRS Unit forwards the claimant's details to the New South Wales Department of Aboriginal Affairs ('DAA') and State Records NSW to enable both agencies to undertake a search of all archived documents in relation to the claimant. The Agencies provide a list of all documents and copies of those documents they consider relevant to the claim.
4. The ATFRS Unit reviews the documents it receives from the DAA and State Records NSW. In particular the ATFRS concentrates on documents that detail payments into and out of the claimant's trust fund account and makes an interim assessment of the amount owed to the claimant.
5. The ATFRS Unit sends its interim assessment to the claimant asking the claimant whether or not they agree with the amount. The interim assessment is accompanied by a copy of the list of all documents and a copy of all of those documents that were reviewed by the ATFRS Unit in making its interim assessment.
6. The claimant must respond to the interim assessment within six weeks. The ATFRS Unit then sends the claimant's response and its own recommendation to the ATFRS Panel.
7. The ATFRS Panel reviews the claimant's response and the ATFRS Unit's recommendation. It has the discretion to review the facts in each case using all available evidence, including oral evidence. The ATFRS Panel can endorse or reject the ATFRS Unit's interim assessment for payment of a claim depending on the strength of the evidence. The ATFRS Panel then makes a recommendation, which is forwarded to the New South Wales Special Minister of State.
8. The Special Minister of State then determines whether to make an *ex gratia* payment or not.

It was not until February 2006 that the ATFRS Guidelines were finalised, twelve months after the ATFRS had officially commenced operation.

V Queensland Indigenous Wages and Savings Reparations

In Queensland, the Indigenous Wages and Savings Reparations ('IWSR') was the scheme implemented to provide monetary reparation to Indigenous people whose wages and savings were controlled by past Queensland Governments.

The IWSR was open for the three years between 1 February 2003 and 31 January 2006 to Indigenous people still living on 9 May 2002 whose wages and savings had been subject to government control. It functioned as a two-tiered scheme: the higher amount of \$4000 was available to those people who were born on or before 31 December 1951; the lower amount of \$2000 was available to those who were born between 1 January 1952 and 31 December 1956.¹³ Payments were made on the condition that the applicant released the Queensland Government from any further liability. An accepted payment was deemed to be in full and final settlement of the debt, regardless of how much the applicant was actually owed. At the end of the IWSR's operation, the Queensland Government had almost \$36 million unspent from the original \$55.4 million allocated. In 2007, the Queensland Government began seeking views from the community about how the remaining money should be spent.¹⁴

VI Evaluating the New South Wales Government's Commitment

There are certainly some significant advantages of the ATFRS over the IWSR. These include the absence of a cap on the amount that can be paid to any individual applicant, the entitlement of descendants to receive a payment, the non-final nature of any payment made under the scheme, and the seemingly longer time allowed for the scheme to operate (but see below).

Having said that, two questions arise from the design of the ATFRS that are useful in evaluating the New South Wales Government's implementation of its commitment:

- will all debts be repaid, and in full?
- will Aboriginal people be compensated for the exploitation of their labour?

A Will All Debts Be Repaid?

The indications to date of the amount paid out of the ATFRS are that very little of the estimated debt of somewhere between \$12 million and \$70 million¹⁵ will be returned to the rightful owners by the proposed end date.

Concern over whether all debts will be repaid arises first of all from the need under the ATFRS to have documentary evidence of the debt. While this approach rightly acknowledges the amounts held in trust as debts,

the evidentiary burden placed on applicants in New South Wales is higher than that in Queensland, with the ATFRS heavily relying on written financial records. This impacts on applicants in terms of both meeting the threshold requirement of establishing that money was held in trust for an individual and on establishing that there is any money owing from that trust. Thus, even though an applicant may be able to establish that there was a trust fund held for them (or for their deceased family member), there may be insufficient evidence of a debt owing. In that situation, the applicant would not receive payment under the ATFRS.

Having to satisfy a higher evidentiary burden becomes even more problematic and detrimental for applicants given the general incompleteness and inadequacy of written records kept by New South Wales departments and agencies. Record-keeping appears to be particularly inadequate at the time that the monies were paid into trust. There has also been a failure by the New South Wales Government to properly maintain and protect the records from damage or destruction. It was the New South Wales Government that was responsible for keeping written financial records relating to the trust monies of Indigenous people; the people for whom the monies were held in trust had no control over the collection or disbursement of monies or over the maintenance of complete, comprehensive and accurate records. Aboriginal people are therefore disadvantaged as a consequence of the failure of those entrusted with the responsibility for their welfare and financial affairs.

It is clear from a review of the documents given to claimants assisted by PIAC that there are no complete chronological records for any trust beneficiary PIAC has been involved with. In particular, there do not appear to be any ledgers recording payments in and out of individual beneficiaries' accounts. This is a significant omission. In its stead there are sporadic documents and arbitrary notations that have been collated from a variety of different sources.

As there are no complete chronological records for these claimants and it seems for many others as well, it is not certain on the face of the records whether the amounts in trust were dealt with appropriately or whether all transactions were recorded. Sean Brennan and Zoe Craven identify the relevant obligations on the New South Wales Government and its agencies in respect of the trust fund monies,¹⁶ however it is apparent from a review of the records provided to the applicants PIAC has assisted that

these obligations were rarely, if ever, met. Indeed, Brennan and Craven note that in September 1953 the then Premier of New South Wales, the Hon Joe Cahill MP, was aware of the fact that 'for years payments had been made from the Special Deposits Accounts without warrant' despite the requirement for such a warrant.¹⁷ As early as 1940, the New South Wales Government was aware of the paucity of records:

It is rather disappointing to find that, after this lapse of time, records of the persons affected are so meagre, not only with regard to older people, but also with regard to children ...¹⁸

The absence of detailed records of the aborigines under the direct and indirect supervisions of the [Protection] Board and its staff, does not permit of any more specific details being given as to the success of the present policy. It is considered that these details should be kept as being essential to the ultimate solution of this problem.¹⁹

Despite this clear acknowledgement of significant problems with the operation of the Boards and the trust funds, it seems that there was little or no attempt made to reform the system.

Aside from those evidentiary issues and documentary deficiencies, further concern about whether all debts will be repaid stems from the focus of the ATFRS solely on the repayment of monies held in trust. It is apparent from an analysis of claimants' records that not all of the amounts that *should* have been paid into trust *were* actually paid into trust. This is perhaps the more serious deficiency: the failure of the Boards to ensure that all the amounts that should have been paid were in fact paid. For example, employers of wards were required to pay that ward's wages, less an amount for pocket money and other sundries, to the relevant Board (either the Aboriginal Protection Board or the Aboriginal Welfare Board depending on the year). A review of the relevant wage levels and the number of years in employment for a sample of applicants indicates that not all the wages owing were collected by the Boards. This is supported by documents indicating that the Boards had to regularly chase payments from debtors. The New South Wales Public Service Board noted the failure to collect child endowment, veteran, old age and invalid pension entitlements from the Commonwealth, as well as the payment of rations in lieu of wages for work done on stations.²⁰ It comes back to issues of documentary evidence: without a full ledger of transactions, it is not possible to ascertain what payments were forthcoming.

In addition, anecdotal evidence from applicants to the ATFRS indicates that in many cases individuals did not receive the pocket money that was held back from the money paid to the Boards. As the money was not paid, and was not required to be paid, to the Boards, claims to the ATFRS for such amounts are unsuccessful.

Another issue relates to the care and employment of a significant number of Aboriginal people in New South Wales by churches and non-religious benevolent organisations. This appears to have been almost a parallel system to the one operated by the New South Wales Government. However, as it was not directly controlled by the Government, there were no trust funds established by the Government in respect of this group. Often those in this system, usually children, were doing hard physical labour for a full day within a mission or similar institution but they were not employed as paid trainees or apprentices. They were underpaid or not paid at all, and there appears to be no record of money being held in trust for them. The current design of the ATFRS does not enable it to deal with claims in respect of monies managed or held by any of those non-government organisations.

B Exploitation of Aboriginal Labour

While the monies held by the Boards are treated by the New South Wales Government as a debt owed to individuals (as they should be, rather than as a 'hand-out' or payment of compensation for harms done), it is still important that all governments consider their commitment to compensating claimants for issues associated with the widespread exploitation of Aboriginal labour in New South Wales and elsewhere in Australia.

These issues of exploitation include physical and sexual abuse occurring within employment situations and institutions such as Cootamundra Girls' Training Home and Kinchela Boys' Training Home. A number of PIAC's clients have shared their stories about their employment situations. Reproduced below are just three of those stories, which formed part of PIAC's submission to the Senate Inquiry into Stolen Wages.²¹

1 Valerie Linow

'We were all slave labour. No-one told us about wages or that we were supposed to get paid. The welfare put us out there and all we had to do was be little black slaves. I worked long

hours from dawn to dusk. We worked seven days a week. There was a lot of work to do for a child. We didn't have that much experience really. Like milking the cows and chopping wood, we had no experience in that. We had no choices. We couldn't complain. We were there to obey. Matron would tell us that: "You're out there to do work and that's it and do a good job. No complaining."

'We always had to be out working, slave labour. All we know was that we were out to obey and to follow their rules. We were too frightened to say anything. If we didn't do jobs properly we had to keep doing them again until they were right. We were segregated. The only people I could speak to were the cows in the paddock. We were taken advantage of. Little black kids going to work was cheap labour for them and that's all we were.

'I ran away from one employer where I was raped. I didn't know who told the police about the abuse. All I remember is the police arriving and they told me to pack up my clothes and go back to the station to meet the matron. When I got back to Cootamundra matron told me "Don't tell anyone what has happened and tomorrow I shall take you down town and buy you a new dress." They should have been protecting us but they didn't. Matron's response was to find me other work. One week later she put me out working with someone else. The only option was to run away, but even this was hard because we were so isolated on the properties and didn't even know which way to head. After this I found it difficult to stay long with any employer.'²²

2 Vince Peters

'There was a not a day at Kinchela that we didn't work. They didn't care what sort of condition we were in, whether we were sick or had an injury, they didn't take that into consideration. You would miss a lot of meals if you didn't finish your chores on time. This would sometimes go on for days on end. We were starved as punishment. You worked from dark in the morning to dark at night on a seven-day basis. Most of the jobs were adult jobs irrespective of whether you were a kid or not. You were expected to do the chore that was given to you. I can only remember one day in seven years that we didn't work and that was because all the kids were sick. Just about everyone in the home, even the managers, were sick.

'The managers would try to inflict as much pain as possible on us. We would get a flogging on a daily basis, even if we

were in trouble at school. They would call out number such and such. We weren't known by our names, just the number we had. We'd get called up the steps if teachers had informed management and we'd get a flogging with a cane. Most of the fellas took a pledge that we'd never let them see a tear in our eye and the managers didn't like that. We would get a flogging for any little thing that wasn't up to scratch and we have to repeat the job until it would meet their expectations. They seemed to enjoy inflicting pain on another human being. What happened to us at Kinchela was something that we'll never forget. It was complete and constant suffering on a daily basis. Each manager done it for pure pleasure.

'We worked and we worked out butts off. We were way too young to even function to do some of the tasks that were given to us.'²³

3 Cecil Bowden

'When we were in Kinchela they used to send us out to local farms. They would put us in a shed or we had to harvest the crops. And we never got anything out of that. I never remember receiving money. We'd harvest their potato crops, carrots and all the vegetables and their corn too. This involved picking the corn-cobs off and placing them in a big bin. This was at Kinchela on the local farms.

'In the mornings we had to get up at 5am go and get the cows in and milk them before we had breakfast. Breakfast was at 7am. A lot of the time we had to get up at 4am and the ground would be freezing cold, we had chilblains all over our feet. The tops of our feet were cracked from the cold and seeping with puss. We did all our work barefoot as they wouldn't supply us with shoes. The grass was knee deep and we had to walk through it. In the summer we were frightened of snakes. In the afternoon we'd have to go and milk the cows again.

'If you made a mistake you were punished and most of the time you were flogged. They'd strip you off and line you up in front of all the boys and each kid had to belt you. If the kid didn't belt you then he would have to get belted. If the other kids didn't hit you hard enough to satisfy the managers they were sent down the line to get a flogging too. By the time you got to the end you were black and blue and bleeding all over. There was one incident I was involved in with cementing the laundry and someone put their footprint in the concrete. When the manager saw this he went crazy and

lined all the boys up to ask who put their footprint there. He made us all place our foot over the print. Half a dozen boys would have fitted it but he blamed me so I was sent down the line and belted. He stripped me off and started belted me with a cane; all over my body. All I could do was cover my face up and my genitals. Later on it was discovered that it was the manager's son that had made the footprint in the wet cement.

'These were the sorts of people put in charge of us. They would make us kneel on the coke, which is burnt coal, near the wood heap and it was very sharp. We had to put a log of wood over our shoulders and hold onto it so there was weight on us causing the coal to cut into our knees. We would be punished for being late, not getting up in time or making mistakes.

'In addition to morning and afternoon work on school days, we would work on the weekends mainly on a Saturday and we had to dig the garden up or plough the fields. They had a couple of big draught horses and we had to walk behind them with no shoes on. I worked on the Kinchela property from the age of 11 till I was 18. When I got out I came down here to Sydney and started a plumbing apprenticeship. This was no good really. The boss used me as cheap labour. He didn't hire any other workers and made me do all the work, but there was no one we could talk to.'²⁴

In these stories, the link between the Stolen Generations and Indigenous stolen wages is strongly evident. Once the actual debts owed to Aboriginal people in New South Wales have been properly identified and repaid, a further New South Wales Government commitment – matched by commitments by all governments in Australia – is needed to provide for reparations for the harms done both through the forcible removal of children and the exploitation of Aboriginal people in work through the inequitable wages paid.

VII Valuable Lessons from the ATFRS

The ATFRS is a comprehensive mechanism. As a consequence, its operations provide significant lessons for the processing of Indigenous stolen wages claims. The rest of this paper suggests key considerations in the establishment of future schemes, not only stolen wages repayment schemes in other States and Territories but also schemes to address related issues of labour exploitation and abuse.

A The Appropriate Starting Point for Calculations

In New South Wales, the ATFRS Unit calculates the amount owed to the claimant by working backwards from the final amount recorded in the claimant's trust account records (if any). The ATFRS Unit then investigates whether any of the payments that were made from the account should not have been made – such as dental bills – and then credits this amount back to the final available balance of the trust account. Limited by the boundaries of the scheme set out in the ATFRS Guidelines, the ATFRS Unit does not question whether the final amount in a person's trust fund account is an accurate assessment of the amount owed, that is, the amount that should have been in trust based on the person's work or entitlements history. The ATFRS Unit does not investigate whether all the wages or entitlements were paid into the trust fund or invite the claimant to give evidence of the dates between which they were employed, their level of wages, information that would indicate any other entitlement, or whether or not they received payments from their trust accounts. In many cases, this approach is likely to lead to a gross underestimation of the amount of wages or entitlements withheld from a claimant. This is not the fault of those who administer the ATFRS; rather, it is a problem related to the limited scope the scheme has been given by the New South Wales Government.

Many of PIAC's clients have indicated that the amounts calculated by the ATFRS Unit are grossly deficient. In some cases the applicants have stated that they did not receive any payments from their employers despite the fact that they worked for many years. Yet the paucity of records means that this cannot be established by documentary evidence.

Consequently the amounts in the assessments have varied dramatically depending on the state of the claimant's records. As the claimant has not ever had any control of the documentation it often comes down to 'pot-luck'. One claimant may be lucky to have had their records survive and so be assessed as having an entitlement, whereas another claimant with a similar work history may receive a 'nil' assessment because no surviving documents have been located.

A preferred starting point would be to estimate the payments (including pensions and benefits) or wages that a claimant should have received during the period in which they were under the control of the Boards. This can be quantified by reference to the time a claimant was eligible for a payment or

wage and the level of that payment or wage. Wage levels were prescribed and the terms of employment are available from documents or from individual evidence from the claimants. The onus of proof should fall on the entity that had the statutory obligation of administering the process of receiving and distributing payments and maintaining financial records: in this case the New South Wales Government.

While this approach to determining the level of debt would expose responsible government to greater liability, unless it is adopted in New South Wales and by future schemes, such schemes will only ever be viewed as capable of making partial repayments.

B The ATFRS Guidelines

The ATFRS Guidelines prescribe the policy and procedure administration for the ATFRS. They are important because they enable both claimants and the ATFRS administrators to be clear about the procedures that are to be followed. Two issues have arisen in New South Wales that can inform the ongoing operation of the ATFRS and future schemes.

Firstly, the release of the ATFRS Guidelines was delayed beyond the commencement of the ATFRS accepting claims. The delayed release of the Guidelines led to confusion about the operation of the ATFRS amongst claimants and also amongst the scheme's administrators. A review of a number of interim assessments indicates that there were different methods of arriving at interim assessments and processing applications in the initial stages of the ATFRS's operations. Some claimants received interim assessments without ever being required to complete a claim form.

Secondly, and perhaps more significantly, the ATFRS Guidelines indicate that they are not binding on the ATFRS Panel and the relevant Minister.²⁵ Without a full review of the claims that have been determined it is not possible to assess whether departures from the ATFRS Guidelines have been to the benefit of claimants or not. However, clear and binding guidelines with a clear approach to beneficial discretion would be a more appropriate approach in New South Wales and for the operation of any future schemes.

C Prioritisation of Claimants

During the work of the initial panel there was significant focus on how claims would be prioritised, with consideration

given to prioritising those who were particularly elderly or unwell.²⁶ It remained unclear for some time after the ATFRS was established how claims would be prioritised. Ultimately, it was determined that this would be on the basis of the order in which claimants had contacted the ATFRS (including the order in which people contacted the initial panel to indicate they thought they had an entitlement before the ATFRS was formally established in February 2006).

While the ATFRS Guidelines do give priority to direct claimants and have some capacity to take into consideration other relevant factors such as age or illness,²⁷ the lack of public information at the time that the initial panel started registering names means that many claimants have a lower priority simply because they were not aware that contacting that panel to indicate a possible claim would be taken as registration for priority purposes.

D Deadlines for Acceptance of Claims

The timeframe for the operation of schemes should be at least five years. In New South Wales, the Minister for Community Services advised on 15 December 2004 that the ATFRS would operate for five years.²⁸ The ATFRS commenced operation in February 2005, although the ATFRS Panel was not appointed until May 2005 and the ATFRS Guidelines were not finalised until February 2006. The ATFRS started formally accepting claims in September 2005, which would mean that it should allow claims to be filed until September 2010 under a five-year timeframe.²⁹ However, the Guidelines indicate that claims shall be lodged no later than 31 December 2008,³⁰ giving people wishing to claim less than three and a half years to do so. The difference in these dates appears to be due to the administrative time required to process applications within the five years allowed for the ATFRS to complete all of its operations. At 14 January 2008, the ATFRS had finalised 85 claims, only a very small proportion of the anticipated claims.³¹ While this does not indicate the number of claims filed, it appears likely that the majority of claims that could be made have not yet been filed, with less than one year left for applications to be made.

This is of particular concern given the limited information available to Aboriginal claimants about the existence of the ATFRS and the claims process. PIAC's work in Aboriginal communities across New South Wales indicates that there remain people who are unaware of the existence of the ATFRS. This reflects the limited promotion of the repayment

scheme, which in turn may well reflect a limited commitment of funds to supporting the effective operation of the ATFRS in New South Wales.

The reason for the decision to limit the claims deadline was not well communicated to the Aboriginal community, a significant proportion of whom were affected by the operation of the Boards and, as a result, are likely to have monies held in trust.

E Access to Records

In New South Wales, when the ATFRS Unit provides the interim assessment to a claimant, it encloses a table that contains a brief description of each document that is held by the DAA and State Records NSW. The designated researcher marks a cross next to those documents that the researcher deems are relevant to the claim and to the ATFRS Unit's decision-making process. Only those documents marked with a cross are copied and provided to the ATFRS Unit and the claimant. The remaining documents are excluded from the ATFRS Unit's consideration in making its interim assessment.

A review of some of these tables indicates that non-marked items can include employment contracts, memoranda regarding employment progress and even documents containing specific reference to trust fund account amounts. A review of all of the documents would assist the ATFRS Unit in its assessment and the claimants by helping claimants to recollect important details of employment; by acting as a cross-referencing tool that may lead to further avenues for investigation; and by providing valuable background material for any submissions to the ATFRS Panel.

While the provision of a complete copy of the documents would add to the administrative costs to the DAA and State Records NSW, this should have been factored into the ATFRS's operations for several reasons, which are listed below:

- The designated researcher within the DAA and State Records NSW reviews each document and writes out a description of each document irrespective of whether a copy is provided. The additional step of making a copy would seem relatively effortless in the circumstances. Indeed, selective copying from the records is likely to add to the administrative burden rather than reducing it.

- The majority of items in the summary table are already marked and copied.
- The additional amount of photocopying is unlikely to be onerous, as there appears to be a general lack of documentation in existence.
- The New South Wales Government has given a commitment to provide access to and copies of documents to Aboriginal people as a result of the recommendations in the *Bringing the Home* Report.

As the situation currently stands in New South Wales, claimants have to make a separate application to the DAA for the entire records, which results in them incurring additional costs and creates further significant delays. The decision to waive the fee is a discretionary one and is made on a case-by-case basis.

The provision of all documents by governments under any scheme established would at the very least be seen as a gesture of good faith. However, it would also demonstrate on the relevant government's part an acknowledgement of their responsibilities and a commitment to ensuring that schemes are rigorous and transparent.

F Funding of Practical Assistance and Support

There is a significant demand for assistance by potential claimants to the ATFRS, in particular, from claimants who are dissatisfied with their interim assessment. This demand notwithstanding, there is limited expertise and capacity within the community to assist. As noted above, PIAC has assisted a number of claimants and has, with PILCH, established a referral scheme to obtain pro bono assistance for claimants from PILCH members. A summary of finalised claims recently provided to PIAC by the ATFRS indicates that the vast majority of claimants – 84 per cent – were not represented and that all of those who were obtained that representation through PIAC or the referral scheme.³² PIAC is aware that there are a small number of other claimants who have legal representation. A preliminary assessment of the figures provided in that table indicates that, in the majority of cases, having representation does positively affect the financial outcome for the claimant.

The ATFRS was allocated the amount of \$100 000 for 'practical assistance' funding. PIAC understands that 50 per cent of this amount has been allocated to Link-Up to provide counselling assistance to claimants and community

education. It is anticipated that the balance will be used for mediation in respect of descendant claims due to potential family disputes. It is appropriate that these two areas in need of support have been prioritised. However, the amount available for Link-Up services and mediation appears inadequate. Further, the failure of the New South Wales Government to allocate resources for ensuring that claimants have support to understand the interim assessments and to make representations to the ATFRS Panel seriously undermines the capacity of the ATFRS to ensure fair outcomes.

There is no legal aid available for such claims and very limited civil and administrative law assistance available in New South Wales to Aboriginal claimants. While the ATFRS asserts that legal assistance is not required, most claimants want to obtain advice so that they can fully understand what is being offered, how it has been calculated and the implications of accepting an interim assessment. This is not an unreasonable expectation for claimants.

In New South Wales, solicitors are paid \$825 for assisting clients with victims compensation applications. Such a model could be followed for payments to solicitors or advocates assisting clients in submitting their application for review, particularly in relation to initial assessments.

G Information Available to the Public about the ATFRS

Stolen wages schemes should be supported by a comprehensive and well-resourced communications strategy so that potential claimants are made aware of the scheme.

There appears to have been very little community information or education about the operation of the ATFRS and the claims process in New South Wales. PIAC has encouraged the ATFRS to participate in Aboriginal community events and outreach programs but to date is not aware of the ATFRS doing this systematically across New South Wales.

This is no doubt a result of the limited resources allocated to the ATFRS and its focus on claims. However, as a consequence of the public demand for information and the level of misinformation (not attributable to the ATFRS itself) in communities about the ATFRS, PIAC has been forced to use significant resources of its own to promote the ATFRS. This has included trips to rural areas such as Dubbo, Bourke

and Walgett, appearances at public seminars and workshops, and the production of information in newsletters and elsewhere.

H Setting the Record Straight

In addition to the need to establish schemes in all jurisdictions, there is an important need for a national forum to publicly air the complexity and the consequences of mandatory controls over Indigenous labour and finances during most of the 20th century. As with the removal of children, the withholding of Indigenous people's wages has entailed widespread injustice that has impacted upon the Indigenous population in Australia. The repayment of debts is a small part of resolving these issues.

VIII Conclusion

The New South Wales scheme certainly cannot be heralded as a completely successful model and should not be used simply as a template for repayment schemes in the other States and Territories. The retention by the New South Wales Government after the ATFRS has ceased operation of any of the money that was held in trust – an almost inevitable outcome at this stage – will be a clear indication of its failure to deal comprehensively, fairly and equitably with the Government's debt to Aboriginal people in New South Wales.

Awareness of the debt owed to individual Indigenous Australians through the withholding of wages and entitlements should not be a new thing. Had we been listening, for decades we would have heard their story being told, often with the story of removal. Back in 1977, Margaret Tucker's autobiography, *If Everyone Cared*, told of her removal to Cootamundra Girls' Home and then the hunger and abuse of domestic service in Cheltenham.³³ In her book, *Unna You Fellas*,³⁴ Glenyse Ward tells of her sister Nita being sent out to work at 14 and of the work she and others were required to perform in the institution in the kitchens, laundry, dormitory, the fields and the dairy.

The story will continue to be told and it should be told to everyone, so that everyone can understand the breadth of impact that government policies have had on the lives of Indigenous Australians. Human Rights Award winner Alec Kruger tells it again and tells of his efforts to have his removal addressed through the Australian legal system.³⁵

At the age of 10, Alec was lined up with a group of other young Aboriginal boys at the Bungalow in Alice Springs so that potential employers could pick from the selection: 'a sort of unofficial labour exchange'.³⁶ Alec tells of the failure of the arrangements and the absence of payment. He tells it in plain language and without emotion. He is telling the story that governments and Australians need to hear and to understand, the story that we all need to respond to with a process that repays the debt and compensates for the treatment:

The contract was between the Aboriginal Protectorate and the employer. The housing and welfare for the worker were supposed to be assessed and monitored. There were supposed to be minimum conditions for clothes, accommodation, food and the like. The reality was different. There was nobody to do any follow up and the station owners and other employers were powerful men.

They told me that money would be paid into a trust fund for me. I was to be able to collect it when I was eighteen. It never happened. No one ever found a contract. There was no money paid into any fund. No one went to check on anything. Most slaves had it better than I got at Loves Creek.³⁷

Endnotes

- * Robin Banks is the Chief Executive Officer of the Public Interest Advocacy Centre ('PIAC'). The author wishes to thank the many people who have been involved in PIAC's work on Indigenous stolen wages for their direct or indirect contribution to this paper, including: Natasha Case, Alexis Goodstone, Simon Moran, Shahzad Rind, Charmaine Smith, Laura Thomas and the former Director of PIAC, Andrea Durbach. This paper is based on that work and, in particular, on the PIAC submission to the Senate Inquiry into Stolen Wages in 2006: Charmaine Smith, Simon Moran and Robin Banks, *Stolen Wages: The Unsettled Debt: Submission to the Senate Stolen Wages Inquiry* (2006) PIAC <<http://www.piac.asn.au/publications/pubs/06.09.29-PIAC%20Submission%20re%20Stolen%20Wages.pdf>> at 20 March 2008. The author also acknowledges the work of Dr Ros Kidd, whose research on Indigenous stolen wages has formed the basis of much of PIAC's understanding and has been vital in focusing the issues; and of Zoe Craven, whose research for the Indigenous Law Centre informed PIAC's original submission to the Aboriginal Trust Fund Repayment Scheme.
- 1 National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families, *Bringing Them Home: Report of the National Inquiry into the Separation of Aboriginal*

- and *Torres Strait Islander Children from their Families*, Human Rights and Equal Opportunity Commission (1997) (*Bringing Them Home Report*).
- 2 The decision was unreported. See Alexis Goodstone, 'Stolen Generations Victory in the Victims Compensation Tribunal' (2003) 5 (22) *Indigenous Law Bulletin* 10.
 - 3 Alexis Goodstone and Amanda Cornwall, *Submission to the Senate Legal and Constitutional References Committee Inquiry into the Stolen Generation: Addressing Term of Reference* (2) (2000) PIAC <<http://www.piac.asn.au/publications/pubs/SenateInquiryintotheSG.pdf>> at 20 March 2008.
 - 4 Senate Legal and Constitutional References Committee, Parliament of Australia, *Healing: A Legacy of Generations: Report of the Inquiry into the Federal Government's Implementation of the Recommendations Made by the Human Rights and Equal Opportunity Commission in Bringing Them Home* (2000) xviii, 286.
 - 5 Amanda Cornwall, *Restoring Identity: Final Report of the Moving Forward Consultation Project*, PIAC (2002).
 - 6 Faye Lo Po, Minister for Community Services, New South Wales, 'Aboriginal Trust Funds Payback Scheme Proposal' (Draft Cabinet Minute), 12 April 2001 (copy on file with author).
 - 7 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 March 2004, 7163 (Robert Carr), <<http://www.parliament.nsw.gov.au/prod/PARLMENT/hansArt.nsf/V3Key/LA20040311012>> at 20 March 2008.
 - 8 This panel had three members, two of whom are Indigenous Australians. It was chaired by Brian Gilligan, and the other members were Terri Janke and Sam Jeffries.
 - 9 Brian Gilligan, Terri Janke and Sam Jeffries, *Report of the Aboriginal Trust Fund Repayment Scheme Panel*, Aboriginal Trust Fund Repayment Scheme (2004) <http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0020/15545/Report_of_the_Aboriginal_Trust_Fund_Repayment_Scheme_Panel_Oct_2004.pdf> at 20 March 2008.
 - 10 Aboriginal Trust Fund Repayment Scheme, 'Guidelines for the Administration of the NSW Aboriginal Trust Fund Repayment Scheme' ('ATFRS Guidelines'), *New South Wales Government Gazette* No 85, 30 June 2006, 152. See <http://www.dpc.nsw.gov.au/_data/assets/pdf_file/0016/15541/Guidelines_for_the_Administration_of_the_NSW_Aboriginal_Trust_Fund_Repayment_Scheme_Feb_2006.pdf> at 20 March 2008.
 - 11 Ibid [2.1].
 - 12 Ibid [3.1].
 - 13 The stated rationale for the different levels of payment was the different legislative arrangements that applied to the two groups. Those born before 31 December 1951 were subject to one or both of the *Aboriginals Protection and Restriction of the Sale of Opium Act* 1897 (Qld) and *Aborigines Preservation and Protection Act* 1939 (Qld), which imposed extensive controls on work and savings. Those born between that date and 31 December 1956 were subject to the *Aborigines' and Torres Strait Islanders' Affairs Act* 1965 (Qld), which imposed less stringent controls.
 - 14 Only two options as to how the remaining money should be spent were proposed by the Queensland Government. The first involves the allocation of all of the unspent funds to those who have already received a payment under the IWSR (an additional \$7346 to the first group and an additional \$3673 to the second group). The second option entails the allocation of part of the unspent funds to those who have already received a payment under the IWSR (an additional \$3000 to all successful applicants) with the remainder of the funds to be allocated to 'an Indigenous-controlled foundation to benefit Aboriginal and Torres Strait Islander peoples, particularly those directly or indirectly affected by controls of wages and savings'. It is notable that both options preclude payment to those who were unsuccessful in their application under the original scheme, and to those who refused to either apply or accept payment under the IWSR. See Aboriginal and Torres Strait Islander Partnerships, 'Unspent Indigenous Wages and Savings Reparation Funds' (2007) <<http://www.atsip.qld.gov.au/datsip/documents/options-fact-sheet.pdf>> at 20 March 2008.
 - 15 Lo Po, above n 6, [7.5].
 - 16 Sean Brennan and Zoe Craven, *'Eventually They Get It All...': Government Management of Aboriginal Trust Money in New South Wales* (2006) Indigenous Law Centre <http://www.ilc.unsw.edu.au/research/documents/ILC_Stolen_Wages.pdf> at 20 March 2008.
 - 17 Ibid 53.
 - 18 Public Service Board of New South Wales, *Aborigines Protection: Report and Recommendations of the Public Service Board of New South Wales* (1940) 12.
 - 19 Ibid 19.
 - 20 Ibid.
 - 21 Charmaine Smith, Simon Moran and Robin Banks, *Stolen Wages: The Unsettled Debt: Submission to the Senate Stolen Wages Inquiry* (2006) PIAC <<http://www.piac.asn.au/publications/pubs/06.09.29-PIAC%20Sub%20re%20Stolen%20Wages.pdf>> at 20 March 2008.
 - 22 Valerie Linow, quoted in ibid 7.
 - 23 Vince Peters, quoted in ibid 8.
 - 24 Cecil Bowden, quoted in ibid 8–9.
 - 25 ATFRS, above n 10, [1.8].
 - 26 The Queensland scheme had a system for prioritising claims with seven levels of priority, with date of birth being the secondary consideration within each level. The first level – 'Urgent' – applied

to those who were terminally ill regardless of date of birth. The second level – ‘Priority 1’ – applied to those born on or before 31 December 1932. The next three levels used date of birth as the key criteria: on or before 31 December 1942, on or before 31 December 1951, then on or before 31 December 1956. The last level of priority that resulted in payments – ‘Priority 5’ – applied to those claimants who had passed away from 9 May 2002. The final level of priority – ‘Priority 6’ – were those outside the scope of the scheme due to their date of birth (after 31 December 1956) or death (before 9 May 2002).

- 27 ATFRS, above n 10, [5.1].
- 28 DoCS, ‘Aboriginal Trust Fund Repayment Scheme Announced’ (Press Release, 15 December 2004) <http://www.community.nsw.gov.au/DOCS/MEDIARELEA/PC_100336.htm> at 20 March 2008.
- 29 As was noted earlier, the ATFRS accepted applications before the formal commencement date and before it formally began accepting completed claim forms, for which it should be commended.
- 30 ATFRS, above n 10, [4.2].
- 31 Letter from ATFRS to PIAC, 14 January 2008 (copy on file with author).
- 32 Ibid.
- 33 Margaret Tucker, *If Everyone Cared* (1977) ch 9.
- 34 Glenyse Ward, *Unna You Fellas* (1991).
- 35 Alec Kruger and Gerard Waterford, *Along on the Soaks* (2007).
- 36 Ibid 65.
- 37 Ibid 66.