

By Thalia Anthony

INDIGENOUS STOLEN WAGES

Historical exploitation and contemporary injustice

In the 20th century, governments in Australia commonly withheld Indigenous people's wages or authorised private employers of Indigenous people to withhold them. There are ongoing claims for the repayment of these wages as they were withheld in breach of statutory and common law duties. These claims bring into sharp focus the harsh exploitation of Indigenous Australians, and the need for a reparations scheme that compensates Indigenous stolen wages. This article explores the legal and administrative avenues available to Indigenous claimants.

After colonisation, Indigenous Australians took on a vast range of jobs, including farming, mining, stock work, road building, irrigation, domestic duties, gardening, pearling and fishing. Employers included governments, churches, mining companies, town enterprises and pastoralists. Some industries, such as the profitable cattle industry in northern Australia – across the Kimberley, Northern Territory and northern Queensland – could not have survived without the thousands of highly skilled Indigenous workers employed every year between the 1880s and the 1960s.¹ In 1913, the Chief Protector of Aboriginals, Baldwin Spencer, stressed that ‘under present conditions, the majority of stations are largely dependent on the work done by black “boys”’.² Despite Indigenous people’s crucial contribution and their entitlement to under-award payments, tens of thousands of Indigenous workers – employed both by governments and corporations – were unpaid.³ These unpaid wages have become known as ‘stolen wages’. In some instances, Indigenous wages were put in trust funds, which Indigenous people were unable to access; in other cases, they were paid in the form of rations (food and clothing) rather than wages.

State government schemes to repay stolen wages, most recently in Western Australia, have been described as an ‘insult’ and ‘mean-spirited’ due to the small *ex-gratia* amounts offered, the narrow class of Indigenous workers who could make claims and the limited time period for applications.⁴ In light of these inadequacies, and the failure of other states and territories to repay Indigenous workers, legal challenges have been launched. In Queensland there have been two successful actions.⁵ Litigation is currently being prepared on behalf of Conrad Yeatman who worked as a carpenter and labourer in Yarrabah in north Queensland from the age of 14 (as a test case),⁶ and Gurindji and Warlpiri peoples who worked in the Northern Territory cattle industry (as a class action).⁷

Some of the arguments that will form the basis of such litigation will be discussed in this article. However, the most consistent and just means of providing redress for unpaid Indigenous wages would be through a federal scheme that comprehensively covers unpaid Indigenous workers and redresses the shortcomings of the state schemes in NSW, Queensland and Western Australia. Such measures were recommended by the 2006 Senate Inquiry into Indigenous Stolen Wages.⁸ This inquiry also recommended providing payment on broad grounds of eligibility: for example, to former government workers and private employees; making payments available to descendants; and providing sufficient payment for reparation.⁹

LEGISLATIVE FRAMEWORK

The regulation of employment and wages of Indigenous people for most of the 20th century was governed by Aboriginal Protection Acts (‘Protection Acts’), which had various iterations until the 1970s.¹⁰ The Protection Acts and accompanying regulations set down the conditions for recruiting and remunerating Indigenous workers. They

Inadequate schemes to repay stolen wages in WA, QLD and NSW have triggered legal challenges.

generally allowed the government to employ Aboriginal people or issue permits or licences to businesses to employ Indigenous workers or Indigenous child apprentices. While they prescribed who was responsible for Indigenous workers and imposed legal duties on governments and employers to provide payment and care of Indigenous workers, at the same time they legalised payment of non-award wages and the means by which payment could be avoided.¹¹

A business’s failure to comply with regulations pursuant to the Protection Acts would lead to the cancellation of a permit. Regulations included the payment of minimum wages (which were lower than non-Indigenous award wages) or sometimes the maintenance of workers and their families instead of payment. Provisions also covered the fair treatment of workers and often the provision of accommodation. It was the role of Protectors (later ‘native affairs officers’ or ‘welfare officers’) to police these provisions.

In some states, regulations under the Protection Acts provided for the wages of Indigenous workers to be paid directly to the Protector. The Protector was required to deposit the wages in the worker’s name in the government bank account and spend the money only on the worker’s behalf.¹² The government was required to keep records of these accounts and pay them out when the Aboriginal person ceased to be under the control of governments. In many cases, these payments were not made in full or at all. The money was sometimes placed in generic welfare funds for the government to spend on Indigenous policy. Some of these funds have been frozen, preventing Indigenous people from being able to access their money.

In the Northern Territory and Western Australia, cattle station workers were given food and clothing for themselves and their families in lieu of wages. This alternative to payment was sanctioned by the Protection Acts in cases where the families of stock workers were maintained. However, the provisions were poorly policed and wages were often sacrificed, even though the families of stock workers were themselves working in jobs on the stations. Furthermore, housing was not provided, contrary to regulations, and food and clothing rations were inadequate. Indeed, when workers went on holidays in the off-season they would have to hand back their clothing and boots. Despite breaches by cattle station employers, permits were not cancelled and Protectors did not ensure that wages were paid.¹³

RECLAIMING STOLEN WAGES: LEGAL BASIS

Legal commentators and historians have proposed a number of legal avenues for the recovery of stolen wages. These >>

We need a comprehensive federal scheme that covers unpaid Indigenous workers and redresses the shortcomings of the state schemes.

include claims of breach of fiduciary duties and breach of trust, as well as for breach of statutory duties, breach of duty of care and breach of anti-discrimination legislation.¹⁴ They have also suggested that stolen wages represent a breach of international law by the Commonwealth government.¹⁵ Their research has mainly centred on stolen wages in Queensland and the Northern Territory, although there has been emerging research analysing the situation in all Australian states and territories.¹⁶ While the legal claims that can be brought will depend on the nature of the legislation, the type of breach and the available evidence, this section will broadly discuss some of the legal avenues.

The relevant state government, or the Commonwealth Government in the case of the Northern Territory and Australian Capital Territory, has been identified as the key defendant in potential legal claims. This is because of the governments' responsibilities to Indigenous people in their care (which included conditions of employment) and their capacity to pay. Where the employer is a corporate entity, this entity may be identified as a concurrent tortfeasor, depending on its continuing survival in the jurisdiction. Stolen Generations compensation cases, such as *Trevorrow*¹⁷ and *Cubillo*,¹⁸ show that statute of limitations legislation may be interpreted to allow Indigenous plaintiffs to make historical claims.

Potential causes of action against governments and employers include:

- (a) Breach of the duty of care in negligence to prevent pure economic loss to Indigenous workers.
- (b) Breach of the statutory duty on the part of the government; for example, breach of the *Aboriginals Ordinance* 1918 and 1933 (Cth) and *Welfare Ordinance* 1953 (Cth) which stipulate that managers fulfil their licence requirement to (i) reasonably maintain Indigenous people on stations; and (ii) reasonably record the number of workers and dependants on stations.
- (c) Breach of fiduciary duties owed by governments to Indigenous workers, including duties to pay welfare entitlements and apprentice awards, and to properly administer trust accounts set up for Indigenous workers.
- (d) Breach of trust and fraudulent expropriation of money held on trust for Queensland workers.
- (e) Breach of anti-discrimination legislation.

Of these causes of action, stolen wages claimants have been successful only in relation to the breach of the *Racial Discrimination Act* 1975 (Cth). In *Bligh & Ors v State of Queensland*¹⁹ and *Baird v State of Queensland*,²⁰ the Human

Rights and Equal Opportunity Commission and the full Federal Court, respectively, awarded damages and costs, and in the *Bligh* case the Queensland Government issued an apology. The finding of a breach of the *Racial Discrimination Act* was based on the Queensland Government's payment of under-award wages to the claimants who had worked on the Palm Island, Hope Vale and Wujal Wujal missions. The payment of damages varied, with the complainants in *Bligh* awarded a flat sum of \$7,000 (which did not take into account their type or length of employment). The complainants in *Baird* were awarded agreed sums between \$17,000 and \$85,000.

ADMINISTRATIVE SCHEMES FOR REDRESS

In Queensland, NSW and Western Australia the state governments set up various schemes to repay some or all of the wages and monies owed to government workers and some social security recipients. These schemes were aimed at Indigenous people whose money was placed in trust funds and not paid out.²¹ They did not apply to those who were under-paid or simply not paid at all. These schemes have now expired, but that does not signal that justice has been done for all claimants in these states. Rather, there are ongoing calls for redress, and attempts are underway to launch legal challenges.²²

Although they have expired, an examination of the schemes will give insights into procedural and substantive issues which will be useful for future schemes. Below is a summary of the schemes.

Queensland

Queensland was the first state, in 2002, to set up a scheme for stolen wages. Rather than compensate Indigenous workers, it provided an *ex gratia* payment of between \$2,000 and \$4,000 to individual claimants alive at the date of its inception. The overall money set aside was \$55.6 million, to be dispersed until 2006. In 2008, top-up payments of either \$1,500 or \$3,000 were made available to claimants who had already received payments. The scheme closed in 2009. The onus was on claimants to collect documentary evidence that their wages or savings were taken by the Queensland Government under the Protection Acts. Without legal support, and given the limited time frame, \$21.1 million from the fund was not claimed. The Queensland scheme has been described as manifestly inadequate due to the caps placed on claims.²³ It is estimated that individual Queensland workers lost wages of up to \$400,000, while the aggregate loss is said to be in excess of \$500 million.²⁴ The *ex gratia* payment fails to consider the individual working experience and contribution of the claimant, including the nature of the job, the degree of skill required by the job, the seniority of the worker and the number of years worked. The repayment of lump sums has been viewed as 'compensation discrimination' against workers on the basis of their membership of an Indigenous community.²⁵ It defies the ordinary principles of compensation which require that the circumstances of the individual loss be taken into account. Furthermore, claimants were made to sign an

indemnity agreement waiving the right to recovery of full entitlements. This precluded some, such as Conrad Yeatman, from making claims under the scheme.

NSW

In NSW, the Aboriginal Trust Funds Repayment Scheme commenced in 2005 and lasted until 2010. The Senate Legal and Constitutional Affairs Committee commended the scheme in 2006 and recommended that the other states use it as a model – although at the time the NSW scheme did not have an expiry date.²⁶ The NSW scheme involved full reimbursement of stolen wages at prevailing rates.²⁷ Payments were made to direct claimants whose wages or entitlements were placed into trust funds between 1900 and 1969, as well as to direct descendants who were blood relatives of a deceased trust fund account holder. Governments assisted claimants to search for their records, and oral testimony could be submitted to the panel which determined the claim. Moreover, claimants retained their right to litigate to recover additional money owed. However, there was no government-funded independent legal representation provided to Indigenous claimants, and the weight that the panel placed on the documentary and/or oral evidence to determine the payment was unclear.²⁸ Also, a requirement for compensation was that a trust fund be found. Yet trust funds were mainly made up of child endowments and apprentice wages. No payments were provided under the scheme for Indigenous workers whose wages did not fit these categories, despite evidence of underpayment or evidence of entitlement to a government endowment which had not been received. Nonetheless, there were some successful claims where money had been taken from wages of indentured children or indentured wards and spent on their food, clothing, lodging, dental and medical care.

Western Australia

The short-lived Western Australian scheme began in March 2012 and ceased in November of that same year. A flat *ex gratia* payment of \$2,000 was made to successful claimants, which did not account for claimants' individual circumstances or length of employment. The eligibility requirements for the scheme included that the claimant was born before 1958, had wages and entitlements withheld in a government trust account while they resided on native welfare settlements, and was alive at the time of the scheme. The onus was on the claimant to compile documentation and prepare their application. No monies were given to the thousands of unpaid Indigenous people who worked in Western Australia's pastoral industry for decades. The report of the taskforce that investigated stolen wages in the lead-up to the scheme recommended that the government provide payment for all Indigenous people who had their monies controlled by the government, and that it provide an administrative process that minimised the trauma for claimants.²⁹ Given the ongoing legal actions by Indigenous people for their stolen wages, it appears that these objectives were not met.

CONCLUSION: NEED FOR A FEDERAL STATUTORY REPARATIONS SCHEME

In international law, reparations are required for 'restoring the balance where wrong has been done'.³⁰ The *Basic Principles and Guidelines on the Rights to a Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law* were adopted by the United Nations General Assembly on 16 December 2005.³¹ They set down international standards for remedying human rights violations and include restitution, compensation and rehabilitation, satisfaction and guarantees of non-repetition. The need for compensation is particularly compelling where the government has taken money from Indigenous people.

Because of the many inadequacies and inconsistencies of the former state-based compensation schemes, especially in Queensland and Western Australia, there is a need for a federal statutory framework to provide reparations in a more holistic way. A just federal scheme would ensure that unpaid or underpaid Indigenous workers and their descendants would not be compensated on the basis of jurisdiction but on the basis of the nature of their claim. The 2006 Senate report, *Unfinished Business*, accordingly recommended establishing a federal compensation scheme.³² Such a scheme might include healing strategies, but should primarily be directed at comprehensive payment for lost wages. A federal compensation scheme should also require that contributions >>



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A just federal scheme would compensate unpaid or underpaid Indigenous workers and their descendants on the basis of the nature of their claim, not jurisdiction.

be made by corporations who employed and benefited from unpaid or underpaid Indigenous workers. Certainly, it is foreseeable that such a compensation scheme, where appropriately established in consultation with claimants, could contribute to reparations more effectively than litigation, and in any case remains mostly untested on the issue of stolen wages. In the absence of an appropriate compensation scheme, Indigenous people have had little choice but to take the path of litigation. Notably, the Commonwealth Government is yet to provide a formal response to the abovementioned 2006 Senate inquiry and its recommendations on a compensation scheme. Nevertheless, its inaction has not dampened Indigenous calls around the country for their wages to be repaid. ■

This article has been peer reviewed in line with standard academic practice.

Notes: **1** Deborah Bird Rose, *Hidden Histories: Black Stories from Victoria River Downs, Humbert River and Wave Hill Stations*, Aboriginal Studies Press, 1991, Canberra, p81. **2** Baldwin Spencer, *Preliminary Report on the Aboriginals of the Northern Territory*, Department of External Affairs, 1913, Melbourne, p43. **3** Standing Committee on Legal and Constitutional Affairs, Australian Senate, *Unfinished business: Indigenous stolen wages*, 2006, Canberra, [2.29], [2.30], [2.45], [2.46]. **4** Amy McQuire, 'WA govt's "mean-spirited" refusal to extend Stolen Wages deadline', *Tracker*, 29 November 2012, p3; Tim Lee, 'WA under fire over stolen wages compensation', *Landline*, ABC News, 31 August 2012, <<http://www.abc.net.au/news/2012-08-31/wa-govt-under-fire-over-indigenous-wages-case/4236772>>. **5** *Bligh & Ors v State of Queensland* [1996] HREOC 28; *Baird v State of Queensland (No. 1)* (2005) 224 ALR 541; *Baird v State of Queensland* (2006) 156 FCR 451. **6** Daniel Bateman, 'A lifetime of wages claimed as test case', *Townsville Bulletin*, 21 October, 2011, <http://www.townsvillebulletin.com.au/article/2011/10/21/276591_news.html>. **7** Paul Bibby, 'Unfinished business of wages at Wave Hill', *Sydney Morning Herald*, 15 December 2007, p1. **8** Standing Committee on Legal and Constitutional Affairs, Australian Senate, *Unfinished business: Indigenous stolen wages*, 2006, Canberra. **9** *Ibid*. **10** For example, *Aboriginal Protection Act 1869* (Vic); *Aborigines Protection Act 1886* (WA); *Aboriginal Protection Act and Restriction of the Sale of Opium Act 1897* (Qld); *Aborigines Protection Act 1909* (NSW); *Aborigines Act 1911* (SA); *Aboriginals Ordinance 1911* (Cth); *Aboriginals Ordinance 1918* (Cth). **11** For example, *Aboriginals Ordinance 1918* (Cth) s24(1); *Wards' Employment Ordinance 1960* (Cth). **12** Standing Committee on Legal and Constitutional Affairs, Australian Senate, *Unfinished business: Indigenous stolen wages*, 2006, Canberra, [2.20]. **13** Thalia Anthony, 'Unmapped Territory: Wage Compensation for Indigenous Cattle Station

Workers' (2007) 11(1) *Australian Indigenous Law Review* 4, p5. **14** For legal arguments in relation to Queensland and the Northern Territory, see: Margaret Thornton and Trish Luker, 'The Wages of Sin: Compensation for Indigenous Workers' (2009) 32(3) *The University of New South Wales Law Journal* 647. Re Queensland see: Rosalind Kidd, *Trustees on Trial: Recovering the Stolen Wages* (2006); Robert James Walker, 'Resolving the Stolen Wages Claim in Queensland: The Trustee's Non-Fiduciary Duties' (2008) 2 *Journal of Equity* 77; Sanushka Mudaliar, 'Stolen Wages and Fiduciary Duties: A Legal Analysis of Government Accountability to Indigenous Workers in Queensland' (2003) 8(3) *Australian Indigenous Law Reporter* 1; Loretta de Plevitz, 'Working for the Man: Wages Lost to Queensland Workers "Under the Act"' (1996) 3(81) *Aboriginal Law Bulletin* 4. Re Northern Territory see: Stephen Gray, 'Holding the Government to Account: The "Stolen Wages" Issue, Fiduciary Duty and Trust Law' (2008) 32 *Melbourne University Law Review* 115; Thalia Anthony, 'Unmapped Territory: Wage Compensation for Indigenous Cattle Station Workers' (2007) 11(1) *Australian Indigenous Law Review* 4. Re NSW see: Sean Brennan and Zoe Craven, 'Eventually they get it all...' *Government Management of Aboriginal Trust Money in New South Wales*, Indigenous Law Centre, University of New South Wales, 2006. **15** For example, *Slavery Convention*, opened for signature 25 September 1926 LNTS 60 (entered into force 9 March 1927) (ratified by Australia in 1953); *Convention Concerning the Creation of Minimum Wage-Fixing Machinery*, ILC No. 26 (entered into force 14 June 1930) (ratified by Australia in 1931); *Convention (No 29) Concerning Forced Labour*, opened for signature 28 June 1930, 39 UNTS 55 (entered into force 1 May 1932) (ratified by Australia in 1933). **16** Rosalind Kidd, *Hard Labour, Stolen Wages: National Report on Stolen Wages*, Australians for Native Title and Reconciliation, 2007. **17** *Trevorrow v State Of South Australia* [2007] SASC 285; *State of South Australia v Lampard-Trevorrow* [2010] SASC 56. **18** *Cubillo v Commonwealth of Australia* (2000) 174 ALR 97. **19** *Bligh & Ors v State of Queensland* [1996] HREOC 28. **20** *Baird v State of Queensland (No 1)* (2005) 224 ALR 541; *Baird v State of Queensland* (2006) 156 FCR 451. **21** Robin Banks 'Stolen Wages: Settling the Debt' (2008) 12 *Indigenous Law Review* 55. **22** In relation to potential legal action in NSW, see: Amy McQuire, 'NSW govt could face legal action over stolen wages response', *Tracker*, 3 April 2012; and in Queensland and Western Australia, see: Amy McQuire, 'Stolen Wages Scandal: WA govt offers pennies for a lifetime of lost wages', *Tracker*, 3 April 2012; Amy McQuire, 'Unions want stolen wages scandal on election radar', *Tracker*, 25 October 2011. **23** Kidd, above n14, p 166; Senate Legal and Constitutional Affairs Committee 2006, Recommendation 6. **24** Andrew West, '\$500m in Wages Stolen: Aborigines say compo offers are not enough', *Sun Herald*, 11 January 2004, Sydney, p25. **25** Scott McDougall, 'A Certain Commonality: Discriminating against the discriminated in the compensation of Queensland's underpaid workers' (2002) 5(14) *Indigenous Law Bulletin* 11, p14. **26** Standing Committee on Legal and Constitutional Affairs, Australian Senate, above n12, Recommendations 4 [8.26(a)(ii)] and 5 [8.27(c)]. **27** Aileen Teo, 'Stolen Wages Update: Establishment of the NSW Aboriginal Trust Fund Repayment Scheme' (2005) 6(9) *Indigenous Law Bulletin* 12, p13. **28** Zoe Craven, *Fact Sheet: 'Stolen Wages' and Entitlements: Aboriginal Trust Funds in New South Wales*, Indigenous Law Centre, University of New South Wales, August 2004, p4. **29** Stolen Wages Taskforce (Western Australia), *Reconciling The Past: Government control of Aboriginal monies in Western Australia, 1905-1972*, Report, 2008 pp6, 8. **30** Gregory Phillips, 'Healing and Public Policy' in Jon Altman and Melinda Hinkson (eds) *Coercive Reconciliation: Stabilise, Normalise, Exit Aboriginal Australia*, Arena Publications, 2007, Melbourne, p149. **31** General Assembly Resolution 60/147 (2005). Also known as the van Boven Principles. **32** Standing Committee on Legal and Constitutional Affairs, Australian Senate, above n12, Recommendation 5.

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