

## THE WAGES OF SIN: COMPENSATION FOR INDIGENOUS WORKERS\*

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### I INTRODUCTION

The labour of Indigenous people has been exploited in Australia since the early years of colonisation. Exploitation has taken various forms, including indentured labour, non-payment and underpayment of wages, under-award payments, withholding and mismanagement of wages, savings and pensions alleged to have been placed in trust accounts, and compulsory redirection of welfare payments and other entitlements. Such practices have come to be known as ‘stolen wages’<sup>1</sup> and in this article we will use this term to refer to the full range of exploitative practices. Within the literature, the principal avenue for recovery of stolen wages is framed in equity, particularly breach of fiduciary duty.<sup>2</sup> Nevertheless, the first legal claims by Indigenous people were made in the industrial arena and later under anti-discrimination legislation, the latter resulting in awards for compensation.<sup>3</sup> In fact, of only six successful cases taken by Indigenous people in relation to race discrimination in employment in Australia, across all jurisdictions,<sup>4</sup> two have concerned stolen wages. These cases served as

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1 This term was used to describe all these formations by the Senate Standing Committee on Legal and Constitutional Affairs: Senate Standing Committee on Legal and Constitutional Affairs, *Unfinished Business: Indigenous Stolen Wages* (2006) (‘*Unfinished Business*’).

2 Rosalind Kidd, *Trustees on Trial: Recovering the Stolen Wages* (2006); Stephen Gray, ‘Holding the Government to Account: The ‘Stolen Wages’ Issue, Fiduciary Duty and Trust Law’ (2008) 32 *Melbourne University Law Review* 115; 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.

3 *Bligh v State of Queensland* (1996) EOC ¶92-848 (‘*Bligh*’); *Baird v State of Queensland (No 1)* (2005) 224 ALR 541 (‘*Baird*’); *Baird v State of Queensland* (2006) 156 FCR 451 (‘*Baird Full Court*’); *Douglas v State of Queensland (No 2)* [2006] FCA 1288 (Unreported, Collier J, 28 September 2006) (‘*Douglas*’).

4 Jennifer Nielsen, “‘There’s Always an Easy Way Out’: How “Innocence” and “Probability” Whitewash Race Discrimination’ (2007) 3(1) *ACRAWSA e-journal* <<http://www.acrawsa.org.au/ejournalVol3no12007.htm>> at 25 September 2009.

a catalyst for the establishment of non-justiciable avenues for the pursuit of compensation via government reparations schemes in both Queensland and New South Wales.<sup>5</sup>

In this article, we overview the struggles by Indigenous people to recover wages stolen as a result of employment relationships that existed during the 19<sup>th</sup> and 20<sup>th</sup> centuries. Underpinning this history is the more positive discourse emanating from the relatively recent phenomenon of civil litigation in which Indigenous people as primary actors assert their legal rights. Following Kant,<sup>6</sup> we argue that the initiation of civil action is a site of active citizenship.<sup>7</sup> Nevertheless, progress is not linear, for power never remains stable once a protagonist seizes the initiative.<sup>8</sup> Locking horns with a powerful respondent, including a government, is likely to be viewed as a dissonant act that invites resistance. This may result in a war of attrition for litigants within a combative arena, including having to satisfy ever more onerous evidentiary burdens.

In this context, we are critical of the use of breach of fiduciary duty as its conceptual basis is predicated on an assumption of paternalism and inequality that corrodes any suggestion of active citizenship at the outset, and an action based on the cognate action of breach of trust poses an almost insuperable burden of proof. Instead, we argue for further consideration of the use of anti-discrimination legislation, the theoretical framework of which is based on equality – a foundational premise of citizenship. This approach is preferred as it represents a counterpoint to the colonialist discourse, even though racial equality for Indigenous people has never really been a norm in Australia in other than a formalistic sense and is a concept that remains highly contested. It is nevertheless acknowledged that the *Racial Discrimination Act 1975 (Cth)* ('RDA'), or State or territory anti-discrimination legislation, is unable to address claims arising prior to the enactment of the legislation, that is, 1975 or thereabouts.

## II 'PROTECTIVE' WAGES

The exploitation of Indigenous peoples' labour was largely subject to legally-sanctioned government control under the so-called protection Acts of the 19<sup>th</sup> and 20<sup>th</sup> centuries. As has been documented elsewhere, for example, under the Queensland *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld), governments exercised extraordinary levels of control over all

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5 In 1999, the Queensland Government established the Underpayment of Award Wages Process and in 2002, the Indigenous Wages and Savings Reparations Offer. In 2004, the NSW Government established the Aboriginal Trust Fund Repayment Scheme.

6 Immanuel Kant, *The Metaphysics of Morals* (Mary Gregor trans, 1996 ed) §46.

7 Margaret Thornton, 'Citizenship, Race and Adjudication' in Tom Campbell and Jeffrey Goldworthy (eds), *Judicial Power, Democracy, and Legal Positivism* (2000) 335.

8 Cf Michel Foucault, *Power/Knowledge: Selected Interviews and Other Writings 1972–1977* (Colin Gordon et al trans, 1980 ed) 98.

aspects of the lives of Aboriginal people, including employment.<sup>9</sup> Government-appointed protectors, usually police officers, had the power to make decisions as to whether Aboriginal people were permitted to be employed and negotiate agreements with employers, including wages.<sup>10</sup> Despite comprising nearly the entire workforce in parts of the cattle industry – one of the most significant industries in Australia at the time – Aboriginal workers' wages were set so that they received only a proportion of their wages as 'pocket money'. It was well-known that the system was abused, working conditions were severe and workers commonly did not receive the money owed. Kidd estimates that between 1920 and 1968, 4500 to 5500 Aboriginal workers in the Queensland pastoral industry lost wage entitlements of a combined amount exceeding \$500 million.<sup>11</sup>

Exploitation was not restricted to the pastoral industry, but was also rife on missions and settlements, where Aboriginal people were interned and worked in areas including construction and maintenance, farming, gardening, cooking, nursing and teaching. Missions and settlements were required to be effectively self-sufficient, in addition to providing a surplus of labour during wartime for charity and outside the reserves in agricultural industries. Regulations under the *Aboriginals Preservation and Protection Act 1939* (Qld) specified that in addition to contributing a percentage of wages from their gross earnings to a welfare fund,<sup>12</sup> all Aboriginal people living on reserves and settlements were required to work on development and maintenance for up to 32 hours per week without pay.<sup>13</sup>

Until the 1930s, Aboriginal people working in the pastoral industry, on government reserves and in the pearl shell industry in Queensland were controlled by legislation that was outside the purview of the industrial relations system. Aboriginal workers were explicitly excluded from awards such as those determined by the Queensland Industrial Court in 1918.<sup>14</sup> The *Aboriginals Regulations of 1972* (Qld) specified that Aboriginal workers be employed in accordance with the provisions of the applicable award or industrial agreement or, where none existed, they were entitled to receive the basic wage. However, this excluded workers on reserves and an 'Aborigine who is an aged infirm or

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9 See Rosalind Kidd, *Hard Labour, Stolen Wages: National Report on Stolen Wages* (2007); Loretta de Plevitz, 'Working for the Man: Wages Lost to Queensland Workers "Under the Act"' (1996) 3(81) *Aboriginal Law Bulletin* 4; *Unfinished Business*, above n 1, 8 ff.

10 Under the *Aboriginals Protection and Restriction of the Sale of Opium Act 1897* (Qld), it was an offence to employ an Aboriginal person otherwise than by permit and written agreement: ss 12–15. Similar provisions existed in: *Aboriginals Protection and Restriction of the Sale of Opium Act 1901* (Qld) ss 4, 5(2), 10(2)–(6); *Aboriginals Protection and Restriction of the Sale of Opium Acts Amendment Act 1934* (Qld) ss 14–15.

11 Kidd, above n 9, 18.

12 The Regulations specified a scale under which 5 per cent of the gross earnings of those without dependants and 10 per cent those with dependants was to be withheld: *Aboriginals Regulations of 1945* (Qld) reg 6(2), *Queensland Government Gazette*, Vol CLXIV, No 90, 23 April 1945, 1063.

13 *Aboriginals Regulations of 1945* (Qld) reg 28(1), *Queensland Government Gazette*, Vol CLXIV, No 90, 23 April 1945, 1065.

14 *In the Matter of the Industrial Arbitration Act of 1916 and the AWUE (Qld)* (1918) 3 *Queensland Industrial Gazette* 757, Clause 22, Station Hands Award. For a discussion, see de Plevitz, above n 9.

slow worker' could apply for a permit enabling that person 'to work for less than the basic wage or minimum wage'.<sup>15</sup>

In New South Wales, under the *Aborigines Protection Act 1909* (NSW), which remained in force until 1969, the Aborigines Protection Board (from 1940 the Aborigines Welfare Board) had the power to control and regulate all areas of Aboriginal life, including the power to indenture Aboriginal children as 'apprentices', collect their wages, place them in the Board's combined interest-bearing trust account, and spend the money at its discretion.<sup>16</sup> Aboriginal children, primarily girls, were systematically removed from their families as part of the policy of assimilation resulting in the stolen generations and placed in institutions where they were trained as domestic servants;<sup>17</sup> boys were sent directly from missions and reserves at fourteen to become farm labourers. Regulations set working conditions and wages, a small percentage of which apprentices were meant to receive weekly as 'pocket money' with the remainder being remitted to the Board, placed in trust accounts and 'paid to the apprentice at the end of his or her apprenticeship, or at such other time as may be approved by the Board'.<sup>18</sup> It was not until 1940 that there was a legal obligation on the part of employers to forward wages to the Board, which retained the power to determine if and when the money was to be paid out and did not provide statements. Apprentices required their employers' written support to access the funds, and the Board consistently resisted attempts by individuals for repayment once their apprenticeships were completed.<sup>19</sup> It generally spent the money as part of its under-resourced budget.<sup>20</sup>

Under the *Aboriginals Ordinance 1911* (Cth), which controlled Aboriginal people in the Northern Territory, 'a fit and proper person' was permitted through a licensing system to employ Aboriginal people, with the Chief Protector having the power to grant licences and agree to conditions and wages, if any, in addition to the power to direct that wages be paid directly to protectors.<sup>21</sup> This power was reinforced by regulations made under the *Aboriginals Ordinance 1918–1933* (Cth), which specified the wages to be paid to Aboriginal workers under a licence, however, with the added 'implied condition' that if the licensee was

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15 *Aborigines Regulations of 1972* (Qld) regs 68–9, *Queensland Government Gazette*, Vol CCXLI, No 59, 2 December 1972, 1473.

16 *Aborigines Protection Act 1909* (NSW) s 11(1). For further discussion of the apprentice wages system in NSW, see: Sean Brennan and Zoe Craven, 'Eventually they get it all ...': *Government Management of Aboriginal Trust Money in New South Wales* (2006) 9 <[http://www.ilc.unsw.edu.au/research/documents/ILC\\_Stolen\\_Wages.pdf](http://www.ilc.unsw.edu.au/research/documents/ILC_Stolen_Wages.pdf)> at 9 September 2009.

17 According to Heather Goodall, approximately 70–80 per cent of apprentices were girls: Heather Goodall, 'New South Wales' in Ann McGrath (ed), *Contested Ground: Australian Aborigines under the British Crown* (1995) 80.

18 *Aborigines Protection Act 1909* (NSW) reg 41, *New South Wales Government Gazette*, No 92, 8 June 1910, 3064.

19 Victoria Haskins, "'& so we are 'Slave Owners'!" *Employers and the NSW Aborigines Protection Board Trust Funds*' (2005) 88 *Labour History* 147, 149.

20 Brennan and Craven, above n 16, 8.

21 *Regulations for the Licensing of Persons to Employ Aboriginals in the Northern Territory 1911* (Cth) reg 7(1). Licenses were for periods of 12 months, with the possibility of renewal upon application.

maintaining the relatives and dependants of a worker, the Chief Protector may grant an exemption from the requirement to pay wages.<sup>22</sup> In 1949, regulations specifically applying to Aboriginal pastoral workers provided for the payment of minimum wages according to a scale, however all money was to be paid to a Protector to be held 'in trust'.<sup>23</sup> Until the mid-20<sup>th</sup> century, the cattle industry was almost completely reliant on Aboriginal labour,<sup>24</sup> yet these workers were not covered by industrial awards or entitlements and were excluded from the industrial relations system.<sup>25</sup>

### III DISSONANT CITIZENS

The struggle for parity in wage rates and for compensation for stolen wages marks an important step towards full citizenship for Indigenous people. While citizenship is a totalising discourse that erases difference, universality is a fiction that is selectively invoked. Although Aboriginal people were admitted to the supposed 'community of equals' as a result of enfranchisement in 1962 and the 1967 Referendum, the construction of Otherness did not instantaneously come to an end with the right to place a ballot in a ballot box, although that is the formal signifier of citizenship and of its universality.

Kant draws a useful distinction between *active* and *passive* citizenship which acknowledges the existence of differences between citizens.<sup>26</sup> He identifies the attributes of a citizen as *freedom* (obedience to a law predicated on a person's consent to it), *equality* (between citizens) and *independence* (based on the exercise of autonomous choice). Kant relegated all women, minors and men without agency (such as servants) to the passive category; they were all 'mere underlings (*Handlanger*) of the Commonwealth' because they lacked civil independence. The lack of civil independence of Indigenous people post-enfranchisement similarly confined them to the passive category. They lacked the freedom and autonomy to determine the course of their lives in community with others, including whether they were subject to the protection Acts or not. Indeed, inequality vis-à-vis other citizens was the essential marker of the status of Indigenous persons in every respect, apart from their common humanness. Their passive status, in the Kantian sense, whether it be as citizens or sub-citizens, was endlessly reiterated for 200 years within the dominant discourse, including

22 *Regulations under the Aboriginals Ordinance 1918–1933* (Cth) reg 14(a).

23 *Aboriginals (Pastoral Industry) Regulations 1949*, under the *Aboriginals Ordinance 1918–1947* (Cth) reg 5(1)(d).

24 Ronald M Berndt and Catherine H Berndt, *End of an Era: Aboriginal Labour in the Northern Territory* (1987) 5, 9.

25 Thalia Anthony, 'Reconciliation and Conciliation: The Irreconcilable Dilemma of the 1965 "Equal" Wage Case for Aboriginal Station Workers' (2007) 93 *Labour History* 15.

26 Kant, above n 6, §46.

judicial texts, so that it became normalised.<sup>27</sup> This idea of the passive citizen, as Kant observes, seems to ‘contradict the very concept of a citizen as such’.<sup>28</sup>

Drawing on the Kantian schema, we argue that the initiation of civil litigation is an important site of active citizenship, for it allowed Indigenous people to challenge the passive conceptualisation conventionally assigned to them.<sup>29</sup> It shows that they are rights-bearing members of the polity entitled to pursue their interests and remedy wrongs through publicly funded courts in the same way as white citizens. This dimension of active citizenship directly challenges the seeds of invidiousness that attach to the negative scripts of passivity and subordination emanating from an era when Indigenous people had to be under the direction or protection of whites. Such actions reveal the three dimensions of active citizenship identified by Kant: the freedom to reject unjust laws, the assumption that Indigenous people are equal with all other citizens, and independence, in that they are free to make choices as they see fit.

In liberal thought, property is the backbone of active citizenship. Freedom, equality and independence cannot be realised without this essential prerequisite and the law zealously safeguards rights to private property, including the right to recover that which has been improperly taken away. Not only had Indigenous people lost this essential prerequisite to citizenship through the expropriation of their lands, but they were prevented from asserting property in the labour of their bodies and the work of their hands, which was properly theirs.<sup>30</sup> As judges are believed to be the neutral arbiters of justice, and judicial texts carry great weight in the public domain, the turn towards civil litigation marked a sharp change in the fortunes of Indigenous people in relation to property.

The pursuit of citizen rights by Indigenous people was nevertheless viewed as a dissonant act that directly challenged the conventional subject position of passivity and subordination. Dissonant and subversive acts were (and continue to be) essential steps in the transition from passive to active citizenship. Nevertheless, this exercise of power is inevitably going to invite resistance, as Foucault has clearly shown.<sup>31</sup> We are not recounting a simple tale of progress from the passive to the active state, as in the case of the apprentice who becomes a journeyman, as Kant might have envisaged the transition. Initiating legal action in an endeavour to seek recompense for past wrongs is not only costly, difficult and time-consuming, it is replete with contradictions. It may, for example, involve litigants assuming the trappings of the victim, that is, having to accentuate their powerlessness in order to assert their power. Victimhood, Otherness and seeming passivity are thereby interwoven with the courage and tenacity that protracted litigation entails. Initiating civil action can thereby be understood as a performative act of great moment in the hazardous journey towards active citizenship.

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27 We draw on the argument developed by Thornton, above n 7.

28 Kant, above n 6, §46.

29 Thornton, above n 7, 336–7.

30 Cf John Locke, *Second Treatise of Government* (first published 1690, 1980 ed) 12.

31 Foucault, above n 8, 98.



#### IV TOWARDS 'EQUAL' PAY

In 1965, in a landmark test case, the Commonwealth Arbitration and Conciliation Commission amended the *Cattle Station Industry (Northern Territory) Award 1951* to include Aboriginal workers.<sup>32</sup> However, despite the fact that this was hailed as an 'equal wages' case, the inclusion of Aboriginal workers was subject to their classification as 'slow workers' on under-award rates, thereby reinscribing a status of subordination. The case was taken by the North Australian Workers Union as a result of industrial action by Aboriginal workers on stations, arguing for deletion of the clause which specifically excluded 'aboriginal or domestic servants' from the award and their inclusion on minimum award rates and conditions. However, the Commission accepted the evidence presented by the employers, finding that 'at least a significant proportion of the aborigines employed on cattle stations in the Northern Territory is retarded by tribal and cultural reasons from appreciating the full concept of work'.<sup>33</sup> It also delayed the implementation of the provision for three years, arguing that this would facilitate the government's assimilation policy by allowing the transportation of Aboriginal workers onto settlements, where they might 'move completely into our culture'.<sup>34</sup>

As Thalia Anthony argues, it is misleading to characterise the decision as an equal wage case, as the Commission's decision essentially undermined the principle of equality underlying industrial awards and the 'shifting tide towards Indigenous inclusion and formal equality'.<sup>35</sup> Averting the potential for its decision to be regarded as discrimination under International Labour Organisation Convention III by declaring all Aboriginal workers 'slow workers', the Commission agreed with the employers' argument that by being prepared to pay award wages to some Aboriginal workers but not others, there was 'no discrimination'.<sup>36</sup> Frustration with the Commission's decision resulted in industrial unrest at the large Wave Hill Station owned by the Vestey family, culminating in 1966 in the famous walk-off of 200 Gurindji cattle workers led by Vincent Lingiari – the longest strike in Australian history, lasting eight years. This and other strikes on cattle stations in the Northern Territory served as the impetus for the land rights movement through which Indigenous peoples struggled to reclaim control over their traditional lands.<sup>37</sup>

32 *Re Cattle Station Industry (Northern Territory) Award 1951* (1966) 113 Commonwealth Arbitration Reports 651 ('*Re Cattle Station Industry*'). For a detailed account of the case, in the context of employment conditions generally for Aboriginal workers in the Northern Territory, Queensland and South Australia, see C D Rowley, *The Remote Aborigines: Aboriginal Policy and Practice – Volume III* (1971) 217–348.

33 *Re Cattle Station Industry* (1966) 113 Commonwealth Arbitration Reports 651, 663.

34 *Ibid* 669.

35 Anthony, above n 25, 29.

36 *Re Cattle Station Industry* (1966) 113 Commonwealth Arbitration Reports 651, 663.

37 Lyn A Riddett, 'The Strike that Became a Land Rights Movement: A Southern "Do-Gooder" Reflects on Wattie Creek 1966–74' (1997) 72 *Labour History* 50. For a discussion of the background to the strike, see Frank Hardy, *The Unlucky Australians* (1968).

The pursuit of land rights through industrial action represented an historically significant act of dissonance that directly challenged the prevailing discursive construction of Indigenous people as passive and readily subjugated. Land rights symbolise both property and political rights<sup>38</sup> and function as a sign of active citizenship within Kant's schema. Nicolas Peterson identifies the emergence of the demand for land rights in the 1970s as signalling a political shift from the demand, largely expressed by non-Indigenous people, for rights based in property and equity, to those based specifically in Indigenous rights, inaugurating the policy of self-determination under the Whitlam Labor Government.<sup>39</sup>

In 1979, another equal wage case was pursued under industrial law, when the Australian Workers Union took action in the Industrial Court of Queensland on behalf of Arnold Murgha, who had been employed on a government-run reserve in Queensland on under-award wages, authorised by the *Aborigines Regulations of 1972* (Qld).<sup>40</sup> In the first instance, the Industrial Magistrate dismissed the claim on the grounds that the applicable law was the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cth), not the industrial award. However, on appeal to the Industrial Court, Matthews J ruled that while the regulations gave the respondent authority to employ Aboriginal workers on reserves on under-award rates, but not workers outside reserves, the inconsistency between the regulation and the award was not clearly expressed as an intention to discriminate.<sup>41</sup> Recognising the 'vulnerable' position the government had placed itself in as a result of the introduction of the *RDA* and the *Aboriginal and Torres Strait Islanders (Queensland Discriminatory Laws) Act 1975* (Cth), the matter was settled out of court. A year later, the Queensland Government announced that it would raise the wage rates of Aboriginal workers on reserves to that of the minimum wage rate, but not award rates.<sup>42</sup>

These cases demonstrate the obstacles Indigenous people have faced in pursuing equality in the workplace under industrial law, as well as the pervasive power of the discourse of paternalism that has infused colonial relations. Tim Rowse argues that, in Central Australia at least, colonial paternalism took the form of managed consumption, orchestrated through a variety of regimes, including rationing administered by missions, government subsidisation of rations through the pastoral industry, economies of exchanged goods and the administration of welfare.<sup>43</sup> The Arbitration Commission decision to include Aboriginal pastoral workers formally in awards represented a move towards a

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38 Nicolas Peterson (ed), *Aboriginal Land Rights: A Handbook* (1981) 3.

39 Nicolas Peterson, 'Introduction' in Nicolas Peterson and Will Sanders (eds), *Citizenship and Indigenous Australians: Changing Conceptions and Possibilities* (1998) 18.

40 Created under the *Aborigines Act 1971-1975* (Qld).

41 *Australian Workers' Union - and - Director, Department of Aboriginal and Islanders Advancement* Appeal from decision of Industrial Magistrate, *The Australian Industrial Law Review*, 11 July 1979, [250].

42 Information reproduced in evidence cited in *Bligh* (1996) EOC ¶92-848.

43 Tim Rowse, 'Indigenous Citizenship and Self-determination: The Problem of Shared Responsibilities' in Peterson and Sanders, above n 39, 82.



more cash-based economy which was regarded as essential to the policy of assimilation, and, as Rowse points out, operated as a 'marker of citizenship'.<sup>44</sup>

However, the compromised resolution of Indigenous claims to equal wages reflects the persistent 'attitude of ambivalence and inconsistency'<sup>45</sup> in relation to the formal acknowledgment of Indigenous peoples' rights within the Australian polity generally. The status accorded Indigenous people in Australia has always been qualified, such that the discourse of citizenship unmodified has proven to be inadequate to the task of representing relations between the colonial state and Indigenous peoples.

## V EQUITY AND TRUSTS

There is comparatively little legal scholarship on Indigenous labour and stolen wages; the principal analyses having emanated from historians and anthropologists.<sup>46</sup> This is in contrast to the more substantial socio-legal analyses that have been conducted in relation to the issues associated with claims made by members of the stolen generations, which share many of the same characteristics. Generally, legal critiques of the issues associated with stolen wages are framed in terms of fiduciary obligations and trusts. There is also literature relating to the establishment of compensation funds<sup>47</sup> as well as an argument for consideration of the stolen wages as a manifestation of slavery,<sup>48</sup> and as a form of postcolonial feudalism.<sup>49</sup>

In brief, a fiduciary duty concerns a relationship of trust and confidence, an obligation owed by one party to act in the interests of another with honesty and integrity in a relationship such as that between a trustee and beneficiary or a guardian and ward. If a fiduciary abuses the position of trust to obtain a benefit,

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44 Ibid 86.

45 Peterson and Sanders, above n 39, 3.

46 For example, Berndt and Berndt, above n 24; Rowley, above n 32; Ann McGrath, *'Born in the Cattle': Aborigines in Cattle Country* (1987); Dawn May, *Aboriginal Labour and the Cattle Industry: Queensland from White Settlement to the Present* (1994); Ann McGrath, Kay Saunders and Jackie Huggins (eds), *Aboriginal Workers*, (1995) 69 *Labour History* 75; Rosalind Kidd, *The Way We Civilise: Aboriginal Affairs – The Untold Story* (1997).

47 Robin Banks, 'Stolen Wages: Settling the Debt' (2008) 12(Special Edition) *Australian Indigenous Law Review* 55.

48 Stephen Gray, 'The Elephant in the Drawing Room: Slavery and the "Stolen Wages" Debate' (2007) 11(1) *Australian Indigenous Law Review* 30; Stephen Gray, 'Slavery and Constitutional Invalidity: Rethinking *Kruger and Bray*' (2008) 31 *University of New South Wales Law Journal* 645. As a genocide argument failed in relation to the stolen generations case of *Kruger v Commonwealth* (1997) 190 CLR 1, because of what was found to be the beneficial intention of the Commonwealth legislation, it is unlikely that a slavery argument would succeed. However, the High Court has upheld the first conviction for sexual slavery effected under amendments to the *Criminal Code* (Cth) s 270.3(1)(a). See *R v Tang* (2008) 237 CLR 1. It is notable that debt bondage has also now been included as an offence under *Criminal Code* (Cth) s 271.8, albeit too late for stolen wages claimants.

49 Thalia Anthony, 'Postcolonial Feudal Hauntings of Northern Australian Cattle Stations' (2003) 7 *Law Text Culture* 277.

the other party is entitled to seek relief in equity.<sup>50</sup> Beyond these basic principles, the fiduciary duty is vague and ill-defined.<sup>51</sup> It is nevertheless apparent that the fiduciary relationship arises in many different situations and, as with torts, the categories of fiduciary relations are not closed.<sup>52</sup> The equitable setting confers a malleable and creative character to the fiduciary relationship, despite the stringency of the duty. A wide discretion also prevails in terms of the relief that may be granted.

Paul Finn identifies the relationship between the people and the state as the most fundamental of fiduciary relationships.<sup>53</sup> The conceptualisation of the duty as one owed by government to all citizens begs the question as to the duty owed to a segment of the polity, namely, Indigenous people.<sup>54</sup> The universalist response would be that they are entitled to be treated in the same way as all other citizens. Alternatively, the resisters might aver that the non-payment of wages within a regime of subjection forecloses any possibility of equal treatment for those who are differently situated. Indeed, the fiduciary is not required to treat everyone equally, but to act '*fairly* as between different classes of beneficiary in taking decisions which affect the rights and interests of the classes *inter se*'.<sup>55</sup> As Indigenous peoples have sometimes been consigned to the formal status of wards of the state, they constitute a class of vulnerable persons upon whom equity has traditionally looked favourably, but this is by no means the end of the matter.

The possibility of a fiduciary duty being owed by the Crown to Indigenous peoples in settler-colonial societies, on the basis that they have 'special rights' as the original occupiers of the land, has been considered by courts in various jurisdictions. In 1984, the Supreme Court of Canada found that a unique fiduciary duty is owed by the Crown to Aboriginal peoples as a result of the nature of their native title to land, which places an equitable obligation on the Crown to deal with the land for their benefit.<sup>56</sup> The Court stated: 'the Crown is a fiduciary [which] depends upon the further proposition that the Indian interest in the land is inalienable except upon surrender to the Crown'.<sup>57</sup> This decision resulted in an amendment to the *Constitution Act 1982*, and was followed by a

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50 For a discussion of the fiduciary relationship, see Patrick Parkinson 'Fiduciary Obligations' in Patrick Parkinson (ed), *The Principles of Equity* (2<sup>nd</sup> ed, 2003).

51 *Breen v Williams* (1996) 186 CLR 71, 92 (Dawson and Toohey JJ); P D Finn, 'The Fiduciary Principle' in T G Youdan (ed), *Equity, Fiduciaries and Trusts* (1989) 1, 25; J D Heydon and P L Loughlan, *Cases and Materials on Equity and Trusts* (5<sup>th</sup> ed, 1997) 207.

52 *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41, 96 (Mason J).

53 P D Finn, 'The Forgiven "Trust": the People and the State' in Malcolm Cope (ed), *Equity: Issues and Trends* (1995) 131.

54 Parkinson, above n 50, 375.

55 Finn, above n 53, 138.

56 *Guerin v R* (1984) 13 DLR (4<sup>th</sup>) 321.

57 *Ibid* 334.

series of decisions in which it was necessary for the Crown to justify infringements of aboriginal rights.<sup>58</sup>

Unlike Canada, Australian courts have not been willing to recognise the existence of a fiduciary duty on the part of the state in relation to Indigenous people. Indeed, some Australian judges have been dismissive of the propensity to widen the fiduciary relationship within Canadian jurisprudence ‘to a point where it is devoid of all reasoning’ and appears to be done for purely instrumental purposes in the absence of an alternative cause of action.<sup>59</sup> In the *Mabo* decision, Toohey J alone was prepared to find a fiduciary duty to exist because of the power of the Crown to destroy Indigenous interests, and the vulnerability of those people to abuse of that power.<sup>60</sup> Justice Toohey went on to say that even if the relationship between the Crown and the Meriam people were deemed insufficient to engender a fiduciary relationship, the legislative regime subsequently created by the Queensland Government would give rise to the requisite obligation.<sup>61</sup> Alternatively, if extinguishment of the title of the Meriam people were to occur, it would constitute a breach of a fiduciary obligation owed to them by the Crown.<sup>62</sup>

There has been resistance to finding the existence of a fiduciary duty in cases concerning the stolen generations. Breach of fiduciary duty was one of the four causes of action pursued by Lorna Cubillo and Peter Gunner against the Commonwealth, on the basis that the relationship was one of guardian and ward. Counsel for the applicants argued that the Commonwealth’s power over Aboriginal people could be exercised “unilaterally” and that it was a power that “brought about a total inequality of position” in a relationship which ‘conjured up terms such as “vulnerability”, “oppression”, “guardianship” and the expectations of people in relation to what they could expect of someone who purportedly acts in their interests’.<sup>63</sup> In his decision, O’Loughlin J rejected the claim based on breach of a fiduciary duty, failing to identify the relationship between guardian and ward as one attracting equitable jurisdiction on the ground that it did not have an economic aspect.<sup>64</sup> He concluded that the case was one of tort grounded in the common law. In contrast to *Cubillo v Commonwealth*, a breach of fiduciary duty on the part of the South Australian Government was

58 *R v Sparrow* (1990) 70 DLR (4<sup>th</sup>) 385; *Delgamuukw v British Columbia* (1997) 153 DLR (4<sup>th</sup>) 193; *R v Marshall* (1999) 177 DLR (4<sup>th</sup>) 513. For a thoroughgoing analysis of the Canadian fiduciary doctrine governing the relations between the Crown and aboriginal peoples in Canada, see: Leonard Ian Rotman, *Parallel Paths: Fiduciary Doctrine and the Crown-Native Relationship in Canada* (1996).

59 *Breen v Williams* (1994) 35 NSWLR 522, 570 (Meagher JA).

60 *Mabo v Queensland (No 2)* (1992) 175 CLR 1 (*‘Mabo (No 2)’*), 199–205 (Toohey J). Dawson J was the only other judge to consider the issue of fiduciary duty at length, although he found that no such duty was imposed on the Crown because the traditional rights had been extinguished.

61 *Mabo (No 2)* (1992) 175 CLR 1, 201 (Toohey J).

62 *Ibid* 203 (Toohey J).

63 *Cubillo v Commonwealth of Australia (No 2)* (*‘Cubillo’*) (2000) 103 FCR 1, 402.

64 In coming to this conclusion, O’Loughlin J followed the decision in *Paramasivam v Flynn* (1998) 160 ALR 203, where Gaudron and McHugh JJ stated that Canadian courts had expanded the law of fiduciary duties in that country such that it supplemented tort law and provided for new forms of civil wrongs: *Cubillo* (2000) 103 FCR 1, 409.

found to have occurred in *Trevorrow v South Australia*.<sup>65</sup> However, Gray J determined that because of the overlap with his findings grounded in tort which gave rise to damages, equitable compensation should not be granted as well.<sup>66</sup>

It has been suggested that a claim for stolen wages may have greater chance of success as a breach of fiduciary duty than stolen generations because of the 'much narrower and more clearly defined obligations to Indigenous workers' as opposed to 'the alleged obligation to maintain general well-being'.<sup>67</sup> The historical association of fiduciary law with property rights and financial interests<sup>68</sup> would also appear to make the equitable avenue stronger in the case of stolen wages and more acceptable to the courts, as implied by O'Loughlin J. The normal rule is that once it is established that the fiduciary is liable to account for moneys owed or withheld, equity determines that a constructive trust has been created and the fiduciary is converted into a trustee.<sup>69</sup> Equity then devises a remedial approach that is flexible and restorative.

Despite equity's flexibility, the colonial ideology in which 'civilised' nations have 'an obligation to protect the interests of native races who are deemed primitive and vulnerable'<sup>70</sup> is reflected in the fiduciary framework. Where claims are made by Indigenous people against the state, this legal framework reinscribes colonial relations, and the discourse of benevolent paternalism is used as the rationale for control and regulation. Colonialist discourses rely on the representation of Indigenous people as 'pre-modern' in part characterised by the absence of a relationship between labour and capital. This designation serves as a rationale for dispossession, based on the Lockean belief that a proprietary interest in land arises from its exploitation.<sup>71</sup> It serves in the perpetuation of racist stereotypes in which Indigenous people are portrayed as indolent and unmotivated.

In the landmark claim made by members of the stolen generations against the Commonwealth, the respondent successfully argued that it believed it was acting in the best interests of the child.<sup>72</sup> Pursuing claims for stolen wages on the basis of breach of fiduciary duty reproduces this discursive construction and facilitates the reinscription of relationships of inequality and paternalism. It reproduces a form of governmentality characteristic of protectionism, where the state, and the various missions and authorities invested with power to control Indigenous people, acted *in loco parentis*. Payment for Indigenous peoples' labour is more readily viewed through this frame as a form of social welfare, as a necessary component of colonial responsibility for sub-citizens. The payment for labour is

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65 *Trevorrow v State of South Australia (No 5)* (2007) 98 SASR 136.

66 *Ibid* [109]. The plaintiff received \$525 000 which, notably, included \$75 000 by way of exemplary damages.

67 Thalia Anthony, 'Unmapped Territory: Wage Compensation for Indigenous Cattle Station Workers' (2007) 11(1) *Australian Indigenous Law Review* 4, 17.

68 Parkinson, above n 50, 357.

69 Heydon and Loughlan, above n 51, 221.

70 Rosalind Kidd, 'The Revolutionary Potential of Walsh's Law' (2006) 31(3) *Alternative Law Journal* 137.

71 John Locke, *Second Treatise of Government* (first published 1690, 1980 ed) 14–15.

72 *Cubillo* (2000) 103 FCR 1.

not then an essential element of industrial law, but a disciplining process of the civilising mission through which subjects are created in modernity.

Despite equity's long association with the principles of justice and fairness, in contradistinction to the strict formalism of the common law, breach of fiduciary duty does not appear propitious for stolen wages claimants. The cognate action for breach of trust might be preferable for, while it is a very particular type of fiduciary relationship relating to the mishandling of property of beneficiaries, it is not based on benevolent paternalism. Specific legal obligations are imposed upon the trustee, which include: the duty to abide by the terms of the trust; the duty to exercise reasonable care; the duty to account; the duty of prudent investment; and the duty to keep trust moneys separate.<sup>73</sup> While the law of trusts is better developed than breach of fiduciary duty, the trust action could address neither the issue of the non-payment nor the under-payment of wages; it could address only the wages that were actually paid into government-managed trust accounts. The other threshold problem relates to the need to identify property that has changed its nature, particularly when mixed with the trustee's own property.<sup>74</sup> There seems to be no precedent that illuminates the stolen wages scenario, where moneys held in trust were merged with an official government treasury over a long period of time, as occurred in Queensland, for example. Despite this impediment, an action based on breach of trust has been recently advocated as the way to proceed by both Robert Walker<sup>75</sup> and Stephen Gray.<sup>76</sup>

The gist of Walker's argument is that an action grounded in breach of general fiduciary duty, even if successful, would invariably be under-compensated in equity. He constructs a careful case for characterising the Queensland government's misconduct in non-fiduciary terms, exhorting a test case based on the assumption that a legally cognisable form of trust was created from money held in bank accounts which would allow recompense for the total amount misappropriated. Gray also supports the framing of an action based on breach of trust to recover wages misappropriated, supplemented by breach of fiduciary duty in the case of non-payment and under-payment of wages.<sup>77</sup> He explores and disposes of objections to possible legal impediments to such a cause of action, particularly the question of the enforceability of a trust against the Crown.<sup>78</sup>

Gray also refers briefly to the Individual Indian Money ('IIM') case,<sup>79</sup> a United States class action with many factual similarities to the stolen wages claims, which contains salutary lessons for a claim based on fiduciary duty and trusts in Australia.<sup>80</sup> This case is claimed to involve approximately 500,000

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73 These duties are summarised by Walker, above n 2, 111. For a full explication, see J D Heydon and M J Leeming, *Jacobs' Law of Trusts in Australia* (7<sup>th</sup> ed, 2006).

74 Heydon and Leeming, *ibid* 672ff.

75 Walker, above n 2.

76 Gray, above n 2.

77 *Ibid*.

78 *Tito v Waddell (No 2)* (1977) 1 Ch 106.

79 240 F 3d 1081 (2001) (US App DC).

80 Cf Rosalind Kidd, 'Abuse of Trust: The Government as Banker in Queensland and the United States' (2003) 5(26) *Indigenous Law Bulletin* 13.

Native Americans and has met with limited success to date.<sup>81</sup> The ‘success’ involved the defendant, the United States Government being ordered to review its accounting practices and produce a historical record of the trust funds, including the accounts of deceased beneficiaries, after a breach of fiduciary duty had been established – based on both statute and common law. Proving the existence of moneys held in trust over a century or more places a huge burden on plaintiffs in the face of death and the destruction of records. It is difficult to imagine reaching the first stage in Australia, that is, requiring a respondent government to produce a detailed record of accounting of moneys held in trust, without either express legislation or a reversal of the burden of proof, which goes against the grain of the Anglo-Australian legal system.<sup>82</sup>

The IIM litigation highlights the juridical inequality of power between Indigenous people and the state, as the United States Government (in the name of the Secretary of the Department of Interior) has lodged countless appeals designed to obfuscate and delay the plaintiffs’ claims. The estimate of the cost to the public purse and the time expended reveals something of the war of attrition that the litigation has sparked:

If the appropriations pattern should continue and the government’s current \$12–\$13 billion estimate proves correct, an accounting of the sort ordered by the district court would not be finished for about two hundred years, generations beyond the lifetimes of all now living beneficiaries.<sup>83</sup>

Understandably, the District Court (Columbia Circuit) has become increasingly impatient with the attempts to frustrate its orders, which has compounded the cost of litigation. It lambasted the Department of the Interior for continuing ‘to litigate and relitigate, in excruciating fashion, every minor, technical legal issue ... against a background of mismanagement, falsification, spite and obstinate litigiousness’.<sup>84</sup> While the Court of Appeal agreed that ‘Interior’s deplorable record deserved condemnation in the strongest terms’,<sup>85</sup> it felt that the District Court had gone too far in focusing on the motives of the Department at the expense of its failures as a trustee. The matter was remanded to the lower court and reassigned to another judge.

IIM underscores our conclusion that reliance on breach of fiduciary duty to recover stolen wages is fraught. The conservative turn of the Australian High

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81 The IIM litigation has been running for more than 12 years and involves funds of at least USD58 billion derived from the exploitation of natural resources and other land uses. For summaries, see ‘*Cobell v Norton: An Overview*’ <<http://www.indiantrust.com/index.cfm?FuseAction=Overview.Home>> at 9 September 2009. It has achieved notoriety (and a Wikipedia listing) as the largest class action in US history <[http://en.wikipedia.org/wiki/Cobell\\_v.\\_Kempthorne](http://en.wikipedia.org/wiki/Cobell_v._Kempthorne)> at 9 September 2009.

82 In the cognate area of native title, the Australian Federal Government has indicated that it is prepared to explore the possibility of reversing the onus of proof for some aspects of native title claims. See Selma Milovanovic, ‘Native title proof may be reversed: Burden on state to disprove claims’, *The Age* (Melbourne), 10–11 April 2009, 3.

83 *Cobell v Norton, Secretary, Department of the Interior*, 428 F 3d 1070, 1076 (2005).

84 *Cobell v Kempthorne, Secretary, Department of the Interior*, 455 F 3d 317, 326–7 (2006).

85 *Ibid* 333 (2006).



Court in recent years is also discouraging.<sup>86</sup> The Court's recent statement on fiduciary duties, *Farah Constructions v Say-Dee Pty Ltd*,<sup>87</sup> constitutes a very narrow reading of the doctrine that affords cold comfort to those who have argued in favour of an equitable remedy for stolen wages. Justice Kirby, in his last months on the Court, adverted to its 'reluctance, (some might even say a hostility) towards the invention and expansion of equitable doctrines and remedies'.<sup>88</sup> He sees the approach adopted by the High Court as antipathetic to the essential task of judicial renewal, despite the best endeavours of intermediate courts. An action based on a breach of non-fiduciary duties in terms of trusteeship, as argued by Walker<sup>89</sup> and Gray,<sup>90</sup> may be superficially appealing, but the issues of proof, including the monopolisation of evidence by respondents, the demise of key witnesses, the confused state of the accounts and problems emanating from limitation periods, laches and acquiescence cannot be gainsaid.<sup>91</sup> The IIM case and its tortuous history in the United States courts attest to that.

Leaving aside these procedural hurdles is the philosophical downside of an action based on breach of fiduciary duty. This action is not based in a notion of sovereignty, the right to free employment or economic autonomy, which are essential elements of full citizenship. It could serve to perpetuate a view of Indigenous peoples' labour as unequal to that of non-Indigenous people, unskilled, inefficient, less productive and unpredictable, characterisations that continue to infuse dominant views. We must therefore add a further qualification to our support for the initiation of civil litigation, as it is apparent that all causes of action are not similarly situated.

Accordingly, we now turn away from equity and trusts to consider the discrimination jurisdiction. Although formal hearings are likely to be beset with similar evidentiary and probative burdens because of the effluxion of time, the *bete noir* of stolen wages claims, the philosophical premise is quite different, for it assumes a norm of equality between all citizens regardless of race from the outset. While our support for the discrimination route is by no means unequivocal, particularly as the jurisdiction emerged only in the mid-1970s, we suggest that it offers a more favourable outlook than the alternatives. What is more, it has been able to offer stolen wages claimants their first, albeit modest, success.

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86 See, eg, Fiona Wheeler and John Williams, "'Restrained Activism" in the High Court of Australia' in Brice Dickson (ed), *Judicial Activism in Common Law Supreme Courts* (2007) 65.

87 *Farah Constructions v Say-Dee Pty Ltd* (2007) 230 CLR 89.

88 Michael Kirby, 'Equity's Australian Isolationism' (Speech delivered at the Queensland University of Technology L A Lee Equity Lecture, Brisbane, 19 November 2008) <[http://www.hcourt.gov.au/speeches/kirbyj/kirbyj\\_19nov08.pdf](http://www.hcourt.gov.au/speeches/kirbyj/kirbyj_19nov08.pdf)> at 25 September 2009.

89 Walker, above n 2.

90 Gray, above n 2.

91 In 2009, an Aboriginal elder, Conrad Yeatman, lodged a claim in the Brisbane District Court alleging breach of fiduciary duty on the part of the Queensland Government. It appears that the action is a preliminary one, as the plaintiff is endeavouring to establish whether his trust account exists or not. See Christine Flatley, 'Aboriginal elder sues for stolen wages', *The Age* (Melbourne), 20 August 2009 <<http://news.theage.com.au/breaking-news-national/aboriginal-elder-sues-for-stolen-wages-20090820-err7.html>> at 25 September 2009.

## VI RACE DISCRIMINATION

All the stolen wages cases arising from the discrimination jurisdiction have emanated from the State of Queensland, a State that has been historically resistant to the non-discrimination principle.<sup>92</sup> It is therefore unsurprising that complainants seeking reparations for stolen wages would be challenged at every step of the way, although a softening of the political climate is discernible from the mid-2000s that culminated in the establishment of reparation schemes, which we discuss below.

The first complaint proved to be a protracted affair, highlighting the Himalayan character of the burden of proof encountered by stolen wages claimants in whatever forum they appear. However, it is notable that the initial case was heard by the Human Rights and Equal Opportunity Commission ('HREOC'),<sup>93</sup> a body that did not possess the trappings of a formal court, which was an advantage for the complainants in light of the strong stance adopted by the state in opposing them.

### A Palm Island, Qld – *Bligh v State of Queensland*

In 1985, eight residents of Palm Island who had been employed by various arms of the Queensland government that had controlled the reserve made a complaint of race discrimination in employment in relation to the underpayment or non-payment of wages. Their complaints typify direct discrimination in that the complainants were, generally speaking, treated less favourably than others who were similarly situated by virtue of their race. That is, had it not been for their Aboriginality, they would have been paid according to the standard award. The complaints concerned the period from 1975, when the *RDA* came into force until 1985, when the *Community Services (Aborigines) Act 1984* (Qld) placed the control of Aboriginal reserves in the hands of elected Aboriginal councils. The lodgement of the complaints had been preceded by a long period of agitation by Indigenous people and their supporters. It is notable that the union movement had written letters to the relevant Ministers as early as 1957.<sup>94</sup>

It took ten years for the complaint to be heard, due to what Carter C described as 'misunderstandings and a significant degree of both official and professional inertia',<sup>95</sup> largely as a result of the failure of HREOC to recognise its own jurisdiction. Having received the complaint in 1985 and conducted initial investigations, the then Human Rights Commission<sup>96</sup> recommended to the

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92 *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, which involved a challenge to the constitutionality of the *Racial Discrimination Act*, is a notable example.

93 As a result of *Brandy v Human Rights & Equal Opportunity Commission* (1995) 183 CLR 245, HREOC lost the power to conduct formal hearings if matters were not conciliated, which passed either to the Federal Magistrates Court or the Federal Court.

94 *Bligh* (1996) EOC ¶92-848, 79,280-1.

95 *Ibid* 79,264.

96 The Human Rights Commission became the Human Rights and Equal Opportunity Commission in 1986 with expanded conciliation powers.

complainants that they pursue legal action for under-award payment through their union. That is, the Commission itself regarded the industrial arena to be the more appropriate forum for resolution of the complaint, as a result of which the complaint files were closed in 1988. Subsequent inquiries on behalf of the complainants revealed that HREOC was not aware of any ongoing concerns, that it believed that as award wages were now paid and that a decision in the Industrial Court had revealed difficulties in pursuing claims for back payment of wages, it did not have jurisdiction. HREOC reopened the files in 1990 and contacted the Queensland Minister for Family Services and Aboriginal and Islander Affairs with a view to conciliating the matter; correspondence continued until 1995, during which time the legal representatives for the complainants had changed three times. Faced with resistance such as this from the body responsible for the resolution of complaints, it is little wonder that Indigenous people have struggled to succeed in pursuing claims of discrimination.

When the matter finally came to hearing, the State of Queensland sought to nip the complaint in the bud by relying on the type of procedural impediments adverted to above. It argued (unsuccessfully) first on the question of delay that it had been denied natural justice by the granting of an extension of time to the complainants. Secondly, as a corollary of the 'staleness' of the complaint, it then sought to have the complaints dismissed as frivolous, vexatious, misconceived and lacking in substance. Relying on the regulatory regime for its defence on the substantive issue, the respondent argued that the laws governing the relationship were those of an 'institutional, social welfare and training setting rather than in an industrial setting' and that 'an employer/employee relationship such as may occur outside of an Aboriginal community did not exist'.<sup>97</sup> Nevertheless, Carter C found that the majority of the complainants were indeed regarded by the Department as its employees. The respondent even sought to argue that the oppressive regime created by the *Aborigines Act 1971* (Qld) and the *Aborigines Regulations 1972* (Qld) constituted a special measure under section 8(1) of the *RDA*, which was for the 'advancement' of Aboriginal people and therefore could not constitute discrimination. This argument was accorded short shrift by Carter C who found the legislative regime had the opposite effect, for it subjected the complainants to discrimination and denied them their human rights.<sup>98</sup>

The complainants had worked over many years in various capacities. Kitchener Bligh was an 82 year-old man who had been employed by the Department from 1968 as a painter and decorator for eleven years, retiring in 1979, having been paid \$1187 as 'cash equivalent of long service leave'.<sup>99</sup> Jack Sibley, a 76 year-old man, who had come to live on Palm Island when he was six years old, had worked as a benchman in the sawmill, carpenter, police constable and assistant manager in the retail store. He had suffered abdominal and eye injuries in the saw mill and was not paid worker's compensation during this time.

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97 *Bligh* (1996) EOC ¶92-848, 79,270.

98 *Ibid* 79,294.

99 *Ibid* 79,271.

He gave evidence that he was a 'slave on Palm Island'. Maurice Palmer, born on Palm Island in 1938, began work when he was 16 in various roles including as undertaker, for which he was paid nothing. Documentary evidence was presented which indicated that he conducted the burial of 162 people, including preparing the bodies, conveying the coffin to the church and cemetery, and digging the grave by hand. He was also employed as a carpenter, fencer and labourer on the roads. Mavis Foster, a 70 year-old woman, came to Palm Island when she was six or seven and lived in the girls' dormitory and later worked as a domestic in the school and convent, a cleaner at the hospital, and a cook's assistant at the hospital and guest house. Fred Lenoy, a 70 year-old man, arrived on Palm Island when he was seven and worked as a blacksmith's welder in the garage workshop until 1983. He was the only person on the island who was certified to use explosives and worked frequently as a powder monkey in civil engineering. According to Carter C, 'It is simply fatuous to regard Fred Lenoy as having engaged only in an institutional or social welfare setting. He was an intelligent, proficient, experienced and skilled employee, of enormous value to his employer the Department.'<sup>100</sup>

The claims of two other complainants, both women, were rejected by Carter C. Buller Coutts was deceased and his wife Florence Coutts pursued the complaint arguing that she had suffered a pecuniary loss because her husband had worked for the Department of Aboriginal and Islander Advancement for approximately 41 years as a plumber, carpenter and highly skilled mechanic. Commissioner Carter determined that it was not possible under the *RDA* for Florence Coutts to pursue a complaint on her own behalf, and dismissed it, although it was the obligation of HREOC to continue the inquiry into the complaint of her husband. Jean Sibley was appointed to the position as residential supervisor of the guest house from 1976 to 1985 as a public servant. It was determined that she was paid in accordance with the relevant public service award and her complaint was dismissed.

HREOC held that the majority of the complainants were 'demonstrably the victims of racial discrimination', the sole reason for which was their Aboriginality.<sup>101</sup> Even though intention is not necessary to establish liability under the *RDA*, which is concerned with the effect of the discrimination,<sup>102</sup> the Commissioner considered the discriminatory conduct to be so egregious that he was prepared to find that the respondent 'intentionally, deliberately and knowingly discriminated against the complainants'.<sup>103</sup>

Commissioner Carter concluded that it was 'quite wrong and contrary to the facts' to regard each of the complainants as having been 'in training', stating that '[b]y 1975 each of them was a mature adult who had already demonstrated considerable skills and talents in his or her various vocations. ... It is unduly patronising to assert, as the respondent does, that they were merely "in training",

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100 Ibid 79,275.

101 Ibid 79,289.

102 Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990) 187.

103 Bligh (1996) EOC ¶92-848, 79,290.

the clear implication being that their services and the quality of them would only be tolerated in this “institutional social welfare” setting’.<sup>104</sup>

The Commissioner recognised the relevance of the history of government policy in relation to Indigenous people, as well as the struggle by Indigenous workers dating back at least to the late 1950s for award wages, identifying the *RDA* as the catalyst for change, when the long-standing struggle for equal wages was ‘given new impetus’. He pointed out that Aboriginal workers on Palm Island had engaged in a political campaign and gone on strike demanding equal wages in 1957, described in the media as a ‘native disturbance’,<sup>105</sup> which resulted in an intensified police presence on the island. It took 30 years for award wages to be paid:

It is impossible to regard the particular complaints in this case in isolation or as constituting some form of whimsical agitation by a few malcontents. Rather the complaints reflect a long standing concern by Aborigines and other pressure groups who persistently urged the respondent to justly and equitably address the question of paying proper wages – the equivalent of award wages – to those Aborigines who qualified.<sup>106</sup>

Acknowledging that it is difficult to compensate people adequately who have been denied a wage and suffered hurt as a consequence, Carter C awarded the six male complainants damages of \$7000 each. Despite the modesty of the awards, the outcome met with strong opposition from the Liberal-National Coalition Government in Queensland. It initially announced that it would not pay the claimants, who then lodged their claim in the Federal Court.<sup>107</sup> However, in April 1997, ‘the Borbidge government sent the minister to Palm Island to apologise to the claimants and hand over the \$7000 cheques’.<sup>108</sup> Kidd reports that by the time the Beattie Labor Government came to power in mid-1998, a number of further claims had been lodged in the Federal Court, which were settled ‘at considerable expense; by May 1999 twenty had been paid and 350 further claims had been lodged with HREOC’.<sup>109</sup> It appears clear that *Bligh*, together with the other unspecified claims, gave rise to the reparations offer made by the Queensland Government, discussed below.

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104 Ibid 79,278–9.

105 Ibid 79,280.

106 Ibid 79,288.

107 Under the *Racial Discrimination Act 1975* (Cth) s 25Z, HREOC lacked the power to make binding orders, rendering it necessary to apply to the Federal Court to enforce a determination.

108 Kidd, *Trustees on Trial*, above n 2, 3.

109 Ibid 3. It is very difficult to document claims that are settled through conciliation within agencies such as HREOC, or ‘out of court’, because of the confidentiality prescript. However, in an out of court settlement in August 1999, the Queensland Government published a formal apology to Ms Lesley Williams for ‘failing to repay or distribute monies taken from her wages earned as a domestic servant and placed in a trust account by the then Department of Native Affairs’: (1999) 24(4) *Indigenous Law Bulletin* 24.

### B Hope Vale and Wujal Wujal (Qld) – *Baird v State of Queensland*<sup>110</sup>

In 2005, eight applicants who had all at one stage resided at Hope Vale or Wujal Wujal missions in far North Queensland run by the Lutheran Church successfully pursued a claim of race discrimination in employment. The Church was initially joined with the State of Queensland as a respondent but joinder was subsequently discontinued. In declining the claim at the primary hearing, Dowsett J of the Federal Court<sup>111</sup> held that the complainants were employed by the Church rather than the State although the judge found that there was actual knowledge on the part of the State that below-award rates were paid on the missions.<sup>112</sup>

Justice Dowsett also considered an alternative claim based on section 9 of the *RDA*, the generic provision of the Act, which proscribes any ‘distinction, exclusion, restriction or preference’ based on race. He nevertheless rejected this claim, adopting a narrow interpretation of the provision in the belief that the applicants needed to establish that government grants were made at higher rates for the benefit of non-Indigenous workers.<sup>113</sup> He construed the payments as having a beneficial rather than a discriminatory effect for Indigenous people, even though the wages may have been lower than what was desired. Despite rejecting the applicants’ case and anticipating that his decision could be appealed, Dowsett J estimated damages for each of the complainants.

The ubiquitous question of delay was also raised by the respondent, disposed of separately and rejected.<sup>114</sup> Perhaps most startling in the stolen wages saga was the conclusion of Dowsett J in the application for costs that the proceedings were ‘misconceived’.<sup>115</sup> Accordingly, he invoked the normal rule of generalist courts that costs follow the event and ordered the Indigenous applicants to pay the respondent government’s costs. This is a dramatic manifestation of the deleterious impact on unsuccessful complainants of the shift in primary hearings (following a failure to conciliate) from HREOC to a formal court post-*Brandy*. Justice Dowsett nevertheless tentatively proffered an olive branch by suggesting that the Queensland Government might consider not enforcing the order.

The costs issue was short-circuited when the claim was upheld on appeal to the Full Bench of the Federal Court where the focus was directed to the narrow interpretation adopted by Dowsett J towards section 9 of the *RDA*. The Full Bench found that Dowsett J had erred in requiring the applicants to establish that government grants were made at higher rates for the benefit of non-Indigenous

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110 See also *Baird* Full Court (2006) 156 FCR 451. There are a number of ancillary decisions which will be referred to separately.

111 As a result of the constitutional challenge regarding HREOC’s capacity to conduct hearings in *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 243, a legislative amendment conferred this role on either the Federal Court or the new Federal Magistracy.

112 *Baird* (2005) 224 ALR 541, 568.

113 *Ibid* 574.

114 *Baird v Queensland (No 2)* (2005) 156 FCR 451.

115 *Baird v Queensland* [2005] FCA 1245 (Unreported, Federal Court of Australia, Dowsett J, 30 August 2005).



workers. The requirement that there be a cognisable ‘distinction’ was satisfied once it was established that the grants were directed at below-award rather than award wages. Crucially, the Full Court also differed with the primary judge on the question as to whether the grants were based on race. Justice Allsop, who wrote the opinion for the Full Court, rejected outright the suggestion that the discrimination was somehow neutral, being based not on the appellants’ race but on the fact that they resided on missions. Of significance for future claimants was the Court’s finding that the broad wording of section 9(1) does not require comparability based on race to be established.<sup>116</sup> In *Baird*, the State calculated grants to be paid to church-run reserves for the payment of wages on the basis of the race of the Aboriginal workers in the same way that it paid under-award wages to those on reserves it administered directly.<sup>117</sup>

The complainants were awarded damages and costs of between \$17 000 and \$85 000, and an apology.<sup>118</sup> The damages awarded differed from those computed by Dowsett J, but were agreed to by the parties. This fact, as well as the larger sums *vis-à-vis Blair*, signifies a somewhat more conciliatory stance adopted by the Queensland Government by the mid-2000s as a result of the strong desire for reconciliation expressed by the Australian people.

### C Doomadgee (Qld) – *Douglas v State of Queensland (No 2)*<sup>119</sup>

In 2006, 17 applicants, who all resided at Doomadgee Mission in Queensland run by the Christian Brethren, lodged a complaint of race discrimination against the Queensland Government. The applicants sought an apology, damages of \$500 000, interest and costs. As with *Blair*, the applicants were found not to have been employed by the State of Queensland and the focus was then similarly directed to sections 9 and 15 of the *RDA*, but the State sought a permanent stay of proceedings on the ground of abuse of process as key witnesses had either died or were too frail to give evidence. The argument was accepted by Collier J who determined that due to the ‘effluxion of time, and taking into account the fragmentary nature of the evidence, the indications of other sources of income of the Mission, and the lack of witnesses to either explain those fragments or fill in evidentiary gaps’<sup>120</sup> a fair hearing was not possible. The respondent submitted that it had ‘engaged in significant, time-consuming, expensive and exhaustive investigations’, but had been unable to obtain evidence in response to the allegations.<sup>121</sup> However, Rosalind Kidd has argued that at least since 1991, ‘a wealth of evidence has been compiled on government trusteeship of Aboriginal

116 Cf Jonathon Hunyor, ‘Landmark Decision in Aboriginal Wages Case: Broad Scope of Prohibition on Discrimination’ (2007) 45(1) *Law Society Journal* 46.

117 *Baird* Full Court (2006) 156 FCR 451, 470.

118 *Baird v State of Queensland (No 2)* [2006] FCAFC 198 (Unreported, Spender, Allsop, Edmonds JJ, 22 December 2006). The claims of two litigants, Ella Woibo and Edgar Ivan Gibson were unsuccessful.

119 *Douglas v State of Queensland (No 2)* [2006] FCA 1288 (Unreported, Collier J, 28 September 2006) (*‘Douglas’*).

120 *Ibid* [130].

121 *Ibid* [56].

savings and entitlements during the 20<sup>th</sup> century', not least of which is evidence collated by the Queensland Government for its own defence.<sup>122</sup>

In December 2006, the applicants successfully applied for leave to appeal the decision.<sup>123</sup> It is notable that express advertence was made to their role as citizens of Australia under the rule of law in that the paucity of records on actual payments should not be invoked to deprive them of their legal rights to resolve the controversy. The applicants argued that the decision of Collier J was attended by sufficient doubt because the judge had failed to separate the claims arising from a 'distinction' based on race under section 9 and race discrimination in employment under section 15 of the *RDA*, but the claim on the basis of section 9 did not rely on the establishment of an employment relationship. In his decision, Greenwood J accepted this argument where 'the discriminatory element coupled with the relevant effect is said to be found in the making of the grant itself', taking into consideration the recently handed down Full Court decision in *Baird*.<sup>124</sup> Justice Greenwood pointed to the similarities between the two cases:

[T]here is, plainly enough, an extensive body of evidence in relation to the structural arrangements between the State and the Christian Brethren Church and, in addition, the policy and governance arrangements in connection with the engagement by the State in the administration of Aboriginal communities and Aboriginal Missions not only in relation to Doomadgee but also in relation to Hope Vale and Wujal Wujal and other Missions.<sup>125</sup>

Two days later, the matter was returned to Collier J when an application for a delay in proceedings was sought pending the outcome of the appeal.<sup>126</sup> However, the matter went into abeyance and was eventually settled, along with a number of other outstanding claims. The details of these settlements remain confidential.

The lodgement of discrimination complaints and the conduct of hearings before HREOC and the Federal Court highlight the contradictions arising from the struggle to obtain recompense for stolen wages. While the damages awarded in *Bligh* were modest, this was a trailblazing case that paved the way for a more significant outcome in *Baird* (albeit on appeal) and a settlement in *Douglas*. This group of cases, believed to be a minuscule proportion of complaints lodged with HREOC, represents an important step towards active citizenship. The cases illustrate the thesis that freedom, independence and equality are crucial attributes of citizenship. However, the concept of equality needs to be qualified in that we see a notion of formal equality, or equality before the law, manifest in the right to bring an action (a right that was challenged in *Baird*), not a notion of substantive

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122 Kidd, *Trustees on Trial*, above n 2, 20.

123 *Foster v State of Queensland* [2006] FCA 1680 (Unreported, Federal Court of Australia, Greenwood J, 5 December 2006) ('*Foster*').

124 *Ibid* [24].

125 *Ibid* [39].

126 *Douglas v State of Queensland* [2006] FCA 1715 (Unreported, Collier J, 7 December 2006).

equality or equality of result,<sup>127</sup> as the damages fell far short of the amounts that had been expropriated. It can be seen that the endeavour to slough off the paternalism of the past is an ongoing struggle, a proposition that is further illustrated by State reparation schemes to which we now turn.

## VII REPARATIONS SCHEMES

### A Queensland

The positive outcomes in *Bligh* and *Baird* – together with the significant number of complaints waiting in the wings – proved to be a catalyst in terms of reparations. In 1999, in direct response to the success in *Bligh*, the Queensland Government established the Underpayment of Award Wages Process (UAWP), to make reparations to Indigenous workers who had been employed by the government on reserves,<sup>128</sup> with a one-off unilateral payment of \$7000.<sup>129</sup> Three years later it established the Indigenous Wages and Savings Reparations Offer (IWSRO) providing payments to those whose wages and savings had been controlled under Protection Acts, setting aside a further \$55.4 million dollars.<sup>130</sup>

As discussed by Scott McDougall in relation to the *Bligh* decision,<sup>131</sup> the arbitrary allocation of a predetermined monetary amount effectively discriminates against claimants by treating all the same, without regard to the specificities of each individual's experience of exploitation. Rather than redressing inequality, it serves to reinscribe claimants in a position of passive citizenship, subordinated in the allocation of a token amount in recompense for what was in many instances a lifetime of unpaid labour. The requirement that those who succeeded in obtaining compensation under either scheme indemnified the Queensland Government against claims for further compensation similarly reduces their status, disentitled to the initiation of civil litigation, which we have discussed as a signifier of active citizenship.<sup>132</sup> The IAWSRO scheme has been

127 Ultimately, substantive equality may have to be adjudged in relation to other factors, such as labour market participation rates, property ownership and education levels, which could take centuries. See Jon Altman, Nicholas Biddle and Boyd Hunter, *The Challenge of "Closing the Gaps" in Indigenous Socioeconomic Outcomes* (2008) <<http://www.anu.edu.au/caepr/Publications/topical/2008TI8.php>> at 25 September 2009; Maggie Walter, *Lives of Diversity: Indigenous Australia* (2008).

128 The timeframe for reparations covered the period 31 October 1975, when the *RDA* commenced, until 29 October 1986, when award wages were meant to be paid to all workers.

129 The UAWP offer was limited to those who were alive on 31 May 1999 and therefore excluded claims made by descendants. For a detailed critique of this and the IWSRO scheme, see Kidd, *Trustees on Trial*, above n 2.

130 Under the IWSRO, payments of \$2000 or \$4000 were available, depending on the date of birth of claimants, to those alive on 9 May 2002. By 2007, the Queensland Government announced that it had paid nearly \$20 million to over 5500 people: <<http://www.atsip.qld.gov.au/people/claims-entitlements/wages-savings/wages-history/>> at 9 September 2009.

131 Scott McDougall, "A Certain Commonality": Discriminating Against the Discriminated in the Compensation of Queensland's Underpaid Workers' (2002) 5(14) *Indigenous Law Bulletin* 11.

132 However, acceptance of the UAWP offer did not preclude acceptance under the IWSRO scheme, as they cover different issues.

strenuously criticised by potential claimants, many of whom were elderly and/or suffering illness and were placed in an invidious position when faced with the paltry offer and many refused to make a claim.<sup>133</sup> As the representative of the Queensland Stolen Wages Working Group, Victor Hart, stated in evidence to the Senate Committee inquiry, 'they do not think we are as equal as other people'.<sup>134</sup>

As a result of the veto by some of the potential claimants of the IWSRO scheme, by October 2006, over \$36 million remained unclaimed.<sup>135</sup> In addition, some claims were rejected because claimants were unable to provide written proof of their work.<sup>136</sup> In an astonishingly blatant repetition of the paternalistic attitude which the reparations schemes were meant to ameliorate, the Queensland Government announced that it would place any unspent money into the Aborigines Welfare Fund, only later to announce that it would seek the views of Indigenous people as to how the money might be spent. The government then announced that it would provide educational scholarships for Indigenous children and young people with remaining funds. Given the State's abysmal history of mismanaging money held in trust for Indigenous people, this decision was regarded as the ultimate irony by potential claimants, who pointed out that it was core government responsibility to provide education for all citizens.<sup>137</sup> Six months later, the government offered yet another pacifier by announcing that it would pay those who had previously received payments under the IWSRO scheme a further allocation, but pursued the proposal to transfer any money then remaining in the Aborigines Welfare Fund into a foundation for educational scholarships.<sup>138</sup> The Senate Committee was particularly critical of the Queensland Government's scheme, recommending that it revise the terms of the offer, including that claimants be 'fully compensated for monies withheld'.<sup>139</sup>

Importantly, the reparations offers are only available to those who worked on government-run reserves; it is not possible to make a claim for unpaid labour on church-run missions. Given the success in *Baird*, with its broad interpretation of race discrimination under section 9(1) of the *RDA*, and the settlement

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133 Kidd reports that by 2006 less than half the eligible claimants had accepted either offer: approximately 5700 people having been paid under the UAWP and a similar number under the IWSRO: *Trustees on Trial*, above n 2, 20.

134 *Unfinished Business*, above n 1, 96.

135 *Ibid*, 95.

136 Siobhan Barry, 'Call for relatives to claim stolen wages', ABC News <<http://www.abc.net.au/news/stories/2009/08/20/2661528.htm>> at 9 September 2009.

137 Monique Bond, 'QLD Government insults Aboriginal workers again' (Press Release, ANTaR, 24 March 2008).

138 In March 2008, the Queensland Government offered \$3000 and \$1500 in the second round reparations offer to the 5553 people who previously received payments of \$4000 and \$2000, and an opportunity for those who did not claim in the first round to do so. It reports that \$14.64 million has been paid to eligible people and that the remaining \$21.23 million will be paid into a Queensland Aboriginal and Torres Strait Islander Foundation: <<http://www.atsip.qld.gov.au/people/claims-entitlements/wages-savings/wages-history/>> at 9 September 2009.

139 *Unfinished Business*, above n 1, xiv.

subsequently reached in *Douglas*, as well as at least two other cases,<sup>140</sup> it is likely that further litigation will be pursued.

## B New South Wales

In the only other State to date to have responded to Indigenous peoples' activism for recovery of stolen wages, the New South Wales Government established the Aboriginal Trust Fund Repayment Scheme ('ATFRS') in 2004 to repay unpaid wages, pensions, benefits and compensation deposited into trust funds operated by the Aborigines Protection Board (later Welfare Board).<sup>141</sup> Unlike the Queensland schemes, and no doubt in an attempt to avert the level of criticism, New South Wales initially conducted consultation with Indigenous people prior to establishing the scheme and appointed an all-Indigenous panel to advise on its operation.<sup>142</sup> It did not cap the amount, and stated that it would repay in present-day dollar value; nor was it necessary for claimants to indemnify the government.<sup>143</sup> Rather than effecting a passive status of recipient through designation of a blanket entitlement, the ATFRS appears to recognise a level of active citizenship on the part of claimants. Nevertheless, the New South Wales Government has so far avoided the level of liability facing Queensland,<sup>144</sup> and should not be regarded uncritically. Describing itself as an 'evidence-based' process which does not rely exclusively on documentary records, but may take into account 'strong circumstantial evidence'<sup>145</sup> in the absence of written records, the scheme does not involve a thoroughgoing analysis of the accuracy of the existing records.<sup>146</sup> Given the fact that most Indigenous people worked for under-award, or no wages, were generally not provided with statements of account, coupled with the unreliable state of the archival records, the amount recorded is likely to be a gross underestimation.<sup>147</sup> On the basis of the assistance provided by the Public Interest Advocacy Centre ('PIAC') to claimants, Banks reveals that

140 *Giblet v Queensland*, Federal Court of Australia, QUD300/2005 and *Chong v Queensland*, Federal Court of Australia, QUD301/2005. The second respondent in both actions was the Uniting Church of Australia.

141 The offer covered the period 1900–68.

142 The members of the panel are Aden Ridgeway, Robynne Quiggin and Sam Jeffries.

143 The repayments were calculated on the basis of the Office of Protective Commissioner rate of interest, under which \$100 owed in 1969 would be worth \$3521 in 2005. However, in March 2009, the NSW government announced changes to the scheme and released revised guidelines, including a standard lump-sum payment of \$11 000 where a repayment is found to be owed: New South Wales Government Department of Premier and Cabinet, *Guidelines for the Administration of the Aboriginal Trust Fund Repayment Scheme* ('Old' February 2006 & 'New' June 2009) ('*Guidelines*') <<http://www.atfrs.nsw.gov.au/home>> at 21 October 2009.

144 At March 2007, Robynne Quiggin, member of the Panel, reported that \$600 000 had been repaid, in amounts ranging from a few hundred dollars to \$20 000: 'Stolen Wages: The Way Forward – The Contribution of the Aboriginal Trust Fund Repayment Scheme' Seminar, Human Rights and Equal Opportunity Commission, 9 March 2007, <[http://www.hreoc.gov.au/legal/seminars/speeches/stolen\\_wages\\_quiggin\\_mar07.html](http://www.hreoc.gov.au/legal/seminars/speeches/stolen_wages_quiggin_mar07.html)> at 9 September 2009.

145 *Guidelines*, above n 143.

146 Banks, above n 47, 59.

147 Banks points out that in 2001, the Minister for Community Services, Faye Lo Po, estimated in a Draft Cabinet Minute that the debt was between \$12–70 million: *ibid*, 58.

'[r]ecord-keeping appears to be particularly inadequate at the time that the monies were paid into trust' and that 'there are no complete chronological records for any trust beneficiary PIAC has been involved with'.<sup>148</sup> The cut-off date of 31 December 2008 for receipt of claims also disadvantages those who were unable to prepare a supported application swiftly enough. The inadequacy of the State's archival records in accurately reflecting the history of Indigenous workers functions itself as evidence of unequal status, for as we know, Western historiography primarily records the history of the powerful and victorious.

Rather than taking full responsibility for the failure of successive governments to recompense Indigenous workers adequately for their labour, the contemporary environment places responsibility for the effects of dispossession and disenfranchisement on the individual affected, regardless of the historic constellation of factors that have produced a relationship of inequality. The individual is then confronted with an almost insuperable burden in having to prove the perpetration of a wrong against them, particularly as neoliberal governments have favoured a shift from specialist tribunals to generalist courts for the hearing of discrimination disputes.

## VIII CONCLUSION

In addressing the stolen wages saga in Australia, we have presented an overview of the expropriation that occurred with the connivance of the state followed by the efforts of Indigenous people to seek recompense as citizens entitled to the equal protection of the law. Although the *RDA* was chronologically the first of such initiatives, *Bligh*, the first complaint lodged under the Act, took an inordinately long time to resolve. Perhaps partly because of the inauspicious beginnings and because *Mabo v Queensland (No 2)* and *Cubillo v Commonwealth of Australia* fired the popular imagination, the legal discourse shifted away from discrimination in favour of breach of fiduciary duty. The fact that harms prior to 1975 were not cognisable may also have been a disincentive. At the same time, a deep conservatism imbued Australian politics, which saw a sloughing off of a commitment to equality,<sup>149</sup> which undoubtedly affected the activist imagination. While never pursued in respect of stolen wages, although advocated, we have argued that breach of fiduciary duty as a cause of action should be treated with caution because it instantiates a paternalistic and colonialist mentality. The contemporary emergency response to the Northern Territory intervention illustrates the point,<sup>150</sup> for Indigenous people are once again being treated as child-like and incapable of managing their own affairs. An action based on misappropriation of trust accounts may similarly carry the seeds of invidiousness with it, but would be almost certain to fail because of the

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148 Ibid, 59.

149 Margaret Thornton, 'EEO in a Neo-Liberal Climate' (2001) 6(1) *Journal of Interdisciplinary Gender Studies* 77.

150 *Northern Territory National Emergency Response Act 2007* (Cth).



inadequacy of the evidentiary record, unless the burden of proof were to be reversed. We have also drawn attention to the limitations of compensation schemes which, while ostensibly well intentioned, similarly contain the seeds of paternalism and tokenism.

Despite its temporal limitations, the discrimination route is to be preferred for those seeking recompense for stolen wages, if at all feasible, because equality constitutes the philosophical underpinning of anti-discrimination legislation. The assertion and legitimation of a right to equal treatment represents a powerful normative symbol that Indigenous people have the same citizenship rights as white Australians. Unlike breach of fiduciary duty, which sustains a notion of Otherness and *in*-equality, discrimination claims reject *ab initio* the idea of wages for Indigenous people as a handout or form of social welfare, because this is not how wages for white people are viewed. Far from being Others warranting special treatment, the non-discrimination principle assumes that Indigenous people are citizens on a par with all other citizens and are thereby entitled to assert their rights and secure remedies for past wrongs, including emotional harm.

Nevertheless, we do not wish to present a simple liberal progressivist view of Indigenous/white relations, for equality is always a contested concept. Its understanding within anti-discrimination legislation is formalistic rather than substantive, although the one is undeniably imbricated with the other. However, a claim in favour of formal equality is peculiarly apt in the case of moneys owing, as captured by the familiar maxim 'equal pay for equal work'. The evidentiary burden perennially frustrates the notion of substantive equality, which remains an unattainable ideal. What is undeniable, we have argued, is that the legal struggle for compensation for stolen wages represents a significant performative step in the direction of active citizenship for Indigenous people in whatever forum an action is pursued.