

STOLEN WAGES

EVIDENTIARY CHALLENGES FOR CLAIMANTS

by Vavaa Mawuli

In 2003, a 78 year old Aboriginal woman requested legal assistance from the Public Interest Advocacy Centre ('PIAC') to recover child endowment payments owed to her. She believed her entitlements had been placed into a government controlled trust fund account when she was a young woman and had never been repaid.

For a period of more than 70 years, the NSW Government systematically deprived Aboriginal people of their wages and other entitlements by placing those monies into trust fund accounts controlled by government agencies and failed to pay the money back. These unpaid trust monies are commonly referred to as 'stolen wages'.

There was little known in the broader community about stolen wages until relatively recently. However, there had been a long running movement by Aboriginal campaigners such as Les Ridgeway and Marjorie Woodrow to lobby the State Government to repay the money to its rightful owners, many of whom are members of the Stolen Generations.

Following the elderly woman's request for assistance, PIAC obtained documents from the NSW Department of Community Services ('DoCS') under the *Freedom of Information Act 1989* (NSW). The documents revealed that DoCS had previously considered implementing a scheme to repay Aboriginal people the trust fund monies as early as 1998.

The proposed scheme appears to have formed the basis of a Cabinet Minute dated 12 April 2001 entitled *Aboriginal Trust Funds Payback Scheme Proposal*, which was leaked and published in the *National Indigenous Times*.¹ The Minute sought an endorsement from Cabinet to establish a scheme to repay the Aboriginal trust fund monies at fair value and in contemporary currency.

The public disclosure of the Cabinet Minute added to the political impetus to prompt the Government into action. PIAC, along with other organisations including Australians for Native Title and Reconciliation ('ANTaR') and the Indigenous Law Centre, joined Aboriginal

campaigners to lobby for the establishment of a scheme to repay stolen wages.

On 11 March 2004, former NSW Premier, Bob Carr issued a formal apology to Aboriginal people whose income had been taken and made a commitment to reimburse the outstanding money.² During his apology, the former Premier described the practice of withholding money from Aboriginal people as 'another legacy of misguided paternalism' and announced that the Government would consult with the community about setting up an appropriate repayment scheme.³

In December 2004, following a public consultation process and the release of a report detailing an appropriate framework, the Government announced that it would establish the Aboriginal Trust Fund Repayment Scheme ('the Scheme'). The Scheme would administer the return of monies held in trust fund accounts between 1900 and 1969 by the Aborigines Protection Board, later renamed the Aborigines Welfare Board (collectively referred to as 'the Boards').⁴ The Scheme started accepting claims from Aboriginal people in September 2005 and is expected to complete processing claims in December 2010.

THE CLAIM PROCESS

The Scheme is not established under legislation. There are guidelines regulating how it is to be administered and setting out the factors that need to be established in order for a repayment to be made ('the guidelines').⁵ In recognition of the fact that many Aboriginal people who are beneficiaries to the trust fund accounts are no longer alive, the Scheme also provides repayments to the descendants of deceased beneficiaries of the trust.

Individual claims are considered by a Panel, which is comprised of three Government-appointed Aboriginal members. The Panel's role is to consider all available evidence and make a recommendation to State Minister for Aboriginal Affairs, Paul Lynch as to whether or not a repayment should be made to a claimant.

The test applied by the Panel in determining whether to recommend a repayment is two-fold. First, there must be strong evidence that the claimant had money that was placed into a trust fund account controlled by the Boards between 1900 and 1969, when the Aborigines Welfare Board was abolished.⁶ Second, there must be strong evidence that the money from the trust fund account was never repaid to the claimant previously.⁷ If these two elements are established, the Panel makes a recommendation to the Minister that an *ex-gratia* repayment should be made to the claimant.⁸

The Panel is not bound by the normal rules of evidence, allowing for some flexibility in its approach to evidentiary issues. To date, panellists have relied almost entirely on the historical records of the Boards to make a determination as to whether money should be repaid to a claimant.

In March 2009, the Minister announced a number of significant changes to the Scheme which will impact on the Panel's determination of claims.⁹ These changes resulted in the release of new guidelines for processing claims.¹⁰

THE BOARD'S RECORDS

The Department of Aboriginal Affairs is the custodian of the Boards' historical records. While many of these records are closed to the general public, the Scheme is able to access them in order to determine whether claimants are owed money from a trust fund account.

The Boards had extensive powers to regulate the lives and livelihoods of Aboriginal people in NSW, including the power to control their wages and entitlements.¹¹ They also had a responsibility to maintain records about the people who came under their control and about the management of their incomes. They largely failed in this duty.¹²

Poor record-keeping has been detrimental to many claimants. Many young Aboriginal apprentices were not told that they were entitled to receive wages for their labour. In many cases, the Boards retained workers' incomes in trust fund accounts, to be repaid upon reaching the age of maturity. However, as early as 1940, a Government report noted that 'the records of the Department in respect of apprentices are not as complete as they should be'¹³ and instructed that '...complete records must be kept together with a more adequate system of follow up of the cases once the apprenticeship has been completed.'¹⁴

Claimants face significant evidentiary challenges in establishing a claim as a result of the failure of the Boards

to properly document transactions and maintain records relating to the trust funds. The Scheme's guidelines allow for consideration of and reliance on oral evidence in order to determine a claim. However, to date, the Panel has consistently rejected claims lacking historical records confirming the existence of a trust fund account.

During his apology speech in 2004, the former Premier acknowledged the evidentiary challenges that claimants would face in substantiating a claim 'given the miserable nature of the records that have been left to us' and committed the Government to doing 'all it can to help find evidence that will support claimants' cases'.¹⁵ Further, he stated that 'in those cases where the evidence is sketchy, the Government, in consultation with the Aboriginal community, will develop rules for payment.'¹⁶ Despite these commitments, the approach to evidence to date has been generally unfavourable to claimants where the records are inadequate.

Information received by PIAC from the Minister's office earlier this year revealed that two-thirds of all claims processed by the Scheme were unsuccessful under the previous guidelines because there was little recorded evidence to substantiate them.

PIAC and other advocacy groups campaigned for the Scheme to take a different approach to evidence, arguing that critical evidentiary issues should not hinge on whether the Boards maintained adequate records of the trust fund accounts, given their history of mismanagement. Instead, the claims should focus on whether there is reliable circumstantial oral and/or documentary evidence to support findings that a claimant worked or was owed entitlements, and that a trust should have or was likely to have been created and that wages and other entitlements should have been paid but were not.

CHANGES TO THE SCHEME

The changes to the Scheme were announced on 30 March 2009.¹⁷ These changes are said to make it easier for the Panel to recommend repayments of more money to more claimants.

The changes will reportedly allow the Panel to give greater weight to oral evidence when considering claims.¹⁸ It is hoped that the Panel will now exercise its discretion more broadly and recommend repayment where claimants' circumstances are such that a trust fund account should have been, or was likely to have been, established by the Boards despite the absence of historical records.

One of the most significant changes concerns the amount of money that will be repaid if a claim is successful. Previously, the amount of money owed from the trust fund account would be repaid with interest and taking into account inflation.¹⁹ As a result of the changes to the guidelines, all successful claimants will receive a one-off lump sum repayment of \$11,000.²⁰ In the case of descendant claims, this amount will be shared between eligible descendants. This figure is allegedly based on the average sum of all repayments made prior to the changes to the Scheme. It is also said to contain a 'compensatory component for the hurt caused [to claimants] for not having control or use of the money during the time it was held by the Boards'.²¹

The move to a one off lump sum repayment of \$11,000 will be beneficial for some claimants. For example, there were many cases under the previous guidelines where claimants received considerably low repayments or no repayments at all because they were unable to prove the full amount they were owed. As a gesture of good faith by the Government, claimants who received repayments of less than \$11,000 under the previous guidelines will have their repayment 'topped up' to this amount.²²

There were however, also cases in which claimants could establish that they were owed amounts in excess of \$11,000. In fact, some claimants received repayments in excess of \$20,000, with the highest repayment reported as being approximately \$44,000. It is not possible to say how many claimants received payments in excess of \$11,000 under the previous guidelines because such information is not publicly available. However in PIAC's experience representing claimants, there will be some who will be able to establish that they are owed more than \$11,000, and will, under the new guidelines, be short-changed. PIAC is campaigning against limits on the repayments so that claimants who establish that they are owed more than \$11,000 can receive a full repayment of the amount to which they are entitled from the Scheme.

While participation in the Scheme does not preclude a claimant from taking legal action against the State Government to recover money, the legal reality is that most claimants will be time-barred from bringing an action at common law. Section 51 of the *Limitation Act 1969* (NSW) provides an ultimate time bar preventing litigants from bringing a claim 30 years after the date on which the cause of action accrued. This year marks the 40th anniversary of the abolition of the Aborigines Welfare Board. Given the significant passage of time, it will be practically impossible for claimants to bring a common law claim unless the

Government waives its right to plead a limitation defence. Claimants will also face serious evidentiary challenges in seeking equitable remedies through the courts because of the paucity of surviving evidence. As a result of these barriers, the only recourse available to most claimants to recover unpaid trust monies is through the Scheme.

The Government has rejected PIAC's calls for the limit on repayments to be removed. The Minister has said that the decision to introduce the \$11,000 lump sum payment was made in order to balance the interests of those cases where there is little recorded evidence with those where there are records available. It is said that this will ensure a higher degree of equity and justice for the Aboriginal community as a whole.

PIAC agrees that the amount of money repaid to claimants should be increased to take into account the fact that many claims cannot be fully substantiated because of the poor state of the records. However, where the evidence is clear that a person is owed more than \$11,000, the Government should not stray from its original commitment to reimburse this money *in its entirety* to the Aboriginal people who have been denied it for so long.

THE GUIDELINES

As a result of these changes, generally all unprocessed claims will be determined under the new guidelines. There are a substantial number of claims that have not yet been processed by the Scheme.

In September 2009, claimants who registered their claims before the changes were introduced were given the choice of making an application to remain under the old guidelines if they wished to do so. Those who wished to make such an application had to do so in writing within 28 days and they had to establish that it would be in the interests of justice or equity for their claim to be determined under the old guidelines.

Many claimants are elderly, disadvantaged through limited education and literacy levels and live in regional and remote areas of NSW. Most of those who contacted PIAC had difficulties understanding and adequately responding to the process within the limited time frame. Many wanted further information about their claims – such as the amount of money owed from the trust funds – before making a decision about whether to apply to remain under the old guidelines. They wanted to find out whether their records indicated that they are owed more than \$11,000, in which case they would apply to remain under the old guidelines in order to receive the full repayment.

The 28-day time frame did not allow claimants sufficient opportunity to access or examine their records, to seek comprehensive advice from a lawyer or to consult with family members before making a decision. PIAC met with the Scheme panellists and representatives from the Minister's office seeking a fair opportunity for claimants to adequately respond to this issue. The Government has conceded that the guidelines do not prevent claimants from making an application to remain under the old guidelines at any stage before their claim has been finalised. This will allow claimants more time to assess the value of their claims and to make an informed decision as to which of the guidelines would be most beneficial to their circumstances.

CONCLUSION

The use of historical records as part of the claim process has advantages and disadvantages. On the one hand, where the records are reliable and complete, they have the potential to substantiate claims for significant repayments. However where they are non-existent or incomplete, they can be detrimental to a claim. Claimants rely on their records in order to uncover the truth of what happened to their stolen wages and entitlements. Given that many records are incomplete and do not accurately reflect the historical truth of state policies, the Scheme should not rely on this shortfall to deny repayment where other evidence exists to support a finding in favour of the claimant.

The success or failure of the Scheme hinges on the ability of the NSW Government to fulfil its promises to reimburse Aboriginal people the money owing to them from the trust funds. It is essential that those who are disadvantaged because of the poor state of the records are able to receive just repayments from the Scheme in order to redress this historical injustice.

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- 1 'NSW Government's Shame over Stolen Wages Payback', *National Indigenous Times* (Canberra) 4 February 2004.
- 2 New South Wales, *Parliamentary Debates*, Legislative Assembly, 11 March 2004, 11 (Bob Carr, Premier).
- 3 Ibid.
- 4 Brian Gilligan, Terri Janke and Sam Jeffries, *Report of the Aboriginal Trust Fund Repayment Scheme Panel* (2004).
- 5 Aboriginal Trust Fund Repayment Scheme, *Guidelines for the Administration of the Aboriginal Trust Fund Repayment Scheme* (2006) and Aboriginal Trust Fund Repayment Scheme, *Guidelines for the Administration of the Aboriginal Trust Fund Repayment Scheme* (2009) both available at <<http://www.atfrs.nsw.gov.au/>>.

- 6 Aboriginal Trust Fund Repayment Scheme, *Guidelines for the Administration of the Aboriginal Trust Fund Repayment Scheme* (2006), clause 12.1, 12; and Aboriginal Trust Fund Repayment Scheme, *Guidelines for the Administration of the Aboriginal Trust Fund Repayment Scheme* (2009), clause 15.1, 8.
- 7 Ibid.
- 8 Ibid.
- 9 Minister for Ageing, Disability Service and Aboriginal Affairs, 'Lump Sum Payment for Trust Fund Claims' (Press Release, 30 March 2009).
- 10 Aboriginal Trust Fund Repayment Scheme, *Guidelines for the Administration of the Aboriginal Trust Fund Repayment Scheme*, (June 2009).
- 11 Sean Brennan and Zoe Craven, *Eventually They Get It All: Government Management of Aboriginal Trust Money in New South Wales* (2006) 7.
- 12 Aboriginal Trust Fund Repayment Scheme, *Guidelines for the Administration of the Aboriginal Trust Fund Repayment Scheme* (2006) above n 5, clause 2.1.
- 13 Public Service Board of NSW, *Aboriginal Protection: Report and Recommendations of the Public Service Board of New South Wales* (1940) 19.
- 14 Ibid.
- 15 Premier Bob Carr, above n 2.
- 16 Ibid.
- 17 Minister for Ageing, Disability Services and Aboriginal Affairs, above n 10.
- 18 Ibid.
- 19 Aboriginal Trust Fund Repayment Scheme, *Guidelines for the Administration of the Aboriginal Trust Fund Repayment Scheme* (2006), Appendix A, 21-22.
- 20 Aboriginal Trust Fund Repayment Scheme, *Guidelines for the Administration of the Aboriginal Trust Fund Repayment Scheme* (2009).
- 21 Ibid, Form One, 12.
- 22 See generally, Aboriginal Trust Fund Repayment Scheme, <http://www.atfrs.nsw.gov.au/frequently_asked_questions>.