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UNMAPPED TERRITORY: WAGE COMPENSATION FOR INDIGENOUS CATTLE STATION WORKERS

Thalia Anthony

I Introduction

Justice for Indigenous cattle station workers requires recognition that unknown numbers of Indigenous people throughout the 20th century had their wages either stolen or wholly withheld. Research has disclosed both the negligent administration of stations by State Governments and the fraudulent expropriation of moneys held on trust for workers.¹ Substantial evidence of fiduciary breaches of trust on the part of both the New South Wales and Queensland Governments has been uncovered.² Both of these States have established compensation schemes for victims of stolen wages. By contrast the Northern Territory (which was the largest employer of Indigenous workers nationally) and the Commonwealth have failed to address the fact that, with few exceptions, Indigenous workers went unpaid for nearly half a century.³ This came to a sudden halt in the late 1960s when Indigenous workers were expelled from stations following In the matter of the Conciliation and Arbitration Act 1904–1965, and of the Cattle Station (Northern Territory) Award 1951⁴ and the introduction of labour-saving machinery.⁵ This article maps the contribution of Indigenous workers to the cattle industry on a national level. It then focuses specifically on possible means of redressing the injustices perpetrated against Indigenous workers in the Northern Territory.

Federal Parliament recently demonstrated its interest in this issue with the 2006 Senate Legal and Constitutional Affairs Committee Inquiry into Stolen Wages, which sought to ascertain the extent to which Indigenous workers ‘whose paid labour was controlled by the government’ had their wages withheld.⁶ The Inquiry received evidence of misappropriated Indigenous wages from Indigenous people, legal bodies, non-government organisations and researchers across Australia.⁷ The Committee made especial note of the sparse records pertaining to stolen wages in the Northern Territory⁸ and recommended that measures be taken to investigate this issue as a matter of urgency.⁹ The issue of stolen wages in the Northern Territory is particularly relevant (and problematic) to the Commonwealth because it governed the Northern Territory between 1911 and 1978, when tens of thousands of Indigenous cattle station workers were employed there.

Pursuant to the findings in the Senate Inquiry a number of workers from the Wave Hill cattle station in the Northern Territory have expressed interest in a test case to recover their stolen wages. The President of the Daguragu Government Community Council has collected a list of over 40 Indigenous people who are willing to testify that they were denied wages and provided with the poorest quality rations.¹⁰

The Commonwealth Government has a moral duty to provide compensation for Indigenous workers deprived of their wages.¹¹ This author suggests that identifying past wrongs committed against Indigenous workers, pursuant to Recommendation 5 of the Senate’s Unfinished business report, and establishing a compensation scheme is an appropriate course of action. It is suggested that the Government is in a better position than courts to remedy stolen wages because it can adopt comprehensive solutions that engage Indigenous communities, pastoral companies and the public. A process of ‘negotiated settlement’¹² that acknowledges the legal and moral obligations of governments could provide broader benefits, so long as the process guarantees a central role for Indigenous organisations and legal services.

However, the Government’s reticence towards this issue suggests more affirmative forms of action are necessary. As such, this paper offers a consideration of the various legal and equitable claims that exploited Indigenous workers could pursue against the Federal Government and cattle corporations. These claims are based on the Government’s allocation of Indigenous people to jobs on cattle stations and the attendant breach of agreements regarding their wages and conditions on the part of both the Government and stations. Three distinct issues must be kept in mind:
Regulations made pursuant to both the *Aboriginals Ordinance 1918* (Cth) (‘1918 Ordinance’) and the *Aboriginals Ordinance 1933* (Cth) (‘1933 Ordinance’) enabled stations to give rations to their Indigenous cattle workers and their dependants in lieu of wages. A licence agreed to by government officials and station managers stipulated this employment arrangement and its associated conditions. This article demonstrates that the Government and stations breached this arrangement by: incorrectly classifying Indigenous people on stations as ‘dependants’ when in fact many of them were also workers; denying drovers their wages on the false pretence that dependants’ rations offset their wages; denying many workers on the homestead and station property their wages because they were classified as ‘dependants’; and failing to enforce standards for Indigenous cattle workers as prescribed by licences and government regulations.

When compulsory wages were introduced after World War II governments failed to enforce their actual payment. Station managers pursued a practice of converting wages to credits in the station store (‘booking down’) while also inflating store prices. Despite Protectors’ awareness of the booking down system, the Chief Protector failed to use his powers under the 1918 Ordinance or the 1933 Ordinance to bring legal proceedings for the defrauding of Indigenous workers.

In certain circumstances cattle station workers had their wages or benefits placed in trust accounts. This included payments for itinerant drovers, apprentices, social security recipients and, after 1957, wards of the state. However, given that payment of moneys into government accounts was both a relatively minor form of remuneration for cattle workers and that there is a need for further research into their operation, such payments will not be emphasised in this article.

Part II of this article traces the significant contribution made by Indigenous workers to the Northern Territory cattle industry, along with the profits that accrued to stations as a result of Aboriginal efforts and the failure of stations to remunerate them. Part III examines the legislative arrangements between the Government and cattle station managers that allowed the circumvention of wage payments through stations maintaining the dependants of workers. Part IV considers the Government’s negligent oversight of cattle stations. Part V then addresses the possible causes of action Indigenous workers could invoke in seeking redress in tort and equity. Part VI considers the conditions on cattle stations in the light of Australia’s obligations under international law, which could provide a basis for a complaint to the International Labour Organization (‘ILO’). Part VII examines what this author considers the most desirable mechanism for redress: a Government compensation commission and payback scheme.

II The Exceptional Contribution of Indigenous Workers to the Northern Territory Cattle Industry

From the 1880s until the 1960s the cattle industry was the largest employer of Northern Territory Indigenous workers. Other employers, including the Government, church missionaries, mining companies and town enterprises, employed a much smaller portion of the Indigenous labour force. The 1928 report on northern Australia by the Chief Protector of Aboriginals, J W Bleakley, estimated that 80 percent of Aborigines employed in the non-Indigenous economy were in the cattle industry. In 1965 the *Equal Wages Case* amended the *Cattle Station Industry (Northern Territory) Award* to include Aborigines. At this time the industry employed approximately 2500 Indigenous workers. A further 3500 people were classified as dependants of workers. As will be discussed, many of these dependants were also engaged in station work.

From the early 20th century the cattle industry was the Northern Territory’s chief industry in terms of output and exports, and Indigenous people were its predominant labour source. The profitability of cattle stations hinged on Indigenous peoples’ vital and unpaid contribution for almost 80 years. As a direct result of Indigenous labour Northern Territory stations operated profitably throughout the Great Depression and subsequent recessions, without the expense of investing in capital. Indigenous stockworker Jack Jangari comments that Indigenous people ‘made Wave Hill [one of the largest stations in the Northern Territory] rich. They made every station...rich. And keep us fellows poor’. It was not only stockworkers that made stations profitable by tendering, mustering and droving cattle, but also their dependants, including Indigenous women, children and the elderly. They carried out a wide range of necessary station tasks, including carrying water from creeks, fencing, yard
and road building, digging dams and bores, and a range of domestic duties for their employers’ homesteads.\textsuperscript{22}

The Indigenous labour contribution was acknowledged among officials. \textbf{Chief Protector of Aboriginals, Baldwin Spencer}, stressed in 1913 that ‘under present conditions, the majority of stations are largely dependent on the work done by black ‘boys’.\textsuperscript{23} In the mid-1920s the Commonwealth Court of Conciliation and Arbitration refused to restrict Aboriginal employment because it would threaten the economic viability of cattle properties.\textsuperscript{24} Chief Protector Bleakley claimed that ‘most of the holdings, especially the smaller ones, would have to be abandoned’ without Aboriginal labour.\textsuperscript{25}

Pastoralists also admitted to the value of Indigenous labour. Charlie Schultz wrote that he had ‘a lot to be thankful for, as regards these abos (sic), and realize without their aid...I would not have been able to carry on’.\textsuperscript{26} H E Thonemann, of the Northern Territory Pastoral Lessees’ Association, declared in 1929 that ‘[t]he pastoralists in the Territory generally feel that the aboriginal is...essential to the progress of the Territory. The stations – I am speaking particularly of the northern and western parts – could not carry on without their assistance’.\textsuperscript{27}

Indigenous workers were valuable not only because they were unpaid, but also because their skills made them adept in the conditions and demands of station work. The low level of technology in the cattle industry until the 1950s meant droving was almost completely performed on foot and horseback. Indigenous hunting skills and awareness of the sprawling ‘station land’ and climatic changes made them competent workers.\textsuperscript{28} Northern Territory Welfare Director Harry Giese maintained that ‘Aboriginals took to very readily’ the activities involved in station and stock work.\textsuperscript{29} Indigenous workers took on their tasks with minimum supervision, and performed roles such as head stockmen.\textsuperscript{30} But despite their enormous contribution, Indigenous people were not justly rewarded.

\section*{III Unpaid Indigenous Labour Arrangement: Legislative Provisions}

\subsection*{A The emergence of unpaid Indigenous labour}

In the late 19th century Indigenous people were made to work on cattle stations without remuneration. This early period, in which pastoralists violently acquired Indigenous peoples’ land and brought them on to stations, has often been overshadowed by the nostalgia regarding cattle station life. This is especially true for Indigenous people born on stations after the 1930s because their situation was not the result of violently enforced recruitment.\textsuperscript{31} However, in 1899 the Northern Territory Inspector of Police, Paul Foelsche, described recruitment of young boys and girls as ‘running them down’ and ‘forcibly taking them from tribes to stations’.\textsuperscript{32} Hobbles Danyarri, an Indigenous ringer on the large Victoria River Downs property (owned, at the time, by the multinational Vestey corporation) claimed the police told cattle station owners to put Indigenous captives ‘on a job’ and ‘make them prisoner’.\textsuperscript{33} Mary Durack of the Durack cattle dynasty wrote that ‘blackbirding aboriginal boys into slavery’ was common knowledge.\textsuperscript{34} Nonetheless, the Government turned a blind eye. The South Australian Minister responsible for the Northern Territory,\textsuperscript{35} J L Parsons, advocated in 1890 that the Government should ‘leave the native question alone’.\textsuperscript{36}

Indigenous people eventually came to perceive the benefits of being on cattle stations, relative at least to being on the ‘outside’.\textsuperscript{37} This is because Indigenous people on the outside were vulnerable to police and government officials who inflicted violent punishment on them. In addition, by living on station property Indigenous people could stay on their country with their kin; acquire sustenance from the managers; practice ceremonies; and, go walkabout in the wet season.\textsuperscript{38} As a result of these factors, wages were not used to secure Indigenous workers’ loyalty. Rather, a ‘feudal’ bond emerged between station managers and Indigenous workers such that Indigenous people retained connections to country and received sustenance in exchange for their labour.\textsuperscript{39}

Thus, when the Federal Government sought to regulate the unpaid relationship between cattle station managers and Indigenous workers in 1911 they were attempting to institutionalise a system that they, along with cattle stations, had in fact created. The licence system for Indigenous employees, which was introduced under the \textit{Aboriginals Ordinance 1911} (Cth) (‘1911 Ordinance’), legalised the control that station managers exercised over their unpaid workers. A licence, which cost 10 shillings per year, entitled an employer to recruit an unlimited number of ‘aboriginal natives’.\textsuperscript{40} Indeed, Chief Protector Cecil Cook suggested that the more the manager kept on his property the better.\textsuperscript{41} Under the permits, Indigenous people were denied freedom to travel outside the employment premises; had
no bargaining powers over their work conditions; and, did not have the right to refuse to work. The Protector of the district could give a licence to any employer he deemed ‘a fit person’. The specific terms of employment were negotiated between the manager and the Protector, without any reference to the wishes of the Indigenous person concerned. This contrasted with the provisions pertaining to licences in Northern Territory Town Districts, which also required ‘an agreement with the aboriginal’. Licences were to be cancelled if they failed to comply with regulations, which included unsatisfactory wages and conditions. In the 1950s these regulations became increasingly prescriptive and onerous, but the ‘individual employer’ still exercised significant discretion.

B Introduction of Legislative Provisions for Wages alongside Legislative Provisions to Bypass Wages

In the early cattle-industry era there was no government legislation requiring Indigenous cattle station workers to be paid wages. The first broad-sweeping Indigenous legislation, the Aboriginals Act 1910 (SA) (supplemented by the 1911 Ordinance when the Commonwealth took over administration in 1911) omitted compulsory or minimum wages for Aboriginal stockworkers. This was repealed and replaced by the 1918 Ordinance which allowed for wages to be circumvented. By the 1930s a movement, spurred on by humanitarians and anti-slavery activists, encouraged the enactment of new protective legislation. In 1930, Arthur Blakely, Minister for Home Affairs, endorsed their view when he stated: ‘It would appear that there was a form of slavery in operation and that aboriginals were being worked without any remuneration whatever.’ Consequently, the Chief Protector of Aborigines for North Australia, Cecil Cook, introduced regulations pursuant to the 1933 Ordinance that extended the Aboriginal wage of five shillings per week to Indigenous people ‘employed in the country’.

Some stations made efforts to honour this requirement. Pastoralists near the border competed with Queensland stations for in-demand Indigenous workers. For example, on the Alexandria station, 15 Aboriginal stockmen were paid eight shillings with food and clothing for themselves and their dependants. At other stations there was occasional pocket money. But these sums were only credits in the station books, meaning that employees rarely saw any cash. When Indigenous workers were given the opportunity to spend these credits they were made to purchase goods from the station store at inflated prices.

Generally, wages for workers on cattle stations went unpaid until 1949 due to Regulation 14 of the 1918 Ordinance, which gave the Chief Protector the power to exempt an employer from the ‘payment of wages’ to an Aboriginal person by feeding and maintaining ‘relatives and dependants’. The 1940 Aboriginal Trust Account Investigation noted that while Indigenous people in Northern Territory town districts were paid moneys into trust funds, ‘very few accounts operate in respect of aboriginals employed in pastoral districts’ due to the power invested in the Director of Native Affairs to exempt employers.

To substantiate any claim for the waiving of a cash wage ‘the employer was required, subject to check [by the protector], to disclose the number and identity of natives’ employed and fed. Managers had to contribute to the Aboriginals Medical Benefit Fund, maintain medical facilities, and provide food rations (including beef, flour, tea, sugar and tobacco) and clothing. They also had to provide ‘sanitary’ and ‘waterproof’ accommodation for Indigenous occupants. In the 1950s, with the wave of assimilation, government welfare officers demanded that living standards on stations be lifted to civilise Indigenous people, particularly in terms of culinary and hygiene standards.

C The rise of wages and ‘booking down’

In the post–World War II era the ration system slowly went into demise and wages were introduced. The 1949 Regulations under the 1918 Ordinance provided for a cash wage for drovers of £1 per week. This rate increased to £2 under the Wards’ Employment Ordinance 1953 (Cth) (‘Wards’ Ordinance’). During this period, the Federal Government increasingly maintained workers’ dependants through welfare payments, which diminished cattle managers’ justification for non-payment of wages. These reforms were prompted by the official Indigenous policy of assimilation and a growing Indigenous rights movement, including the Pilbara cattle workers’ strike for wages in Western Australia. However, station managers abused the maintenance system by placing payments into general revenue, which will be discussed below. The Federal Government did not ensure that these payments were properly spent on maintaining dependants. In addition, stations continued to be reluctant to pay cash wages, turning instead to the booking down system...
to avoid this responsibility. As a result of the booking down system, Indigenous people could only spend their wages at the station store, which more or less equated with the rations they had previously received. **It ensured that the pastoralist could continue to avoid wage payment.** Patrol officers noted that even in the 1950s, ‘work for no pay was not at all uncommon’.63

Government officials were aware of this practice but did not seek to ensure that station store prices were kept at market levels. In fact, they believed that booking down assisted Indigenous people who were unable to handle their own money.64 Prices in some station stores (such as the Victoria River Downs Station) were marked up by 300 percent in comparison to town prices.65 Ted Evans, who had extensive responsibilities over cattle stations as Superintendent of Welfare in Alice Springs from 1935, Patrol Officer from 1946, and Chief Welfare Officer from 1955 to 1976, has cast light upon the inadequate monitoring of the credit system.66 He said that when the **£1 payment was introduced, managers weren’t required to pay that in cash**67 clarifying that ‘[t]hat wasn’t specifically stated but the practice was not to pay it in cash but to give credit in the store’.68 Consequently, ‘[i]t was open to all kinds of abuse as you can well imagine, and with only one or two visits a year, which was the most that I could make, it was pretty hard to police’.69

**D Government trust accounts in the pastoral industry**

While trust accounts comprised only a small proportion of Indigenous workers’ entitlements in the Northern Territory cattle industry, there are a number of discernable categories for which they were established. This will be discussed below. In addition, the few drovers unattached to stations70 (that is, those that did not have their wages offset by maintenance of dependants) theoretically had their wages placed in a trust account under the Cook Administration.71 However, official monitoring of this disbursement was difficult, resulting in employers pocketing the money.72 There is ongoing research on whether the Government was also directly involved in misappropriating funds from trust accounts.73 Below is a brief description of some of the streams of trust fund revenue and indications of government negligence in maintaining these accounts. Where there were stolen funds from trust accounts there may be actionable legal claims. This is also discussed below.

(i) Apprentices

Chief Protector Cook used his powers under the 1918 Ordinance to implement the Apprentice (Half-Caste) Regulations in 1930.74 This ‘half-caste apprenticeship scheme’ required managers to pay six shillings into an apprenticeship fund for part-Aboriginal apprentices.75 According to McGrath, cash was alien to Indigenous people and ‘quite novel’,76 meaning that they did not expect payment and the Government could easily pocket salaries plus interest.77 A variety of anecdotal cases describing apprentices’ stolen wages appear in the *Northern Standard*, such as the following comment on ‘Yarrum’ published in 1935: ‘Concerning his wages, who has them? ... I would like to know how much this lad has to his credit, seeing he has been working for years’.78 The article goes on to satirise the ‘Raffety Rules apprenticeship’ agreement:

Mr. Station Owner (to Protector): ‘Get me a boy: I will keep him; I can’t give him much wages; he can wear my old clothes and sleep in the shed or under the tree; his hours won’t be long – about fifteen per day. I’ll give him a few bob a week and with the few bob he can buy what he wants out of the station store.’

 Protector: ‘Yes, I’ll send you a good boy, but you will have to pay his wages into the trust account. You see out of his trust account we build houses for half-castes in Darwin. Money no good to them. They don’t know the value of it.’79

(ii) Wards

The *Wards’ Ordinance* replaced the 1933 Ordinance, coming into force in 1957. The Welfare Ordinance 1953 (Cth) (‘Welfare Ordinance’) registered all but six of the Northern Territory’s 15,700 ‘full blood’ Aboriginal people as wards.80 However, many Aboriginal people on remote stations were not registered as they did not come under the official purview.81 While licences were not required for the employment of wards the Director of Welfare required notification and retained the power to forbid that person from employing the ward where the person, having regard to their previous conduct in relation to a ward, was not a fit and proper person to employ a ward.82

Under section 41 of the *Wards’ Ordinance*, the Director of Welfare could require Aboriginal workers’ wages to be paid into trust funds. However, station managers and patrol officers continued to exercise discretion in enforcing...
this provision. Patrol Officer Giese noted the ‘ambivalent attitude’ that station management adopted towards the trust fund. The Social Welfare Ordinance 1964 (Cth) (‘Social Welfare Ordinance’) repealed the short-lived Wards’ Ordinance.\textsuperscript{84}

(iii) Social Security recipients

The distribution of child endowments to cattle stations after World War II was a major development towards governments assuming responsibility for the welfare of Indigenous people on cattle stations. Under the 1947 Alice Springs agreement between the Northern Territory Pastoral Lessees’ Association and the Northern Territory Administration, the pastoralists were to be responsible for the maintenance of the male employee, his wife and one child, and the Northern Territory Administration were to be responsible for additional children. Further, the Commonwealth Department of Territories provided a five shilling endowment for first children under the Social Services Consolidation Act 1947 (Cth) in order to supplement rations that the managers were required to give children as part of the employment arrangement.\textsuperscript{85} The child endowments were held by the Director of Welfare in a trust.\textsuperscript{87} The disbursement procedure was for a claim to be made by managers and certified by a Patrol Officer. Payment was then made to management for the child’s benefit.\textsuperscript{88} This contrasted with the direct payment of elderly pensions to managers.\textsuperscript{89} For the child endowments the manager had to furnish the Northern Territory Administration with quarterly reports on how the endowments were spent and whether in fact the children were still on the station.\textsuperscript{90}

Despite government intentions for endowments to be used for the betterment of Indigenous children, it was not uncommon for endowments to disappear into ‘general station funds’.\textsuperscript{91} The Director of Social Services observed that there was ‘nothing to prevent a Station Manager from using child funds’.\textsuperscript{92} (iv) Stewardesses for the benefit of the children in respect of whom it is paid. Child endowment payments are now being used to reimburse Cattle Station Managers for expenditure previously borne by them, ie in the feeding, clothing etc of the natives; therefore no benefit is derived by the natives from such payments.\textsuperscript{93}

IV Government’s Negligent Oversight of Cattle Stations: Factual Basis for a Legal Case

A Negligent oversight of the conditions under which workers and dependants existed

The responsibility to protect Indigenous persons, which ultimately rested with the Chief Protector, included guarding against ‘injustice, imposition and fraud’.\textsuperscript{94} Under the Protector a network of District Protectors administered the 1918 Ordinance. In 1939 these powers were transferred to the Director of Native Affairs who oversaw a body of patrol officers and police protectors. In 1953 the Director of Welfare and welfare officers assumed this responsibility.\textsuperscript{95} At each phase, the network of protectors or officers was responsible for inspecting stations and ensuring their provisions complied with licence provisions.

Government monitoring of pay and conditions for Indigenous workers was difficult as the stations spanned thousands of kilometres. However, the Government did little to cover this ground, which was divided by poor roads and subject to a harsh climate. In the high tide of ‘official’ protection in the 1930s, there were only 48 Northern Territory protectors to oversee 523,000 square miles.\textsuperscript{96} Even on their rare visits, protectors only made inquiries with management or relied on their monthly reports.\textsuperscript{97} This was exacerbated by the fact that owners avoided being on their station when protectors visited.\textsuperscript{98} Anthropologists have described these inspections of station provisions and employment conditions as ‘nominal and superficial’.\textsuperscript{99}

The failure of Protectors to more scrupulously monitor station conditions for Indigenous people gave rise to major discrepancies between what the pastoralists officially conveyed and the reality of their treatment of Indigenous people. For example, in a submission to the 1937 Payne Inquiry on the Northern Territory land industries, the manager of Vestey’s Victoria River Downs station attempted to disprove that Indigenous people were a cheap labour source.\textsuperscript{100} Comparisons with statistics in the station ledgers reveal that there was a gross exaggeration in the submission of the maintenance costs. The total cost in the submission amounts to £9682, whereas the cost stated in the station ledgers is £4344.\textsuperscript{101} According to Kidd, ‘entries on station books reflected neither the size of the workforce nor the quantity of rations distributed’.\textsuperscript{102}
Licences to employ Indigenous people were rarely cancelled due to the Government’s lack of monitoring, turning a blind eye when violations were recognised or blatantly siding with the station owners. In one instance enlightened Patrol Officer Ted Evans cancelled a licence after the manager of a station owned by the English corporation Bovril refused for one year to install a water pump so that all water was carted by Indigenous people on yokes. Within days the Federal Government sent Evans a telegram telling him to reinstate the licence. Evans said:

Someone had obviously been in touch with Canberra. It was just signed DENATAFF, which is the telegraphic name for Native Affairs Branch. I just said I would want to be assured that the telegram was authorised by the Director, stalling. At any rate a telegram came from the Director saying that it was authorised by him. So I had to restore the licence, regretfully. However, that’s the kind of power and lobbying you’re up against when you try to do something.

B Workers and their dependants did not receive adequate rations or provisions that could amount to ‘maintaining’ them

The lack of monitoring and enforcement of legislative provisions and regulations meant cattle station managers circumvented requirements to ‘maintain’ employees’ dependants. Consequently, rations were not an equal trade off for wages even at Indigenous levels, which explains why stations sought to exaggerate maintenance costs. Indigenous people thus bore the burden of inadequate provisions of food, clean water and accommodation. Commonwealth Department of Health surveys of cattle stations pointed to the high incidence of Indigenous peoples’ malnutrition and disease. Indigenous people were given the ‘scraps’ according to Ruby De Satge, an Indigenous domestic servant on Victoria River Downs Station: ‘They fed the dogs better than they fed the blacks out there!’ Hobbles Danyarri, also on the Victoria River Downs Station, claimed that ‘tucker’ consisted of ‘flour with kerosene...they make a johnny cake smell like diesel and kerosene’.

When Government standards for food and shelter for Indigenous people increased in the 1940s, cattle stations were not held to account for falling beneath them. The 1947 Regulations pursuant to the 1933 Ordinance required specified accommodation for Indigenous people on cattle stations. Patrol Officer Evans noted that few stations made any real attempt to provide accommodation in accordance with regulations. Given his failed efforts to cancel licences for non-compliance with hygiene standards (due to the Federal Government’s defiance) he claimed it was not possible to enforce accommodation standards.

When Indigenous stockmen were ‘housed’ it was in huts made of paper bark, grass, canvas, tin, galvanized iron and any other scrap material. Northern Territory Welfare Officer of the 1960s, Bill Jeffrey, likened them to ‘dog kennels’. Pat Dodson, who was a Jackaroo in the Katherine, claimed ‘accommodation would be something you could scavenge from the station dump’. The dependants, on the other hand, often slept in the open and had no access to permanent shelter structures. The acting Director of Native Affairs, VG Carrington, described these camps as ‘unsightly and dirty’. Patrol Officer Evans said they were a ‘hazard to the health of the Aboriginals’. There were mostly no amenities or provisions for hygiene, washing or sanitation, including water pumps.

The incidence of illness on stations was made worse by the lack of medical attention. Employers failed to make contributions to the Government’s Aboriginals Medical Benefit Fund, which was required between 1933 and 1947 under Regulation 12 of the 1933 Ordinance. There was also a lack of Occupational Health and Safety standards for station workers making Indigenous work injuries common. Pain and suffering sustained from work injuries were often not acknowledged, and injured Indigenous people were put back to work immediately unless they were incapacitated.

The injustice of not attending to workers’ injuries was made worse by the fact that managers did not pay compensation. ‘Half-castes’ were entitled to compensation for work injuries or employment negligence under the Northern Territory’s Workers’ Compensation Ordinance 1949 (Cth) and ‘full-blood’ Aboriginal wards were entitled under the Wards’ Ordinance. Section 50 of the 1953 Ordinance required an employer to give written notice of any injury to the welfare officer, who was required to arrange for a medical examination and to report the matter to the Director. This notice was rarely given and ‘obvious cases’ of compensation were not pursued by welfare officers. The consequences were that station workers were made to pay for medical costs from work injuries. That they could not afford treatment meant they remained ill and their future employment opportunities were diminished. Stockworker Kwementyaye Price was a casualty of this
system. On Glen Helen station near Alice Springs this ‘superb stockman and horse tailer’ sustained head injuries by falling from a horse in 1961, resulting in severe epilepsy and the loss of employment. These circumstances were significant in his involvement in crime and subsequent death in custody in 1980. Price did not receive any workers’ compensation from the cattle industry.\(^\text{125}\)

C  ‘Dependants’ misconstrued

The Government administered the regulations that allowed many station workers to be classified as ‘relatives and dependants’. This classification justified stations’ non-payment of wages to those Indigenous people who should have been classified as ‘country workers’, as well as to Indigenous ‘drovers’. Regulations 14 and 15 of the 1918 Ordinance set out the prescribed wage rates for ‘country workers’ and ‘drovers’.\(^\text{126}\) By claiming they were ‘maintaining dependants’ of drovers, station owners would not have to pay the ‘dependants’ who were working the station or the drovers who were mustering the stock.

The Government was happy to comply with this approach. Chief Protector Cook encouraged a policy of rationing, rather than wage payments, as it would maximise the Indigenous peoples on stations and minimise the Government’s responsibility\(^\text{127}\) to provide basic goods, such as blankets, which fell to the Chief Protector under the 1918 Ordinance.\(^\text{128}\) Treating station workers as ‘dependants’ en masse enabled the Government to bypass this responsibility. Therefore, Aboriginal Protectors did not scrutinise managers’ false characterisation of many Indigenous people on stations as drovers’ ‘dependants’ rather than workers in their own right.

Many relatives and dependants of drovers had a vital role in cattle station upkeep. Indigenous women were especially significant, but were also assisted by Indigenous children, the elderly and invalids in running the homestead, cooking, fencing, gardening, attending to dairy cattle, building roads and shelter and digging dams. White managers felt ‘they were getting a pretty fair spin’ as Indigenous women were ‘quite solicitous when they were employed’.\(^\text{129}\) ‘Dependants’ worked long hours on necessary and demanding tasks in return for the poorest of provisions and accommodation. Indeed, they were often required to pursue hunting and collecting activities for their food.\(^\text{130}\) Women were also made to provide ‘sexual labour’ to supplement their scarce rations, if they received anything at all.\(^\text{131}\) While some managers claim that the dependants who stayed in ‘black camps’ on stations were unproductive,\(^\text{132}\) Indigenous oral histories testify to the enormous sacrifices of Indigenous ‘dependants’ for their employers.\(^\text{133}\)

However, pastoralists keenly understood the Government’s desire to reduce the cost of providing for Indigenous people and appealed to this concern when the issue of wage regulations arose.\(^\text{134}\) They claimed that ‘dependants’ were unproductive and a great cost to stations. Pastoralists’ significant bargaining power, given their role in the Northern Territory economy, ensured wages were not introduced. Cattle station owners also had an interest in providing rations, rather than wages, to Indigenous people. It reduced their outlays and, according to Chief Protector Spencer in 1913, withholding wages meant ‘all the difference between working the stations at a profit or a loss’.\(^\text{135}\)

The Commonwealth Government did not ensure that ‘dependants’ were correctly classified (or otherwise classified as workers) despite protectors noting that these dependants – Indigenous women, children and the elderly – were actually workers on stations.\(^\text{136}\) The 1928 Report of Chief Protector Bleakley, which was quoted in the 1930 Commonwealth Government publication The Status of Aboriginal Women in Australia, noted that Indigenous women are ‘one of the greatest pioneers of the Territory’ but remain classed as ‘dependants’ and consequently live in conditions of ‘semi-starvation’.\(^\text{137}\)

V  Domestic Remedies

The Government negligently administered both the 1918 Ordinance and the 1933 Ordinance, as well as the Wards’ Ordinance, the Welfare Ordinance, and the regulations made pursuant to these instruments. It deliberately avoided enforcing regulations to allay its welfare responsibilities to Indigenous cattle station workers. These breaches give rise to potential causes of action in tort and equity. Stations could also be found liable as concurrent tortfeasors. This requires proof that each entity was responsible for causing the same damage,\(^\text{138}\) meaning that Indigenous claimants must prove that their loss of wages was caused by the concurrent failure of station owners to pay wages and the failure of government officials to ensure that such payments occurred.\(^\text{139}\) This would involve bringing two separate actions for the full recoupment of their wages.\(^\text{140}\) Lack of success in one case would not extinguish another action.\(^\text{141}\)
Potential causes of action against the Government and cattle stations as concurrent tortfeasors include:

(a) Breach of the duty of care in negligence to prevent foreseeable physical injury and pure economic loss to Indigenous workers on stations.

(b) Breach of the statutory duty (based on the 1918 Ordinance, 1933 Ordinance and Welfare Ordinance) to ensure that managers fulfilled their licence requirement to:

(i) reasonably maintain Indigenous people on stations; and
(ii) reasonably record the number of workers and dependants on stations.

It is suggested that stations and Government also owed (and breached) various fiduciary duties to Indigenous workers. The following could form the basis for actions against these entities on an individual basis:

(a) The Government’s avoidance of its welfare responsibilities towards Indigenous workers in order to reduce its expenditure and social responsibility.

(b) The Government’s failure to properly administer trust accounts set up for Indigenous workers.

(c) Stations’ practice of ‘booking down’ (which could form the basis of a constructive trust) and the Government’s complicity in this.

A Preliminary Considerations

(i) Limitations Issues

With a time lapse of over 40 years statutory limitations pose a threshold hurdle for claimants. For cases brought against the Commonwealth in the Northern Territory, the Limitation Act 2000 (Northern Territory) (‘Limitation Act’) applies by operation of section 79 of the Judiciary Act 1903 (Cth). Section 12(1)(b) of the Limitation Act provides that actions are not maintainable after the expiration of three years from the date on which ‘an action founded on tort including a cause of action founded on a breach of statutory duty’ accrues. However, section 44(1) of the Limitation Act enables a discretionary extension of the time period within which an action may be launched. Under section 44(3) facts ‘material to the plaintiff’s case’ must have been ascertained after the expiration of the limitation period and the action must have been instituted ‘within 12 months after the ascertainment of those facts’; or ‘the plaintiff’s failure to institute the action within the limitation period’ must have been a result of the ‘representations or conduct of the defendant’ or representative. An extension is also possible where it would be ‘just to grant the extension of time’.

In order to satisfy the requirements of section 44(3) claimants could argue that their awareness of the ‘facts’ of their cause of action arose as a result of seeing research on the misappropriation of their wages. Alternatively, it is arguable that the time delay is a result of the Government and cattle corporations imbuing workers with the impression that they were not entitled to wages and not informing them that they were withheld or misused. The moral injustice of denying such an application may also influence a court’s decision in this regard.

(ii) Corporate and Governmental Liability

It is suggested that actions against smaller or less profitable stations would benefit from joining the Government as co-defendants. This is for moral, as well as monetary reasons. Similarly, cases should be brought against the (past and present) corporations ultimately responsible for the conditions on cattle stations to ensure that adequate reparatory payments are made in the event of successful litigation. This requires claimants to establish the vicarious liability of the relevant corporate entities. In New South Wales v Lepore the High Court affirmed the ‘control test’ for establishing vicarious liability, such that an employer’s liability for the wrongs of their employees is determined by the degree of control that employer exercises over the employee in question. Ted Evans has noted that station managers were accountable exclusively to owners, who had to authorise expenditures as small as $50. This indicates that station owners exercised fairly strict control over managers and the payments they made. This no doubt stretched to the supervision of wages (or lack thereof).

Extant corporations such as the Vestey Group and LJ Hooker are potential subjects in an action alleging vicarious liability. These corporate entities held much of the pastoral property in the Northern Territory (including the Wave Hill, Victoria River Downs, Rosewood, and Legune Stations) and employed many Indigenous workers. According to Patrol Officer Evans it was the larger stations that were most likely to breach employment regulations. Indeed, much of the evidence referred in this article involves stations owned
by the Vestey Group, which has ongoing transnational operations.\textsuperscript{148} It is worth noting that class actions against companies responsible for unpaid and forced labour have developed international momentum. In the United States and South Africa plaintiffs have sought restitution, compensatory and punitive damages, and accounts of profits from companies who employed slaves.\textsuperscript{149} While these cases were ultimately unsuccessful they focused courts’ attentions on slavery-based corporate profiteering, which has in turn led to settled compensation schemes.\textsuperscript{150}

B  Duties of Care in Tort

(i)  Negligence: physical injury and pure economic loss

This section assumes, for heuristic purposes, the imputation of potential liability to Government and corporations. Establishing a cause of action in negligence requires proof, on the balance of probabilities, that a defendant owed a duty to take reasonable care to prevent harm or damage to the claimant, and that this duty was breached by the alleged negligence. It must then be shown that this breach caused the relevant damage, and that damages are materially assessable.\textsuperscript{151} Establishing liability under common law negligence does not require proof of statutory authorisation, though a claim may be mounted against a statutory authority.\textsuperscript{152} The negligent administration of stations by corporate entities and Government engendered both physical injury (from malnutrition and work injuries) and pure economic loss (through the denial of wages).

Pure economic loss involves a loss of opportunity, rather than actual damage to person or property.\textsuperscript{153} It requires establishing the probability of what would have occurred if the breach had not happened. For Indigenous plaintiffs this requires assessing the quantum of wages to which they were entitled.

A claim for physical injury requires proof of pain and suffering, loss of amenities of life, and loss of earning capacity. Damages seek to restore the injured plaintiff to the circumstances prior to the negligence through payments for medical treatment and rehabilitation, and restitution for the loss of past and future earning capacity.\textsuperscript{154} Personal injury can be assessed cumulatively if similar physical harm is inflicted on the plaintiff on separate occasions.\textsuperscript{155}

(ii)  Did a Duty of Care Exist?

(a)  Stations

In \textit{Perre v Apand}\textsuperscript{156} the High Court laid down the requirements of a successful claim for the tort of pure economic loss. Justice McHugh (with whom the majority agreed) claimed that this species of tort requires the damage concerned to have been reasonably foreseeable; that the risk involved was known to the defendant; that the potential victims of the negligent behaviour were part of a determinable class; and, the plaintiffs were vulnerable to the impact of the defendant’s actions.\textsuperscript{157} In later cases particular emphasis has been placed on the vulnerability criterion.\textsuperscript{158} Vulnerability entails ‘the plaintiff’s inability to protect itself from the consequences of a defendant’s want of reasonable care’.\textsuperscript{159} It is likely to arise when the defendant has assumed responsibility and the plaintiff relies on this responsibility.\textsuperscript{160}

There is sufficient evidence that station owners breached their duty of care to prevent Indigenous workers’ economic loss. Workers were vulnerable to station managers (and their corporate controllers) and unable to exercise self-protection as they were given no input concerning employment licences, and no means of redress for the breach of the terms of such licenses. There can be little doubt that managers had knowledge of the risk of economic loss, particularly in relation to the ‘booking down’ system. Former cattle station workers are an ascertainable class of plaintiffs, which diffuses the indeterminacy argument against finding that a duty existed to prevent economic loss. While Indigenous workers obviously suffered the physical loss of their wages, ancillary losses arose from this. The lack of an ascertainable monetary value on their labour prevented Indigenous workers assessing their earning capacity and seeking more lucrative employment.\textsuperscript{161} Official records attest to this underlying purpose.

Northern Territory Administrator in 1949, A R Driver, stated that not paying wages prevented labour mobility and enforced ‘a system of serfdom...to maintain strict control of a subject people’.\textsuperscript{162} Commonwealth Minister for Territories Paul Hasluck recognised that stations issuing rations (in lieu of wages) was ‘the best way of holding the workforce’.\textsuperscript{163}

The other basis on which a claim that stations breached their duty of care could be brought relates to physical injury. This duty is owed to another when exposure to the risk of injury by an act is reasonably foreseeable.\textsuperscript{164} It was
reasonably foreseeable to station owners that if they did not provide adequate rations, workers would suffer physical harm, including illness arising from malnutrition. It was also foreseeable that if station managers did not attend to workplace injuries workers might have become incapacitated. Indigenous workers have testified that each of these forms of injury arose as a result of inadequate care. The existence of such a duty to Indigenous workers is strengthened by the fact that the plaintiffs were a vulnerable class and at the mercy of the cattle station for their livelihood.

(b) The Commonwealth

The Government had a duty of care to ensure that workers did not suffer physical injury or pure economic loss. In 2002 the High Court considered government liability in *Barclay Oysters Pty Ltd v Ryan and others*. The Court held that to establish a duty of care, a government or its authorities must have more than foresight, capacity to act on the part of a defendant and a statutory power to supervise: a factor of ‘control’ is of fundamental importance in discerning a duty of care on the part of a public authority. This will be more apparent where plaintiffs are vulnerable to the proper exercise of government authority. The Court in *Barclay Oysters* found that the Government was not responsible for an oyster contamination that injured the plaintiffs because of Government policy allowing self-regulation of the oyster industry, and the lack of any discernible relationship between the Government and the consumers of oysters. It is suggested that potential stolen wages claimants could demonstrate Commonwealth control more clearly than the plaintiffs in *Barclay Oysters*. The employment licences the Government negotiated with station managers clearly indicate control over workers’ conditions. Licences covered the maintenance and payment of workers in accordance with the rates set down in government regulations. The Government directly controlled the renewal or revocation of employment licences for Indigenous workers. Indeed, Ministers for the Territories and the Interior had an acute awareness of, and influence over, Indigenous labour conditions. Indigenous labour was vital to the development of the Northern Territory cattle industry.

(iii) Was the Duty Breached?

(a) Stations

The test for a breach of duty is whether the defendant acted like a reasonable person in the circumstances. The failure to provide adequate rations and living conditions for Indigenous workers clearly represents a breach of managers’ duties to prevent physical injury. The failure to pay wages constitutes a clear breach of the duty not to cause economic loss.

Material evidence of these breaches can be found in deliberate attempts to avoid compliance with regulations that governed Aboriginal living conditions. Former Patrol Officer Evans claims that in the late 1940s and early 1950s managers who worked from the cities, generally Sydney, would make an effort to avoid being at the station when they were aware that officers would be visiting. Managers made it difficult for officials to check if wages were being ‘dispersed correctly’ and consequently it was exceptional for Indigenous workers to be paid out. Evans described it as ‘doing battle with the pastoral management in respect of the conditions of employment’, particularly on stations owned by the Vestey Group. He stated that managers did not adhere to government policy because ‘they were accountable to Vestey’s, they weren’t accountable to anybody else’. This resulted in a ‘continuous battle between management and myself on the conditions in which the Aboriginal found himself’.

The practice of booking down is further evidence of the stations’ breaches of their duties of care. Under this system wages were withheld and credited to station stores which grossly inflated their prices. These measures were undertaken by managers with a view for stations to profit. The motivation for booking down wages and for avoiding government officials was clearly profit maximisation. Unlike Abadee J’s finding in *Williams v The Minister, Aboriginal Land Rights Act 1983 & Anor* that the impugned missions were acting in the best interests of the plaintiffs, there is no indication that cattle stations were acting in the best interests of the plaintiffs by breaching their duty.

(b) The Commonwealth

The Government breached its duty of care in relation to both physical injury and economic loss through negligent policing of the conditions on stations. Inspections were required to give effect to employment licences in accordance with government regulations. However, patrol officers and protectors rarely visited stations. This was partly a result of constraints imposed by inadequate staff and the enormous distances between stations, though it must be said that even in spite of these obstacles the cancellation of licenses was
The negligence of the alleged tortfeasor the causal link in this respect will be much more difficult. Indigenous workers it is suggested that establishing a clear also contributed to the endemic health problems among working conditions. While it is a reasonable inference managements’ failure to ensure the existence of adequate from seeking more gainful employment) were caused by workers’ ongoing health problems (which prevented them be seen as directly liable for the tort of pure economic loss. Setting aside time issues, station managers can thus economic losses occurred as a direct result of the deprivation of wages by station managers. A causal relationship between the withholding of these obstacles may be surmountable. Nevertheless, the emphasis on policy in indicates these obstacles may be surmountable. A clear causal link exists between the withholding of workers’ wages (or their conversion into store credits) and the economic loss suffered by Indigenous people on cattle stations. Setting aside time issues, station managers can thus be seen as directly liable for the tort of pure economic loss. In terms of the negligence claim it is submitted that workers’ ongoing health problems (which prevented them from seeking more gainful employment) were caused by managements’ failure to ensure the existence of adequate working conditions. While it is a reasonable inference that poor hygiene, accommodation and food standards also contributed to the endemic health problems among Indigenous workers it is suggested that establishing a clear causal link in this respect will be much more difficult. There is cogent evidence supporting the argument that the Government caused both physical injury and pure economic loss to Indigenous workers because of their failure to enforce the regulations they had imposed. Gordon Sweeney, who visited ‘practically every cattle station, every mining settlement, every farm and every police station in the Territory’ while carrying out a Road Survey for the North Australian Commission after World War II, said ‘no wages were paid, no housing was provided’. He attributed this to the Government bowing to the economic power of the stations:

The cattle stations were a world to themselves. They were the greater part of the Territory and they were the most important industry in the Territory and therefore most of the Administration bowed to the needs of cattle stations. However, proving causation on the part of the Government is a more onerous burden because stations may have refused to comply with directives notwithstanding government pressure. Nonetheless, the Government’s ability to cancel licenses for breach may prove to be a sufficient basis for imputing causal responsibility.

C Breach of Statutory Duty and Mandamus

(i) Breach of Statutory Duty

A claim for breach of statutory duty is actionable where the defendant has breached a duty imposed by a statute or regulation and the legislature has shown an intention to confer a statutory remedy. Specific intent on the part of the legislature to provide a remedy in tort is not required. However, it must be demonstrated that the defendant owed a positive duty under the statute or regulation, and that the plaintiff has an enforceable right to performance of the statutory duty. These factors may be more easily established where they affect vulnerable groups who would otherwise be exposed to specific danger. Indigenous people may well fall within this category. A claimant must demonstrate that the harm suffered was within the class of risks at which legislation was directed, and there must be proof that the defendant breached their duty and caused the harm for which damages are sought. The tort does not require a breach to be inflicted negligently or intentionally.

None of the relevant Ordinances explicitly conferred a right to compensation for a breach of statutory duty. However, such a right might be inferred by reference to the
absence of alternative remedies and the class of people the statute is intended to protect, particularly given the lack of alternative legal avenues for Indigenous workers and the fact that they constitute a narrower class than the general public.

It is submitted that the Commonwealth owed a statutory duty towards Indigenous workers because it assumed responsibility for their welfare with the passing of the 1911 Ordinance. Evidence for this is found in the Commonwealth's revision of the previous South Australian legislation to better ensure the welfare of Indigenous people. Pursuant to the various Ordinances the Government passed regulations specifically addressing the needs of Indigenous workers. In doing so it imposed a duty on itself to cancel licences where regulations were breached. Indigenous cattle workers were clearly a foreseeable class of plaintiffs during this time as they constituted a large section of the Indigenous population. The specific statutory duties owed to Indigenous cattle station workers that may be imputed to the Commonwealth are as follows:

- The 1918 Ordinance and the 1933 Ordinance conferred on the Chief Protector a duty to protect Aboriginal people. This included exercising 'general supervision and care over all matters affecting the welfare of the aboriginals' and protecting 'them against immorality, injustice, imposition and fraud'. This duty existed even if the 'aboriginal or half–caste is under a contract of employment'. Similar duties arose from the government's legal status as guardian of Aboriginal wards under the Welfare Ordinance.

- Under the 1918 Ordinance the Chief Protector had a duty to bring legal proceedings for the recovery of wages owed to an Aboriginal or half–caste. However, this does not necessarily impute an intention to provide compensation where such proceedings do not occur.

- The 1918 Ordinance and the Wards' Ordinance required the protector or officer to cancel licences or employment arrangements where the protector was 'satisfied that the holder is or has become an unfit person to employ aboriginals or has failed to comply with the Ordinance or the regulations thereunder'. Once again the problem may be establishing an intention to provide compensation for the breach of this duty.

The following duties can be imputed to stations:

- A duty under regulations pursuant to the 1918 Ordinance to maintain workers and their relatives and dependants through the provision of rations.

- From the 1930s, regulations also imposed a duty on stations to provide health cover and facilities. From the 1950s this duty extended to the provision of accommodation.

The specific nature of the protective legislation suggests that Indigenous workers had a right to the proper performance of the duties owed by both stations and the Government. In Cubillo v Commonwealth the Federal Court was willing to imply that such a duty existed towards Indigenous children. While the vulnerability of children may distinguish it from a case for stolen wages, the fact that Indigenous workers were exploited for their labour and were under government control may be sufficient to ground an action, particularly given that they were the specific target of the regulations in question.

There can be little doubt that the harm suffered by Indigenous workers was within the class of risks the legislation was intended to prevent, nor that the potential defendants breached this duty and caused the actionable harm. In Cubillo O'Loughlin J was unwilling to find a breach of statutory duty where the Director's duty was broadly 'protection'. By contrast, the Commonwealth's statutory duties to Indigenous workers were stated specifically in the various Ordinances. The duties were breached through the Commonwealth's failure to ensure proper maintenance of Indigenous people on stations; by not bringing legal proceedings despite an awareness of the fraudulent 'booking down' system; and, in failing to cancel licences despite the inadequate care of Indigenous workers.

(ii) Mandamus

The Commonwealth's failure to bring legal actions to protect Indigenous workers, pursuant to its statutory obligations theoretically makes a claim for mandamus more appropriate than a private action in tort. In practice, though, it is unlikely to prove particularly useful. Mandamus compels an officer of the Commonwealth to perform his or her duties. A claim for mandamus in the Federal Court requires an applicant to first demand performance of the public duty by the officer. This must have been followed by a refusal on the part of the decision–maker to comply with the demand. Where there is no express demand and refusal, it may be implied from conduct.

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Indigenous workers do not appear to have made express demands to the Aboriginal Protector (who was responsible for executing the duty) to bring legal proceedings against cattle stations or other Commonwealth officers. The partiality of officers to station managers and against Indigenous workers would have dissuaded workers from making this demand. Further precluding express demands would have been the concerted efforts by officers and station managers to conceal their rights. It may be implied that the lack of bargaining power by Indigenous workers’ meant they were reliant on the Protector to initiate proceedings. However, this is not so much a demand as an inability to demand performance. Were the Court of the opinion that this satisfies the first limb, the issue becomes that of an implied refusal by the Government to accede to demands for performance. This could be inferred from the Government’s persistent refusal to comply with Indigenous workers’ demands.

Even if the Court found in favour of Indigenous claimants in respect of the threshold requirements of a mandamus claim it would appear likely that such an action would fail because the duty must be performed within a reasonable time, otherwise it may be presumed to have lapsed. To prevent this presumption, it would have been necessary for the Protector to issue a definitive statement as to whether or not they would have acquiesced to the workers’ demands. In the absence of such evidence it is difficult to subject the decision-maker to an administrative appeal. It seems impractical for Indigenous people to demand that the Commonwealth perform its duty to bring legal proceedings after the termination of the employment relationship. For this reason it is suggested that private actions in tort offer a more viable means of redress and restitution for former cattle station workers.

D Fiduciary duties

A fiduciary duty is an obligation on the part of a fiduciary to act in the interests of its beneficiary. It is a product of a fiduciary relationship, which arises where there is an undertaking to act for, or on behalf of another person. It is generally held to apply when there is ‘an understanding to act in the interests of another person, an ability [for one party] to exercise a power or discretion that may affect the rights of another’ or a relationship of ‘inequality’, ‘dependency and vulnerability’. Justice O’Loughlin in Cubillo observed that, depending on the facts, fiduciary duties may arise from a relationship that has been created by statute. While Mabo v Queensland (No 2) indicated the theoretical possibility of the Government being held in breach of fiduciary duties such a breach was not actually upheld in that case. Notwithstanding, it is suggested that the existence of such a duty is worth exploring in relation to stolen wages.

(i) Existence of fiduciary duty on the part of the Commonwealth to Indigenous workers

First, it is necessary to establish that a fiduciary relationship existed between the Commonwealth Government and Indigenous workers. The relationship can be seen to bear the factual qualities of a fiduciary relationship for the following reasons: the Aboriginal Ordinances 1918–57 represented an undertaking that the Government would act in the interests of Indigenous workers; a relationship of inequality, dependency and vulnerability existed on the part of Indigenous workers because of the capacity of governments to enter into employment licences their behalf; and, Indigenous workers had no bargaining power or means of redress. Second, it is suggested that the Government held the specific fiduciary duties of ensuring the general welfare of Indigenous workers, and also of properly administering the trust accounts into which many workers’ wages were paid. While the existence of a fiduciary duty was denied in Williams (No 2) it is arguable that the Government’s much narrower and more clearly defined obligations to Indigenous workers (in comparison to the alleged obligation to maintain general well-being in Williams (No 2)) would engender a finding in favour of the existence of the duty.

(ii) The Commonwealth’s breach of its fiduciary duties: conflict of interest and profiting from fiduciary relationship

Fiduciaries have a duty to avoid conflicts between their interests and the interests of a beneficiary, and to avoid profiting as a result of their position as fiduciaries. The purpose of these rules is to ensure that the fiduciary acts at all times in the interests of the beneficiary. The Commonwealth, as a fiduciary, breached its duties by allowing stations to provide rations rather than wages in order to avoid its own welfare responsibilities; by failing to inspect stations; and, by failing to enforce protective regulations. In pursuing its own interests to minimise expenditure the Commonwealth engaged in a conflict of interest and profited from its role as fiduciary. Marsh, of the Commonwealth Department of Territories, claimed ‘the pastoralists in maintaining aboriginal
dependants are doing the job which would otherwise fall to the Government'.

It is arguable that the Government also declined to cancel licences for fear that Indigenous cattle station workers would become its responsibility. Askins noted the steady increase in the licences issued by the Chief Protector in 1930, stating that ‘[p]rotectors were eager to see that natives were profitably employed’. In addition, Government’s interest in the profitability of stations gave owners enormous influence over Government decisions regarding Indigenous workers. The Government consistently sought the approval of the Northern Territory Pastoral Lessees’ Association before it pursued any substantive amendments to Indigenous labour policy. This led humanitarians to conclude that licences in fact protected the pastoralist rather than the Aboriginal worker.

(iii) Breach of Government managed trust funds

For workers whose earnings were placed in Government administered trusts a possible cause of action exists against the Government based on the mixing of those funds with consolidated revenue. These funds for Indigenous workers as beneficiaries were managed by the Government as a trustee. Kidd and Mudaliar suggest the Government owed a duty as the financial trustee of workers’ earnings to keep proper accounts.

The Government breached its duty by failing to implement checks or systematic inspections of workers’ earnings to ensure that massive financial loss did not occur. This constitutes maladministration causing loss to the trust fund. Breaches also occurred through the unauthorised mixing of trust funds with consolidated revenue. There is evidence of the misappropriation of funds placed in Indigenous accounts under the Apprenticeship Scheme, Wards’ Ordinance and Social Services Consolidation Act 1947 (Cth). These misappropriations are actionable breaches of trust causing loss to the Indigenous beneficiary.

(iv) Booking down: Stations’ breaches of trust

Given that the Government did not authorise payment to Indigenous workers in the form of store credits after World War II, the ensuing underpayment can be seen as unjust enrichment for cattle station owners. The owners’ retention of Indigenous wages and their conversion into store credits should be seen as creating a constructive trust in favour of workers. This is in line with their remedial purpose in effecting the restitution of property, the removal of unjust enrichment and the enforcement of trustee’s equitable duties. Constructive trusts are an appropriate remedy for Indigenous station workers (the beneficiaries) since station owners did not otherwise intend to create an express trust in favour of cattle station workers.

VI International remedies

The aforementioned domestic causes of action provide strong grounds for the remuneration of former Indigenous cattle workers. However, the experience of the Stolen Generations shows that subjective issues of statutory interpretation and the admissibility of evidence may lead to unfavourable verdicts when claims are litigated. This is especially the case when legislation gives wide discretion to the Government. International law, on the other hand, provides more categorically for the rights of Indigenous people and workers. Therefore, there may be a stronger basis in international law for finding that the non-payment of wages to Indigenous cattle workers was illegal, though it is unlikely that any such finding would involve restitution or damages.

Since the early 20th century, Indigenous organisations have been cognisant of Australia’s failure to meet obligations under the Conventions of the ILO. In the 1940s a range of complaints were presented to the United Nations Association of Australia in relation to the lack of cash wages paid to Indigenous workers. Indigenous activists such as Daisy Bates and Mary Montgomerie Bennett also alleged that Australia had violated the Slavery Convention through the abysmal conditions on cattle stations.

A ILO Conventions and other relevant agreements protecting Indigenous cattle workers

The most notable Convention relating directly to Indigenous workers that Australia ratified before the 1960s is the Convention concerning the Creation of Minimum Wage-Fixing Machinery 1928, which Australia ratified in 1931. Article 1 obliges States to create machinery for minimum wage rates. Article 3(2) requires that representatives of workers shall be consulted in this process. Article 4 establishes a system of supervision and sanctions ensuring wages are not paid at less than minimum rates, and workers are informed of these rates. The Commonwealth Government did not
ensure that these obligations were met on Northern Territory cattle stations. Indigenous workers did not have access to minimum wages due to the ration system. The poor quality of the rations meant that they were not, in any event, equal to the minimum wages otherwise prescribed. Further, workers were not informed of the conditions of their licences, and were not consulted in the process of their formation.

*The Universal Declaration of Human Rights 1948 (‘Declaration’) enshrines basic working standards.*228 As a resolution of the United Nations General Assembly it has been seen as having important symbolic value, but not binding status. An alternate interpretation is that the provisions of the Declaration have legally binding force by virtue of their status as customary norms of international law.229 This may include the provisions on labour rights, if not the entire document.230 Article 23(1) provides a right for ‘free choice of employment and to just and favourable conditions of work’. Article 23(2) further states that ‘[e]veryone, without any discrimination, has the right to equal pay for equal work’. The conditions on Northern Territory stations meant that Indigenous drovers were paid less than their non-Indigenous counterparts, and without the right to negotiate terms. Their dependants were made to work without any remuneration whatsoever.

In 1932 Australia became a party to the *Forced Labour Convention*.231 This treaty creates obligations to suppress forced or compulsory labour in all its forms.232 Articles 4(1) and 6 prohibit public authorities from imposing ‘compulsory labour for the benefit of private individuals, companies or associations’. Certain exceptions, such as military service and penal servitude are permitted, but they must be carried out by the public authority and not placed at the disposal of private individuals or companies.233 It is contended that the Australian Government breached these obligations by knowingly providing licences to cattle station managers to employ an infinite number of Indigenous people in spite of workers’ practical inabilities to leave stations to which they belonged. According to the *Forced Labour Convention* sanctioned forced labour must comply with certain minimum standards including: the provision of cash remuneration at prevailing rates for voluntary labour;234 not deducting rations from wages;235 providing workers’ accidents compensation;236 and, supplying hygiene facilities and accommodation.237 If the ILO accepted that Indigenous workers were forcibly employed it appears that a strong case could be put that the Government fell short of meeting these minimum requirements.

**B Application to the International Labour Organization**

An application to the ILO on behalf of former cattle station workers would be heard by the Organization’s Governing Body. Article 24 of the ILO Constitution requires a representation to be filed by inter alia, ‘an industrial association of workers’ against a convention ratified by a member State of the ILO. The Australian Council of Trade Unions could perform this task, having historically brought complaints against Commonwealth legislation.238 Alternatively, the Australian Workers’ Union (AWU), which represents Northern Territory cattle hands, may be an appropriate body. The AWU is the successor to the North Australian Workers’ Union that made an application on behalf of Indigenous people in the *Equal Wages Case*.239

Australia was a founding member of the ILO in 1919. Accordingly, the ILO has jurisdiction to hear representations against the Australian Government. Article 24 of the ILO Constitution requires a state to have ‘failed to secure in some respect the effective observance within its jurisdiction of the said Convention’,240 meaning the breach needs to be imputed to the State241 or one of its agents.242 The Government could argue that the Chief Protector or Director for Native Affairs had responsibility for Indigenous workers. However, it is possible to impute responsibility to the Government since the Protector’s duties were mandated under the *Aboriginal Ordinances 1918–57*. It is irrelevant under international law whether the organs of the State (such as the Aboriginal protectors) acted in excess of their governmental duties,243 negligently,244 or in contravention of State instructions.245 Provided they are organs of the State, the State will be deemed responsible. Given that Aboriginal protectors and directors of Native Affairs and Welfare were agents of the State, liability may be consequentially imputed to the Government.

As a general rule international law requires that the complainant has exhausted domestic remedies before bringing a complaint to an international body.246 Article 44(b) of the International Law Commission’s Draft Articles on State Responsibility state that if the rule of exhaustion applies, applications against a State are inadmissible where ‘available and effective’ domestic remedies have not been exhausted.247 This suggests that at least some domestic causes of action must be pursued prior to bringing a claim under international law.
It is unlikely that time limitations would bar a claim to the ILO since ILO provisions do not appear to set a time limit within which a complaint must be brought. Nor, under international law, is there a presumption that after a period of time the claim is barred. The ICJ in *Certain Phosphate Lands in Nauru* allowed a case to proceed against Australia despite Australia arguing that a State responsibility claim relating to the period of its joint administration of the Trust Territory for Nauru (1947–1968) could not be brought decades later.

The Court stated that the ‘relevant circumstances’ of each case will determine whether the passage of time renders an application inadmissible. The ILO Governing Body would presumably consider a number of factors in deciding whether an application is time barred, including: whether it would prejudice the respondent State; whether the injured party ‘validly acquiesced in the lapse of the claim’; whether there was unreasonable delay in bringing the claim; whether it would be procedurally fair; the amount of time needed to collect evidence; and, the importance of the rights involved. Given the Government’s role in the time delay it is likely that a union application to the ILO regarding stolen wages would be accepted.

If an application was accepted a tripartite committee of three members of the ILO Governing Body would examine all evidence, including the Australian Government’s response. The committee would then submit a report to the Governing Body on the legal aspects of the case and provide recommendations, which could include ‘full reparations’ where a state’s violation of its obligations caused the claimant injury or loss. Such recommendations may carry persuasive force in a compensation claim by Indigenous people. In the past, adverse findings against Australia by the ILO have led the Australian Government to repeal impugned legislation. More recently, the Government has been reluctant to reverse legislation at the behest of international law. However, recommendations for reparations may provide the impetus for a Commonwealth compensation scheme.

**VII  Government Compensation: A Practical Move to Acknowledgement and Reconciliation**

At the beginning of this article it was suggested that in spite of the domestic and international legal remedies potentially available to Indigenous workers who were deprived of their wages, the most desirable means of addressing past and present injustices is through the establishment of a Commonwealth Government compensation scheme. Such an initiative would involve recognition of the moral, as well as economic injustice suffered by Indigenous workers. It would also benefit the Government by removing at least some of the incentive for many claimants to bring lengthy and potentially embarrassing claims against the Government. This section considers the compensation schemes enacted in New South Wales and Queensland, and suggests that the former constitutes a more equitable model for the Commonwealth.

Queensland’s compensation scheme has been the subject of sustained criticism from Indigenous bodies. The 2006 Senate Report on Stolen Wages reflects the concerns raised by Indigenous groups. It urges ‘the Queensland Government [to] revise the terms of its reparations offer’ in Recommendation 6 because the scheme provides Indigenous people with a token payment rather than a compensatory sum. In essence the scheme involved the payment of between $2000 and $4000 to individual claimants alive at the date of its inception. This totalled $55.6 million in reparations between May 2002 and January 2006 to Indigenous people whose wages were held in trust accounts. It is estimated that some workers lost wages of up to $400,000, while the aggregate loss is said to be in excess of $500m. The scheme has also been criticised for failing to allow ‘derivative claims’ by the families of deceased workers, which would recognise the inter-generational detriment of unpaid wages.

One of the key shortcomings of the Queensland scheme is that Indigenous claimants must relinquish future rights to litigation. Claimants are made to sign an indemnity agreement waiving the right to recovery of full entitlements. Unsurprisingly, Indigenous communities reacted scornfully to Queensland Aboriginal and Torres Strait Islander Policy Minister, Judy Spence’s claim that the scheme is ‘not a replacement amount for any money which people may allege or believe they are owed, but a reconciliation gesture which recognises past injustices’. The removal of litigation rights suggests the opposite: that the scheme is in fact ‘a replacement’. The limited Queensland Government funds set aside to support the scheme indicates that it is also far from ‘conciliatory’.

If a monetary scheme does not expressly involve compensatory payments then it must provide a return commensurate with workers’ losses. This requires consideration of individual worker’s contribution based on
the length of their employment, their degree of skill and the
seniority of their position. These factors should also be taken
into account in determining ongoing losses from employment
injuries. The injustice of standardised payments was seen in
Commissioner William Carter’s ruling in Bligh and Ors v State of Queensland.266 The flat payout of $7,000 to seven Palm
Island workers who were underpaid by the Queensland
Government arguably breached the Racial Discrimination
Act 1975 (Cth)267 in its presumption of commonality among
the workers. The ruling overlooked evidence attesting
to different jobs, levels of responsibility, conditions and
employment periods among the workers.268 According to
McDougall this amounted to compensation discrimination
for belonging to an Indigenous community.269

The New South Wales Aboriginal Trust Funds Repayment
Scheme, which commenced in 2005, has had a more positive
reception. The New South Wales scheme involves full
reimbursement at prevailing rates.270 There are also no time
limitations on claims, giving claimants sufficient time to have
freedom of information requests processed and to develop
cases in response to new records surfaced. New South
Wales claimants also retain their rights to litigate to recover
additional moneys owed. While ideally compensation
schemes should alleviate the need to litigate it is important
that this right is not stripped from potential claimants.

In spite of its positive aspects the New South Wales Scheme
has been criticised for lacking procedural transparency.271
The considerations behind awarding payments have not
been stated categorically, nor has the procedure where
written records are not found. In saying this, the New South
Wales Government has made a commitment to search for
records,272 a marked improvement on the Queensland
scheme where the Government failed to take on this
responsibility. Rosalind Kidd argues that governments
have a fiduciary duty to provide ‘full and frank disclosure
...of all material facts’ contained in government records
relating to Indigenous people’s money.273 In 2000, the United
States Court of Appeals for the District of Columbia Circuit
found, in relation to the Individual Indian Monies Trust
Fund (amounting to $40 billion of unpaid proceeds from
leases and enterprises on treaty land since 1887), that the
Government’s failure to keep accurate accounts constituted
a breach of the ‘most basic’ fiduciary duty,274 and that the
Government was required to disclose all trust property.275 It
is suggested that the Australian Government should bear
the onus of searching for written evidence to support Northern
Territory Indigenous workers’ claims. Correspondingly, the
Government should also bear the burden of proving that the
full value of wages was paid.

To supplement written records, or where they are unavailable,
oral evidence should be admissible. The New South Wales
Government has provided assurances that the compensation
scheme’s administrators will hear oral testimony to
substantiate claims.276 However, the Government is yet to
establish the type of setting in which oral evidence will be
heard, the weight it will be afforded, and how such testimony
will be honoured. Bob Haebich, who represented the Palm
Island workers in Bligh, has advocated the establishment
of a special tribunal in which claimants can have their case
heard.277 This is an important measure given the gaps in the
New South Wales records.278 Such gaps are equally apparent
in the Northern Territory. While oral evidence is useful
in supplementing written records it is suggested that this
erroneously presumes the accuracy of such records.279 Thus,
forums of the type suggested by Haebich should involve an
interrogation of discrepancies between written records and
oral testimony, rather than an inherent acceptance of the
veracity of written records.

Extant corporations that exploited Indigenous workers and
their families in the Northern Territory are morally obliged
to provide records containing the names of workers, the various
jobs those workers held, the wages that were paid, the prices
at station stores and child endowments. These corporations
should be made to pay funds into a Government-initiated
scheme in recognition of the benefits they accrued from
unpaid Indigenous labour. This is particularly so in relation
to groups such as LJ Hooker which remain active in Australia.
Further, and in light of the Venezuelan Government’s 2005
repossess of land illegitimately acquired by the Vestey
Group,280 it would behove corporations to consider pre-
emptive compensatory action. Such measures are not only
morally appropriate, but could also enable corporations to
avoid the sorts of damaging publicity cast upon James Hardie
for its continual obfuscations regarding the New South Wales
asbestos compensation scheme.

It is suggested that, in addition to a Commonwealth
Government compensation scheme, a Commission should
be established to comprehensively examine the evidence of
Indigenous people, governments, and corporations, with
a view to making findings and recommendations on the
best way to compensate unpaid Indigenous workers. While

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monetary compensation would be a major aspect of this, other measures such as land access may be more appropriate. However the process is handled it is vital that Indigenous people play a role in determining the form of reparations for themselves and their communities.

VIII Conclusion

This article began by mapping the extraordinary contribution of Indigenous workers to the Northern Territory cattle industry, the deplorable failure of cattle station owners to remunerate them, and the Government’s complicity and negligence in failing to rectify the situation. Pursuant to the interest expressed by a number of former workers in running a test case to recover stolen wages this article has considered the domestic and international avenues that may be open to claimants. While such claims are fraught with difficulties it is contended that reasonable grounds exist for claims in tort and equity against station owners and the Federal Government, while an international remedy (in the form of a recommendation) could be sought from the ILO. Nevertheless, it is contended that the best means of addressing the wrongs perpetrated against Indigenous workers is through the establishment of a voluntary compensation scheme on the part of Government and responsible corporations. The first step in this must be formal implementation of the Senate Committee’s recommendation that consultations with Indigenous people begin immediately in tandem with sustained archival research. The challenge will be for the Government to create a scheme that is truly a conciliatory gesture by involving Indigenous communities in the process of delivering wage justice.

Endnotes

* Faculty of Law, University of Sydney. The author wishes to thank Dr Rosalind Kidd, Mr Stephen Gray, Dr Fleur Johns, Mr Jamie Glister, Professor Chris Cunneen, Mr Luke Taylor, Ms Julia Mansour and the anonymous referees, for their invaluable feedback.


3 Kidd, above n 1, 2.

4 (1966) 113 CAR 651 (‘Equal Wages Case’). This decision of the Commonwealth Conciliation and Arbitration Commission led to the 1968 Pastoral Award when equal wages were effectively introduced.


9 Ibid, Recommendation 5.


13 As recommended by the Standing Committee on Legal and Constitutional Affairs, above n 8, [4.48]. The workers of these employers had their wages mostly placed in government trust accounts: V J White (Secretary, Native Affairs Branch), Aboriginal Trust Account Investigation, 12 June 1940, 4–6; National Archives (Darwin) CRS F1 Item 42/40.

14 J W Bleakley, The Aborigines and Half–Castes of Central Australia

17 Frank Stevens, Equal Wages for Aborigines: The background to industrial discrimination in the Northern Territory of Australia (1968) 9.

18 Commonwealth, The Year Book of Australia for 1911 (1912).


21 See Rose, above n 19, 156.


23 Baldwin Spencer, Preliminary Report on the Aborigines of the Northern Territory, Department of External Affairs, Melbourne (1913) 43.


25 Bleakley, above n 16, 7.

26 Charlie Schultz and Darrell Lewis, Beyond the Big Run: Station Life in Australia’s last Frontier (1994) 126.


31 Rose, above n 19, 73.


33 See Rose, above n 19, 137.

34 Mary Durack, Kings in Grass Castles (1962) 315–16.

35 The Northern Territory was governed by South Australia between 1882 and 1910.


37 Tim Rowse, ‘Were You Ever Savages?’ Aboriginal Insiders and Pastoralists’ Patronage’ (1987) 58(2) Oceania 81, 84.

38 Jeannie Gunn, We of the Never-Never (1990) 185.


40 Aboriginals Ordinance 1911 (Cth) s 8(1); Aboriginals Ordinance 1918 (Cth) s 22(1).


42 Austin, above n 30, 92.

43 Aboriginals Ordinance 1911 (Cth) s 8(1); Aboriginals Ordinance 1918 (Cth) s 23(2).

44 Aboriginals Ordinance 1911 (Cth) s 8(1).

45 Aboriginals Ordinance 1918 (Cth) s 26(1).

46 d’Abbs, above n 29, 2.


48 Ibid.

49 This did not include ‘half-caste females employed as domestics’ who received six shillings; Aboriginal drovers ‘travelling with stock’ who received 24 shillings; and, Aboriginal drovers ‘travelling with plant’ who received 16 shillings: Aboriginal Trust Account (1938) National Archives (Darwin) F1 38/17.


52 McGrath, above n 22, 138.


54 R K McCaffery (1953), Maintenance Payment to Dependents of Aboriginal Employees on Pastoral Properties, National Archives (Darwin) CRS F1 1953/307.

55 White, above n 15, 5.

56 Giese, above n 41, 9.

57 Ibid 10. This was enacted on 29 June 1933 under Regulation 12 of the 1918 Ordinance: M M Culnane (Department of the Interior) Aboriginal Trust Account, 4 May 1951, Memorandum No 45/1/1544, 1, National Archives (Darwin) F1 48/67.

58 Giese, above n 41, 60.

59 Winifred Wilson, Dietary Survey of Aboriginals in the Northern Territory, Commonwealth Department of Health (1952) 106.

transcript, 1962, 30) Northern Territory Archives Service NTRS 266 TS46 (Box 3).

61 Higgins, above n 20, 5.


63 Colin MacLeod, Patrol in the Dreamtime (1997).

64 C R Lambert, Employment and Payment of Aborigines in the Northern Territory, National Archives (Canberra) CRS F1 1953/307.

65 Rose, above n 19, 155.


67 Ibid 22.

68 Ibid.


71 V J White (Director of Native Affairs), Aboriginal Trust Account (Memorandum to the Acting District Officer, Alice Springs, 8 June, 1939) 3, National Archives (Darwin) F1 42/40; Aboriginal Trust Account, above n 49.

72 Mudoon (Mounted Constable and Protector, Stuart Police Station, NT), Authority to spend moneys from Trust Funds of Aboriginal Drovers – George, Silas, Willie (1) Willie (2) (Memorandum to Sergeant Lovegrove, Officer in Charge Police, Stuart, and forwarded to The Chief Protector of Aboriginals, Darwin, 2 July 1932) National Archives (Darwin) F68, A8.


74 Giese, above n 41, 12.

75 McGrath, above n 47, 42.

76 McGrath, above n 22, 139.

77 Ibid.


79 Ibid.

80 McGregor, above n 13, 520.


82 Gray, above n 73, 37.

83 d’Abbs, above n 29, 11.

84 McGregor, above n 13, 513.

85 See Gray, above n 73, 47.

86 H J Goodes (Director-General, Melbourne) Child Endowment for Aboriginal Children on Cattle Stations in the Northern Territory (Memorandum to the Minister, 17 March 1960) National Archives (Canberra) A885, B456, Part 2.

87 A S (The Director of Social Services), Proposals to change (i) the method of payment of pensions in respect of aboriginal pensioners on Settlements in Northern Territory (ii) the method of payment of child endowment to aboriginal endowees on pastoral properties in Northern Territory, Memorandum to L. L. Gillespie (Assistant NT Administrator), 20 December 1962, National Archives (Canberra) A885/5, 456 Part 2.

88 L L Gillespie (Assistant NT Administrator), Child Endowment for Aboriginal Children on Cattle Stations in the Northern Territory, (Memorandum to the Director, Department of Social Services, Adelaide, 31 October 1962) National Archives (Canberra) A885, B456 Part 2.

89 Ibid.

90 Minister for Social Services, House of Representatives Notice Paper No. 38 (Response to Question 84, 27 August 1959) National Archives (Canberra) A885/5; 456 Part 2.

91 See Rose, above n 19, 154.

92 L W Loveless (Director of Social Services), All subjects: Payment of Child Endowment in respect of Aboriginal Children (Memorandum to Director-General, Department of Social Services Melbourne, 12 March 1952) National Archives (Canberra) A885, B456 Part 2.

93 L W Loveless (Director of Social Services), NT Natives (Memorandum to Director-General, Department of Social Services, Melbourne, 24 July, 1952) National Archives (Canberra) A885, B456 Part 2.

94 See Aboriginals Ordinance 1918 (Cth) s 5(1)(f).

95 Northern Territory Welfare Ordinance 1953 (Cth).


97 See, eg, Stephenson, above n 60, 42; Report of the Aborigines Welfare Board for Year ending 30th June, 1949, 4–5, National Archives (Darwin) NTAC1976/137/0.

98 Stephenson, above n 60, 42.


100 See Higgins, above n 20, 10.

101 Ibid.


103 Stephenson, above n 60, 37–38.

104 Ibid 39.

105 Wilson, above n 59, 2.

106 See Jackie Huggins, ‘Firing on in the Mind: Aboriginal Women

107 See Rose, above n 19, 139–40.
108 Stephenson, above n 60, 30.
109 Stephenson, above n 60, 19.
110 Ibid.
111 Peter Sing and Pearl Ogden, From Humpy to Homestead: the biography of Sabu (1992) 59; Stephenson, above n 60, 30–31.
113 Bill Bunbury, It’s not the money it’s the land: Aboriginal stockmen and the equal wages case (2002) 84.
115 V G Carrington (Acting Director of Native Affairs, Native Affairs Branch, NT Administration), Report on Aboriginal Employment to the Administrator (Darwin, 10 October 1945, 1, 2) Noel Butlin Archives (Canberra) 42/12.
116 Stephenson, above n 60, 31.
117 Ibid 37.
118 M M Culnane (Department of the Interior), Aboriginal Trust Account (Memorandum No. 45/1/1544, 1, 4 May 1951) National Archives (Darwin) FI 48/67.
120 d’Abbs, above n 29, 3; Askins, above n 81, 3.
121 See Gray, above n 73, 16.
122 Ibid 18.
123 Dexter Daniels Report, 20 March 1966, Miscellaneous Workers’ Union, PAC 34, Correspondence, Box 32, NTAS, Darwin in Gray, above n 73, 18.
125 Ibid.
126 White, above n 15, Appendix 11.
127 Wages of Aboriginals and Half-Castes – Northern Territory, National Archives (Canberra) A1/15 1938/329.
128 Aboriginals Ordinance 1918 (Cth) s 5(1)(b).
129 Giese, above n 41, 60.
130 Wilson, above n 59, 5.
132 Ann McGrath, Interview with Noel and Dorothy Hall (Oral history transcript, 1978) Northern Territory Archives Service, NTRS 226, TS230 (Box 14).
135 Spencer, above n 23, 40.
136 J H Sexton, Report by a Protector of Aboriginals on his Recent Visit to Central Australia (13 June, 1930) 21, Mortlock Library Archives (Adelaide) SRG 139/1; Series 1, No. 169; Stephenson, above n 60, 37.
141 Ibid [49].
142 (2003) 212 CLR 511 (‘Lepore’).
144 Stephenson, above n 60, 37.
146 The Vestey Group leased an area of pastoral land in northern Australia that was larger than Tasmania, included the large stations of Wave Hill and Helen Springs in the Northern Territory: Knightley, above n 69, 133, 152; LF Hooker owned Victoria River Downs, Rosewood, and Legune Stations: ibid 39.
147 Stephenson, above n 60, 19.
148 The Vestey Group currently operates from England and runs a number of subsidiary companies, including an international food product business and significant cattle ranching interests in Brazil and Venezuela. Its current holdings are estimated at £650 million. Lord Sam Vestey, the current Chairman of the Vestey Group, is the great grandson of the first Lord Vestey who built the cattle empire in northern Australia. See Company Information, Angliss International <http://www.angliss-international.com/vesteygroup.htm> (10 April 2007); Classic Fine Foods


*Sharman v Evans* (1977) 138 CLR 563, 599 (Murphy J).


*Perre v Apand Pty Ltd* (1999) 198 CLR 180 (‘Perre’).


Ibid.


A R Driver, *Correspondence to the Secretary, Department of the Interior*, 6 July 1949, National Archives (Darwin) CA1070, F1 43/24.

Hasluck above n 28, 53.


(2002) 211 CLR 540 (‘Barclay Oysters’).

Stephenson, above n 60, 39.

Ibid 42.

Ibid 35–36.

Ibid 30.

Ibid 37.

Ibid.

Ibid.

Spencer, above n 23, 47.


Ibid (438).

Ibid 23.

This is a necessary requirement for a government employee to have fulfilled their duty of care: *Harrison v National Coal Board* (1951) AC 639, 688 (Lord Reid).

Carrington, above n 115, 3.


March v E & MH Stramare Pty Ltd (1991) 171 CLR 506 (‘Stramare’).

Ibid 523–25 (Deane J).

Ibid 516 (Mason CJ).

Dickson, above n 30, 26.

O’Connor v SP Bray Ltd (1937) 56 CLR 464, 478 (Dixon J).

Ibid.

Ibid, 486–87 (Evatt and McTiernan JJ).


O’Connor v SP Bray Ltd (1937) 56 CLR 464, 477 (Dixon J).

The 1918 Ordinance, the 1933 Ordinance, and the Wards’ Ordinance.


Aboriginals Ordinance 1918 (Cth) s 5(1)(f).

Aboriginals Ordinance 1918 (Cth) s 6(3).

McGregor, above n 13, 552.

Aboriginals Ordinance 1918 (Cth) s 57: ‘Any action or other proceedings against any person for the recovery of wages due to an aboriginal or half-caste, who is or has been employed by
that person, or for the breach of an agreement made with an aboriginal or half-caste, may be instituted and carried on by, or in the name of, any Protector authorised in that behalf by the Administrator'.

198 Aboriginals Ordinance 1918 (Cth) s 24(1); Wards' Employment Ordinance 1960 (Cth).

199 Cubillo v Commonwealth (2000) 174 ALR 97 ("Cubillo").


203 See, eg, Acting Director of Native Affairs, Carrington’s refusal to accept that the treatment of Indigenous workers was so inconsistent with the requirements of the 1933 Ordinance as to warrant cancellation of a licence, despite acknowledging that accommodation and sanitary provisions did not meet the requirements under the Regulations: Carrington, above n 115, 2–3.

204 The Federal Court under s 39B of the Judiciary Act 1903 (Cth) has original jurisdiction with respect to any matter in which mandamus is sought against Commonwealth officers.

205 R v Blakeley; Ex parte Association of Architects, Engineers, Surveyors & Draughtsmen of Australia (1950) 82 CLR 54.

206 Re Williams and Town of Brampton (1908) 17 OLR 398.

207 See Deputy Commissioner of Taxation v Ganke [1975] 1 NSWLR 252; Re O'Reilly; Ex parte Australena Investments Pty Ltd (1983) 58 ALJR 36.


210 Ibid [1284].

211 Ibid.


213 Ibid 60 (Brennan J); 228 (Deane J); 203 (Toohey J).

214 Nor was such a breach found in Kruger v Commonwealth (1997) 190 CLR 1.


217 R Marsh (1954), Maintenance of Aboriginal Dependents on Pastoral Leases (Memorandum to the Minister, No 51/1634, 12 May 1954, 1) at National Archives (Canberra) A452/54, 1955/303.


221 Mudalier, above n 2, [5]; Rosalind Kidd, Trustees on Trial (2006), 45.

222 A constructive trust is imposed by law where it would be unconscionable for a person to deny another’s equitable claim and irrespective of the intention of the parties: Muschinski v Dodds (1985) 160 CLR 583, 620.


225 Slavery Convention, opened for signature 25 September 1926 LNTS 60 (entered into force 9 March 1927). Although not ratified by Australia until 1953, the Convention prohibited slavery conditions and the owning and trading of people under Art 1.


227 Convention concerning the Creation of Minimum Wage-Fixing Machinery, ILC No. 26 (entered into force 14 June 1930).

228 GA Res 217A(III) (10 December 1948).


229 Ibid 323.

of labour discipline, punishment, workforce mobilisation for economic development, and racial discrimination: Art 1(a)–(e).

Forced Labour Convention arts 1 and 4(2).

Forced Labour Convention art 2(2).

Forced Labour Convention art 4(1).

Forced Labour Convention art 14(5).

Forced Labour Convention art 15(1).

Forced Labour Convention art 16(2).

This includes the 2005 successful ACTU complaint to the ILO that the Building and Construction Industry Improvement Act 2005 (Cth) breaches ILO Conventions on union rights to freely associate and collectively bargain. See Chris White, ‘Workchoices: removing the choice to strike’ (2005) 56 Journal of Australian Political Economy 66, 67–68.


Trail Smelter Arbitration (United States of America v Canada) (1939) 33 AJIL 182.


Neer Claim (USA v Mexico) (1926) 21 American Journal of International Law 555. See also ILC Draft Articles, above n 243, art 39.

Youmans v Mexico 21 AJIL 571 (1927); ILC Draft Articles, above n 243, art 7.

Elettronica Sicula SpA (ELS) (Unites States of America v Italy) (1989) IJC Rep 15, 42 [50].


264 Andrew West, "$500m in Wages Stolen: Aborigines say compo offers are not enough’, Sun Herald (Sydney) 11 January 2004, 25.

265 Ibid.


268 Ibid.

269 Ibid.


271 Zoe Craven, Fact Sheet: ‘Stolen Wages’ and Entitlements: Aboriginal Trust Funds in New South Wales, Indigenous Law Centre (Faculty of Law, UNSW), August 2004, 4. This criticism is set apart from the unequivocal support of the NSW Scheme by the Senate Inquiry, as reflected in its recommendations that other states and territories model their schemes on NSW compensation scheme: above n 8, Recommendations 4 [8.26(a)(ii)] and 5 [8.27(c)].


275 Kidd, above n 221, 45.

276 Teo, above n 272, 13.


278 Sean Brennan and Zoe Craven, ‘Eventually they get it all…’


281 Standing Committee on Legal and Constitutional Affairs, above n 8, [8.27].