AUSTRALIANS FOR NATIVE TITLE AND RECONCILIATION (ANTaR) N.S.W. Inc.

The Secretary
Aboriginal Trust Fund Reparation Scheme
Locked Bag 29
Ashfield NSW 1800

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ANTaR NSW SUBMISSION TO ABORIGINAL TRUST FUNDS REPARATION SCHEME PANEL

Australians for Native Title and Reconciliation Inc (New South Wales), ANTaR NSW, offers the following submission to the Aboriginal Trust Funds Reparation Scheme Panel.

ANTaR NSW is an incorporated not-for-profit association of mainly non-Indigenous organisations and individuals working in support of justice for Aboriginal and Torres Strait Islander peoples in Australia. It is part of a federated national ANTaR network. ANTaR's purpose is to support Aboriginal and Torres Strait Islander people speaking for themselves, rather than to speak for them, by working to create space for the recognition and acceptance of Aboriginal and Torres Strait Islander agendas in rights, health, education, employment, and culture, and by campaigning and educating Australians on the need to understand, respect, and accept Aboriginal and Torres Strait Islander peoples' aspirations and goals in these areas.

This submission covers the following topics:

- Background to the issue, and the NSW Government's initial response.
- The work of the panel so far.
- Time-frames for the Panel's Report, consultation with the Aboriginal and Torres Strait Islander community, and determination of a resolution mechanism.
- Towards resolution - principles for just settlement

BACKGROUND TO THE ISSUE, AND THE GOVERNMENT'S INITIAL RESPONSE

Aboriginal people have campaigned for many years about the withholding by the State Government and its agents, through much of the 20th century, of wages and benefits owed to individual Aboriginal people, and the denial of access to, or apparent disappearance of, many of the official records through which they should normally, like any other citizens, be able to determine their claims and the basis for them. The issue has gained wider public attention in 2004.

The Premier's apology on 11 March 2004, Minister Tebbutt's statement in Parliament the same day and the commitments made in their joint media conference on 5 May 2004 represent an excellent start in addressing the past taking of people's money. ANTaR congratulates the Government in particular on the following elements of the Government's initial response, which recognise some cardinal principles of justice and procedural fairness in this situation:

- For decades Aboriginal people were forced to pay their legal entitlements into government-controlled trust accounts;
- In many cases that money was never returned to its rightful owners or their heirs;
- The actions of government in this respect were wrong and cannot be defended;
- Record keeping by the government has been poor;
- As far as the Carr Government is concerned, the categories of people affected is not necessarily confined to the four nominated by the Premier in Parliament;
- Criteria for identifying those entitled to repayment and a mechanism of repayment should be determined on the basis of wide consultation with potential claimants;
- There should be no capping or arbitrary limit on individual repayments;
- While non-adversarial resolution is preferred, the Government will not limit the right of people to go to court in pursuing their cases;
- The Government will do all it can to help find evidence to support claimants' cases;
- The Government seeks recommendations from its panel about assumptions to be made in favour of prima facie claimants in cases where the documentary evidence is insufficient and/or where oral evidence is available;
- Pressing claims will be settled as soon as possible by the panel, even before other criteria and issues are clarified;
- Where records can be assembled, government will assume responsibility for finding and informing potential claimants;
- The panel and the resulting scheme will be the vehicles for ensuring a just resolution, discharge of government debts, and that this requires an distinct, specialised and efficient apparatus;
- The money will be returned to claimants with interest;

- The Government does not want any injustices to persist out of this issue.

THE WORK OF THE PANEL SO FAR

ANTaR NSW appreciates the scale and difficulty of the task before the panel and recognises that its appointment is an historic opportunity to rectify a terrible wrong done to so many Aboriginal people in NSW. In a spirit of seeking to ensure that full advantage is taken of this opportunity, we would like to bring to the attention of the panel some concerns that have been raised with us by individuals and organisations, concerning the panel's call for community comment and public meetings held to date.

These concerns relate to establishing confidence in the government's and the panel's processes. Establishing trust in the present process must be slow, careful, and deserved. As we are sure the panel is aware, without that trust and confidence it will not be possible for the panel able to adequately canvass the views of Aboriginal communities and potential claimants. We understand attendances at some panel hearings have been very small relative to the likely numbers of potential claimants in those areas. It has been suggested to us that if there is reticence on the part of some Aboriginal families and individuals to date, the causes need to be examined and borne in mind as the panel continues its work, and that the background to this apparent reticence lies at least partly in these concerns.

The concerns registered with us are:

- that the panel has only limited resources available to it
- that its October reporting deadline is too restrictive
- that its processes need to be carried out in a fully-supported, culturally safe manner
- that the placement of the ATFRS unit in DoCS is perceived by some as problematic, given that the department and its predecessors has been the vehicle for much bad Government policy in the past directly affecting the lives of families and individuals
- that while an open-ended beginning to consultation may have merit, without more definition *at some point* in the consultation process, it will be difficult for people to give an informed opinion on the appropriate repayment scheme.

STRATEGIES SUGGESTED REGARDING TIME-FRAMES FOR THE PANEL'S REPORT, CONSULTATION WITH THE ABORIGINAL

COMMUNITY, AND DETERMINATION OF A RESOLUTION MECHANISM

Having canvassed the views of a number of individuals and organisations, we would like to put forward the following strategies to address these concerns:

1. We call for an extension, by at least one or two months, of the panel's reporting deadline and of the closing date for submissions to the panel.

2. That the panel strongly recommend to the Government that there be a "second stage" of more informed and targeted consultation, primarily with the Aboriginal community, in the first half of 2005, to provide Government with the best options for a final assessment and payment scheme. It would be a wasted opportunity for NSW if the eventual scheme, through poor and hasty design or lack of consultation, encourages litigation or fails in gaining the respect and cooperation of claimants. This would prevent realisation of the Premier's commitment to fair and thorough investigation and restitution.

This process of thorough consultation should not preclude the urgent determination, in consultation with representative and specialist Aboriginal organisations, of "fast-track" procedures, for the surviving primary (direct) claimants to obtain legal and financial advice and to lodge claims, have them assessed, and receive restitution of monies owed to them, without prejudice to fuller consideration of their claims when the whole process is established. These claimants are mostly now elderly.

ANTaR strongly urges closer consultation by Government and the ATFRS panel (or its successor), during this second stage, with organisations that have been closely involved in tracing community and family linkages and in providing support and advice for individuals affected by past Government policies, for example in relation to residency restrictions and forced family break up. These organisations include *Link-Up*, and the *NSW Sorry Day Committee*. To the extent wages issues arise it would seem appropriate that liasion also take place with the Aboriginal & Torres Strait Islander Committee of the Labor Council.

TOWARDS RESOLUTION - PRINCIPLES FOR JUST SETTLEMENT

We have discussed with other organisations the principles which should underpin a just solution to these issues and we would particularly like to acknowledge the work of the Public Interest Advocacy Centre and Link-Up for their ideas and their work in this area. We submit that the following principles and procedures should be included in the Panel's report and adopted in the proposed scheme:

Successful non-adversarial resolution of this issue is in the interests of all people of the State. Success in this would be an enormous and historic step by New South Wales towards Aboriginal reconciliation and towards the removal of a large and growing financial debt on the State. The failure in fiduciary duty by past Governments is very clear, and leaves the State wide open to an indefinite process of litigation unless a transparent and fair process, acceptable to the Aboriginal claimants, can be established. The Government's good initial response to the issue takes us in that direction. Successful resolution of this issue in NSW would set a new and much-needed national benchmark for good government practice in resolving the "unfinished business" of Reconciliation. It would greatly assist the Reconciliation process nationally, and on other State-level issues.

The further development of the restitution arrangements should involve continuing liaison with representative Aboriginal bodies, and the adoption of culturally and socio-economically appropriate forms of communication. It will take time to establish a process for the hearing and determination of claims that is acceptable to Aboriginal people. The avenues used for community consultation and provision of information are also crucial – referring older people to phone numbers with their perceived connection to DoCS, or websites as primary or only sources of information, as has happened during the initial phase of the panel's work, is unlikely to constitute successful communication.

Monies withheld by the government, its agents, and employers answering to its regulations, are the rightful property of those individuals entitled to them at the time. The proposed scheme for determining and making payments is restitutional, not compensatory. Monies owed are debts, not benefits or ex gratia payments. Nor is this a case of Aboriginal people claiming "taxpayer's money". *They are claiming their own money*. The language of Government, its departments, and of the parliament should reflect and respect this fact and this should be conveyed clearly to the general public.

The Government should establish a clear and explicit "whole of government" approach, in which all relevant departments and agencies are required to facilitate information flow, the location and translation of records, provision of advice to potential claimants, and coordination of agency efforts to meet the Government's commitment to fair process. The key agencies include Treasury, DOCS, State Records, Department of Aboriginal Affairs. Federally, this should include agencies concerned with taxation, pensions, and benefits past and present.

A clear principle must be established that the onus of proof is on the government to disprove claims. The Government of the day arrogated to itself the right to withhold monies and maintain and dispose of its own records with little or no accountability and right of access by claimants. It would be fundamentally unjust to place an onus of proof of claim on claimants, beyond establishing identity and their prima facie eligibility to wages and benefits at the time.

The onus of investigation and disclosure is also on the Government. The scheme administration, or a parallel but independent body, must be charged with active investigation of records, at the request of claimants and pro-actively, to determine likely debts owed, location of records, and location and identity of individuals and their

beneficiaries. The body charged with this role must be adequately resourced, and must closely engage with Aboriginal organisations for advice on issues of cultural communication and privacy.

Payments should be tax-free and based on calculations of pre-tax amounts owing at the time the debt was incurred. Payments of debt should not compromise the ability of successful claimants to receive other, unconnected present-day entitlements, and should not be subject to any means test. The Government has a moral, and probably a legal, obligation to ensure that successful claims under the scheme do not incur a punitive effect on claimants in relation to thresholds for tax payments or any benefits to which they are currently entitled, including medical benefits. Active management by the State Government is required to ensure this principle is accepted by the Commonwealth Government for areas under its control (e.g. taxation, welfare), including both a general mode of payment, and individual structuring of payments, to ensure no loss or disadvantage.

Payments should be made at fair value, with an independent agent calculating conversion to modern equivalents with due allowance for inflation and interest.

In the absence of specific records, payments should be made at the maximum probable level of their applicability at the time. The Government and the scheme administration should resist the temptation to cut costs by calculating debts only at the bottom end of applicable scales.

There should be no arbitrary cap on total amount of payments to be made. Any form of cap would be contrary to the restitutional nature of the payment scheme.

Priority should be given to a fast-track scheme for surviving claimants. As recognised by the Premier, many original claimants are well beyond average life expectancy. A prolonged process for these surviving direct claimants would deny natural justice. A fast-track process may perhaps involve provisional determinations and part-payments of debts owed, as long as this does not compromise the claimants' (or their heirs') rights and ability to pursue full claims. It should also involve the urgent provision of impartial advice on the drafting of wills, maintenance of personal records, and setting down of personal histories.

Provision and resourcing should be made by Government for truly independent legal and financial advice and counselling for claimants, during preparation of claims and in determining their preferred disposal of funds (e.g. preparation of wills, investments, etc). These services should be funded and administered by an entirely separate arm of government from that which administers the payment determination scheme. Government should facilitate the difficult dovetailing of probate law with the needs of individuals and families, for example in determining beneficiary status for the purpose of original (direct) claimants making claims or wills, or for relatives attempting to determine possible eligibility and shared-benefit entitlements where direct creditors are deceased. Independent advisors, credible to both Government and the Aboriginal community, should be engaged for such a facilitation role.

Where funds owned by individuals and held in trust by the Government were invested in real assets that were subsequently sold by Government, there is a strong argument that a share in the benefits of such sales should accrue to claimants. We recommend a fair and open investigation of the equity issues involved in such situations.

Funds expended by the Aboriginal Protection Board and similar government bodies in petty items (blankets, household goods) should not be counted against the value of wages and benefits withheld. It is our understanding that there is a clear legislative basis to demonstrate that such items remained the property of the government and hence were never received in a property sense by the supposed beneficiaries.

Provision should be made for family and personal counselling for claimants and their families, both during the awareness and contact process, and later where the filing of rightful claims, or their determination, or the consequences of payment, cause distress to individuals and families. Government needs to recognise that the issue of withheld wages and benefits is closely entwined with that of forced removal of children, separation of families, and abuses arising from official forced and indentured labour schemes. Determining beneficiary status and entitlements among heirs and relatives may be an extremely distressing process in some cases. The Panel and the Government need to consult closely with organisations dealing directly with affected individuals and families on these issues, including Link-Up and the Sorry Day Committee networks.

Provision should be made for claimants and their immediate heirs to be able to tell their personal stories. As recommended in the '*Bringing Them Home' Report*, truth-telling and its acknowledgment is recognised internationally as an important primary step in the process of restitution. For the Reconciliation process, the placing of historical truth and personal life experiences on record is essential to establishing mutual respect, and acceptance of administrative process. Establishment of a culturally safe forum for this purpose, with due recognition by government and non-Aboriginal society, is necessary to establish the basis of trust from which the whole "stolen wages" episode may become 'finished' business.

Provision should be made for the establishment of a holding trust fund for unclaimed monies, being funds that are determined by the scheme (or any independent investigatory body) as likely to be owed, but for which direct creditors and their heirs cannot be traced. Given the likelihood of a slow uptake by "tail-end" claimants, these funds should be held in trust for a fixed and lengthy period, with any proposal to use these funds at the expiry of the fixed period subject to the decision-making authority of appropriate Aboriginal community representatives.

A compensatory element should be added to payments, notwithstanding the basic restitutional principle, in recognition of the lost opportunity costs incurred by those denied their money at the time. Those denied their own funds by the government and its agents were among those least able to do without them. Present levels of disadvantage owe something to the denial of these funds in past decades.

Consideration should be given, and Aboriginal views sought, on the administrative location of the investigatory and assessment body (or bodies) established under the eventual scheme. Placement in DoCS may be logical from a Governmental point of view, but DoCS comes to the process with considerable historical baggage that may have an adverse impact on its ability to be seen as impartial. This may affect the ability of the scheme to attract the trust that it needs from claimants to ensure a non-adversarial climate for resolution of claims.

Consideration should be given to administrative separation of the initial investigative role (location of records, initial advice to potential claimants, liaison with the Aboriginal communities), from the actual assessment and determination process. There may be significant problems of perception, and real conflicts in the priorities of government staff implementing the program, if these roles are conflated.

We urge the panel to include in its recommendations provision for State agencies to pursue, and to assist claimants to pursue, basic information to aid in the identification of other forms of entitlement that may have been withheld. Monies and entitlements owed may not be limited to just State-administered benefits and wages, nor to the 'trust account era', the period 1900 to 1969. Entitlements withheld may also not always have been of a purely monetary nature, but may include compensation for assets. While the State Government may not be able to assume responsibility for private sector or Commonwealth maladministration, misappropriation, or discriminatory practices, it should in fairness assist its citizens to determine their rights in such cases.

In developing this submission we have been pleased to note the anticipation of several of these principles, and the stated need for careful consultation and detail in the eventual scheme, in the Premier's statements establishing the panel, and in the literature published by the panel itself. We nevertheless urge that they be made explicit in the panel's report and recommendations, and in the next stage of the process. A desire by the Government for a reasonably rapid investigation cycle leading to a prompt beginning for restitution payments is understandable and commendable, but ensuring good process will multiply the benefits of the whole scheme.

Thank you for the opportunity to make this submission. Please contact us if clarification of any part of this submission is needed. ANTaR NSW is keen to help the panel and Government achieve good process and a just resolution of these issues.

Yours sincerely,

Bob Makinson
Secretary, NSW ANTaR Inc.

NSW ANTaR contact people for this issue:
Claire Colyer (President): 0419 239 219, clairecolyer@bigpond.com
Sally Fitzpatrick (Vice-President): 02 9564 2935, sfjw@iprimus.com.au
Janene Collins (Office Manager): 02 9555 6138, janene@antar.org.au