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Law

Castan Centre for Human Rights Law

24 July 2006

Committee Secretary
Senate Legal and Constitutional Affairs References Committee
PO Box 6100
Parliament House
Canberra Vic 2600

Re: “Inquiry into Stolen Wages”

Dear Sir/Madam,

Please find attached a submission to the “Inquiry into Stolen Wages”, public submissions to which were invited on 13 June and due on 28 July 2006. The submission addresses the Inquiry in relation to Indigenous workers employed in the Northern Territory.

The bulk of the submission addresses paragraphs (a), (b) and (c) of the Terms of Reference. It does this through a historical analysis of legislation controlling the labour of Indigenous workers in the Northern Territory, including so-called ‘protective’ measures designed to safeguard these workers from physical, sexual and employment abuses. It notes the sections of the legislation under which trust funds were established, and the degree of legislative control and supervision of such funds. It refers to past allegations of fraud and abuse, and the limited extent to which governments investigated such allegations.

More generally, however, the submission addresses itself to paragraph (i) of the Terms of Reference, which invites discussion of:

“whether there is a need to 'set the record straight' through a national forum to publicly air the complexity and the consequences of mandatory controls over Indigenous labour and finances during most of the 20th century.”

This submission argues that there should, indeed, be a national forum to air the complexity and consequences of mandatory controls over Indigenous labour and finances. However, such a national forum should not be limited to the consequences of mandatory controls over *paid* Indigenous labour. Indeed, arguably the most significant corollary of mandatory control over Indigenous labour in the Northern Territory is that much of it was *unpaid*.

As the submission points out, from the beginning of the 20th century legislation in the Northern Territory authorised or condoned the widespread practice of not paying Indigenous workers in the pastoral industry and elsewhere. It expressly authorised this by allowing workers to be classified as ‘temporary’ rather than permanent; and by allowing employers to pay wages ‘in kind’ (in the form of rations) to an employee or his/her dependants. Later it authorised non-payment by allowing employees to be classified *en masse* as ‘slow, aged or infirm’ and therefore not eligible even for the wage prescribed under the *Wards’ Employment Ordinance*. Alternatively, it implicitly condoned non-payment of wages by allowing employers to classify workers as ‘dependants’ rather than employees.

This submission addresses the issue of unpaid Indigenous labour by considering whether such unpaid labour should be regarded as ‘slavery’. This is not an attempt to be provocative. Rather it is an argument that the term should play a legitimate part in any national debate on the issue. Indeed, it has played a prominent role in such debate in the past. The submission notes that ‘slavery’ did not merely become a criminal offence when the Commonwealth enacted new laws on the issue in 1999. It has been an offence in British, and Australian, law since at least 1824, and at international law since at least 1926. It is legally arguable that some Northern Territory employment practices would have infringed anti-slavery laws, even where they were legislatively authorised or condoned.

While the Inquiry’s Terms of Reference are admirably far-reaching, this submission argues that they might more clearly include the ‘complexity and consequences’ of non-payment of Indigenous wages. An attempt to trace misappropriated money is only likely to identify a limited proportion of money paid into trust funds or accounts over the previous hundred years. In any case an exclusive focus upon this issue does not fully address the broader Indigenous sense of grievance at having been underpaid or unpaid. While *under*-payment was usually legislatively authorised, at least prior to 1975, the complete non-payment of wages was less clearly legal, particularly in the light of anti-slavery laws.

Nevertheless, I submit, a discussion of unpaid Indigenous labour and the ‘slavery’ question does fall within the Terms of Reference, paragraph (i), since it is one of the consequences of “mandatory control over Indigenous labour and finances”.

Please contact me should you require any further information or clarification.

Yours sincerely,

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Submission regarding the Inquiry into Stolen Wages by the Senate Legal and Constitutional Affairs References Committee prepared by Stephen Gray, Lecturer in Law, on behalf of the Castan Centre for Human Rights Law.

“Stolen Wages” and Aboriginal labour in the Northern Territory

In 1999, following a report by the Model Criminal Code Officers’ Committee, the Commonwealth Parliament enacted new laws relating to slavery and sexual servitude.¹ In June 2006, amidst wide publicity, the first person was convicted pursuant to these new laws.² At the same time, although attended by considerably less publicity, the Senate Legal and Constitutional References Committee has begun its “Inquiry into Stolen Wages”, with submissions due by 28 July and a report due to the Senate on 7 December 2006. The terms of reference to the Inquiry, however, make no reference to the notion of slavery. Arguably, by referring to “paid Aboriginal labour”, they seem to preclude it.³ Nor, as far as I am aware, has the emotive term “slavery” been used in the public debate preceding the Inquiry. It is, indeed, a sleeper, an elephant in the drawing-room of civilised debate.

This submission argues firstly that the label “slavery” is more relevant to an Inquiry into Stolen Wages than may be first thought. Government officials amongst others regularly applied the term to discussions of Aboriginal labour in the Northern Territory and elsewhere until the 1970s, when it unaccountably dropped from sight. Secondly, I wish to survey the historical and legal position of Aboriginal workers whose entitlements may have been withheld by the Northern Territory Administration in its various forms.⁴ The purpose of such a ‘case study’ is to consider whether Aboriginal people outside Queensland and New South Wales may have similar claims to those within those jurisdictions, where extensive research and political and legal developments have already occurred. Thirdly, the submission will consider the possibilities for legal redress in the event that the Senate Inquiry does not lead to a satisfactory political settlement for Indigenous claims.

Whether redress ultimately occurs through political or legal means, the notion of slavery must be recognised, its presence acknowledged as part of the debate. Otherwise, this

¹ See the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999*, introducing a new s.270(3)(1)(a) into the *Criminal Code (Commonwealth) 1995*. See also Model Criminal Code Officers’ Committee of the Standing Committee of Attorneys-General, *Model Criminal Code Chapter 9, Offences Against Humanity: Slavery*, (“Slavery”), November 1998.

² See *R v Wei Tang* [2006] VCC 637 (McInerney J, Melbourne, 9 June 2006).

³ The terms of reference refer to “Indigenous workers whose paid labour was controlled by government.”

⁴ The Northern Territory was under South Australian administration from 1863 until 1911, when it was taken over by the Commonwealth. It achieved its current form of self-government in 1978.

submission will argue, the ‘great Australian silence’ surrounding the truth of Aboriginal dispossession – a silence pilloried by anthropologists and historians since the 1960s⁵ and once thought to have disappeared from debate – will once again be allowed to prevail. This will be to the detriment of any prospect of lasting resolution of this least-recognised of the great running sores of Aboriginal-European relations in Australia.

1. Slavery and the Aboriginal labour debate

The term ‘slavery’ carries a social stigma equalled by few other terms in debate about Aboriginal issues. While popular understanding of its meaning has varied over time, its association with the African slave trade has contributed greatly to its “long held strongly emotive and moral associations.” Arguably, like the term ‘genocide’ – a term whose use and misuse has helped fuel a backlash against Aboriginal people during the so-called ‘culture wars’⁶ – the term ‘slavery’ has come to be, “above all else, a marker or register of excess”.⁷ Like ‘genocide’, the term ‘slavery’ is dangerous, and to be handled with care. Nevertheless, according to Raymond Evans, the term ‘Aboriginal slavery’ “may be applied not simply as a loosely analogous term of opprobrium, but as one which may be defended with academic precision and rigour”.⁸

Slavery was outlawed in the British Empire, including Australia, by 1833.⁹ From the 1860s, religious and humanitarian bodies began to invoke “charges of chattel bondage and slavery” to describe aspects of north Australian conditions for Aboriginal labour.¹⁰ While initially such charges were confined to Melanesian indenture or the ‘Kanaka traffic’, this changed in 1891 when a ‘Slave Map of Modern Australia’ was printed in the September-October edition of the British *Anti-Slavery Reporter*.¹¹ This map, reprinted from the English journalist Arthur Vogan’s account of frontier relations in Queensland, showed most of central and north Queensland, the Northern Territory and coastal Western Australia as areas where “the traffic in Aboriginal labour, both children and adults, had descended into slavery conditions.”¹² Following from the controversy over

⁵ The anthropologist W.E.H Stanner first rebuked historians for perpetuating the ‘great Australian silence’ about these issues in his 1968 Boyer Lectures.

⁶ See, for a recent discussion of the use of the term ‘genocide’, Bain Attwood, *Telling the Truth About Aboriginal History*, Allen & Unwin, 2005, especially Chapter 4.

⁷ Bain Attwood, *ibid*, p.88.

⁸ Raymond Evans, “Kings in Brass Crescents: Defining Aboriginal Labour Patterns in Colonial Queensland”, in Kay Saunders (ed), *Indentured Labour in the British Empire, 1834-1920*, Croom Helm, London, 1984, p.203.

⁹ The legislative process leading to the abolition of slavery in the British Empire began in 1807, with “An Act for the Abolition of the Slave Trade” (47 Geo III, sess 1, c 36), followed by other Acts of the UK Parliament in 1824, 1833 and 1843. The UK also entered into various anti-slavery treaties during this period. The *Slave Trade Act* 1873 represented a culmination and consolidation of these enactments: see generally Model Criminal Code Officers’ Committee, *Model Criminal Code, Chapter 9*, cited above, pp.1-2.

¹⁰ Alison Holland, “Feminism, Colonialism and Aboriginal Workers: An Anti-Slavery Crusade”, “Aboriginal Workers”, (1995) 69 *Labour History* 52.

¹¹ See discussion, and a reproduction of the ‘Slave Map’, in Alison Holland, *ibid*, pp.52-3.

¹² Alison Holland, *ibid*, p.52, and see also Tony Austin, *Simply the Survival of the Fittest: Aboriginal Administration in South Australia’s Northern Territory 1863-1910*, Historical Society of the Northern Territory, Darwin, 1992, p.42.

the actions of the Queensland Native Mounted Police, it “represented colonial race relations as rampant cruelty, slavery and extermination.”¹³

From this time until the 1960s the charge of slavery was regularly invoked by certain ‘crusading’ journalists and human rights activists, including missionaries and unionists, in the context of Aboriginal labour. Sometimes the term used was ‘slavery’ itself; sometimes it was ‘conditions akin to slavery’, or ‘serfdom’. Alison Holland has written of the work of the “first-wave” feminist reformer Mary Montgomerie Bennett (1881-1961), who argued during the 1920s and 1930s that Australia’s treatment of Aboriginal people was in breach of the Slavery Convention adopted by the League of Nations (and by Australia) in 1926.¹⁴ Bennett argued that the condition of slavery as defined by Sir Isaac Isaacs¹⁵ “exactly described the position of ‘our’ native and half-caste people.” At the same time she argued that Aboriginal labour was ‘forced labour’ within the definition in the Forced Labour Convention, that is “work or service exacted from any person under the threat of any penalty and for which the said person has not offered himself voluntarily.” This imprecision of terminology arguably diminished the effectiveness of her work, although Alison Holland argues that the difference between Bennett and nineteenth-century reformers was “that in the context of international politics, the issue of slavery had been revitalised and redefined.”¹⁶

Bennett and other ‘first-wave’ feminists including Bessie Rischbieth, Constance Cooke and Jessie Street were all members of the Australian branch of the Anti-Slavery and Aborigines Protection Society, a body formed in Britain in 1909 and whose very title “enabled a conflation of the issues of slavery and Aboriginal protection.”¹⁷ In 1943, in a speech to the Society, she characterised the value of “aboriginal slave labour” in Western Australia as not less than 60,000 pounds a year, and criticised the trust account system “as a policy open to fraud and grave abuse.”¹⁸ Missionaries, including the Australian Board of Missions and Aboriginal Friends Association also used the terms ‘chattels’ and ‘slaves’ to describe Aboriginal pastoral workers.¹⁹

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From 1944 to 1946, the anthropologists R M and C H Berndt were conducting their survey of Aboriginal labour on Northern Territory cattle stations. Initially the report was suppressed, but it was eventually published in 1987 as *End of an Era: Aboriginal Labour in the Northern Territory*.²⁰ The Berndts were wary of applying the emotive label of slavery to their findings, particularly given that their report had initially been

¹³ Alison Holland, *ibid*, p.52.

¹⁴ See 1926 International Convention to Suppress the Slave Trade and Slavery, referred to in Model Criminal Code Officers’ Committee, “Slavery”, cited above, p.4. The 1926 Convention defined “slavery” as “the status and condition of a person over whom an or all of the powers attaching to the rights of ownership are exercised” (Art 1). It distinguished between slavery and forced labour, which was “considered to be analogous to slavery but not as heinous as it” (“Slavery”, p.5).

¹⁵ Sir Isaac Isaacs’s definition of slavery was that it was “the deprivation of all kinds of property, including a man’s property in himself”: see Alison Holland, cited above, p.56.

¹⁶ Holland, *ibid*, p.61.

¹⁷ Holland, *ibid*, p.55.

¹⁸ Holland, *ibid*, p.60.

¹⁹ Ann McGrath, “Modern Stone-Age Slavery”, cited above, p.41.

²⁰ Australian Institute of Aboriginal Studies, 1987.

commissioned by the Australian Investment Agency (Vestey's) themselves. However, they commented that Aborigines:

“owned neither the huts in which they lived nor the land on which these were built, they had no rights of tenure, and in some cases have been sold or transferred with the property. Their security depended on the new land-holders – a precarious security at times and in places where there were few, if any, checks or curbs on the treatment accorded these people who had, for a long period, no effective rights at law”²¹

The influential anthropologist Professor A P Elkin commented, on reading the report, that “it might not be slavery, but is a form certainly approaching that institution.”²²

Since the 1920s, unionists had also used the rhetoric of slavery to describe the conditions of Aboriginal workers. In 1932, the North Australian Workers' Union (NAWU) characterised Aborigines as ‘slaves without the advantage of slavery’. Unionist Owen Rowe argued that:

“A slave owner would not allow his slave to be decimated by preventable disease and starvation the same as these people are in the country or bush. If there is no slavery in the British Empire then the NT is not part of the British Empire; for it certainly exists here in its worst form.”²³

Such arguments were not disinterested advocacy for the improvement of Aboriginal conditions. Rather they were a means of distinguishing the situation of Aboriginal workers (who at this time were not unionists and whom the unions made no effort to recruit) from that of the white workers who were their real constituency. In 1927, Owen Rowe organised a boycott of two hotels which had employed Aboriginal labour “and got an agreement with the hoteliers not to employ Aboriginal workers.”²⁴ In 1928, he stated that the unions “were not objecting to the abo. (sic) on the ground of color, but on economic grounds, as the black slave was competing with the unskilled white worker.”²⁵

After World War II, however, the NAWU changed its position, with Aboriginal workers and unionists working together to improve Aboriginal conditions and have the invidious *Aboriginals Ordinance* repealed. It continued to characterize Aboriginal wages under the Ordinance as “slave rates.”²⁶

²¹ *End of an Era*, *ibid*, pp.272-3

²² Elkin to Berndt, 30 July 1946, quoted in *End of an Era*, *ibid*, 256-8.

²³ ‘Aboriginal Employment and Conditions in the Northern Territory’, Owen Rowe, North Australian Workers Union, 16 March 1932, in ANU Archives of Business and Labour (Butlin Archives), ACTU Correspondence, 1-5, quoted in Ann McGrath, “Modern Stone-Age Slavery: Images of Aboriginal Labour and Sexuality”, cited above, p.41.

²⁴ *Northern Standard*, 9 December 1927, quoted in Bernie Brian, *The Northern Territory's One Big Union: The Rise and Fall of the North Australian Workers' Union 1911-1972*, Unpublished PhD thesis, Northern Territory University, 2001, p.110.

²⁵ *Northern Standard*, 13 April 1928, quoted in Bernie Brian, *ibid*, p.111. For discussion of the position of the unions during this period, see also Ann McGrath, “Modern Stone-Age Slavery”, cited above, pp.40-2.

²⁶ *Northern Standard*, 22 July, 4 November 1949, quoted in Bernie Brian, *One Big Union*, p.219.

Even after the repeal of the *Aboriginals Ordinance* the term ‘slavery’ was still used of the conditions of Aboriginal workers in the Northern Territory, particularly those in the pastoral industry. In 1958, when the well-known artist Albert Namatjira was convicted of supplying liquor to a ward, the Aborigines Advancement League briefed Melbourne barrister to appear before the Northern Territory Supreme Court on his appeal. Ashkanasy argued that the *Welfare Ordinance* was unconstitutional as not being for the ‘peace, order and good government’ of the Northern Territory under the *Northern Territory (Administration) Act*. He gave as an example of a law outside the Territory’s constitutional power “a law for the enslavement of part of the population of the Northern Territory.”²⁷ The reference to the *Aboriginals Ordinance* – or indeed to the *Welfare Ordinance* itself – can scarcely have been unintended.²⁸

In the 1960s the economist and lawyer Frank Stevens, who carried out extensive first-hand research on Northern Territory cattle stations between 1965 and 1967, characterised the relations between cattlemen and Aborigines as “the Territory form of peonage.”²⁹ ‘Peonage’ is legally defined as compulsory labour in payment of a debt.³⁰ John Kelly, who had researched Vestey and Bovril-owned cattle stations in Northern Australia for many years, also wrote in 1966 that Vestey’s had “gained immensely from Aboriginal slave labour. It is very heavily in debt to the Aboriginal, as well as other Australians.”³¹

One might expect that officialdom – particularly representatives of the Northern Territory Administration, and the responsible Commonwealth Ministers – would have strongly rejected the use of the term ‘slavery’ in the Aboriginal labour debate. Thus, for example, Dr Cecil Cook, the Chief Protector of Aborigines from 1927 to 1939, was opposed to cash wages for Aboriginal workers in the pastoral industry. Cook argued that cash was “the greatest single factor in the degradation of the native brought into contact with white civilisation.”³² He even argued that displaced, nomadic Aborigines could be used as cheap labour in otherwise unprofitable plantation industries such as the “cultivation of cotton, sisal hemp, and coconuts for copra production.”³³ According to Ann McGrath,

²⁷ See *Northern Territory of Australia in the Supreme Court No. 194 of 1958*, p.9, and discussion in Julie Wells, *The Long March: Assimilation Policy and Practice in Darwin, the Northern Territory 1939-1967*, unpublished PhD thesis, University of Queensland, 1995, p.117.

²⁸ Kriewaldt J, however, considered that protection against slavery did not rest on the provisions of the phrase “peace, order and good government”, but on the fact that the Northern Territory was a “civilised community”: see *Northern Territory of Australia in the Supreme Court No 194 of 1958*, p.9.

²⁹ Stevens interviewed cattlemen, stockmen, station employees and Aboriginal people on 30 of the Territory’s 210 stations, revealing evidence of fraud, abuse of privilege and dereliction of duty: see Frank Stevens, *Aborigines in the Northern Territory Cattle Industry*, Australian National University Press, Canberra, 1974, pp.3-4.

³⁰ Model Criminal Code Officers’ Committee, *Slavery*, cited above, p.9.

³¹ Deborah Bird Rose, *Hidden Histories – Black Stories from VR Downs, Humbert River and Wave Hill Stations*, Aboriginal Studies Press, Canberra, 1991, p.150.

³² Tony Austin, *Never Trust a Government Man: Northern Territory Aboriginal Policy 1911-1939*, NTU Press, Darwin, 1997, p.173.

³³ Austin, *ibid*, p.173.

Cook considered that “Aborigines had unique characteristics and freedoms of choice which made them the opposites of slaves.”³⁴

Somewhat surprisingly, however, this was by no means a consistent official view. In 1898 the Territory’s Judge and Government Resident Charles Dashwood wrote that Aboriginal people who were ‘run down’ or kidnapped from their traditional lands and taken to work on distant stations were “virtually slaves.”³⁵ The responsible South Australian Minister refused to approve indentures for the unpaid apprenticeship of two Northern Territory Aboriginal children on the grounds that they represented “an open door to slavery dimly disguised.”³⁶

In the early 1930s, Cecil Cook himself used the slavery analogy to advocate for the extension of his *Apprentices (Half-Castes) Regulations* 1930 to central Australia, where they were not yet in force.³⁷ He argued that the cattle industry had the responsibility to provide improved conditions of employment for their ‘half-caste’ apprentices, in order to give them ‘an opportunity of evolving, more or less, into a white man.’ He pointed out that Australia was in breach of its obligations under the League of Nations Slavery Convention, since the conditions of half-castes under the age of 21 in Central Australia amounted to “forced labour analogous to slavery.”³⁸ It is not clear how Cook reconciled this view with his support for the similar or identical conditions in which other Aboriginal employees lived and worked. Clearly, in Cook’s view, the Slavery Convention was applicable to ‘half-castes’ alone.

Responsible Commonwealth ministers also referred to slavery in the context of Aboriginal labour. Arthur Blakely, the Minister for Home Affairs, wrote of the Northern Territory pastoral industry in 1930 that “[i]t would appear that there was a form of slavery in operation and that aboriginals were being worked without any remuneration whatsoever.”³⁹ In 1945, the Acting Director of Native Affairs, V G Carrington, wrote that “[i]f it were not for the fact that natives can leave employment at will and have protection from ill treatment, their position would be little less than slavery.”⁴⁰ Nevertheless, Carrington considered that “in

³⁴ Ann McGrath, “Modern Stone-Age Slavery”, cited above, p.42.

³⁵ SAA 790, Dashwood to Holder, 12/7/1898, quoted in Tony Austin, *Simply the Survival of the Fittest: Aboriginal Administration in South Australia’s Northern Territory 1863-1910*, Historical Society of the Northern Territory, Darwin 1992, p.46.

³⁶ Austin, *Simply the Survival of the Fittest*, ibid, p.46.

³⁷ Separate administration for North and Central Australia was introduced on 1 March 1927, by Part IV of the *North Australia Act* 1926. Under this legislation the Northern Territory was divided into the Territory of North Australia and the Territory of Central Australia. The *North Australia Act* was repealed by the *Northern Territory (Administration) Act* 1931.

³⁸ Tony Austin, *Never Trust a Government Man*, cited above, p.204.

³⁹ See Ann McGrath, “Modern Stone-Age Slavery”, cited above, p.42.

⁴⁰ V G Carrington, A/Director of Native Affairs, Native Affairs Branch, NT Administration, to the Administrator, 10 October 1945, in A1734, NT1969/1404, AAC.

no case was the treatment of natives so inconsistent with the requirements of the Aboriginals Ordinance and Regulations as to warrant cancellation of a licence.⁴¹

1.1 Legal Definitions of Slavery

It is unremarkable up to a point that the term ‘slavery’ should rarely be heard in contemporary discussions of Aboriginal labour and the ‘stolen wages’ issue. After all, discriminatory wage rates for Aboriginal workers were declared unacceptable in the Northern Territory cattle industry in the ‘equal wages’ decision in 1966.⁴² They had disappeared from most if not all Northern Territory awards by the time the *Wards’ Employment Ordinance* was repealed in 1971.⁴³ Nevertheless this is irrelevant to the question of whether the term is applicable to discussions of the past. This is so particularly if it is accepted that:

“[r]egardless of how historians may quibble over technology, ex-slave status is ‘seared into the consciousness’ of Aboriginal and Melanesian peoples in Australia, and the position of indigenous Australians as ‘colonised labour’ is affirmed by the low paid low status work most continue to perform, and their high rates of unemployment and underemployment.”⁴⁴

Prior to the *Criminal Code Amendment (Slavery and Sexual Servitude) Act 1999*, old UK Imperial Enactments represented the law of slavery in Australia.⁴⁵

Under the *Slave Trade Act* (UK) 1824, it was an offence to “deal or trade in slaves or persons intended to be dealt with as slaves” (s.10). This provision was directed at the international slave trade, particularly that coming out of Africa, although arguably it could have been applied to Australian practices such as the Kanaka trade in Queensland or the practice of ‘running down’ and trading Aboriginal women and children as servants or sexual ‘companions’.⁴⁶ It did not define ‘slavery’.

‘Slavery’ was defined in the 1926 Slavery Convention (Art 1):

“Slavery is the status and condition of a person over whom any or all of the powers attaching to the right of ownership are exercised.”

⁴¹ Ibid.

⁴² *In the matter of the Conciliation and Arbitration Act 1904-1965, and of the Cattle Station (Northern Territory) Award 1951* (Equal Wages decision) C No. 830 of 1965, (1966) 113 C.A.R 651.

⁴³ After the ‘equal wages’ decision, ‘slow worker’ clauses continued to operate for a period under the federal *Pastoral Industry Award*, the *Aircraft Industry Award 1955*, the *Hotel Employees’ (N.T) Award 1960*, and the *Northern Territory Pearl Fishing Award 1955*. In comparison to the pastoral industry, very few Aborigines were employed under these awards.

⁴⁴ Ann Curthoys and Clive Moore, “Working for the White People”, cited above, p.5. See also *Bligh and Others v State of Queensland* [1996] HREOCA 28, to be discussed further below. One of the complainants in this case, Jack Sibley, “aggressively likened his lot to that of a slave in Uncle Tom’s cabin – ‘I was one of them slaves here see. I’m a slave on Palm Island. After I was doing a good job for the white carpenters’”: see p.15.

⁴⁵ Model Criminal Code Officers’ Committee, “Slavery”, cited above, p.2.

⁴⁶ For discussion of this practice in Queensland, see Rosalind Kidd, *The Way We Civilise*, University of Queensland Press, 1997, pp.30-32.

It did not say what the “powers attaching to the right of ownership” were. It seems clear, however, that not all those powers need be exercised over a person before he or she could be said to be a slave. Thus, for example, it would not be necessary for a master to have the legal power to buy or sell a slave, let alone the power of life and death.⁴⁷ It might be sufficient if the ‘master’ had the *de facto* power of sale, or if, as the Berndts reported of the Northern Territory cattle industry during the 1940s, the Aboriginal labourers were said to ‘go’ with the property upon sale. In this context, it is worth noting a New Zealand case from 1993, *Decha-Iamsakun*,⁴⁸ in which the defendant made an offer to sell a woman to an undercover police officer for a sum of money. He was convicted of a slavery offence.

The legal position is arguably muddled further by the prohibition on slavery in the 1948 Universal Declaration of Human Rights:

“No one shall be held in slavery or servitude; slavery and the slave trade shall be prohibited in all their forms” (Submission 4).

This prohibition conflates ‘slavery’ and ‘servitude’.

In 1990, the Australian Law Reform Commission recommended that ‘slavery’ have the following definition:

“Slavery means the status or condition of a person over whom any power of ownership (including a power of ownership arising from a debt or contract) is exercised, and ‘slave’ has a corresponding meaning.”⁴⁹

The Model Criminal Code Officers’ Committee proposal was in response to a request from the Attorneys-General to examine laws dealing with ‘sex slavery’. Consequently, its attentions were directed not to “chattel slavery” but to “the more marginal and practices at the edges of international adoption, migration and of domestic child welfare and working conditions.”⁵⁰ It adopted Bassiouni’s comment that:

“the basic legal element in international instruments on slavery is the total physical control by one person over another. Whenever the control is less than total, such as when it is partial or limited in time, it is removed from the system of protections developed by these international instruments.”⁵¹

⁴⁷ Even under eighteenth-century English slave law, an owner was not permitted to ‘destroy’ a chattel slave: see *Smith v Gould* (1706) 2 Salk 666; 91 ER 567, and discussion in Model Criminal Code Officers’ Committee, “Slavery”, cited above, p.1.

⁴⁸ [1993] 1 NZLR 141, noted in (1993) 17 *Crim LJ* 117.

⁴⁹ Australian Law Reform Commission Report No. 48, (1990), *Criminal Admiralty Jurisdiction and Prize*, draft Bill, s.6(3).

⁵⁰ Model Criminal Code Officers’ Committee, “Slavery”, cited above, p.14.

⁵¹ Bassiouni, “Enslavement as an International Crime” (1991) 23 *NYJ Int Law & Politics* 445 at 459, quoted in “Slavery”, *ibid*, p.15.

The Committee warned that to describe practices of sexual exploitation (whether commercial or not) as ‘slavery’ “devalues the core meaning of the word and the very serious nature of the crime against humanity involved in chattel slavery and true debt bondage and involuntary servitude.”⁵²

In the end, the Committee recommended a definition of ‘slavery’ in the following terms:

“For the purposes of this Part, *slavery* is the condition of a person over whom the powers attaching to the right of ownership are exercised. Slavery includes any such condition of a person resulting from a debt owed or contract made by the person” (Part 9.1.1).”

The definition ultimately enshrined in the 1999 legislation, however, reflects the broader definition of slavery preferred in the ALRC Report:

For the purposes of this Division, *slavery* is the condition of a person over whom any or all of the powers attaching to the right of ownership are exercised, including where such a condition results from a debt or contract made by the person.⁵³

It is stating the obvious, therefore, to say that the precise scope of the legal concept of ‘slavery’ has been the subject of considerable debate. There is considerable force in the Criminal Code Officers’ Committee’s warning that to describe ‘marginal’ practices as slavery devalues the ‘core meaning of the word’. Nevertheless it is far from clear what the core meaning of the term actually is. The New Zealand case law in *Decha-Iamsakun* suggests that, contrary to Bassiouni’s view, methods of control that are partial or limited in time may be regarded as slavery. Indeed, the recent Victorian conviction of a brothel owner for possessing a slave suggests that an offence of slavery may exist even where the ‘slaves’ have come willingly and to make money, and were not physically prevented from leaving.⁵⁴

2. Aboriginal labour in the Northern Territory: a historical ‘case study’

2.1 The South Australian period 1863-1911

During the nineteenth century the Territory, even from a European perspective, was a wild and lawless place.⁵⁵ From an Aboriginal perspective it was more likely one of cataclysmic change, of massacre, a sudden and nearly complete disruption of traditional ways and ties to land. Aboriginal people whose land was taken became refugees, driven by fear of death into the lands of traditionally

⁵² “Slavery”, *ibid*, p.21.

⁵³ See s.270 *Criminal Code (Cth)* 1995.

⁵⁴ *Wei Tang* [2006] VCC 637.

⁵⁵ See, for example, Glen McLaren and William Cooper's account of the early history of the cattle industry, in *Distance, Drought and Dispossession: a History of the Northern Territory Pastoral Industry*, NTU Press, especially pp.40-42.

hostile clans, or else into the invader's embrace, into the missions, towns and stations he was setting up on their land.

It is clear that the pastoral industry, at least, could not have survived without Aboriginal labour. According to Ann McGrath, the northern pastoralists "desperately needed" Aboriginal labour⁵⁶: according to Tony Austin's history of Aboriginal administration during the South Australian period, "there could be no doubt about the utter reliance of the [pastoral] industry on supposedly inefficient Aboriginal labour"⁵⁷ Aboriginal stockmen possessed "horsemanship, a capacity for long hours in unrelenting heat, and an unmatched knowledge of bushcraft and the land."⁵⁸

On the stations Aboriginal people did not receive wages. Instead they were paid in "food, tobacco, clothing and perhaps some medicine for themselves, and food for varying numbers of relatives."⁵⁹ Non-payment of wages to Aborigines was consistently justified on the basis that Aboriginal labour was inefficient,⁶⁰ that 'uncivilised' Aboriginal employees had "no idea of the value of money and no means of spending it",⁶¹ and that station-owners were obliged to maintain non-working Aboriginal dependants in addition to the person being employed.⁶²

It was generally accepted that "firmness" was a necessary ingredient of workplace relations on pastoral leases, since "it was important to keep the Aborigine in his proper place - to stand no insolence or disobedience".⁶³ "Firmness" was a euphemism for what today would be called physical abuse. Sexual abuse, while commonplace, was generally not referred to at all.⁶⁴

In early 1870s Darwin the Larrakia, who had been displaced from their traditional land by European building, were employed cutting wood, clearing land, and labouring on building sites, as well as various types of domestic and other work.⁶⁵ In return they received "a little flour and the scraps from the table."⁶⁶ By the

⁵⁶ McGrath, above, p.20.

⁵⁷ Tony Austin, "Simply the Survival of the Fittest: Aboriginal Administration in South Australia's Northern Territory 1863-1910", Historical Society of the Northern Territory, Darwin, 1992, p.42.

⁵⁸ Austin, *ibid*, p.43.

⁵⁹ Austin, *ibid*, p.44.

⁶⁰ McLaren and Cooper, *Distance, Drought and Dispossession*, above, p.162.

⁶¹ Report by J D Gilruth, quoted in Glen McLaren and William Cooper, *Distance, Drought and Dispossession*, above, p.60.

⁶² According to McLaren and Cooper, by the early 1930s "[s]tation owners had adopted a paternalistic role, assuming responsibility for large numbers of dependants and believing, as a result, they were justified in not paying their workers": *Distance, Drought and Dispossession*, *ibid*, p.163.

⁶³ Harriet Daly, 1877, quoted in Austin, *ibid*, p.47.

⁶⁴ See, however, Dashwood, Select Committee of the Legislative Council on the Aborigines Bill, 1899, p.4, quoted in Austin, above, p.46.

⁶⁵ See, for discussion and analysis of Larrakia labour in Darwin in the 1870s, Samantha Wells, *Negotiating Place*, cited above, pp. 154-160.

⁶⁶ William H Marcus, *South Australia: Its History, Resources and Productions*, Sampson Low, Marston, Searle and Rivingston, London, 1876, p.184, quoted in De La Rue, above, p. 42.

1880s prisoners, including Aboriginal prisoners,⁶⁷ were employed on such 'public works' as the construction of a fenced bathing pool at Fort Hill in 1880, the installation of terraced gardens on the slopes surrounding the Residency in 1882,⁶⁸ and the construction of a new house for the Deputy Sheriff with responsibility for prison labour, John George Knight.⁶⁹ Aboriginal labour was also used extensively in the short-lived Jesuit mission at Rapid Creek.⁷⁰

In legal theory, from the moment South Australia took over administration of the Northern Territory on 12 November 1863, Aboriginal people were subject to South Australian law. In the early South Australian period, laws designed for the Aboriginal population of South Australia, particularly of Adelaide, were theoretically applicable in the far-flung "wastelands" of the Northern Territory. Thus, Ordinance No. 12 of 1844, "An Ordinance to provide for the Protection, Maintenance and Upbringing of Orphans and other Destitute Children of the Aborigines", allowed:

"...any two Justices, with the consent of His Excellency the Governor and of either of the parents, if living and within the Province, but if otherwise without such consent, on the application of the Protector of the Aborigines, to bind by indenture and put out any half-caste or other Aboriginal child having attained a suitable age as an apprentice, until he shall attain the age of twenty-one years, to any master or mistress willing to receive such child in any suitable trade, business or employment whatsoever, and every such binding shall be as effectual in law to all intents and purposes as if the child had been of full age, and had bound himself to be such apprentice, provided also that such Justices shall see that in the indenture due and respectable provision is made for the maintenance, clothing and humane treatment of any such apprentice".⁷¹

No provision was made for wages.⁷²

In July 1898 Northern Territory Judge and Government Resident Charles Dashwood provided a report arguing a case for protective legislation along similar lines to legislation passed in Queensland in 1897.⁷³ Dashwood urged legal protection against practices such as 'running down' - that is, kidnapping boys and girls and taking them to work and to provide sexual companionship on stations far away from their homeland.⁷⁴ According to Dashwood, extreme cases of mistreatment included cases where Aboriginal women were employed "simply for

⁶⁷ De La Rue, above, p.59.

⁶⁸ Ibid, p.59.

⁶⁹ Ibid, p.72.

⁷⁰ In the mission's first year "the Aboriginal residents and missionaries cleared and fenced an eight acre paddock and two five acre gardens. The Aboriginal workers brought in huge quantities of mangrove wood and made outhouses and fences. They also dug two wells – one over forty feet deep and five feet wide – through hard and rocky ground": Samantha Wells, *Negotiating Place*, cited above, p.216.

⁷¹ Ordinance No. 12 of 1844 (SA), and see Austin, "Simply the Survival of the Fittest", above, p.48.

⁷² These were the provisions which governed the proposed indentures of two children, in rejecting which the South Australian Attorney General commented that they "bear a strong resemblance to slavery": see discussion above.

⁷³ The Queensland legislation left South Australia as the only state in Australia at this point without protective legislation.

⁷⁴ See, for example, SAA 790, Foelsche to Dashwood, 14/2/1898, referred to in Austin, "Simply the Survival of the Fittest", above, p.46.

the purpose of having carnal knowledge or intercourse."⁷⁵ Dashwood was invited to draft the bill himself.⁷⁶

There was intense opposition to the Bill in the Northern Territory. This came particularly from pastoralists such as Joseph Bradshaw, the lessee of 'Bradshaw's run', who wrote to a Select Committee of the South Australian Legislative Council established to report on the Bill, commenting on the impracticability for pastoral lessees of travelling great distances to obtain employment licences.⁷⁷ The influential F J Gillen, at that time a Sub-Protector of Aborigines, commented in reply to a question about permits and written employment agreements, that "[i]t is the thin edge of the wedge of slavery to introduce the permit system in the case of the blacks."⁷⁸ This opposition, added to by an injudicious remark of Dashwood's about whites who "shot the blacks down like crows", led to the failure of the Bill in the South Australian Upper House. However the impetus for some form of 'protective' legislation became irresistible by the time the Commonwealth took over the administration of the Northern Territory in 1911.

2.2 *Protection and control 1911-1953: the Aborigines Ordinance*

The *Northern Territory Aborigines Act 1910* (SA) and its successor, the *Aborigines Ordinance 1911* (Cth) established two categories of people - Aborigines' and 'half-castes' - who were to be subject to somewhat different regimes of "protection and control". Under s.3 *Northern Territory Aborigines Act 1910* (SA), an "Aboriginal" included "an Aboriginal native of Australia; or a half-caste who lives with such Aboriginal native or lives or associates with them; or a half-caste child up to 16 years old". A "half-caste" meant "the offspring of an aboriginal mother and other than an aboriginal father, unless such a person was deemed to be an aboriginal." In 1918 the Commonwealth passed a new and more detailed Ordinance. Under the *Aborigines Ordinance 1918* the definitions were altered to include as 'Aboriginal' a 'half-caste male child whose age does not apparently exceed eighteen years', as well as 'a female half-caste not legally married to a person who is substantially of European origin or descent and living with her husband'.

Under s.23 *Northern Territory Aborigines Act* (SA), no person could "continue to employ an aboriginal or any female half-caste unless such person has a licence to employ aborigines in the prescribed form for the time being in force."⁷⁹ Under s.24, a person desiring to obtain a licence had to apply to the Protector of the district. The regulations required the applicant to set out the "nature of the

⁷⁵ Select Committee of the Legislative Council on the Aborigines Bill, 1899, p.4, quoted in Austin, *ibid*, p.46.

⁷⁶ SAA 790/1898/333, minute Kingston (Premier of South Australia) to Holder 22 August 1898.

⁷⁷ PP (SA), 1899, no.77a, p.109.

⁷⁸ PP (SA), 1899, no.77, p.99.

⁷⁹ It was not, therefore, necessary to obtain a licence for the employment of a male 'half-caste'. Note also that the apprenticing of aboriginal and half-caste children could continue subject to the conditions prescribed by any regulation in that behalf": see s.23(3).

employment in which aboriginals are proposed to be employed”, and the “conditions of employment and the wages proposed to be paid.” The regulations also stipulated that the Protector could “refuse to grant any licence unless he is satisfied that the wages to be paid and the conditions of employment are reasonable and just.”⁸⁰ However, no provision actually required wages to be paid.

Under s.46, the Protector could also “take possession of, retain, sell or dispose of and give valid title to any... property, whether real or personal” of an Aboriginal or ‘half-caste’, and could “exercise in the name of any aboriginal or half-caste any power which the aboriginal or half-caste might exercise for his own benefit, provided that the powers conferred by this section shall not be exercised without the consent of the aboriginal or half-caste, except so far as may be necessary to provide for the due protection of such property.”⁸¹

In 1913 the Administrator, Gilruth, instituted a Trust Account system for the first time. The Trust Account had the same results for Aboriginal workers as did similar accounts elsewhere in Australia. Trust Account books could be easily falsified. Aboriginal people signed with a cross to withdraw their money. In other cases, “money was released simply on the say-so of someone in authority.”⁸² Workers did not understand their rights, or how the Trust Account operated. By 1917 there were 481 accounts worth 1,448 pounds; in May 1920, 1,184 pounds of unclaimed money dating back to the inception of the scheme went into consolidated revenue.⁸³

The 1918 legislation gave the Chief Protector a number of additional ‘duties’ exercisable in relation to “the aboriginals”, including “a general supervision and care over all matters affecting the welfare of the aboriginals, and to protect them against immorality, injustice, imposition and fraud.” These powers were not strictly exercisable in relation to ‘half-castes’. Under section 15, a Protector could “if he thinks fit give authority in writing to any person so desiring it for the removal of any aboriginal, or any female half-caste, or any half-caste male child under the age of eighteen years, from one district to another...”⁸⁴ It also contained new and more detailed provisions regarding employment licences (Part IV). A person wishing to employ any aboriginal within a Town District had to enter into an employment agreement in addition to obtaining a licence. An employer in country districts was required to obtain a licence, but did not need to enter into an employment agreement.

⁸⁰ See regulations 1 & 2, *Commonwealth Gazette*, 16/9/1911.

⁸¹ See discussion in Tony Austin, *Never Trust a Government Man: Northern Territory Aboriginal Policy 1911-1939*, Northern Territory University Press, Darwin, 1997, p.5.

⁸² Austin, *ibid*, p.80.

⁸³ Austin, *ibid*, pp.80-1.

⁸⁴ Section 20 (relating to unlawfully removing or enticing an aboriginal from a reserve) also only applied to ‘aboriginal’ people.

Nearly a year after the *Aboriginals Ordinance* 1918 came into force, regulations under the 1918 Ordinance were published in the *Commonwealth Gazette*.⁸⁵ These provided for wages for Aboriginal and ‘half-caste’ apprentices in Town Districts. Only part of the wage each week was to be paid to the apprentice, with “[t]he difference between the amount to be paid to the apprentice and the amount due [shall be] paid every four weeks to his credit in the Aboriginal Trust Fund at the Chief Protector’s Office in Darwin” (reg. 8). The Regulations also set a wage of 5s per week for employment of aboriginals in town districts, of which 2s was to be paid to the Chief Protector or Protector to keep on trust. This was the first time employers (at least in town districts) were required to pay cash wages. It was also the first time the trust account system had been formalised in legislation.

Aboriginal employees in country districts did not fare so well. The application for a licence to employ aboriginals in a country district (Form 2) required the applicant to “undertake to pay wages at the rate of 5s. per week and provide food, clothing and tobacco... and *if requested in writing by the Protector*, to pay to the Protector a proportion of such wages, to be held in trust for the aboriginals, such proportion to be not less than 10s. every month.” The applicant also undertook to keep a record of native labour employed, the nature of their employment, and the wages paid (including the amount paid to the Aboriginal Trust Fund), such record to be open for inspection by the Protector at any time.⁸⁶ Where the aboriginals were only “employed temporarily”, however, the regulations required only that the employer state the “approximate maximum number” employed (see Form 4). An employer in country districts could avoid paying wages by classifying employees as “temporary” rather than “permanent”.⁸⁷

Under the *Aboriginals Ordinance* 1933, a new s.29A was introduced to the 1918 Ordinance. Under s.29A(1), the Chief Protector or any authorized Protector could direct an employer to pay to him a prescribed portion of the wages of any employed aboriginal. All such moneys received were to be paid into a trust account. When the amount to the credit of the individual employee reached twenty pounds, the money was to be withdrawn and paid to the credit of a trust account in the individual employee’s name (s.29A(5)). Such money could be spent by the Chief Protector or authorized Protector on behalf of, or for the benefit of the employee. It could also be spent by the employee with the Chief Protector’s or authorized Protector’s approval (s.29A(6)).

⁸⁵ *Commonwealth Gazette*, 29 May 1919, p.908.

⁸⁶ In 1928 a new Form 11 was added to the Regulations. Under a new Regulation 22, the return to be furnished in pursuance of s.25 of the *Aboriginals Ordinance* 1918-1927 by the holder of a licence to employ aboriginals in a country district had to include information, *inter alia*, about the nature of the employment and the wages paid (see G.N 139/28, *Gazette*, 21 May 1928).

⁸⁷ This was formalised by an amendment in 1925: see *Commonwealth Gazette*, 30 July 1925 (No. 14 of 1925).

More significant changes were made by new regulations under the *Aboriginals Ordinance* 1918, also introduced in June 1933.⁸⁸ Regulation 14 prescribed conditions on the grant of a licence to employ aboriginals in country districts. The grantee of a licence was required to pay wages at the rate of 5s per week for each aboriginal employed by him, plus food, clothing and tobacco.⁸⁹ However, the loophole allowing country employers to avoid paying wages was greatly expanded by a new provision under regulation 14 that:

“... where it is proved to the satisfaction of the Chief Protector that the grantee of the licence is maintaining the relatives and dependants of any aboriginal employed by him, the Chief Protector may exempt the grantee from the payment of any wages in respect of that aboriginal.”⁹⁰

This provision, which Cecil Cook had pushed through at the 1930 conference, did not even include a requirement that rations for relatives and dependants be nutritious. According to Ann McGrath, this had dire consequences for the health of workers and other displaced Aboriginal people living on stations with nowhere else to go.⁹¹

The 1933 legislation represented a significant worsening in the conditions of Aboriginal people subject to the Ordinance, particularly those in country districts. Large concerns such as Vestey’s and Bovril’s remained “laws unto themselves, profiting at the expense of Aboriginal labour.”⁹² Violence was used with impunity, even by the police.

Wages in the towns at this time continued to be paid into the Trust Account. An example of the operation of the Trust Account system at this time can be found in the recollections of Val McGinness, who started working as message boy for the Administrator at the age of 12 in 1922. McGinness recalled that he was only ever able to draw two-thirds of his wage and that the rest went straight into the Aboriginal Trust Fund.

“And whatever happened to that trust money that we put in there, I really don’t know from that day to this... There was no bank book; there was no record of anything, as far as I can remember. But they said that the money that we put in went towards building houses for part-Aboriginals that were exempted from the Aboriginal Department, or something to that effect anyway... I got a hundred and fifty pounds from my house, for the amount that I put in. But the balance of the

⁸⁸ See Regulations under the Aboriginals Ordinance 1933, *Commonwealth Gazette*, No. 40, 29 June 1933, p.935.

⁸⁹ There was no requirement that the provision of rations be at an equivalent standard to rations paid to European workers, as had been advocated by the NAWU at the conference in 1930: see discussion in Austin, cited above, at 261.

⁹⁰ Thalia Anthony, “The Ghost of Feudalism”, Volume 2, pp. 275, 347.

⁹¹ See discussion in Austin, cited above, at p.262.

⁹² See discussion in Austin, p.265. According to Bird Rose “[i]t is amply clear, however, that they [Vestey’s] cared about profits and that they insisted upon extracting profits, even at the expense of the Australian nation as a whole. Aborigines were at the end of the line in a series of relationships which force one to query whether Vestey’s ever showed any accountability to any society and to any set of legal institutions”: Bird Rose, *Hidden Histories*, cited above, p.149.

trust money that we was putting in ever since 1922, approximately, I don't know what happened to that.”⁹³

According to Tony Austin, the relevant government departments made little effort to recover money owed by employers to the Trust Account, and the Trust Account administration generally was very poor. Sums unclaimed after six years reverted into consolidated revenue,⁹⁴ and sporadic efforts by Acting Administrator Carrodus and by Cook to have these moneys used for the benefit of Northern Territory Aborigines were successfully resisted by Treasury.

During World War II, the anthropologists R M and C H Berndt conducted an investigation into conditions on Northern Territory cattle stations. According to the authors, Vestey's considered that “it would be absolved from making a payment of five shillings a week to its Aboriginal employees, provided that the cost of supporting their dependants and the aged and infirm people on the station exceeded the proposed aggregate amount.”⁹⁵ This led to the employer inflating the number of people listed as ‘dependants’ and under-estimating the number of people ‘employed, a practice apparently condoned by the local Protector, who approved of ‘casual employment for dependants’.⁹⁶ More generally, Vestey's displayed “no more than superficial” attention to government regulations relating to the employment of Aborigines, and sent in misleading and inaccurate employment returns.⁹⁷

Children under twelve were employed in open disregard of the Ordinance.⁹⁸ Figures for clothing and food supplied were inflated, with both employees and dependants being given food that had gone mouldy or deteriorated and was not wanted by the Europeans.⁹⁹ Whole beasts were charged to their account but not actually received, with dependants receiving only offal and bones.¹⁰⁰ Violence was used.¹⁰¹ Medical treatment was inadequate or non-existent, with boils or

⁹³ Oral history interview, Valentine Bynoe (Val) McGinness, TS No: 963, NTAS, Darwin. McGinness says he eventually started working for higher wages in 1933 or 1934, but that money still had to go into the trust fund.

⁹⁴ Austin p.268, and references cited at footnote 58 therein.

⁹⁵ *End of an Era*, *ibid*, p.62.

⁹⁶ See discussion at *ibid*, pp.62-3, and see also p.135 regarding Manbulloo.

⁹⁷ *End of an Era*, pp.220-1.

⁹⁸ The authors give an example of an employment return in which children under twelve were actually listed as employees. Children were employed because it was an ‘submission of faith’ that good stockboys had to be ‘broken in’ early: see *ibid*, pp.66-7, and p.133.

⁹⁹ See *ibid*, pp.73-80.

¹⁰⁰ *Ibid*, p.87.

¹⁰¹ See for example the practice of “cockfighting” described at, *ibid*, p.103. According to the authors, “[any manifestation or even hint of rebellion was met with instant physical punishment”]: p.124. They also describe “local administration of ‘justice’” such as severely beating three young men caught cattle-stealing, and chaining them up at the homestead for several days, the result of “the belief that Aborigines were better disciplined by the sight and the experience of punishment meted out on the spot”: p.124. One European “always went armed when there were Aborigines near, which was most of the time”. The authors describe an incident in which, for a joke, he shot into ground at the feet of a blind Aboriginal man approaching the homestead: p.124.

other painful conditions common, in addition to undernourishment.¹⁰² Europeans treated the Aboriginal employees in a manner which aroused their “furious but impotent resentment.”¹⁰³ An atmosphere of dissatisfaction and disillusionment prevailed amongst the Aboriginal employees, who believed that “their future and that of their children – those few who were present – was not only strictly circumscribed but seemed to lead nowhere... What was made clear to them, was their eventual disappearance as a people and their replacement by others.”¹⁰⁴

In February 1947, a conference of government representatives and pastoralists was called to consider the conditions of Aboriginal workers in the pastoral industry. Under regulations passed pursuant to this agreement, the old Regulation 14 of the *Aboriginals Ordinance* ceased to operate in the employment of aboriginals in the pastoral industry. This was the regulation allowing pastoralists to avoid paying wages where they were able to prove “to the satisfaction of the Chief Protector” that they were maintaining the employee’s relatives and dependants.¹⁰⁵ However an equivalent loophole was provided “[w]here the licensee and a Protector authorized in writing in that behalf by the Director agree that an aboriginal is not sufficiently competent to be paid the appropriate rate... the licensee may employ that aboriginal at such lesser rate as is agreed upon between the licensee and the Protector.”¹⁰⁶ In other words, employers could avoid paying wages altogether by having a worker classified as incompetent.¹⁰⁷

Both unions and Aboriginal people were excluded from this conference. During these post-war years, unions and Aboriginal people ran a campaign which eventually resulted in the repeal of the *Aboriginals Ordinance* and its replacement by ‘general’ legislation, the *Welfare Ordinance* 1953.

2.3 Assimilation and ‘special measures’: the *Welfare and Wards’ Employment Ordinance* 1953

The *Welfare Ordinance* 1953 and its complementary legislation the *Wards Employment Ordinance* 1953 were the legislative expression of the new policy of “assimilation”, announced by the Minister for Territories Paul Hasluck in 1951. Superficially, they were applicable to anybody: both Ordinances

¹⁰² See for example, *ibid*, p.115, and at 218. Medical treatment and workers’ compensation will be discussed further in Chapter 4, below.

¹⁰³ The authors make this comment of incidents they observed at Limbunya in which the manager’s wife made “a detour to leeward of a group of seated women, holding her nose and snorting with disgust”: *ibid*, p.91.

¹⁰⁴ *Ibid*, p.97.

¹⁰⁵ See Regulation 2(2), *Aboriginals (Pastoral Industry) Regulations* 1949, notified in the *Commonwealth Gazette*, 30 June 1949.

¹⁰⁶ Regulation 5(2), *Aboriginals (Pastoral Industry) Regulations* 1949, *ibid*.

¹⁰⁷ See discussion in Bernie Brian, cited above, p.219, and contrast Brian’s verdict on the 1947 conference with that of McLaren and Cooper, above.

assiduously avoid reference to race. However, as no person eligible to vote could be declared a ward, and as ‘aboriginal natives’ were not in 1953 eligible to vote, in reality only Aboriginal people could be declared wards.¹⁰⁸

The *Welfare Ordinance* 1953 gave the Director of Welfare sweeping powers over wards. The Director was the guardian of a ward and the ward’s estate “as if that ward were an infant” (s.24).¹⁰⁹ He could order that a person be taken into his custody, removed to a reserve or institution (s.17), or moved within or outside the Territory (s.21). He held the property of a ward as trustee (s.25), and could pay debts, judgments, payments, allowances or other costs from the ward’s property (s.26).¹¹⁰ Under s.27, he was required to keep a proper record and account of all money or other property of the ward which came into his hands, and to hold the property or income for the benefit of the ward (s.28).

A Wards Appeal Tribunal was established under s.30 to hear and determine appeals by wards for the revocation of declarations made under the Ordinance. It was constituted by a Judge of the Northern Territory. No person was permitted to “habitually live with a ward” unless he was “a ward or a relation of the ward” (s.61), and a male other than a ward was prohibited from having or attempting to have sexual intercourse with a ward (s.64). A non-ward was not permitted to marry a ward without the consent of the Director (s.67), a provision which led to nationwide controversy when Giese refused permission for such a marriage in 1959.

In short, the powers of the Director over wards were as broad as those exercised by the former Native Affairs Branch over persons defined as “aborigines” under the *Aborigines Ordinance* 1918. In some important respects they were broader – for example, even the 1918 legislation did not automatically make the Chief Protector the legal guardian of all aborigines. The legislation had idealistic goals, but its methods “relied on the enforcement of authoritarian, repressive regulations and techniques of control which were in direct contrast with the optimistic and liberal rhetoric of rehabilitation and assimilation.”¹¹¹

At the same time as the *Welfare Ordinance*, the government passed the *Wards’ Employment Ordinance*, regulating the employment of ‘wards’. Part IV of the Ordinance governed the employment of wards. Under s.32, a person could not

¹⁰⁸ See Northern Territory Electoral Regulations, in force under the *Northern Territory Representation Act* 1922-49, the *Northern Territory (Administration) Act* 1910-1956, and the *Commonwealth Electoral Act* 1918-1953, Regulation 22. Amended electoral regulations came into force on 7 November 1957 allowing Aborigines to vote: see Statutory Rules No. 66, 1957 Electoral Regulations.

¹⁰⁹ There were exceptions to this under s.24. A ward could commence proceedings against the Director or against another ward. Section 24 was repealed in 1962: see s.12, *Welfare Ordinance* 1961.

¹¹⁰ Dick Ward, who opposed the introduction of the Ordinance in the Legislative Council, stated in the Legislative Council that the provision allowing a native’s property to be “sold or anything else done with it without the supervisions of the courts... seems to me to place the native in a lower category than the mental defective”: Dick Ward, *NTLCD*, 10 June 1957, and Wells, *The Long March*, p.113.

¹¹¹ Julie Wells, *The Long March*, p.128.

employ a male ward unless he was the holder of a valid licence to employ male wards; and a female ward unless he was the holder of a licence to employ female wards.

Under s.38, a licensee was not permitted to employ a ward except in accordance with the prescribed conditions of employment and at the prescribed wage for the employment of the ward. The prescribed conditions were specified in the regulations; and the prescribed wage was the wage specified by the Administrator in the *Gazette* as the wage payable to a ward in the relevant industry or calling.¹¹²

However, under s.38(3) *Wards Employment Ordinance*, a licensee was permitted to employ a slow, aged or infirm ward under a wage less than the wage prescribed, provided the wage was agreed upon between the employer and a welfare officer. As Rowley notes, there “was no safeguarding cross-reference to definitions of the ‘slow worker’ established in the general industrial legislation; therefore the *ward’s* wage could cease to be an effective minimum.”¹¹³

During this period, the Administration maintained that many Aboriginal workers, particularly outside the pastoral industry, were in fact receiving wages in excess of the prescribed rate.¹¹⁴ Wages for Aboriginal people were better particularly on the wharf, and in other places where union representation was strong, or where Aboriginal and non-Aboriginal people had formed close bonds. On the other hand they were non-existent on the missions. On the pastoral leases Aboriginal people, particularly women, continued to work in slave-like conditions. In the professional households of Darwin, Aboriginal people continued to be employed as the public servants’ servants. At Darwin’s Bagot Reserve and on other government settlements, wards’ wages were docked as part of a “system of payment for food and board for settlement dwellers.”¹¹⁵

The days of the *Welfare Ordinance* were numbered, particularly after amendment to the Electoral Regulations meant that no further Aboriginal people could be added to the iniquitous “Stud-Book”, the so-called Register of Wards. The Equal Wages decision¹¹⁶ also placed considerable pressure on government to repeal the *Wards’ Employment Ordinance*, which had in any case become a

¹¹² For example, see *Northern Territory Government Gazette* No. 40, 16 September 1959, containing a table of wages applicable to the employment of wards. Males in agricultural work were entitled to £2 weekly, females to £1; drovers with plant and stock to £10 weekly, with plant only to £5; miners on the surface to £2 weekly, underground miners to £6 weekly.

¹¹³ C D Rowley, *The Remote Aborigines*, cited above, Volume III, p.300.

¹¹⁴ Letter from J C Archer, Administrator, to the Secretary, Department of Territories, Re Aborigines in the Northern Territory, 15 October 1955, in *Employment of Aborigines in the Northern Territory*, A452, 1955/668, AAC. This letter contains a table listing the numbers of Aborigines employed in various industries as at 30 June, 1955, and the numbers said to be in receipt of wages in excess of the prescribed rate.

¹¹⁵ Julie Wells, *The Long March*, p. 144.

¹¹⁶ *In the matter of the Conciliation and Arbitration Act 1904-1965, and of the Cattle Station (Northern Territory) Award 1951* (Equal Wages decision) C No. 830 of 1965, (1966) 113 C.A.R 651.

logical and legal anachronism after 1964, when the legal category of ‘ward’ ceased to exist. Nevertheless, the Northern Territory Administration maintained that the *Wards’ Employment Ordinance* was necessary, in part because some Aboriginal people continued to be employed in award-free industries, particularly domestic labour.

In November 1966, new *Wards’ Employment Regulations* repealed the *Wards’ Employment Regulations 1959*. They prescribed terms and conditions for wards not employed under a general award (Regulation 6). They provided that an employer should pay to a ward “the wages and other moneys payable to the ward at the time and in the manner specified in an award or industrial agreement applicable in respect of the calling or industry in which the ward is employed” (Regulation 7). They also provided that awards or industrial agreements relating to termination of employment, payment of fares and allowances, working hours, overtime, annual leave, sick leave, leave without pay and other matters should apply to wards (Regulations 10-16).

Despite the Equal Wages decision, and the alleged effectiveness of the *Wards’ Employment Ordinance*, during this period many Aboriginal people continued to work at rates considerably less than the basic wage. According to E J Hook, writing to the Department of Territories in 1965:

“Aborigines who do work for the Commonwealth in the NT fall into three broad classes:

- (a) those occupying established positions in the Cth Service who are being paid standard public service rates of pay
- (b) those working in Cth departments who do not occupy established positions and who are paid at rates less than the basic wage
- (c) those living on a government settlement who, on a more or less regular basis, perform the necessary odd jobs around the settlement and are paid an amount weekly at a rate substantially less than the basic wage.”¹¹⁷

Hook considered that whether persons performing work in categories (b) and (c) were ‘employees’ posed “a mixed question of fact and law”. This question could “rarely be susceptible to a definitive answer.” It could be argued that Aborigines “who do odd jobs around the settlements without occupying any established positions” were ‘employees’ and subject to Award rates. However, he considered that “the possibility of claims being made that persons within this class are ‘employees’ may be reduced if care is taken to ensure that none of the trappings of the employer-employee relationship permeates the arrangements made with them.”¹¹⁸

¹¹⁷ Correspondence from E.J. Hook to Department of Territories, Re. Aborigines on Government Settlements and in Cth Departments in the NT, 2 Nov 1965, file no. 65/3158, in *Engagement of Aborigines on Northern Territory Government settlements and missions*, A432, 1965/3158, AAC.

¹¹⁸ Ibid. By ‘trappings’, Hook meant in particular the description of the relationship, and the description of the remuneration paid. Compare this analysis with criticism of the Community Development Employment Program (CDEP) scheme, established by the Fraser government in 1977.

Although Hook was writing before the Equal Wages decision, his arguments anticipate that decision, and are equally applicable to Aboriginal people working on government settlements after it. Missions were equally able to employ the argument that Aboriginal people doing ‘odd jobs’ on the mission were not actually ‘employed’.

3. Arguments other than slavery: the prospects for legal action in the Northern Territory

3.1 An action under the Racial Discrimination Act 1975 (Cth)

In *Bligh, Coutts and Others v State of Queensland* [1996] HREOCA 28, the Human Rights and Equal Opportunity Commission considered discrimination claims by a number of Aboriginal residents of Palm Island, near Townsville. The residents claimed that

“in their respective areas of employment by the relevant Queensland Government Department or instrumentality they were discriminated against because of their Aboriginality in that they were paid wages less than that to which they would otherwise have been entitled were they not Aborigines, and generally, that they were employed on terms and conditions significantly less favourable than would otherwise have been the case were they not Aborigines” (para 1).

The residents’ claim began with the commencement of the RDA on 31 October 1975 and ended with the Queensland Government’s decision to pay “award wages”, reflected in the *Community Services (Aborigines) Act 1984* (Qld) which commenced on 31 May 1984 (p.5, 8).

The Commissioner rejected submissions by the respondent that it should exercise its discretion not to inquire into the complaint because of lapse of time (p.6). It also rejected a submission that payments for work done were “made in an institutional, social welfare and training setting rather than in an industrial setting”.¹¹⁹ It held that the residents were as skilled as the white workers alongside whom they worked in their various occupations. While the residents had not served formal apprenticeships in the relevant trades, they were nevertheless skilled in their trades and were not paid what a reasonable employer would be expected to pay for the relevant trades work. The Commissioner accepted figures arrived at by a witness experienced in industrial relations, Mr Les Kidd, quantifying the monetary loss suffered by the various applicants during the period between 1975 and 1984.¹²⁰

¹¹⁹ The Commission considered, for example, that “[i]t is simply fatuous to regard Fred Lenoy as having been engaged only in an institutional or social welfare setting. He was an intelligent, proficient, experienced and skilled employee, of enormous value to his employer the Department” (p.17; see also p.12, and p.21).

¹²⁰ Despite the “severe limitations” of a mathematical exercise undertaken without complete records, the Commissioner regarded the witness’ approach as “inherently valid in broad terms”. The amounts arrived at were; Mr Kitchener Bligh \$8,573.66; Mr Jack Sibley \$12,149.75; Mr Maurice Palmer \$17,294.15; Mr Fred Lenoy \$20,982.97; Mr Buller Coutts \$11,190.37; Mrs Mavis Foster \$8,647.88 (pp.21-22).

The Commissioner accepted that it is “beyond doubt that the discriminatory response of the respondent was based wholly and solely on the fact that the relevant workers were Aborigines.”¹²¹ He considered that “the intention to discriminate is now obvious” (p.33). Regardless of whether intention to discriminate is an essential element of the statutory unlawfulness defined by the RDA,¹²² the Commissioner found that there was a clear relationship of cause and effect between the race of the complainants and the fact that they were denied equal pay for equal work and other rights (p.33). The Commissioner assessed the past monetary loss, together with the “personal hurt and stress” which each complainant had encountered at \$7,000 for each successful complainant.

In *Baird v State of Queensland* [2005] FCA 495 (19 August 2005), however, a similar case brought against the Queensland Government by a number of residents of two Far North Queensland missions failed. The missions were administered by the Lutheran Church, which received government grants for housing, water supply, education and other facilities, together with “an amount identified as being for wages” (p.11, para 34). The grant for wages was not sufficient to pay all indigenous workers award wages.¹²³ There was conflicting evidence as to whether the government actually prescribed pay rates for indigenous workers, although the weight of evidence was that the Church made the final decision on rates of pay and numbers employed, taking into account the size of their grant.¹²⁴ Nevertheless, the amount allocated to church communities for wages was increased when there was an increase in wages for indigenous workers on State-controlled reserves (para 79, p.21). The Government “was aware that wages were paid on the missions at rates below award rates and that there was pressure to remedy the position. At some stage, the Government seems to have accepted that churches would pay increased wages to indigenous employees on missions only to the extent that it increased their grants” (pp.29-30, para 109).

Dowsett J considered that the applicants were employees of the Church, or possibly of the relevant Aboriginal Council, not of the Queensland Government (para 128). Thus, the applicants’ claim of discrimination in relation to employment under s.15 of the RDA failed.

Dowsett J also rejected an argument based on s.9 of the RDA, that the payment of grants at a level insufficient to employ workers at equal wages was “a distinction, exclusion, restriction or preference” which is “based on race”. He considered that the “[g]rants were certainly based on race in the sense that they

¹²¹ *Bligh and Others v State of Queensland*, p.32.

¹²² The Commissioner considered that it was not: see *Waters v Public Transport Corporation* (1991) 173 CLR 349 at 359-360, and other cases cited in *Bligh*, p.33.

¹²³ Some indigenous residents were employed as Church staff, and they were “paid at the same rates as non-indigenous Church staf” (p.11, para 34).

¹²⁴ Dowsett J concluded that the government’s “decisions as to wage levels had no binding legal effect upon wage levels payable on church missions” (p.29, para 108).

were made in order to assist indigenous people, but the applicants do not rely on that discrimination in their favour” (para 134). The Government was under no obligation to give grants to the churches. When it did, such payments were “entirely neutral, save for the fact that they were intended to benefit indigenous people” (para 138, p.35).

Dowsett J accepted that there was evidence that the government calculated the amounts of its grants to missions using particular (that is, lower) wage rates (paras 134, 136). However he did not consider that any such evidence demonstrated a “discriminatory purpose or effect” (para 136). Even if the calculation and payment of grants demonstrated such a purpose or effect, he did not consider that this was “based on race”: “any discrimination against the applicants was based on the fact that they resided and worked on the missions rather than their race (para 141, p.36).

Dowsett J’s decision is subject to appeal. A particularly questionable aspect of this decision is the finding that the calculation of government grants to missions using wage rates lower than those applicable in the general community was not a discriminatory act “based on race”. Nevertheless, the case illustrates the difficulty of bringing a discrimination claim, and the danger of falling between two stools where the ‘employer’ is funded partly or wholly by government grants.

In any case, the *Racial Discrimination Act* applies only after 1975. For actions occurring prior to this date, including those discussed earlier in this submission, other legal avenues must be considered.

3.2 An action under industrial legislation.

In the *Murgha Case*¹²⁵, the Australian Workers’ Union applied to the Queensland Industrial Court on behalf of Arnold Murgha, an Aborigine employed by the Director of the Department of Aboriginal and Torres Strait Islander Advancement on a reserve, for payment of wages in accordance with the Building Trades Award. Murgha had been paid a lesser amount than the sum payable under the Award. The Industrial Magistrate declined jurisdiction. In the Industrial Court, however, Matthews J ruled that the Magistrate did have jurisdiction and referred the matter back to him for consideration. The case was settled out of court, attracting wide publicity.¹²⁶

¹²⁵ Matthews J, Queensland Industrial Court, 29 May 1979.

¹²⁶ See discussion in *Bligh and Others v State of Queensland*, p.27. See also *Baird v State of Queensland* [2005] FCA 495, pp. 23-4, for consideration of Cabinet discussions following the decision in the Murgha case. According to Dowsett J the Government dealt with the Murgha decision by “reducing the number of employees so that wage levels could be increased without the appropriation of additional funds” (p.26, para 94).

Dowsett J in the *Baird* case appears to have believed that the applicants should have pursued a remedy under industrial legislation rather than under the *Racial Discrimination Act*:

“...following the Murgha decision, it was known that relevant industrial legislation offered the applicants the same wage protection as was offered to all other workers. I am not suggesting that the applicants were in any way blameworthy for not seeking out or pursuing remedies under industrial legislation. I am merely demonstrating that my view of s.9 does not mean that the applicants were without appropriate remedies” (para 143, p.36).

Even apart from any difficulties due to lapse of time, an action alleging breach of relevant industrial legislation is of limited use to most Northern Territory Aboriginal people. As noted at length above, the level of wages such people received, or indeed the non-payment of wages, was usually authorised by legislation in force at the time, in particular the *Aboriginals Ordinance* and the *Wards' Employment Ordinance*. Only individuals exempt from the provisions of these Ordinances were covered by general industrial awards. This would include ‘part-Aboriginal’ people after 1953, since such people were eligible to vote and were not declared wards. However, such people were often working in award-free industries such as domestic labour, or else were regarded as falling under the ‘slow worker’ clauses of relevant awards.

In 1946, the NAWU succeeded in having Aboriginal workers included in the *Works and Services Award*.¹²⁷ The Crown Solicitor advised that the Award was inapplicable to Aborigines to the extent that it was inconsistent with the *Aboriginals Ordinance*. It seems that the matter was not pursued further.

3.3 A constitutional challenge

Northern Territory laws directed at Aboriginal people were first subject to constitutional challenge in 1958, when the well-known Aboriginal artist Albert Namatjira was convicted of supplying liquor to a ward, contrary to the *Licensing Ordinance* 1957. Namatjira argued on appeal that the *Welfare Ordinance* was unconstitutional because it was not a law for the “peace, order and good government of the said Territory” and hence was not a law authorised by s.4U *Northern Territory (Administration) Act*. Kriewaldt J rejected this, and other, arguments.¹²⁸ Namatjira did not pursue the constitutional argument on his appeal to the High Court.

More recently, in *Kruger v The Commonwealth; Bray v The Commonwealth (Kruger and Bray)*¹²⁹ the High Court considered a constitutional challenge to the validity of the *Aboriginals Ordinance* 1918. The challenge was on various bases,

¹²⁷ It successfully argued for the deletion of clause 3, which provided that Aborigines were excluded from the provisions of the Award: see Julie Wells, p.81, and Bernie Brian, cited above, p.218.

¹²⁸ See *Northern Territory of Australia in the Supreme Court No.194 of 1958*. For an account of the case see Wells at pp.114-118.

¹²⁹ (1997) 146 ALR 126.

including that the Ordinance was not a valid exercise of the Territories power in s.122 of the Constitution; that it exceeded the constitutional power of the Commonwealth, which did not extend to laws authorising genocide or other crimes against humanity; and that it was contrary to implied constitutional guarantees of equality, freedom of movement and association.¹³⁰ The High Court rejected these arguments, on grounds which have been extensively discussed elsewhere.¹³¹

In light of the decision in *Kruger and Bray*, a constitutional challenge to the validity of the *Aboriginals Ordinance* or the *Welfare or Wards' Employment Ordinance* in the context of 'stolen wages' claimants seems highly unlikely to succeed.

3.4 *An argument based on breach of trust*

The most promising argument for 'stolen wages' claimants in the Northern Territory, as elsewhere, is that the Government breached a fiduciary duty to those whose wages it controlled. Such an argument would require the claimants to prove that the government was a fiduciary, and that it breached its duty under that relationship.

Mudaliar has argued that equivalent 'protective' legislation in Queensland, in particular legislation establishing 'trust' funds or accounts, created a relationship of beneficiary and trustee.¹³² As in the Northern Territory, legislation described moneys as being held 'in trust', or 'on behalf of' the account holders, in whose interests the responsible government officer was supposed to act. She has suggested that the fact that government "consistently dealt with the money in the accounts as one pool of money and used it for purposes that were not related to individual account holders" may suggest a lack of intention to create a trust.¹³³ However, the fact that the government or its officers breached its duty by mixing trust moneys should not be used as an argument that no such duty existed.

As in *Cubillo and Gunner v The Commonwealth* concerning the 'stolen generation',¹³⁴ lapse of time is a significant issue for 'stolen wages' claimants. Given the loss of records and the death of key witnesses, the accounting

¹³⁰ See, for a summary of the plaintiffs' arguments, (1997) 146 ALR 126 at 184-5 per Gaudron J.

¹³¹ See, for example, "Forum: Stolen Children: from Removal to Reconciliation", (1997) Vol 4 No 3 *UNSW Law Journal*, and more recently on the prospects at international law, Maria O'Sullivan, "Past Violations under International Human Rights Law: The Indigenous 'Stolen Generation' in Australia", (2005) Vol 23/2 *Netherlands Quarterly of Human Rights* 243-272.

¹³² See Sanushka Mudaliar, "Stolen Wages and Fiduciary Duties: A Legal Analysis of Government Accountability to Indigenous Workers in Queensland" (2003) 8(3) *Australian Indigenous Law Reporter* 1 at p.4.

¹³³ Mudaliar, *ibid*, p.5, and see also *Kauter v Hilton* (1953) 90 CLR 86, and *Paul v Constance* [1977] 1 All ER 195.

¹³⁴ *Cubillo and Gunner v The Commonwealth* [2000] FCA 1084.

difficulties of tracing ‘what happened’ to individual moneys placed in trust are likely to be almost insuperable. Governments rather than individuals are best placed to answer such questions. In a Canadian case discussed by Mudaliar, *Cobell v Norton*,¹³⁵ the Government was ordered “to overhaul its accounting practices and to produce an historical account of the trust funds” following a finding of breach of trust. Such an order would be of considerable value to ‘stolen wages’ claimants in the Northern Territory as elsewhere.

4. *The Relevance of ‘Slavery’ to Stolen Wages Claimants*

In a recent article, former judge and Royal Commissioner into Aboriginal Deaths in Custody Hal Wootten has argued at length that courts are inappropriate places to decide issues of Aboriginal injustice such those relating to native title and the ‘stolen generation’. He considers that this is a consequence of the inherent nature of the judicial and adversarial process, in which issues to:

“be decided as questions of fact are just the kind of issues that are unsuitable for adversarial judicial determination. Unspecialised judges are called on to decide extraordinarily complex issues about the culture, cultural continuity and history of societies that are quite foreign to what their personal and professional lives have prepared them to do, magnifying the scope for misunderstanding and misinterpretation that, as I have already noted, exists whenever courts have to venture into unfamiliar territory”¹³⁶

He argues that what is at stake for Indigenous people in such cases “is not the vindication of rights that they possessed, but redress for what happened to them when they were accorded no rights.”¹³⁷ Courts, he argues, are only suited to inquire into narrow issues such as “individual slip-ups by government officers that made their particular actions unlawful”, rather than the far-reaching “effects of a legislatively authorised policy”.¹³⁸

It is beyond the scope of this submission to consider whether Wootten’s defence of the decisions in *Cubillo and Gunner v The Commonwealth*¹³⁹ and particularly *Members of the Yorta Yorta Aboriginal Community v Victoria and Others* (“the Yorta Yorta decision”)¹⁴⁰ is correct. Other commentators have questioned Wootten’s claim that the claimants’ failure in these cases is due to the inherent limitations of the adversarial process rather than judges’ unduly

¹³⁵ *Cobell v Norton*, Case No. 1:96CVO1285 (D.D.C), and see discussion in Mudaliar, *ibid*, p.8.

¹³⁶ Hal Wootten, “Conflicting imperatives: pursuing truth in the courts”, in Iain McCalman and Ann McGrath (eds) *Proof and Truth: the Humanist as expert*, Australian Academy of the Humanities, Canberra, 2003, p.33.

¹³⁷ Wootten, *ibid*, p.34.

¹³⁸ Wootten, *ibid*, p.35.

¹³⁹ [2000] FCA 1084, and on appeal at [2001] FCA 1213; 183 ALR 249.

¹⁴⁰ [2002] HCA 58; 194 ALR 538.

narrow view of their own function.¹⁴¹ Nevertheless, it is beyond doubt that court processes in both native title and ‘stolen generation’ cases have generally disappointed Indigenous litigants. In the light of these decisions, the idea that litigation will meet the expectations of litigants in the ‘stolen wages’ cases should be treated with some care.

Even if successful, litigation based on breach of trust or fiduciary duty addresses only a relatively small part of the broader ‘stolen wages’ issue. For many Indigenous people, the injustice is not so much that a portion of their wages or entitlements have disappeared into government ‘trust’, but the fact that for decades they were paid at grossly unequal rates, or not paid at all.

An argument based on the legal concept of ‘slavery’ is not subject to these limitations. The matters required to prove a charge of ‘slavery’ are precisely the broader matters of injustice in this area: the fact that Indigenous people were paid at minimal rates, or not paid at all, and the fact that many had no real choice but to work under the conditions they did. The question of whether their treatment was legally sanctioned at the time or not is not crucial to a charge of slavery. Clearly laws such as the *Aboriginals Ordinance* did not ordain, or even expressly authorise, conditions of slavery. On the other hand they facilitated and condoned the existence of such conditions. Many of the legislative restrictions on Aboriginal human rights they contained, such as the restrictions on freedom of movement, would be matters tending to prove the legal condition of ‘slavery’.

Australia was not a ‘slave state’ in the manner of the American South. Nor did all Aboriginal people during the relevant period live in a condition of ‘slavery’. Nevertheless there is a strong argument that at least some Aboriginal people – particularly those in the pastoral industry – lived and worked in conditions which would satisfy the definitions of ‘slavery’ contained in the 1926 Slavery Convention, and in the applicable law under the *Slave Trade Act* (UK) 1824.

This is not to say that prosecutions should be brought. Lapse of time is a greater problem here even than in the ‘stolen generation’ cases, or in potential litigation based on breach of trust. It is, rather, an argument for recognition of the concept within the terms of reference for any possible reparations tribunal formed as a result of the *Inquiry into Stolen Wages*. Without recognition of its existence, meaningful debate on this issue cannot occur.

¹⁴¹ See, for example, Jan Muir and Monica Morgan, “Yorta Yorta: the Community’s Perspective on Oral History”, in *Through a Smoky Mirror: History and Native Title*, Mandy Paul and Geoff Gray (eds), Aboriginal Studies Press, Canberra, 1999, p.1.