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The Honourable Peter Beattie MP,
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Friday, 9 February 2001

NOT FOR MEDIA PUBLICATION NOR GENERAL RELEASE

Dear Mr. Premier,

The National Coordinator, Mr. John Leslie instructs me, to convey to you and to Mr. Damien McGreevy of your office our appreciation for your efforts to arrange an urgent meeting with Minister Judy Spence next Tuesday at 1:30pm at her office in Brisbane.

I am instructed that the Aboriginal Negotiation team involved in the Aboriginal Welfare Fund project would desire you to convey to Minister Spence the following information for urgent consideration by both Minister Spence and you prior to next Tuesday's meeting: -

1. That the Queensland State Government give urgent consideration to the allocation of an amount of One Hundred and Eighty Million dollars ($ 180,000 AUD) for payment over a period of Three state budgets in full and final settlement of any present and future claims concerning the Aboriginal Welfare Fund and the legislative regime under which it operated in Queensland;

2. As apart from the above, that the Queensland State Government give urgent consideration to the possibility that a transfer be undertaken of all housing in respect of which funding is now or has in the past been allocated for the housing of Aboriginal and the Torres Strait Islander peoples in the State of Queensland with such transfer being made to the various Regional Housing Authorities established by ATSIC across the State of Queensland;

It is hoped, Mr. Premier, that you will be able through your leadership to provide the Minister and her staff with positive instructions to respond to the points raised above as a means of demonstrating the practical continuation of negotiations on a clear timeline with practical and meaningful outcomes for the benefit of the claimants and their families now and in their future.

It is hoped by the negotiating team to be able to call a press conference next Thursday to assure the Aboriginal peoples of Queensland that the efforts at resolution of the AWF regime are well and truly on track to a genuine resolution in the lifetime of the remaining claimants.

Above all, Mr. Premier, I am instructed to again express the firm view of the Aboriginal Negotiating team that your direct insight into the wider political aspects of the Queensland governmental system would be most helpful and constructive to such a meeting with Minister Spence and that you would be most welcome to attend that meeting next Tuesday if you are at all able to do so despite your clearly busy schedule.

Yours Faithfully,

Geoffrey Atkinson LLB, JP
National Solicitor,
Office of the National Solicitor, NAILSS Australia

National Secretariat for
Aboriginal and Torres Strait Islander Legal Services
In Australia

A Consultative NGO of the UNITED NATIONS
(accredited to the Economic and Social Council – EcoSoc, New York)
(accredited to the UN Commission on Human Rights – UNCHR, Geneva)
(accredited to the UN Commission on Crime Prevention & Criminal Justice-UNCCPCJ,Vienna)
(accredited to the World Intellectual Property Organisation – WIPO, Geneva)
(accredited to the UN CHR Working Group on the elaboration of a text for a Draft declaration on the Rights of Indigenous peoples-Geneva)
(accredited to the UN Working Group on a Permanent Forum for Indigenous Peoples-Geneva)
(accredited to the UN Secretariat for the Convention on Biological Diversity-UNBIODIV,Montreal)
(accredited to the UN Working Group on Indigenous Populations-UNWGIP, Geneva)
(accredited to the UN World Criminal Justice Information Network-UNWCJIN,Washington)

DRAFT

DOCUMENT PREPARED FOR THE PURPOSES OF NEGOTIATIONS CONTAINING THE DEMANDS OF CLAIMANTS IN RELATION TO THE ABORIGINAL WELFARE FUND, ASSOCIATED ACCOUNTS AND ISSUES.

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26 June 2000

Prepared by: Queensland Aboriginal and Islander Legal Services Secretariat (QAILSS)

On Behalf of: 'The Claimants'

For the Attention of: The Queensland Government

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STATEMENT OF DEMAND

Categories of Compensation

Compensation is owing to eligible claimants under the following categories:-

1. Account of monies held in the *Aboriginal Protection of Property Account*;

2. Unlawful Enslavement;

3. Breach of Fiduciary Duty;

4. Unlawful Statutory Deductions; and

5. Human rights violations.

BACKGROUND INFORMATION

What facts give rise to this claim?

The *Aboriginals Protection and Prevention of the Sale of Opium Act (Qld)* ("*the Protection Acts*") came into force in 1897. The legislation created the Office of the Chief Protector of Aboriginals and introduced a permit system for Aboriginal employment as well as imposing numerous other restrictions on the movement and lifestyle of Aboriginal people.

The Protection Acts set up a regime which, amongst other things, controlled payment of and access to the wages of Aboriginal workers from 1897 until about 1975. This document is concerned chiefly with the control of property. The characteristics of these schemes varied for each type of worker.

Prior to 1919, all wages were paid to a third party who exercised control over the monies; the Local Protector, Superintendent of the settlement, or the Superintendent of the church mission. After 1919, regulation provided for a part advance to be made to the worker as *pocket money*, however the majority of claimants testify to never receiving this *pocket money*.

For those Claimants who did not receive payments of *pocket money*, many were aware of their entitlement to a fortnightly advance of cash. Despite this, Claimants state that they were too fearful to ask about these payments as the level of intimidation and oppression was so great as to create a level of fear; only the bravest would dare stand up and voice any concerns about payments. The control given to employers, protectors and superintendents by virtue of the provisions of the *Protection Acts* was such as to empower them with devices which achieved subservience from the people they were empowered to control.

Aboriginal workers who resided on settlements were given rations and vouchers to spend at the local store. Wages of Aboriginal workers who worked under the *Protection Acts* were controlled pursuant to that Act by the relevant controlling authority, be it the local protector, the superintendent of the settlement, etc. This

system of control entrusted the controlling body with the power to manage funds, collect wages, control expenditure, enforce terms of employment, etc.

Types of Workers

Distinctions were made between the following Aboriginal workers:-

- Mission workers;
- Residents of Aboriginal settlements who worked *outside* settlements;
- Residents of Aboriginal settlements who worked *inside* settlements; and
- Local workers.

In addition to these workers, a separate but similar scheme existed for Torres Strait Island workers. As such, these workers should also be included in a scheme for payment of individual reparations.

Mission Workers

This group comprised mission residents who worked outside the confines of the missions. Their wages were controlled by the Superintendent of the mission. Statutory deductions made on the wages of these workers were paid to the Superintendent to be applied for the general upkeep of the mission.

Outside Workers

These workers were settlement residents who were sent out of the settlement to work for white employers, typically providing agricultural and domestic labour. The wages of these workers were paid by employers but controlled by the Superintendent of the settlement. Workers were usually housed and fed by the employer and in turn, the employer was required to pay the worker an amount of *pocket money*. However, supervision of these payments was very limited, as mentioned above, many Claimants claim not to have received such payments.

The wages of outside workers may be categorised in the following way:-

1. Compulsory Savings

The bulk of wages paid to outside workers were deposited into the *Queensland Aborigines Account*. These monies made up the compulsory savings component of the wages and were drawn upon by Government, without the consent of the wage earner, in order to meet additional withdrawals as well as requests for clothing and other essentials.

The costs associated with compulsory removals and other travel expenses were also deducted from compulsory savings.

2. Statutory Deductions

Settlement maintenance deductions were compulsorily made on the wages of outside workers regardless of their taxation status.

Prior to 1945, there was no legislative authorisation for such deductions. Deductions were set at arbitrary levels and ranged from between 5% to 24% of the worker's wages.

After 1945, regulations provided that workers with dependents who resided on settlements were to pay 10% by way of settlement maintenance. Workers with no dependents on settlements were to pay 5%. The amount of the deduction varied depending on the status of the employee. For example, the deduction for a single man would be less than for a married man whose wife and children resided on the settlement.

3. Pocket Money

A component of the wage was to be advanced directly to the outside workers as pocket money. However, many Complainants claim never to have received cash in hand or pocket money from outside employers and this is consistent with the lack of supervision over wages payments.

Inside Workers

Inside workers were settlement residents who worked inside those settlements. It was a mandatory requirement that all residents of a settlement work without pay for 32 (40) hours a week. (but were only paid for 32 hours) Once this time quota was exceeded, inside workers were to be paid a small wage.

Wages of these workers were controlled by the Superintendent of the settlement. Workers received food rations, which were very basic and usually always the same, and were housed on the settlement. Advances of extra cash monies had to be approved by the Superintendent. If the request was considered unnecessary or unreasonable it was refused.

Until 1975, the Superintendent was given ultimate control over the property of residents. The legislation provided for a broad discretion to be exercised by the Superintendent when dealing with the property of Indigenous persons.

Wage components can be categorised as follows:-

1. Compulsory Savings

A portion of monies was placed in the *Queensland Aborigines Account* and made up the compulsory savings component of the monies. These monies were applied to meet requests by residents for cash advances, clothing, medical and other necessities.

2. Statutory Deductions

Records of the accounts of inside workers suggest that not all of these workers had deductions made from their wages by way of settlement maintenance. Hence, Departmental revenue, derived by way of settlement maintenance deductions, were deductions made from the wages of outside workers.

There is some evidence to suggest however, that workers in some cases at certain periods, settlement maintenance deductions were also made from the small portion of wages earned by inside.

3. Cash Allowances

Residents who worked ~~more than 32~~ 40 hours per week were given a small cash allowance. This allowance was a portion of the wages earned for labour exceeding the 32 hour quota.

Local Workers

Local workers were not residents of a settlement. Rather, they were employed by private employers and usually lived and worked at their place of employment. Pastoralists, cattle stations and other private enterprises provided the major source of employment for these workers and local protectors exercised control over their wages.

Control over wages was exercised in much the same way as for outside workers with monies split into the following major components:-

1. Compulsory Savings

A component of wages was administered through the *Queensland Aborigines Account* and represents the compulsory savings of these workers.

2. Statutory Deductions

Statutory deductions were made from the wages of local workers from 1919 until 1966 when all deductions ceased. These deductions varied in accordance with regulations which were amended several times over this period.

Deductions were banked variously throughout that time, in the *Standing Account*, the *Provident Fund* and the *Aboriginal Welfare Fund*. These deductions were made over and above Commonwealth income tax deductions.

3. Pocket Money

As in the case of outside workers, local workers were advanced a sum of cash as *pocket money*. Regulations provided that it was the employer's responsibility to forward this sum to the worker, although there appears to be limited controls placed

on the employer in order to ensure that these advances were actually made. As a result, the majority of Claimants state that they did not receive this portion of their wage.

Torres Strait Islanders

Torres Strait Islanders were subject to a similar scheme of wages control as that experienced by Queensland Aborigines. Prior to 1939, the *Protection Acts* covered Aboriginal and Torres Strait Islanders. In 1939, the *Aboriginals Preservation and Protection Act 1939* and *the Torres Strait Island Act 1939* provided separate schemes for Aboriginal and Torres Strait Islanders. However, similar elements of control existed for both groups of people and the Act relating to Torres Strait Islanders imports sections of the *Protection Acts*.

In 1965, the *Aborigines' and Torres Strait Islanders' Affairs* Act placed Aborigines and Torres Strait Islanders under the same act, however the act is split into separate sections which apply different rules to both groups of people. In 1971, the *Aborigines Act* and *the Torres Strait Islanders Act* were enacted and provided different schemes for both groups.

Despite differences within the schemes which applied to Aboriginal and to Torres Strait Islander people, the fundamental element of control of wages existed in both schemes. This involuntary control of property is the basis of any reparations program. Hence, Torres Strait Islander, as well as Aboriginal people, allege entitlement to individual reparation.

Persons in Receipt of Government Benefits

Indigenous persons in receipt of Government allowances such as child endowments and pensions had their benefits controlled in the same way as control was exercised over the wages of Aboriginal workers. These monies were accumulated and utilised in the same way as the compulsory savings component of wages of outside and local workers. Monies were drawn upon for such purposes as the provision of clothing, medicines, cash advances, etc. without the consent of the grantee.

INVOLUNTARY CONTROL OF PROPERTY

Essentially, regardless of the designation of the Claimant, in cases where property was controlled by a third party there now exists a case for reparation to be made.

Aboriginal people under *the Act* were forced to take up employment and punished if they refused. Punishment such as incarceration was authorised by regulation and commonplace for such a refusal.

Systems of involuntary control coupled with the threat of punishment undermined the exercise of any free will by Aboriginal people who were subject to the *Protection Acts*. The consequence of this regime was an oppressive system of controlling every aspect of a person's life, contrary to fundamental basic values of a democratic society.

In implementing the scheme of protection, Aboriginal people were kept ignorant as to the use, control and application of their property, including wages. Our research indicates that terms of employment were largely unknown to the Aboriginal worker and that this ignorance was fostered in the interests of the State.

For example, information relating to rates of pay, statutory and other deductions made to wages, disbursement of funds, accumulated savings balances and the location of funds, as well as amounts deducted for rations, clothing and accommodation, were carried out in the absence of any such detail being imparted to the Aboriginal employee.

A large number of Claimants state that whenever they inquired in relation to funds held on their behalf the relevant information was not forthcoming. In fact, many such inquiries were met with answers such as "mind your own business", or "as an Aboriginal you know you can't get that sort of information".

Clearly, it was a system put in place in order to maintain a steady supply of cheap labour to industries which required such a source.

Social Consequences for Later Generations

The social consequences for generations of persons suffering systematic abuses of human rights sanctioned and enforced by the State in the name of protection have been severe and far reaching.

The impact of the *protection regime* is manifested on two levels: firstly, in those persons still living who were subject to *the Act* themselves; and secondly, for those persons whose parents and grandparents suffered the consequences of *the Act*.

The Acts usurped the freedom of Aboriginal people, giving many a sense of being unable to control their own affairs. So affected was the mental and emotional state of many Aboriginal workers toiling in conditions imposed by *the Acts*, that attempted suicides were not uncommon. This lack of freedom and sense of hopelessness has had a lasting effect on the confidence of Aboriginal people to succeed as part of the broader community.

The consequence on later generations is apparent in many of the social problems currently facing Aboriginal communities. The lack of self confidence in workers can been seen today.

One can argue that many of these problems, such as, alcohol abuse, high rates of incarceration, deaths in custody and domestic violence, are as a consequence of past injustices visited on Aboriginal people. The effect of which has been to weaken the fabric of Aboriginal communities, causing discontent and manifesting in a range of social issues.

It is for these reasons that QAILSS puts forward the view that, if proper recompense is to be made, payments must be made to the heirs of those persons who would have been eligible for an individual reparation payment.

AGREEMENTS

Between 1884 and 1964 agreements were enforced on outside and local workers. Prior to 1964 entering into agreement was a mandatory requirement in order to take

up employment. These agreements, made between employers and the Aboriginal worker set out the terms and duration of employment. However, the *voluntary* nature of these agreements must be looked at in an appropriate context.

Firstly, high levels of illiteracy amongst Aboriginal people at the time was widespread, and secondly, it is purported that there was a threat, and meting out, of punishment if agreements were not signed and followed. In this context, it is clear that the Aboriginal person who signed the agreement was forced to do so with little or no free will associated in entering the agreement.

Indeed, it is not difficult to establish that agreements were entered into under duress. It is a long established principle of common law that a contract is not enforceable against a party whose assent was procured by threatened deprivation of liberty.

Many Claimants assert that if they refused to sign work agreements or indeed to enter into employment at all, the threat of incarceration hung over their heads. Hence, contracts entered into in this fashion are *void* and cannot be relied upon.

POLICY CONSIDERATIONS

Principles of Reconciliation

Principles of Reconciliation are well established and have been implemented by numerous countries, including South Africa's *Truth and Reconciliation Commission*. These principles are as follows:-

- Truth finding and telling;
- Acknowledgment and apology;
- Reparation for harm in financial terms;
- Restoration of land;
- Redesign of state politico-legal institutions and process.

Both the Commonwealth and Queensland Governments have displayed a public commitment to Reconciliation in Australia. The payment of individual reparations to

Claimants who have suffered systematic injustices by past labour governments is a step toward realising those commitments.

Uncovering histories is critical to the process of reconciliation so that both Indigenous and Non-Indigenous people have a sense of their own histories. In particular, stereotypes of Indigenous people as burdens on the Queensland economy are inconsistent with the generations of enforced labour, especially in the pastoral industry, which are the subject of this document.

Records clearly reflect that Aboriginal monies were used to fund Aboriginal services. Necessities such as blankets, health, travel as well as Christmas presents, provided to residents of settlements, were funded by Aboriginal wages.

Aboriginal workers have always been subject to payments of taxation and, as discussed in this paper, were further taxed to meet the costs of general expenses made on behalf of Indigenous communities. These taxes were imposed on persons whose wages were well below award rates of pay made to their Non-Indigenous co-workers.

It is now the time to redress the unconscionable conduct of past, successive Queensland Governments.

Public Commitments to Negotiation

The present Government has communicated its commitment to resolving issues associated with the *Aboriginal Welfare Fund* directly via letter to some of the Claimants involved. Commitment to a negotiated settlement in relation to the sensitive issues presented by this Claim is urged as a matter of principle.

Effects of Litigation

The greatest cost to Government of litigating would invariably be the resulting public outrage. The public airing of details of a regime which imposed the systematic abuse of Indigenous Australians, exposed via a court and in the world media would only

serve to diminish Australia's questionable reputation with respect to the treatment of Indigenous persons.

Further, the effects on the Reconciliation process would be considerable. Putting Indigenous Claimants to proof in a court of law, in relation to matters, which are the subject of universal condemnation, can be devastating. An example of this can be seen in the present Commonwealth Government's approach to the concerns of children forcibly separated from their families.

The result of this approach has been to cause bitterness, alienation and a denial, in modern contexts, by technical legal means of wrongs, which are themselves not in issue.

There are significant costs involved in litigation for all parties involved. Further, the judicial pronunciation of issues may seriously prejudice the interest of the State Government or that of Indigenous Claimants. Recourse to high judicial bodies is inevitable when dealing with matters of such significance. This would further increase costs and cause enormous delay in finalising the matter.

The Advantages of Negotiation

There are obvious advantages to a negotiated settlement between the Queensland Government and the Claimants. Examples of such advantages are listed below.

- A settlement would provide relief to persons who have suffered as a direct result of past policies, practices and laws imposed by the Queensland Government.

- Acknowledgment and reparation would greatly alleviate the burden of past injustices and clearly signify the Government's genuineness towards the whole Reconciliation process.

- Further, the spirit of goodwill shown by negotiating, will increase the Government's profile amongst Indigenous persons.

- A negotiated settlement, and payment of individual reparations, would have an enormous impact on improving Australia's international standing at a time of increasing scrutiny of its treatment of Indigenous people.

- A negotiated settlement would circumvent the need for any legal proceedings. Clearly, it is anticipated that part of any settlement made by the Queensland Government would involve obtaining a waiver from Claimants in relation to their right to sue any party with respect to the issues raised in this process. This is significant as pastoralists and other farming industries may potentially be made party to a litigious action for recovery of damages. Indeed, it is reasonable to assume that industries which utilised the cheap labour of Aboriginal workers may be party to any action brought by Claimants.

- The monetary cost of compensation made to individual Claimants pursuant to a negotiated settlement would be far less than the cost of litigating and the payment of compensation and legal costs pursuant to a court order.

- Negotiation allows for the inclusion of significant Reconciliation issues, such as the collection of oral histories, which could not be entertained by a legal settlement.

ELIGIBILITY OF CLAIMANTS

Who is eligible to make a claim for compensation?

The history of any Claimant whose property was controlled under *the protection regime* is complex, contradictory, and not necessarily consistent with departmental records.

Accordingly, QAILSS has been unable to develop a framework for assessing Claimant ability that is commensurate with the personal hurt, humiliation and monetary loss suffered by each Claimant. As such, QAILSS suggests that criteria based on *classes of eligibility*, and quantum based on *period of work*, rather than *individual merit*, should form the basis for individual reparations.

The starting point for classes of eligibility is the *involuntary* control of Indigenous property by the State under the *protection regime*. In order to process claims speedily and ensure that elders are paid as quickly as possible, the eligibility criteria is submitted to be as follows:-

1. Persons who worked, including inside workers, outside workers, local workers, mission workers and Torres Strait Islander workers, under the *Protection Acts* or equivalent acts, or whose wages were controlled by a 'third party' by reason of their Indigenous heritage; or

2. Persons who were in receipt of government benefits and by reason of their Indigenous heritage such benefits were controlled by a 'third party'; or

3. Children and grandchildren, of persons who come under categories 1 or 2; or

4. Persons entitled to a share in the unclaimed estates of Indigenous persons where those estates were retained by the State for example in the *Treasurers Unclaimed Monies Fund*.

LEGAL ARGUMENTS

It is important to keep in mind that this paper was prepared in order to facilitate negotiation. Legal arguments are not presented with the view that they will be relied on if the matter proceeds to litigation.

Hence, the following arguments are but an overview of potential arguments which could be made. QAILSS reserves its right to alter, amend or include new or existing arguments should this matter proceed to litigation.

1. Unlawful Enslavement

It is submitted that the *Queensland Aboriginal Protection Legislation* was repugnant to the *Imperial Abolition of Slavery Act* 1833.

Section 28 of the *Australia Courts Act* 1828 provided that all laws were inherited unless they were not "applicable to the colony". There is nothing about colonial conditions which would prevent the operation of the 1833 Imperial Act.

Hence, as long as it can be established that the *Protection Acts* set up a scheme, akin to slavery, inconsistent with the 1833 Act, the *Protection Acts* must be struck down as an invalid exercise of State legislative power and therefore, unconstitutional.

Section 12 of the *Abolition of Slavery Act* 1833 states the following:-

> "and that from and after the said First Day of August One thousand eight hundred and thirty four slavery shall be and is hereby *utterly and forever* abolished and declared unlawful throughout the British Colonies, Plantations and Possessions Abroad."

This law is directed at the direct or immediate abolition of slavery. As the 1833 Act does not contain a definition of slavery, other sources must be referred to for such a definition.

The *Slavery Convention* (of 9 March 1927) came to being after many decades of international pressure for the abolition of slavery. Article 1(1) of the Convention provides the following definition;-

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

The key element of this definition is the notion of *ownership*. There are sufficient indicia in the scheme of enforced Indigenous labour in Queensland, in order to establish that the State Government exercised control, or ownership, of Indigenous people and their labour. This is despite the fact that international thinking at the time had clearly outlawed such practices.

Even though there appears to be no trading in human bodies, as occurred in English colonies and America, there was the supply of cheap labour provided to industries,

which was heavily controlled by the State. The control extended to every aspect of the Indigenous person's being, giving him or her none of the rights enjoyed by *free* persons.

Even if it is assumed that the form of slavery referred to in the 1833 Act is slavery in the classical sense. That is, one person's ownership of another with the right to that person's unremunerated labour and with the right to sell or to free him or her at will, the indicia of such slavery contained in the scheme of protection, meet this definition.

However, the words used in *Section 12* are broad and emphatic. The 1833 Act arguably does more than prevent mankind being treated as human chattels capable of ownership, disposition and unpaid labour. The prohibition is complete, leaving no exception. It is suggested that the 1833 Act abolished all forms of slavery, that is slavery in essence, even if it does not appear to be so by form.

Indicia of Slavery

A broad definition of slavery is preferred, however an argument can be mounted that the *protection legislation* set up a scheme akin to slavery in the classic sense. The classic definition of slavery has three key elements, these are:-

(a) Ownership;

(b) The right to the person's unremunerated labour; and

(c) The right to sell or free the person.

Each will be discussed in turn.

(a) Ownership

The *Queensland Protection Legislation* set up a scheme of wages control which effectively gave the Queensland Government ownership of Indigenous labour.

All property belonging to Aboriginal persons was controlled by the Protector or Superintendent. Protectors and Superintendents were officers of the then Department

of Native Affairs. Monies were used only with the consent of these officers, who controlled the monies in accordance with the *protection legislation*. Hence, the Queensland Government had these monies at its disposal for purposes it required. *Settlement Maintenance* and *Provident Fund* deductions are examples of the State's use of the funds.

Missions and settlements were well known as a source of cheap labour for neighbouring pastoralists and farmers. These institutions became proficient in sourcing Indigenous labour to industries which required it. The *protection legislation* ensured the ongoing supply of cheap Indigenous labour.

In most cases Aboriginals were displaced from their homelands and taken to missions or settlements. Aboriginal males were trained in labouring. Aboriginal females were trained in domestic work. Taking up employment was compulsory and at the age of approximately 12 years Aboriginals were taken out of training and placed in employment.

Refusal to work was met with a term of incarceration. Movement was completely restricted. Permits being required in order to travel or even move about within the settlement.

Hence, the scheme was a system of *ownership* of Indigenous people by the State Government which gained control over the income of their labour and applied it for, amongst other things, the funding State expenses.

(b) The Right to Unremunerated Labour

Aboriginal persons who resided on settlements were forced to work for 32 hours with no remuneration. Food rations and menial shelter was provided by the settlement, but no wages were paid. Clearly, these workers were treated in the same way as that contemplated by the classic definition of slavery.

Other Aboriginal workers, that is outside and local workers, were to be paid a portion of their income by way of pocket money. However, the majority of Claimants claim

never to have been paid this portion. The scheme of protection was such that insufficient mechanisms were in existence in order to ensure payment of pocket money.

The remainder of the wage was paid to the Protector or Superintendent who used the monies for the provision of goods and services. For example, clothing, medical and travel expenses were paid from the worker's income. This is not unlike the treatment of slaves outlawed by the 1833 Act. Slaves were given food rations, a provision of clothing, shelter, medical and other services.

Hence, to suggest that Aboriginal workers were remunerated for their labour would be incorrect.

(c) The Right to Sell or to Free the Person

An Aboriginal person came under the scheme of protection unless they received an exemption from the State. The system of exemption varied over the years, but in general, a worker could only be exempt with the consent of the State. It is interesting to note, Claimants considered themselves or other Aboriginals *free* once they received an exemption. An exemption, once given, could also be withdrawn by the State.

Hence, only the State had power to free Indigenous persons from the control imposed by the scheme of protection.

Furthermore, the State controlled the supply of labour, as such, it could choose where persons were to be employed and the terms of such employment. Hence, the State had the right to sell Indigenous labour to employers.

Conclusion

The Abolition of *Slavery Act* 1833 uses broad and emphatic words – "Slavery shall be and is hereby utterly and forever abolished and declared unlawful..." in order to outlaw practices of slavery. The intention of the legislation, as evidenced by its wording, was to outlaw slavery in all its aspects.

Key indicia of slavery can be found in the policies and practices which ensued under the *Protection Acts*. If applied to a broad definition of slavery or serfdom, the regime of enforced labour would, no doubt, fall within such a definition.

For example, Article 1(b) of the 1956 *Supplementary Convention on the Abolition of Slavery* defines serfdom as:-

> "the condition or status of a tenant who is by law, custom or agreement bound to live and labour on land belonging to another person and to render some determinate service to such other person, whether for reward or not, and is not free to change is status..."

Aboriginal people were, by law, bound to live and labour on land, be it a settlement, mission, or cattle station, which certainly did not belong to them, and were not free to change their status. Clearly, the scheme of protection amounts to serfdom in accordance with that convention.

Regardless of this, even if the classic definition of slavery were applied, the regime set up by the *Protection Acts* would still be contrary to the *1833 Abolition of Slavery Act* for the reasons set out above. Therefore, as the State Legislature did not have power to abrogate an Imperial statute, the *Protection Acts* are invalid as being repugnant to the *Abolition of Slavery Act* 1833.

Once a court declares the repugnance and invalidity of the legislation, Claimants would potentially have a claim for false imprisonment, which would give rise to a substantial sum of damages.

2. Account of Monies Held in the *Aboriginal Protection of Property Account*

A number of Claimants assert that the estates of their deceased relatives were never distributed to beneficiaries. These Claimants believe that the State took possession of such funds without taking the necessary steps to inform beneficiaries of their entitlement.

QAILSS understands that a portion of these monies is held by the State in the *Treasurers Unclaimed Monies Fund* and that there are other portions held by the *Public Trustee*. As part of the process of reparations it is only just that these beneficiaries receive the inheritance to which they are entitled at law.

We propose a process whereby persons who believe they have an interest in an estate held by the fund are able to come forward and have their interest assessed and paid.

3. Breach of Fiduciary Duty

Establishing a Relevant Relationship

Regulations promulgated under the *1904 Protection Acts* provided that the Protector was to act as trustee for persons whose accounts were under their control. Even if this express trust is rejected, the nature and purpose of these accounts includes all the ingredients necessary in order to establish a fiduciary relationship.

It is an accepted legal principle that a fiduciary relationship exists where a person entrusts property to another and relies upon them to deal with that property to the benefit of that person. There is usually an undertaking to act on behalf of another person, and inherently, a position of reliance or vulnerability causes reliance to be placed on the person entrusted with the property.

In the case of control of wages under the *Protection Acts*, the Protector or Superintendent, was entrusted with property confiscated from Aboriginal people without their consent. Reliance was placed upon that person to deal with that property to the benefit of the Aboriginal person - even in accordance with administration of the funds under *the Acts*.

Aboriginal people subject to the *Protection Acts* were inherently in a position of vulnerability given the absolute control of their monies entrusted to the 'third party'. High levels of illiteracy and the lack of knowledge and understanding in relation to the application of these funds, compounded this vulnerability and placed them at a

distinct disadvantage. Consequently, complete reliance was placed upon the trustee to apply these funds in a beneficial way.

Breach of the Fiduciary Relationship

It is the consistent evidence of Claimants that instances of fraud occurred regularly in the administration of their property. An example of such an occurrence given regularly by Claimants relates to requests made for withdrawal of funds.

Claimants suggest that requests were seldom made due to the difficulty of obtaining approval for such withdrawals. However, when such requests were approved, the sum actually *withdrawn* was often greater than the sum *requested* and the difference misappropriated by the person drawing on the funds. This also demonstrates the facial invisibility of fraud in the records.

Once again, high levels of illiteracy implied a greater level of reliance on the Administrator to act in the best interests of the wage earner; the disproportionately weaker and stronger positions held by each respective party to the transaction increases the opportunity for fraud.

The opportunity to commit fraud on the accounts of Aboriginal persons existed to such an extent that the lack of proper mechanisms to prevent such fraud itself constitutes a breach of the fiduciary relationship.

Making of Investments

The accumulated savings of Aboriginal workers were kept in the *Queensland Aborigines' Account*, also known as the *S2127*. These monies were held in accordance with the strict restrictions imposed on any trust.

A large amount of those monies were invested in *Government Inscribed Stock* and other investments, including loans of the monies to hospital and eduction boards, without the knowledge or consent of the Indigenous owners of these accounts.

Documents reveal that a proportion of the investments made resulted in the loss of these monies. Clearly, such investments were made in breach of the trust.

4. Unlawful Statutory Deductions

As discussed previously, statutory deductions took two forms. These were:-

- *Settlement Maintenance Deductions* (SMD); and
- *Provident Fund Deductions* (PFD).

The amount of deductions varied depending on whether the worker was married or single, and the number of dependents either on the settlement or in their care. In relation to SMD, prior to 1945, deductions made were arbitrary and not pursuant to any legislative scheme. These deductions were clearly immoral, and questions also arise in relation to the *legality* of the deductions.

SMD made prior to 1945 have no legislative basis and as such are clearly unlawful. With respect to SMD made after 1945 and PFD, both were after tax deductions. It is repugnant to any democratic system of Government to impose a double tax on persons based on racial class. It is especially disturbing that such forms of deductions were made when one takes into account that the wages of Aboriginal workers were merely a portion of the wages earned by the larger community.

5. Human Rights Violations

<u>International Precedents</u>

The *United Nations Universal Declaration of Human Rights* (of 10 December 1948) is a statement encoding basic human rights. As such, it is to be adhered to by the international community as a benchmark standard of basic human rights.

The State of Queensland is in breach of 24 out of 30 of the Articles contained in that Declaration as a result of the scheme set up under the *Protection Acts*. Any breach is

significant and represents a disregard for the basic human condition of the Indigenous people of Queensland. The most significant breaches are discussed below.

Article 4 states that "No one shall be held in slavery or servitude...". Clearly, the scheme of enforced labour imposed by the Queensland Government amounts to servitude or serfdom as defined by *Article 1(b)* of the *Supplementary Convention On The Abolition of Slavery The Slave Trade, And Institutions And Practices Similar To Slavery*. These arguments have been previously discussed.

Article 5 states that, "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." Undoubtedly, there can be no question that the practices, which ensued under the *Protection Acts*, were inhuman and degrading. Aboriginal people were treated as prisoners; the fundamental right to live as one pleased and to make decisions in relation to one's life, taken away from them. All that remained was an environment of intimidation and punishment where obedience became a way of life.

Article 13 makes provision for the right to freedom of movement and residence. This basic right was not afforded to the Aboriginal worker. Their movement on and off settlements, as well as within settlements, was stridently restricted. Further, strict rules which provided for residence on settlements or within the boundaries of places of employment, are clearly in breach of this Article.

Next is the provision for freedom of opinion and expression (*Article 19*). The intimidation and punishment on and off settlements was such that any expression of opinion not in conformity with the policies of the day were considered to be acts of disobedience, and met with severe punishment.

Article 23(1) provides that, "Everyone has the right... to free choice of employment, to just and favourable conditions of work..." *Article 23(2)* provides that, "Everyone, without any discrimination, has the right to equal pay for equal work." Again, the Aboriginal worker was denied these basic rights.

Over 700 Claimants make the assertion that the type of employment taken up by each worker was imposed upon them, they were forced to enter into agreement, and given no choice in the matter. Further it was not until 1984 that all Aboriginal workers received equal pay for equal work. Prior to this, Indigenous workers often received a fraction of the wage earned by White workers. In fact, residents of settlements worked for 32 hours per week with *no* remuneration.

Moreover, the policies instituted by the *Protection Acts* are in breach of several other international instruments. These include *the Convention Concerning Forced Or Compulsory Labour* of 28 June 1930 and the *Convention On The Abolition Of Slavery, The Slave Trade, And Institutions And Practices Similar To Slavery* of 7 September 1956. Disregard for the human rights of Aboriginal people is flagrant in the practices and policies legitimised by the *Protection Acts*.

It is time to recognise and reconcile these hardships in the form of individual reparations. This is in alignment with processes which have taken place in Switzerland and Germany - countries which have taken steps to rectify the wrongs of past Governments.

Loss of Fundamental Freedoms

The *Protection Acts* facilitated the control of all facets of the lives of Aboriginal people. The object of the legislation was to segregate Aboriginal people from the rest of the community, while at the same time destroying Aboriginal culture by enforcing practices aimed at assimilation.

The legislation sought to control their existence and utilise Aboriginal workers as a source of cheap labour on settlements and for private industry. For residents of settlements and missions alike, every decision of any significance had to be approved by permit or other authority. For example, permission had to be sought for a trip to the local town in order to purchase goods. Decisions in relation to where one was to work and what they were to do, even the decision to marry, had to be approved by the Superintendent of the settlement or mission.

For residents of settlements, at the age of about three or three and a half, children were segregated from their parents and moved to a boys or girls home situated in a different part of the settlement. The children of local Aborigines were often taken at birth or at a very young age (the 'stolen generation'). Quite simply, policies of the day were intended to eiminalate traditional Aboriginal culture and lifestyle via a system of intimidation and control.

The huge disparity in power, ensured subservience from the Aboriginal race. Not surprisingly, Claimants who worked under the *Protection Acts* only considered themselves *free* men or women once they were no longer bound by that legislation.

Loss of Opportunity

As a result of the system of intimidation and control Aboriginal people lost the economic opportunities available to the rest of the community in terms of business, career, investment and the accumulation of wealth.

The system of enforced labour imposed by the *Protection Acts* effectively stripped Aboriginal people of their dignity, self worth and self confidence. The result was a race of people who were programmed to believe that they were incapable of controlling their own affairs This has had devastating repercussions on successive generations, who have had to overcome mental stigmas and financially struggle in order to gain what their forbearers were unable to achieve.

LIMITATION OF ACTIONS

Legal and moral duties exist for reconciling the wrongs of past governments. The matters in issue deal with fundamental breaches of human rights and a legislative scheme which enforced practises akin to slavery. A scheme which, if publicised, would bring this country under tremendous international scrutiny.

If negotiations were to be entered into with goodwill, in the spirit and integrity of Reconciliation, any suggestion of relying on a defence in relation to the *Limitation of Actions Act*, would be unconscionable.

As mentioned, the purpose of this paper is not to cover legal arguments with any great detail. However, in order to illustrate that, if necessary, QAILSS can successfully bring an action on behalf of its Claimants, these arguments will be briefly addressed.

The Commonwealth v Verwayen (1990) 170 CLR 394, involved a collision on 10 February 1964, between two ships upon the high seas in the vicinity of Jervis Bay. Actions were brought by a number of people for injuries sustained as a result of the collision. In this matter the Commonwealth did not rely on the *Limitation of Actions Act* despite the fact that the action was clearly statute barred.

Given the sensitive nature of this action, which amounts to decades of Government control over a scheme of enforced Indigenous labour, it would be inappropriate, if not absurd, to allege a limitation defence. Furthermore, as negotiation is the preferred means of resolving this matter, preserving the integrity and spirit of Reconciliation, a limitation defence serves only to defeat this purpose, reigniting the pain and anger suffered by Claimants.

Despite the nature of some claims, which date back to wrongs committed in 1920, there are provisions of the *Limitation of Actions Act 1974(Qld)* which would allow an action to succeed.

Section 29 of that Act provides that if a person is under a disability an action may be brought at any time before the expiration of 6 years from the date the person ceased to be under the disability. It is not difficult to establish that Aboriginal and Torres Strait Islander people have been under a disability as a consequence of the practices enforced by the *Protection Acts*.

Requests to access documents in the Government's possession, which would have given rise to a cause of action, was denied until about 3 years ago. Privilege claimed over documents such as, Savings Bank Account Ledger Cards of Aboriginal workers, meant that there was insufficient evidence to prove any wrongdoing.

More importantly, *Section 27(1)(b)* of the *Limitation of Actions Act 1974 (Qld)* provides for no limitation with respect to an action by a beneficiary of a trust, to recover from the trustee trust property previously received by the trustee and converted to the trustee's use. Despite the fact that *Section 27(2)* appears to override *27(1)* with respect to broader breaches of trust, *Section 27(2)* is clearly made subject to *27(1)*.

There is sufficient evidence to illustrate that Aboriginal monies were applied to consolidated revenue and used to meet general Governmental expenditure, especially during the depression years when funds were limited. This expenditure was made without the knowledge of the owners of the accounts and is clearly in breach of the trust.

Revenue raised as a result of unlawful statutory deductions made from Aboriginal wages was applied to meet departmental expenditure, which should more rightly have been made from consolidated revenue. Interest earned on investments of Aboriginal money was not always or completely credited back to the owners of the accounts, these monies were also applied to meet departmental expenses.

Hence, there is ample evidence to support an action in terms *of Section 27(1)(b)*, which would not be statute barred.

Similarly, any argument based on the repugnance of the *Protection Acts* to Imperial statutes would not be subject to the limitation of actions.

QUANTUM

Individual Reparations

Payment of reparations to individual Claimants by way of compensation for the injustices imposed under the *protection regime* is prosed as follows:-

Persons who worked 5 years or less	$25,000.00
Persons who worked more than 5 years but less than 10 years	$30,000.00
Persons who worked more than 10 years but less than 15 years	$35,000.00
Persons who worked more than 15 years but less than 20 years	$40,000.00
Persons who worked more than 20 years	$45,000.00

These figures take into account the need to balance the interests of Claimants with Government budgetary constraints. Given that the average wage in Queensland in 1999 was $30,000 the figures proposed for compensation are very conservative.

It is important to keep in mind that many Claimants worked under the *Protection Acts* for many years. The work often involved carrying out laborious tasks for long hours with minimal, if any, pay. The compensation is for the blatant exploitation and control by the Queensland Government in relation to Indigenous labour, over many years.

In order for justice to be done and to 'be seen to be done' in the communities, it is important that persons who served for many years under the Act receive larger sums of compensation than those who worked for shorter periods. In terms of justice, it is only fair that someone who worked many years be paid a greater amount than a person who worked perhaps just one year.

QAILSS suggest that payments be made along with a formal letter of apology to each Eligible Claimant.

Commemorative Shrine and Oral Histories

As part of the reconciliation process, QAILSS proposes that some funds be applied towards building a commemorative shrine in recognition of those generations of Aboriginal and Torres Strait Islander labourers who were subject to injustices under the *Protection Acts*.

The shrine would be a tangible monument to the dignity and integrity of those aggrieved people and assist in the healing process for their descendants.

An integral part of the healing process is the venting of emotion and telling of stories. As such, QAILSS proposes a process which will enable the venting of stories from people who came under the *protection regime*. Unleashing the hurt, anger and pain felt by Claimants will be as important as the payment of individual reparations.

We have found Claimants to be very forthcoming with their stories and willing to share their experiences with others. In fact most Claimants are eager to tell such stories, believing that many years of silence now has an opportunity to be voiced.

Therefore, it would be imperative that an oral histories project be put in place. The project would resemble the project currently undertaken by the *National Library of Australia* in relation to the recommendation of the *Bringing Them Home*, report of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander children.

Scholarships

Similarly, instituting a scholarship program for Aboriginal and Torres Strait Islander students would be a key initiative toward reconciliation and a worthwhile use of fund monies.

Facilitating the opportunity to pursue tertiary studies is an important gesture of recognition, particularly given that their Aboriginal ancestors were not afforded the same opportunity.

ADMINISTRATION OF THE FUND

In order to ensure the swift processing of claims, an independent tribunal is required. This tribunal would have the responsibility of administering claims.

To ensure proper representation of the interests of Indigenous persons, which will be seen as such by Indigenous communities, it is important that the Tribunal's members include respected Aboriginal and Torres Strait Islander Elders.

The Tribunal's role would entail the administration of claims and overseeing of the process which ensures just payments are made to rightful Claimants.

PROCESS FOR ADMINISTRATION OF FUND

Advertising

A period of advertising will be necessary to ensure that all persons who may have a rightful claim come forward to assert that claim.

This will involve circulating information sheets to Aboriginal and other communities. Advertising in community newspapers and notices, as well as field trips made by persons responsible for imparting information in relation to the compensation process, would also be required.

QAILSS suggests an advertising a period of 18 to 24 would be sufficient to allow all Claimants to come forward.

Sunset Clause

In order to give the process some certainty and finality, QAILSS suggests imposing a sunset clause, after which no claims can be processed.

Priority for Elderly Claimants

A system of priority needs to be established in order to ensure that elderly Claimants, who were *themselves* affected by the regime, are paid and given a chance to tell stories before other Claimants who may be the *descendants* of such persons.

It is the Claimants who lived and worked under the Acts who would most benefit from a process which recognises their hardships and makes amends for past injustices.

Level of Proof Required

Due to the age of a number of the potential claims, necessary evidence of a person's employment may have been lost, destroyed, or misplaced. In some instances, Claimants state not to have been given any documentation. For these reasons, we suggest that the proof required, in order to process a claim, be far less than what would be required in a court of law. Affidavit evidence should be sufficient.

Waiver of Right to Sue

QAILSS understands that in order to give the process some certainty and finality, it will be necessary for Claimants to provide a waiver of their rights to bring a legal action in relation to the issues associated with this matter.

As such, QAILSS is prepared to advise Claimants, who receive some compensation under this process, to commit to a waiver of their rights to take action in the future in relation to the issues associated with enforced labour in Queensland.

MONIES HELD IN THE ABORIGINAL WELFARE FUND

We understand that approximately $7.6 million is held in the *Aboriginal Welfare Fund*. Legislation requires these monies to be disbursed *'for the benefit of Aborigines generally'*.

Guidelines for Distribution

In distributing these monies we propose the following guidelines be adhered to: -

(a) The amendment of legislation which currently governs use of the funds;

(b) Monies not to be applied for provision of goods and services, as these monies were accumulated from after tax deductions. the provision of goods and services have already been paid for through taxation ie. administrative costs of processing claims;

(c) Monies not to be distributed on community by community basis for two reasons:-

(i) This does not take into account the large proportion of movement of Indigenous people from community areas, therefore those persons affected by the protection regime will not necessarily be the same persons who currently reside at the communities; and

(ii) As a result of the movement expressed in (c)(i), many Indigenous people who reside on communities do not consider the community to be their traditional country. There is often no traditional connection with that community as the traditional country is considered to be the place from which that person's tribe or community originated.

(d) Monies not to be applied to payments of individual reparations for similar reasons expressed in (b).

Distribution of the fund

We suggest that these monies be applied to the costs of establishing numerous projects which aim at making reparation which would benefit future generations and educate people with respect to Indigenous histories.

The projects suggested are as follows:-

- Building a commemorative shrine;

- Setting up a comprehensive scheme of scholarships for Aboriginal and Torres Strait Islander students;

- The collection and distribution of oral histories; as well as

- Including an exhibition in the National Library which illustrates the history of Indigenous Australians under the scheme of protection.

As the legislation which now governs the distribution of these monies was put in place during the era of protection and pursuant to the *protection legislation*, to distribute monies in accordance with existing legislation would be to legitimise that scheme. We submit that the legislation be repealed and new legislation enacted which allows the monies to be applied for the purposes outlined above.

INTERNATIONAL PRECEDENTS

Precedents have been set in both Germany and Switzerland in relation to individual reparations payments made to Claimants who were subject to enforced work schemes.

An overview of each model is provided below.

The Swiss Model

Swiss banks were indirectly involved in enforced work schemes to which persecuted minorities, including Jews and homosexuals, were subject during the Nazi era. The bank's involvement stems from the laundering of assets and wages extracted from minorities in the course of such programs.

Evidentiary and jurisdictional issues have meant that a legal solution has not been readily available. Therefore, the basis for making such payments has been one of policy rather than judicial. Despite this, a fund worth $US1.25 billion has been provided by Swiss banks in order to satisfy individual reparations payments and some monies have been set aside for philanthropic purposes.

Importantly, the Swiss model makes provision for payments to be made to the heirs of deceased persons who would have been eligible for a payment. Obviously, this recognises that the heirs of persons effected by schemes of enforced labour have themselves been financially disadvantaged and recompense is made for this.

The descendants of Australian Aboriginals have been similarly disadvantaged because of the restrictions placed on their ancestors which severely curtailed their financial progression. These matters have been previously discussed.

The German Model

The forcible conscription by the Nazi Government of the bulk of its work force into the war effort left acute labour shortages in private industry during World War II. Prisoners of the Nazi Government, who were predominantly Jews and Eastern Europeans, were forced to fill the labour shortages.

The *Remembrance, Responsibility and the Future* Foundation was established on 16 February 1999 in order to compensate survivors for lost earnings. The Foundation will be funded by the State as well as private enterprise. DM 10.2 billion has been set aside for the fund.

The impetus in setting up the fund has been the moral responsibility of private industry in Germany for injustices to workers, which occurred in World War II, and settlement of all outstanding claims against the State and private sector.

In addition to individual reparations a philanthropic fund is planned which will support projects promoting social justice, international cooperation, and understanding between nations.