

SUBMISSION OF

THE HUMAN RIGHTS AND EQUAL OPPORTUNITY COMMISSION

TO

**THE SENATE LEGAL AND CONSTITUTIONAL
REFERENCES COMMITTEE**

INQUIRY INTO STOLEN WAGES

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A. Introduction

1. The Human Rights and Equal Opportunity Commission ('the Commission') makes this submission to the Inquiry into Stolen Wages ('the Inquiry') being conducted by the Senate Legal and Constitutional References Committee ('the Committee').
2. The Commission welcomes the Committee's Inquiry. Many issues involving the underpayment, withholding and misappropriation of wages earned by Aboriginal and Torres Strait Islander people remain unresolved. The failure to adequately compensate Indigenous people who were discriminated against in employment on the basis of their race remains a significant human rights issue in Australia and a matter of great concern to the Commission.

B. Scope of this submission

3. The Commission has been, and continues to be, involved in a number of cases involving claims of racial discrimination in Queensland under the *Racial Discrimination Act 1975* (Cth) ('the RDA'), relating to the underpayment of wages to Aboriginal and Torres Strait Islander people. As a result of its involvement in these matters, the Commission has chosen to focus this submission on these cases and related developments.
4. This submission highlights the following significant issues that the Commission urges the Committee to take into account:
 - The importance of *underpayment* in any comprehensive examination of 'stolen wages';
 - The limited coverage of the Queensland government's Underpayment of Award Wages scheme for Indigenous people whose wages were underpaid by the State;
 - The exclusion from the Queensland government's Underpayment of Award Wages scheme of those Indigenous people who were employed by church organisations on mission communities that were funded by government; and
 - The difficulties faced by Indigenous people seeking a remedy under the RDA for underpayment of wages.
5. The Commission is conscious of the important work done by other groups and individuals concerning allegations of the failure to pay money held by governments ostensibly on trust for Indigenous workers. The Commission also regards these allegations as raising serious human rights issues and welcomes the current Inquiry as a forum in which these issues can be further examined.
6. The Commission supports the suggestion in the terms of reference that there is a need to 'set the record straight' through a national forum to publicly air the

complexity and consequences of government control (direct and indirect) over Indigenous labour and finances.

7. The focus of this submission on developments in Queensland should not be understood as suggesting that the issue of stolen wages is exclusively, or even primarily, one affecting Indigenous people in that State alone. This focus follows from the fact that the cases brought under the RDA upon which the Commission's submission focuses have, to date, originated in Queensland.

C. Underpayment and the terms of reference

8. The terms of reference do not make specific reference to underpayment. However, the Commission submits that underpayment of wages by government to Indigenous workers clearly falls within paragraph (b) of the Inquiry's terms of reference: 'all financial arrangements regarding their wages'.
9. While wages 'stolen' by means such as fraud and misappropriation form an important part of the present Inquiry, the Commission submits that the issue of underpayment should also form a significant component of it. As the information presented in this submission demonstrates, it is an issue that affects many Indigenous people.

D. Employment on church-run missions and the terms of reference

10. The terms of reference commence 'With regard to Indigenous workers whose paid labour was *controlled* by Government...' (emphasis added). The Commission submits that the word 'control' should not be narrowly construed. It should include forms of indirect control and the Committee should consider the employment of Indigenous people by church organisations on 'mission' communities that were funded by government and were regulated by State legislation, as occurred in Queensland.
11. As will be seen from this submission, Indigenous people employed by church organisations on missions, but not directly employed by the Queensland government, are a group otherwise facing significant difficulties in obtaining compensation for underpayment of their wages.
12. In the alternative, the Commission urges the Inquiry to seek an extension of its terms of reference to explicitly include the position of all Indigenous people employed on church-run 'mission' communities that were *funded* by government.

E. Underpayment of wages in Queensland

13. This section provides an overview of litigation and government responses to the issue of underpayment of wages to Indigenous workers in Queensland. This is a significant issue and many aspects of it remain unresolved.

(i) *The Palm Island Wages Case*

14. In 1985 and 1986, a number of Aboriginal people from Queensland's Palm Island lodged a complaint of racial discrimination with the Commission¹ alleging underpayment of wages by the State of Queensland. They claimed that they were discriminated against because of their Aboriginality in that they were:

- paid wages at a rate less than that paid to people who were not Aboriginal; and
- employed on terms and conditions significantly less favourable than were provided to people who were not Aboriginal.

15. The claims covered the period 31 October 1975 (the commencement date of the RDA) to 31 May 1984 (when the administration of Palm Island was transferred from the government to an elected Aboriginal council under the *Community Services (Aborigines) Act 1984* (Qld)).

16. A decision was handed down by the Commission in 1996, finding that six of the complainants had been discriminated against by the State: *Bligh and Ors v State of Queensland*² ('*Palm Island Wages Case*'). Commissioner Carter concluded that the complainants were 'demonstrably the victims of racial discrimination' by reason of the entrenched policy of the Queensland government during the relevant time to pay Aboriginal workers less than non-Aboriginal workers doing the same work.³

17. While evidence received by the Commission suggested that the loss of income for individual complainants ranged from \$8,573.66 to \$20,982.97,⁴ Commissioner Carter decided to award \$7,000 to each of the successful complainants.⁵ This was due to difficulties in precisely and accurately assessing their loss, including the lack of records and faulty recollection of details.⁶

(ii) *Responses to Palm Island Wages Case*

Underpayment of award wages process

18. In response to the decision in the *Palm Island Wages Case*, the Queensland government introduced the Underpayment of Award Wages Process ('UAW process') on 31 May 1999. This process made a single payment of \$7,000 available to Aboriginal and Torres Strait Islander people employed by the government on Aboriginal reserves between 31 October 1975 (the commencement date of the RDA) and 29 October 1986 (from which point Award wages were paid to all workers).

¹ At that time, the Human Rights Commission, the forerunner of the current Human Rights and Equal Opportunity Commission.

² [1996] HREOCA 28.

³ Ibid part 11.

⁴ Ibid part 9.

⁵ Ibid part 15.

⁶ This calculation of damages has been strongly criticised: see Scott McDougall "'A Certain Commonality": Discriminating Against the Discriminated in the Compensation of Queensland's Underpaid Workers', [2002] ILB 5, available at <http://www.austlii.edu.au/au/journals/ILB/2002/5.html>.

19. It is understood that 5,729 claims were paid under the UAW process, totalling approximately \$4 million.⁷
20. There were, however, a number of features to the UAW process which limited its capacity to compensate people for their loss:
- The amount of \$7,000 was a flat sum, paid regardless of the total amount by which a person was underpaid.⁸
 - The period of 1975-1986 covered by the process, while reflecting the dates during which the underpayment of wages was potentially discriminatory under the RDA, excluded earlier periods of employment during which people were underpaid.
 - People employed by church organisations on ‘mission’ communities (such as Hopevale, Wujal Wujal, Doomadgee, Arukun and Mornington Island) were **not eligible** for compensation as they were not directly employed by the State.
 - People accepting payment under the UAW process were required to sign a deed to waive their rights to recover further compensation.
 - The closing date for applications was 31 January 2003.
 - The UAW process only compensated those people alive as at 31 May 1999. The estates of workers who had died before that time were therefore not eligible for payment.
21. The Commission is also concerned that people eligible for payment under the UAW process may not have been in a position to make an informed decision about whether to accept payment under it. People considering accepting this one-off capped payment were unlikely to have access to records that would have enabled them to properly determine the extent of any liability that the government may have had for underpayment. The problem of the unavailability of records and incomplete recollections was recognised in the *Palm Island Wages Case*.

Indigenous Wages and Savings Reparation Process

22. The Queensland Government also introduced the Indigenous Wages and Savings Reparation Process in November 2002. This was not related to the issue of *underpayment* of wages. The process offered limited payments to people whose wages and savings were controlled under Queensland ‘Protection Acts’. People alive on 9 May 2002 who were born before 1952 were eligible for payment of \$4,000 and people born between 1952 and 1956 were eligible for \$2,000.⁹

⁷ Communication with Department of Aboriginal and Torres Strait Islander Policy, 25 July 2006.

⁸ Of course, one result of this is that the process potentially *overpaid* some people.

⁹ See ‘Indigenous Wages and Savings (1890s-1980s) Reparation Process Information Sheet: http://www.datsip.qld.gov.au/pdf/reparations/final_infosheet.pdf.

23. Many of the concerns raised above in relation to the UAW process apply equally to the Indigenous Wages and Savings Reparation Process. In particular, the Commission is concerned about the limited availability of, and access to, information that would have enabled those eligible under this scheme to make an informed decision about whether to accept the payment offered. In circumstances where the offer under the scheme was available only for a limited time and was made on the basis that its acceptance would conclusively determine any rights to compensation, the lack of access to information raises a particular potential for unfairness.
24. The previous Aboriginal and Torres Strait Islander Social Justice Commissioner, Dr William Jonas AM, also expressed concern at the time that the Indigenous Wages and Savings Reparation Process was announced that there had been inadequate consultation with people potentially affected. Dr Jonas stated:

Only about 10% of people potentially affected took part in the consultation process; it was presented as a once only 'take it or leave it' offer, placing considerable stress on people often living in dire economic circumstances; there was a lack of independent legal advice on the implications of accepting the offer; and there was significant confusion as to the purpose of the consultations...¹⁰

25. Dr Jonas was also critical of the compensation offered under the scheme, suggesting that the amounts of \$2,000 and \$4,000 were arbitrarily chosen and inadequate.¹¹

(iii) *Baird v State of Queensland*

26. As noted above, the Queensland UAW process did not extend to Indigenous people who were employed on church-run mission communities. The decision in *Baird v State of Queensland*¹² ('*Baird*') illustrates the difficulties that may be faced by people seeking a remedy under the RDA in those circumstances.

The applicants' case

27. The Indigenous applicants in *Baird* claimed that between 1975 and 1986 they were employed on one or other of the Hope Vale and Wujal Wujal missions by the Queensland Government ('the Government'). They alleged that during this period they were paid rates less than other non-Indigenous persons employed by the Government to perform similar work and/or below relevant levels established by applicable industrial awards.
28. Wujal Wujal and Hopevale were 'reserves' for the purposes of the *Aborigines Act 1971* (Qld). During the period covered by the application, the Government had placed the reserves under the management of the Lutheran Church of Australia ('the Church') in accordance with that Act.¹³ These cases therefore differed from

¹⁰ See Aboriginal and Torres Strait Islander Social Justice Commissioner, Media Release 8 November 2002, http://www.humanrights.gov.au/media_releases/2002/81_02.html.

¹¹ Ibid. See also Media Release 22 November 2002, http://www.humanrights.gov.au/media_releases/2002/84_02.html.

¹² [2005] FCA 495.

¹³ Ibid [115]-[116].

the *Palm Island Wages Case* where the management of the community was directly in the hands of the Government.

29. The Government provided funding to the Church for the running of the missions by way of annual grant. The level of such funding was found to reflect, to some extent, the cost to Government of managing reserves. Grants included amounts identified as being for wages payable to Indigenous residents and these amounts reflected a wage rate less than the relevant award rate. However, once the grants were made, it was essentially for the Church to decide how the grant money was to be spent.
30. The applicants claimed that the underpayment of their wages constituted race discrimination for which the Government was ultimately responsible. The Church was not a respondent to the litigation.¹⁴ The race discrimination was said to be contrary to two provisions of the RDA:
- section 9, the general prohibition against discrimination, and
 - section 15, the specific prohibition on discrimination in employment.

The Court's decision

31. The Court accepted that some of the applicants had proven economic loss of between \$8,000 and \$37,000 as a result of underpayment of their wages.¹⁵ However, the underpayment was not the result of discrimination by the Government contrary to the RDA.
32. The Court rejected the application in relation to s 15 (discrimination in employment) on the basis that the Government did not employ the applicants. The Court stated:
- No doubt the Government allowed and expected the Church to perform functions on the missions, which functions the Government would, itself, have performed in the absence of the Church. However, that does not lead to the conclusion that persons apparently employed by the Church... were employed by the Government. Nothing in [the relevant legislation] suggests that the Church or council was authorised to employ staff on behalf of the Government.¹⁶
33. The Court also rejected the applicants' argument that the calculation and payment of grants by the Government involved discrimination contrary to s 9 which provides a general prohibition against discriminatory acts. The applicants argued that use of pay rates in the calculation of grants which differed from rates paid to non-Aboriginal Government employees and/or specified in awards discriminated against them.
34. The Court found that:

¹⁴ Initially the Church was named as a respondent but the applicant discontinued the proceedings against it. It can be noted that it was not suggested in *Baird* that the Church had profited from the underpayment of wages – it had paid out in wages amounts equivalent to the grants received. However, those grants anticipated payment at under-award rates.

¹⁵ *Ibid* [148]-[163].

¹⁶ *Ibid* [119].

- There could be no doubt that Indigenous people in Queensland were, for some or all of the period in question, significantly disadvantaged and one such disadvantage was that wage levels paid on reserves were lower than levels prescribed by awards and therefore paid in the general community;
- It is probable that the system of reserves established and maintained under Queensland legislation was a cause of such disadvantage;
- The Government's apparent acceptance of the fact that the Church was not paying award wages on the missions also contributed; and
- Such acceptance was the natural consequence of the fact that the Government was paying below-award wages to Indigenous workers on the reserves which it administered.¹⁷

35. The Court nevertheless held that there was no discrimination in the payment of grants by the Government:

The applicants have established that the grants were not sufficient, themselves, to enable the Church to pay award wages, but there is no basis for asserting that the calculation of the grants involved any discriminatory element. Any discrimination arose from the discrepancy between the amounts paid to indigenous workers (which amounts were derived from the grants) on the one hand, and amounts paid to other workers (which amounts were unrelated to the grants) on the other. That discrimination was the result of numerous factors, unrelated to the acts upon which the applicants rely. For this reason that discrimination was not involved in those acts. In these proceedings the applicants complain of discrimination against them as employees, not that they failed to receive a fair share of public resources generally.¹⁸

36. The Court nevertheless expressed the following concern at the end of its reasoning:

At least after [29 May 1979] the Government was aware that indigenous workers on reserves were entitled to award wages. It was also aware that the RDA might require that indigenous workers be paid at equivalent rates to non-indigenous workers. Notwithstanding my conclusion that the applicants cannot succeed in this action, **it is of grave concern that the Government should have chosen to ignore breaches of both Queensland and Commonwealth legislation. This is particularly so when it was at the expense of vulnerable citizens.** However it is fair to say that this attitude was the culmination of a long history of neglect of indigenous people, based on a tacit assumption that they were disadvantaged by choice. That assumption was false. In the 1970s and early 1980s our attitudes were changing, but such changes have only gradually been reflected in our treatment of indigenous people. Thus the Government treated its obligation to meet the basic entitlements and needs of these people as a matter of relatively low priority, to some extent conditional upon further funding from the Commonwealth.

It is no doubt an inevitable part of inter-governmental dealings in a federation that there be haggling concerning funding and responsibilities. However governments should not lose sight of the fact that hard bargaining can disadvantage those whom they are obliged to protect.¹⁹ (emphasis added)

¹⁷ Ibid [135].

¹⁸ Ibid [138].

¹⁹ Ibid [167]-[168].

Appeal

37. The decision in *Baird* was appealed to the Full Court of the Federal Court. The appeal was heard in February 2006 and a decision is, at the time of writing, reserved. The Commission was granted leave to appear in that matter as an intervener and made written and oral submissions which argued that the Court at first instance had erred in its approach to a number of issues.²⁰
38. Although the outcome of the matter is still unknown, the matter nevertheless highlights the potential difficulties faced by people seeking a remedy for underpayment of wages through litigation under the RDA.

(iv) Other current litigation

39. Indigenous people from other former mission communities, namely Doomadgee, Mornington Island and Aurukun, are also engaged in litigation seeking a remedy for alleged racial discrimination in the underpayment of wages. The Commission's Aboriginal and Torres Strait Islander Social Justice Commissioner and Acting Race Discrimination Commissioner has been granted leave to appear in three of those cases.²¹
40. At the time of writing, the State of Queensland has sought to have one set of proceedings permanently stayed. The basis for the application is that the State is unable to defend the application due to the time that has passed since the events and the consequent unavailability of significant evidence including that of witnesses who are deceased or unable to recall matters due to age and/or ill-health.
41. The Court has, at the time of writing, reserved its decision on the application for a permanent stay. However, the matter again highlights the difficulties faced by people seeking a remedy for alleged underpayment of wages through litigation under the RDA.

(v) Voluntary work of community organisations and individuals

42. The Commission recognises the significant work done by community organisations, lawyers and other individuals acting on a voluntary basis or with very limited resources, to assist people to assert their rights under the RDA and make decisions in relation to government compensation schemes,
43. The scale of the task involved in providing this assistance, given
- the potential numbers of Indigenous workers involved,
 - the difficulties in accessing relevant records,
 - the necessary forensic/accounting exercises that follow from any such access, and

²⁰ The Commission's submissions are available at:
<http://www.humanrights.gov.au/legal/intervention/baird.html>

²¹ *Douglas and Others v State of Queensland* QUD389/2005; *Chong and Others v State of Queensland and Uniting Church in Australia Property Trust* QUD301/2005; *Giblet and Others v State of Queensland and Uniting Church in Australia Property Trust* QUD2000/2005.

- the complexity of litigation

makes this task a difficult one. The Commission therefore welcomes the intervention of this Inquiry and the opportunity for detailed scrutiny it will bring to these issues.

F. Conclusion

44. The issue of underpayment of wages to Indigenous workers in Queensland employed by government and on government-funded missions is one that is yet to be resolved satisfactorily. The Commission urges the Committee to recognise in its report the importance of this issue with a view to achieving just outcomes for those who have suffered loss as a result of this discrimination.
45. The Commission supports the suggestion in the terms of reference that there is a need to 'set the record straight' through a national forum to publicly air the complexity and consequences of government control (direct and indirect) over Indigenous labour and finances.
46. The Commission has sought to focus these submissions on a particular issue of relevance to the Committee about which it has special knowledge. The Commission would, however, be pleased to provide the Inquiry with further assistance in relation to human rights issues that arise in the course of the Inquiry, particularly once more of the facts relating to the issue of 'stolen wages' become clear.

1 August 2006

Human Rights and Equal Opportunity Commission