CHAPTER 7

REPAYMENT OF MONIES BY GOVERNMENTS

> What if your wages got stolen? Honestly, wouldn't you like to have your wages back? Honestly. I think it should be owed to the ones who were slave labour. We got up and worked from dawn to dusk. I had to get up and milk the cow. I did not know how the hell to milk a cow. I got there and I had to chop wood. I was only young; I was only a kid. So of course I want my money and the rest of them want their money. It belongs to them. Everything else has been taken off them. Why can't they have something back? Australia should give something back to us Aboriginal people. We lost everything – family, everything. You cannot go stealing our lousy little sixpence. We have got to have money back. You have got to give something back after all this country did to the Aboriginal people. You cannot keep stealing off us.[1]

7.1 In 1999 the Queensland Government introduced a process referred to as the Underpayment of Award Wages Process (UAWP) to make reparations for the underpayment of award wages to Indigenous workers who had been employed by the government on Aboriginal reserves for the period 31 October 1975 to 29 October 1986.

7.2 In 2002, the Queensland Government introduced the Indigenous Wages and Savings Reparations Offer (the reparations offer) for the reparation of money to Indigenous workers who had their wages and savings controlled under protection Acts. The NSW Government also introduced the Aboriginal Trust Fund Repayment Scheme (ATFR Scheme) to address the repayment of monies held in trust funds by the NSW Government. Evidence suggests that the ATFR Scheme for the repayment of monies is generally better regarded than the Queensland reparations offer.

7.3 This chapter provides a brief overview of the UAWP, which was used as a model for Queensland's reparations offer. An outline is then provided of both the Queensland reparations offer and the NSW repayment scheme. Evidence which identified problems and criticisms of these schemes is also discussed.

Queensland

7.4 The first scheme introduced by the Queensland Government was the UAWP scheme which provided a one-off payment of $7000 to workers employed on Aboriginal reserves. The second scheme was the reparations offer which provided for payments of $2000 or $4000, depending on the date of birth of the Indigenous worker.

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1 Ms Valerie Linow, *Committee Hansard*, Sydney, 27 October, pp 21-22.

The Underpayment of Award Wages Process

7.5 The Queensland Government announced the UAWP in direct response to a decision of the Human Rights and Equal Opportunity Commission (HREOC): the so-called *Palm Island Wages case*[2].

7.6 In 1985 and 1986, workers from Palm Island complained to the Human Rights Commission (HREOC's predecessor) claiming that, in the course of their employment on the Queensland Government reserve on Palm Island, they had been discriminated against because they were Aboriginal people, and, in particular, that they had been paid wages at a rate less than they would have been paid if they were not Aboriginal.

7.7 The matter took 10 years to run its full course and, ultimately, HREOC determined that six of the workers had been discriminated against in the course of their employment on the basis of race[3]. HREOC rejected the Queensland Government's claims that the workers were not 'employees' and that it had been acting in compliance with Queensland law at the time[4].

7.8 HREOC heard evidence that each worker had suffered a loss of between $8,573.66 and $20,982.97. Despite this, each of the successful workers was awarded $7,000 in compensation.[5]

7.9 The UAWP was announced by the Queensland Government in May 1999. The process included a single payment of $7,000 which was paid to Aboriginal and Torres Strait Islander people who were employed by the Queensland Government on Aboriginal reserves between 31 October 1975 (the commencement of the Racial Discrimination Act 1975 (Cth)) and 29 October 1986 (the date from which Award wages were paid to all workers).[6]

7.10 Applications for the UAWP closed in 31 January 2003. The UAWP offer was open to employees of government reserves who were alive on 31 May 1999 (the date the process was announced) and, therefore, excluded Aboriginal and Torres Strait Islander people who had died prior to this date. Claimants who accepted the $7,000 payment were required to sign a deed waiving their rights to recover further compensation.[7] However, the Queensland Government stated that the acceptance of the payment in the UAWP offer does not prevent a person accepting a payment under the Queensland Government's reparations offer, because the two offers relate to

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2 *Bligh & Ors v State of Queensland* [1996] HREOCA 28.

3 *Bligh & Ors v State of Queensland* [1996] HREOCA 28, part 11.

4 *Bligh & Ors v State of Queensland* [1996] HREOCA 28, part 9.

5 *Bligh & Ors v State of Queensland* [1996] HREOCA 28, parts 9 and 16.

6 HREOC, *Submission 41*, para. 18.

7 HREOC, *Submission 41,* para. 20

different matters.[8] The Queensland Government has paid out $40 million to workers under the UAWP.[9]

7.11 One criticism that has been levelled at the UAWP is that it only applied to workers on government-run reserves, and not to people employed by church organisations on the mission communities.[10] The committee notes the issue of underpayment of award wages for workers on church missions has been the subject of litigation. In one matter, *Baird v State of Queensland* (the *Baird case*), the Federal Court accepted that the applicants had proved economic loss, but ruled that loss was not a result of discrimination by the Queensland Government contrary to the Racial Discrimination Act.[11] That decision was successfully appealed, with the Full Federal Court ruling that the calculation and payment of grants by the Queensland Government to the missions, based on the payment of below-award wages to Aboriginal workers on the missions, was a breach of the Racial Discrimination Act. The Full Federal Court is yet to make final orders in relation to the case.[12] In a second matter, a permanent stay has been granted over the bulk of the proceedings insofar as they relate to the employment of the applicants.[13]

Indigenous Wages and Savings Reparations Offer

7.12 In May 2002, the Queensland Government made a 'without prejudice offer of a one-off payment' to Indigenous workers who were able to demonstrate governmental control of their wages and savings under the Queensland Protection Acts.[14] In the Queensland Parliament on 16 May 2002, Premier Peter Beattie stated: '...this offer is made in the spirit of reconciliation, as a demonstration of our desire to heal the past, so we can move on.'[15]

7.13 The Queensland Government, in its submission to the inquiry, set out the components of the reparations offer:

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8 Queensland Government, *Submission 116*, Attachment 7, *Indigenous Wages and Savings (1890s-1980s) Reparation Process Information Sheet*, September 2003.

9 Queensland Government, *Submission 116*, p. 6.

10 HREOC, *Submission 41*, para 20.

11 HREOC, *Submission 41*, paras 26-38.

12 *Baird v State of Queensland* [2006] FCAFC 162.

13 HREOC, *Submission 41*, paras 39-41; and Mr Jonathon Hunyor, HREOC, *Committee Hansard*, Sydney, 27 October 2006, p. 2.

14 The Hon. Peter Beattie, Premier of Queensland, *Legislative Assembly Hansard*, 16 May 2002, p. 1715.

15 The Hon. Peter Beattie, Premier of Queensland, *Legislative Assembly Hansard*, 16 May 2002, p. 1716.

> 1. $55.4 million[16] for payments to individuals with any unspent balance to be applied to the Aborigines Welfare Fund and a proportion allocated for Torres Strait Islanders;
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> 2. a written apology from the Government to all living persons who had their wages and savings controlled under an Act and who were eligible to make a claim for compensation;
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> 3. a statement in Parliament to publicly recognise past injustices on the basis of race; and
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> 4. a protocol for commencing official Government business with an acknowledgement of the traditional owners of the land.[17]

7.14 The Queensland Government provided the following eligibility criteria for individuals claiming the reparations offer. In order to be eligible, claimants had to:

- be alive on 9 May 2002, which was the date of the offer;
- be born on or before 31 December 1956; and
- have had their wages or savings controlled under a 'protection Act'.[18]

7.15 Depending on the claimant's date of birth, the following amounts were to be paid to eligible claimants under the reparations offer:

- $4,000, for those born before 31 December 1951; and
- $2,000, for those born between 1 January 1952 and 31 December 1956.[19]

7.16 The Queensland Government provided the following explanation for the structure of the reparations offer:

> The cut of date of 1956 was based on the fact that people born between 1957 and 1965 would have been 9 years old or younger when the 1939 Act was repealed in 1965 and 15 years old or younger in 1972 when the 1965 Act was repealed. They were therefore unlikely to have had their wages and/or savings compulsorily controlled.
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> Depending on their date of birth, eligible claimants were paid either $4,000 or $2,000. The differing amounts reflected the assumption that (a) people born before 31 December 1951 were subject to the 1897 and/or the 1939 Acts and their wages/savings were subject to intensive controls and (b) those born between 1952 and 1956 were more likely to have worked and had their savings controlled under the 1965 Act. This Act removed some of

16 The total amount of the offer was $55.6 million, however the Queensland Government gave $200,000 to the Queensland Aboriginal and Islander Legal Services Secretariat (QAILSS) to conduct consultation on the offer. This consultation is discussed later in this chapter.

17 *Submission 116*, p. 3.

18 *Submission 116*, p. 5.

19 *Submission 116*, p. 5.

> the controls, such as compulsory contributions to the Aborigines Welfare Fund, included in the earlier legislation[20].

7.17 If a claimant was determined to be eligible for the reparations offer, and chose to accept the offer, the claimant was required to sign a 'Deed of Agreement', which included the claimant indemnifying the Queensland Government against:

> …all actions, suits, claims, costs and demands which the Claimant, and all other persons claiming by or through or under the Claimant may now have or could have, whether pursuant to common law or under the Protection Acts, against the State, its servants or agents.[21]

7.18 The committee was advised that claimants who were assessed as eligible were provided with independent legal advice prior to accepting the reparations offer. Claimants had a 24-hour 'cooling off' period once they received their legal advice to decide if they wanted to accept the offer.[22]

7.19 The reparations offer was approved by State Cabinet in November 2002 following a period of consultation which was carried out by the Queensland Aboriginal and Islander Legal Services Secretariat (QAILSS). Claims were able to be lodged from 1 February 2003[23] and the offer closed on 31 January 2006.

7.20 The Queensland Government provided the following statistics of claims and assessments made under the reparations offer:

- 8,761 claims have been received;
- up until 9 October 2006, 8,752 claims had been assessed;
- of those 8,752 claims, which had been assessed, 63 per cent were deemed eligible; and
- 5,413 claims have been paid totalling $19.11 million (of the $55.4 million set aside for the scheme).[24]

7.21 The Queensland Government's reparation offer received criticism from witnesses and submitters during the inquiry in the following areas:

- the inadequacy of the reparations offer;
- the requirement for indemnity and provision of legal advice;
- the reliance on documentary evidence; and

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20 *Submission 116*, p. 5.

21 Queensland Public Interest Law Clearing House (QPILCH), *Submission 50*, p. 21.

22 Queensland Government, *Submission 116*, Attachment 7, *Indigenous wages and savings reparations process: How will it work?*.

23 The Hon. Peter Beattie, 'Historic Reparations Offer to Indigenous Queenslanders To Proceed', *Press Release*, 20 November 2002.

24 Queensland Government, *Submission 116*, p. 6.

- the distribution of the remainder of the reparation offer monies and Welfare Fund amounts.

Inadequacy of the reparations offer

7.22 The most widespread criticism of the Queensland Government's reparations offer is that it was too far short of the real value of appropriated wages and savings to be acceptable. The failure to offer reparations to the beneficiaries of deceased workers is another area in which the offer has been criticised.

7.23 A number of witnesses who appeared before the committee described the offer as 'insulting'[25]. One witness called it 'laughable'[26]. Mr Victor Hart of the Queensland Stolen Wages Working Group saw the offer as a reflection of the Queensland Government's general attitude towards Indigenous people:

> I think it is pretty obvious that the general attitude behind the government's offer of $2,000 implies that they take for granted the legal and constitutional rights of Indigenous people. From this you can apparently make a clear assertion that they do not think we are as equal as other people.[27]

7.24 In presenting the offer to the Queensland Parliament, Premier Beattie acknowledged that there were estimates that the total amount owed to Indigenous people in Queensland may be as much a $500 million[28]. Despite this, Premier Beattie pre-empted criticism of the extent of the offer on the basis that it was preferable – from the perspective of both the Queensland Government and claimants – to a protracted legal battle:

> Canberra has spent more than $12 million on just one case alone – the Gunner and Cubillo case – which went all the way to the High Court and helped no-one but the lawyers. If we resisted every one of these cases, this could cost Queenslanders $100 million or more in legal expenses. That is a rough guess. It is a lot of money. Settling this away from the courts will save the taxpayers of Queensland millions. There is a win for indigenous people, particularly old indigenous people or elderly indigenous people

25 See Dr Ros Kidd, *Committee Hansard*, Brisbane, 25 October 2006, pp 5-6; Ms Yvonne Butler, *Committee Hansard*, Brisbane, 25 October 2006, p. 21; Dr Rev. David Pitman, *Committee Hansard*, Brisbane, 25 October 2006, p. 38; Mrs Alexandra Gater, *Committee Hansard*, Brisbane, 25 October 2006, p. 44; and Ms Tammy Williams, *Committee Hansard*, Brisbane, 25 October 2006, p. 66.

26 Ms Yvonne Butler, *Committee Hansard*, Brisbane, 25 October 2006, p. 22.

27 Mr Victor Hart, Queensland Stolen Wages Campaign Working Group, *Committee Hansard*, Brisbane, 25 October 2006, p. 58.

28 The Hon. Peter Beattie, Premier of Queensland, *Legislative Assembly Hansard*, 16 May 2002, p. 1716.

> approaching the end of their lives. There is a win for taxpayers, because it will cost them less, and there is a win for reconciliation and decency.[29]

7.25 Some witnesses mentioned their anger that, in announcing the reparations offer, Premier Beattie had referred to the funds as 'taxpayers' money'.[30]

> All I want is justice and what is owed to us. And it is not taxpayers' money; these are wages that every working Australian earns each week.[31]

7.26 Witnesses commented that their understanding was that the reparations offer was based on what the Queensland Government could 'afford to pay', and not what it owed to claimants.[32] In November 2002, Dr William Jonas, the then Aboriginal and Torres Strait Islander Social Justice Commissioner highlighted this inadequacy in the reparations offer, and criticised the Queensland Government's unwillingness to increase reparations by staggering payments over successive budgets:

> ...it was not an appropriate figure for the inter-generational harm and poverty inflicted on Indigenous people through the control exercised by the government. It is clearly an arbitrary figure based on what can be afforded by Queensland Treasury in one hit. There does not appear to have been due consideration of proposals by Indigenous groups for staggering payments over several budgets. There is no justification for how the figure of $55.4m came to replace the previously cost [sic] of $180m (estimated by the Queensland Aboriginal and Islander Legal Service) to adequately address the harm caused.[33]

7.27 Dr Ros Kidd disagreed with the suggestion that the reparations offer could be considered as recognition by the Queensland Government that it accepted some responsibility for the injustices suffered by Indigenous workers. In Dr Kidd's view, this could only be the case if the Queensland Government had made an 'honest and equitable' attempt at reparations.[34] However, when compared with other initiatives of the Queensland Government, Dr Kidd did not believe that the offer demonstrated the Queensland Government accepting any responsibility:

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29 The Hon. Peter Beattie, Premier of Queensland, *Legislative Assembly Hansard*, 16 May 2002, p. 1716. Peter Gunner and Lorna Cubillo were the unsuccessful claimants in a 'stolen generation' case; they were seeking compensation for being removed from their families.

30 See the Hon. Peter Beattie, Premier of Queensland, *Legislative Assembly Hansard*, 16 May 2002, p. 1716.

31 Mrs Yvonne Butler, *Committee Hansard*, Brisbane, 25 October 2006, p. 21; see also ANTaR, *Submission 78*, p. 13.

32 See Dr Ros Kidd, *Committee Hansard*, Brisbane, 25 October 2006, p. 2; Mr Victor Hart, Queensland Stolen Wages Campaign Working Group, *Committee Hansard*, Brisbane, 25 October 2006, p. 60.

33 Dr William Jonas, '"Stolen Wages" case should be delayed, says Social Justice Commissioner', *Press Release*, 8 November 2002; Stolen Wages Working Group, *Press release*, 15 May 2005.

34 *Committee Hansard*, Brisbane, 25 October 2006, p. 5.

> …to say to a person over 50, 'We value your working life at $4,000,' is an absolute insult. I should say that in the same year…the Beattie government offered $50,000 to each of 200 underperforming teachers so they could retrain. It gives you an idea of the level of their sorrow.[35]

7.28 Given the considerable anger that was expressed by claimants and other witnesses at the public hearings in relation to the amount set aside for the offer, the committee was interested to learn how the Queensland Government had arrived at the overall figure of $55.6 million for the reparations offer. In an answer to a question on notice, the Queensland Government informed the committee that:

> The amount of $55.6 million was determined by Government. This monetary amount is one part of a broader reparation package which also includes a written apology from the Government, a statement in Parliament to publicly recognise past injustices on the basis of race, and a protocol for commencing official Government business with an acknowledgement of the traditional owners of the land.[36]

7.29 During the public hearing in Brisbane, the Queensland Government was questioned on the adequacy of the reparations offer. The justification given was:

> …the reparations offer was not by way of compensation. It was a gesture of reparations in a spirit of reconciliation. It acknowledged the scale of the injustices done to people whose wages and savings were controlled under the legislation; it was not by way of compensation.[37]

7.30 The Queensland Government's failure to offer reparations to the descendants of deceased workers was another aspect of the offer that witnesses and submitters to the inquiry criticised as being inadequate.

7.31 Mr Peter Bird expressed to the committee the frustration of his family of being denied the wages of his mother-in-law who had worked at Cherbourg for more than 30 years:

> My wife's mother worked for Cherbourg for some 30 or 40 years, looking after the dormitory cooks – our cook, in fact. Then she ended up being a cook at the Cherbourg Hospital. We could not get the money that should be hers either. She died in the early nineties. She was entitled to that $4,000. We have tried and tried and we have pleaded with every known source of government.[38]

7.32 Ms Pamela Meredith explained the experience of her grand-uncle, whose wages were withheld from him for his entire life:

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35 *Committee Hansard*, Brisbane, 25 October 2006, p. 6.

36 *Submission 116B*, p. 2.

37 *Committee Hansard*, Brisbane 25 October 2006, p. 7; see also *Committee Hansard*, Brisbane 25 October 2006, pp 70, 75 and 80.

38 *Committee Hansard*, Brisbane, 25 October 2006, p. 48.

> The wages of my grandfather's brother (my grand-uncle) James Meredith continued to be withheld for years after he was taken from Cherbourg mission and adopted to a white family. He never married and worked until he was quite old, meaning the government collected a life-times wages belonging to this gentleman – he was practically a slave for them! His wages should rightfully be returned and re-paid to his estate.[39]

7.33 Mr Marshall Saunders pointed out that the NSW scheme (discussed below) makes provisions for the payment of money to the estates of deceased workers:

> My mother died in 1966, and as with many other women she was sent out from Cherbourg (Q) to work on 6 different work sites. She died not knowing what happened to her wages…NSW has paid for deceased people, why can't QLD.[40]

7.34 The Queensland Government provided evidence which explained its reasons for not opening the reparations offer to the families of deceased workers:

> The Government was aware from its experience in the [UAWP] that the majority of Aboriginal and Torres Strait Islander people die intestate and that attempts to distribute estates in accordance with succession requirements are administratively complex and likely to result in outcomes that are considered inequitable by some or all of he parties concerned. These difficulties would have been magnified if descendents of long-deceased persons were entitled to claim on behalf of these persons. Having considered these matters, a decision was taken to focus on those persons who were alive at the time of the offer.[41]

Inadequate consultation with the community

7.35 The Queensland Government has been criticised for the way in which it consulted with the Indigenous community over the reparations offer. Much of the criticism focussed on the manner in which the offer was initially conveyed to representatives of the Indigenous community. The consultation process which was conducted by QAILSS in 2002 was also criticised.

7.36 To appreciate the frustrations of the Indigenous community in respect to the inadequacy of consultations undertaken on the reparations offer, it is important to understand the events which preceded the offer, how the offer was initially made and communicated, and the context in which the QAILSS' consultation occurred.

7.37 For a number of years before the reparations offer both claimants and the Queensland Government were preparing for litigation. At the time the reparations offer was announced, the Queensland Government had spent at least $1.5 million researching the history of Aboriginal wages and savings in preparation for legal

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39 *Submission 18*.

40 *Submission 46.*

41 *Submission 116*, p. 5.

challenges. Further, the Aboriginal and Torres Strait Islander Commission (ATSIC) had provided at least $800,000 in funding to QAILSS for research in preparation for litigation. QAILSS had also collected testimony and identified approximately 4000 potential litigants wanting to recover lost wages.[42]

7.38 In preparation for negotiating with the Queensland Government in relation to the Aboriginal Welfare Fund and associated savings accounts and issues, QAILSS prepared a statement of demand on behalf of claimants. The statement of demand set out a table of reparations to individual claimants for injustices imposed under the protection regime. The proposed reparations were based on a sliding scale, depending on how long a person worked under the protection Acts. At one end, a person who worked 5 years or less would receive $25,000 and, at the other end, a person who worked more than 20 years would receive $45,000. The total amount of the proposal was $180 million to be paid over a period of three budgets.[43]

7.39 It appears that this document was provided to the Queensland Government in February 2001 by the National Aboriginal and Torres Strait Islander Legal Services Secretariat (NAILSS) on behalf of QAILSS.[44] The committee did not receive any evidence during the inquiry to determine the extent of consideration given to the proposal by the Queensland Government.

7.40 On 9 May 2002, Premier Beattie and the then Minister for Aboriginal and Torres Strait Islander Policy, Judy Spence, met with representatives from QAILSS, the State Government Indigenous Advisory Board, and the Aboriginal Community Council.[45] Evidence provided by witnesses suggests that some attendees at the meeting were confident that the Queensland Government would make an offer along the lines of the proposal that QAILSS had put forward. Mrs Ruth Hegarty advised of a meeting she attended with QAILSS representatives, two days before the meeting with Premier Beattie, where it was agreed that if the Queensland Government did not make the offer that QAILSS proposed, then the Indigenous representatives would leave the meeting.[46]

7.41 However, as Mrs Hegarty explained, at the meeting with the Queensland Government, Premier Beattie made the offer of $55.6 million and said that claimants

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42 The Hon. Peter Beattie, Premier of Queensland, *Legislative Assembly Hansard*, 16 May 2002, p. 1716.

43 Ms Lin Morrow and Mr Andrew Dunstone, *Submission 26B*, Queensland Aboriginal and Islander Legal Services Secretariat (QAILSS), *Document prepared for the purposes of negotiations containing the demands of claimants in relation to the Aboriginal Welfare Fund, associated accounts and issues*, 26 June 2000, p. 10 (The QAILSS Proposal).

44 The QAILSS Proposal, covering letter.

45 Queensland Stolen Wages Campaign Working Group, *Submission 117A*, answers to Question on Notice.

46 Mrs Ruth Hegarty, Queensland Stolen Wages Campaign Working Group, *Committee Hansard*, Brisbane, 25 October 2006, p. 60.

could 'either take it or leave it'. The Mayor of Cherbourg Aboriginal Community, Mr Kenneth Bone, who was also present at the meeting, supported Mrs Hegarty's recollection of the meeting, commenting that Premier Beattie said 'This is a one and only offer'.[47]

7.42 The Queensland Government explained that, following the offer of the $55.6 million for reparations, it was subsequently agreed that $200,000 from the original amount would be given to QAILSS to undertake community consultation, reducing the final offer to $55.4 million.[48]

7.43 HREOC provided the committee with a copy of QAILSS' report to the Queensland Government on the consultation (Report on the QAILSS Consultations).[49] The QAILSS consultation process took place between 13 June 2002 and 9 August 2002 and comprised five consultation teams who visited a total of 115 locations across Queensland. The Report on the QAILSS Consultations also contained copies of documents provided to those who attended the consultations, including: a sheet advising claimants of what would happen if they accepted or rejected the offer; and a copy of the letter of acceptance/rejection to be signed and witnessed by claimants.[50]

7.44 The Queensland Government informed the committee that the QAILSS consultation found that, from 5,501 responses, there was an acceptance rate of 94% for the reparations offer.[51]

7.45 The committee was somewhat surprised at the high rate of acceptance, particularly given the obvious dissatisfaction expressed about the offer in the QAILSS report on the consultation:

> Most of the individuals and communities expressed concern at the level of the Government offer ($4,000 and $2,000) with the concerns ranging from dismay through to outright anger.
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> A number of individuals and communities referred to the Reparations offer as a 'pittance' or a 'lousy pittance'…[52]

7.46 The Report on the QAILSS Consultations also contained a 'selection of representative comments' from Indigenous people who were consulted which explained their feelings on the offer:

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47 *Committee Hansard*, Brisbane, 25 October 2006, p. 50.

48 *Committee Hansard*, Brisbane, 25 October 2006, p. 73.

49 *Submission 41A*, answers to Questions on Notice, the *Report on Consultations with Aboriginal Peoples and Torres Strait Islanders of Queensland Regarding Queensland Government offer of Reparations* (Report on QAILSS Consultations).

50 See Schedule 1 of the Report on QAILSS Consultations.

51 *Submission 116*, p. 2.

52 Report on QAILSS Consultations, p. 6.

> I think it very rude of government (sic) to offer that $4,000. I lost my teenage years and worked like a dog, and I got whipped and everything all over. I worked so hard, it was no holiday. This is a rip off, you go back and tell them what I said. Many of these people have died now. $4,000 is not good enough. Our women were raped by white men and we were all ripped off.
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> This is criminal, discriminating. This offer is blackmail, they don't care. It's not enough. It is bloody sickening, discriminating. We're sitting on our land and it is controlled by government, they think it is theirs.
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> This is the closure? You can't go anywhere with this, and we are forced to take it! [53]

7.47 The conclusions to the Report on the QAILSS Consultations provided the following explanation of the incongruity between the concerns about the adequacy of the offer and the high level of acceptance of the offer:

> Whilst the support is extremely high it is not indicative of the view that it is considered that the sums offered to persons falling in Category A ($4,000) and Category B ($2,000) are adequate.[54]

7.48 To this end, a number of witnesses provided explanations as to why the acceptance rate of the offer in the consultation period was so high.

7.49 Ms Christine Howes, the Queensland President of Australians for Native Title and Reconciliation (ANTaR), believed that in responding to the QAILSS survey in the course of the consultation, people believed they were signing legal documentation in relation to the offer, and if they ticked 'no' on the survey, then it would be recorded that they had rejected the offer:

> The documents that people were presented with at those meetings looked legal and felt legal.
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> …
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> The [acceptance/rejection letter] that people were asked to sign looked like a legal document; to the extent that some people we spoke to…had the expectation that the cheque was in the mail an`d that they should receive it by Christmas. They thought that they were getting $4,000 and that they should have it by Christmas.
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> …
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> [If they had ticked 'no' in the survey, it was their understanding they would have been rejecting the offer]…and it would have been on some kind of record somewhere they that were saying no. If they had known that it was a survey, if it was explained to them that it was a survey right from the

53 Report on the QAILSS Consultations, pp 6-8.

54 Report on QAILSS Consultations, p. 16.

> beginning, then I am not convinced that they would have got 94 per cent out of it.[55]

7.50 Mr Darren Dick, Director of the Aboriginal and Torres Strait Islander Social Justice Unit of the Human Rights and Equal Opportunity Commission (HREOC), suggested that those who were not in favour of the offer simply did not participate in the consultation process:

> QAILSS … turned up to communities with … a one-page flyer. It was not what you would call particularly independent legal advice: telling people that if they say no to this offer then they could get stuck in the courts like Mabo for the next 10 years and they may not end up with anything. It was all sorts of things like this which were not particularly objective in nature. They then held community meetings in which they would ask people to sign on to an offer – 'Do you want this money?' – and you would have to tick 'yes' or 'no'.
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> …
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> A lot of the feedback that we got from people was, 'They think we are going to say no so then it is on record somewhere that we do not want the compensation.' I think at the end of the day, the money has been dangled in front of people and they may well ultimately choose to take it. I think that accounts for the very high rate that the Queensland government pays because those people who want to accept the offer were willing to tick the form. Those who were not willing to sign it just did not show up. The records that QAILSS had in their report would show that, for example, there might be a community with 1,000 people in it and there would be 50 who would turn up to the meeting.[56]

7.51 In respect of these criticisms, two paragraphs in the Report on the QAILSS Consultations are particularly relevant:

> Persons and communities were advised that they were at all times free to either return the forms duly executed to the consultation team before it departed the locality or they could if they so wished keep the forms and discuss them with their families or communities or their own legal advisers after the consultation teams had departed without any pressure or duress.[57]
>
> Great care was taken by the consultation teams to point out that the Letters of Acceptance or Rejection were not in themselves legally binding documents in any way and that it was only the actual Queensland Government document which may be subsequently submitted for signature which will be legally binding.[58]

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55 *Committee Hansard*, Sydney, 27 October 2006, pp 52-53.

56 *Committee Hansard*, Sydney, 27 October 2006, p. 4.

57 Report on the QAILSS Consultations, p. 6.

58 Report on the QAILSS Consultations, p. 14.

7.52 Mr Victor Hart of the Queensland Stolen Wages Working Group expressed other concerns about the manner in which the QAILSS consultation was conducted:

> Over the last four years, I have raised concerns and there have been concerns raised to the [Queensland Stolen Wages Working Group] about the process of consultation undertaken by QAILSS back in 2002 on behalf of the Beattie government. Over a three-day period, they visited something like 16 communities in Cape York and consulted with, apparently, 95 per cent of claimants. To fly around and meet at least 3,000 or 4,000 people in that time is a phenomenal piece of research.[59]

7.53 Mr Tony Woodyatt, Co-ordinator of QPILCH, also noted that by failing to undertake a 'proper' consultation, the Queensland Government has ended up with a situation where people are 'justifiably' unhappy with the outcome.[60]

7.54 Mr Bob Weatherall stated his concern that the QAILSS representatives who conducted the consultation were placed in the situation of having to sell the reparations offer.[61] On this point, the committee notes that the Report on the QAILSS Consultations does say:

> Consultations teams were clearly instructed that they were not agents or servants of the Queensland Government and were not authorised at any time to make any promise or to offer any interpretation or to communicate any decision as being made by the Queensland Government at any time whatsoever.[62]

The indemnity and the provision of independent legal advice

7.55 Further elements of the reparations offer that were criticised were the extent of the indemnity that claimants were required to sign on accepting the offer, and the manner in which the independent legal advice was provided to claimants prior to them signing the Deed of Agreement (see paragraph 7.17).

7.56 In advice to potential claimants, the Queensland Government said of the indemnity:

> If you decide to accept the payment you must also sign a Deed of Agreement saying you will not ever go to the courts about the same claim. If you decide to sign this Deed, then you can receive your payment.[63]

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59 *Committee Hansard*, Brisbane, 25 October 2006, p. 53.

60 *Committee Hansard*, Brisbane, 25 October 2006, p. 15.

61 *Committee Hansard*, Brisbane, 25 October 2006, p. 26

62 Report of the QAILLS Consultations, p. 4. Emphasis in original.

63 *Submission 116*, Attachment 7, *Indigenous Wages and Savings (1890s-1980s) Reparation Process Information Sheet*, September 2003.

7.57 As noted previously, the Queensland Government also paid for claimants to receive independent legal advice, after which claimants would have at least a 24 hour cooling off period before deciding if they wanted to accept the offer.[64]

7.58 HREOC noted that the effect of accepting the reparations offer and signing the indemnity was to conclusively determine any rights to compensation in relation to missing or withheld wages and savings. HREOC expressed concern that in those circumstances, claimants had only limited access to information to make an informed decision about accepting or rejecting the offer.[65]

7.59 Given the implication of accepting the offer and signing the Deed of Agreement on a claimant's ability to take future legal action, the committee is concerned that some claimants felt they had been coerced into accepting the offer and signing the indemnity agreement. Some of the comments that the committee heard from claimants included:

> I signed for it. I went to the city and I had a witness with me. I went in to see the bloke, the solicitor. He said: 'You sign it or you get nothing.' …'Or wait 20 years like Mabo.' So I signed it, because my cousin died of cancer. I signed it under pressure.[66]

> The reason why I took it was my little daughter was very sick. That is the only reason why I took it; otherwise I would never have taken it.[67]

> The whole point is: I was practically going on for 70 years of age. I was sick; my wife was sick and there were many around about my age. We were so concerned about the future: we might not be alive by the time all of this great amount of money came in. So, in a sense, we were coerced into taking the $4,000 …[68]

> What had happened was that when people were out there, they already had the money spent – the $4,000 or the $2,000. In your mind, you had that money spent. Most of it was spent for funerals. Mine was, for my 94- year-old mother…There was no way in the world that I could not have signed that piece of paper, indemnity or not. That indemnity, we were told by the young solicitor who was there, was a legal document.

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64 Queensland Government, *Submission 116*, Attachment 7, *Indigenous wages and savings reparations process: How will it work?*

65 *Submission 41*, para. 23.

66 Mrs Ettie Gleeson, *Committee Hansard*, Brisbane, 25 October 2006, p. 50.

67 Pastor Henry Collins, *Committee Hansard*, Brisbane, 25 October 2006, p. 49; see also *Committee Hansard*, Brisbane, 25 October 2006, p. 50.

68 Mr Peter Bird, *Committee Hansard*, Brisbane, 25 October 2006, pp 50-51.

> What I am saying is that we had had that money spent, more or less. When you then get into a meeting and somebody says, 'If you do not sign this paper, you do not get the money,' what are you going to do? Are you going to go back and tell your mum: 'Look, I refused the money. I cannot bury you. We have got to hand the hat around again to communities'? So I think it was unfair of them to say to us, 'You sign it.'[69]

7.60 In responses to questions on notice, the Queensland Government provided information in relation to access by claimants to independent legal advice[70]. The Queensland Government advised that:

> In accordance with the offer document, the Department expected the legal advice to be provided by a legal practitioner on an individual basis to an eligible claimant, whether by personal interview and/or telephone and/or letter of advice.
>
> …
>
> However, the department's preference was for legal advisors to meet directly with each eligible claimant.[71]

7.61 The Queensland Government advised that letters were sent to each eligible claimant which included the Deed of Agreement, payment instructions, Practitioner's Checklist and Practitioner's Certificate; and no eligible claimant could sign a Deed of Agreement without first receiving independent (non-government) legal advice about the implications of signing the indemnity.[72]

7.62 In response to a question about the actual number of people who sought access to the legal advice, the Queensland Government advised that:

> The number of eligible living claimants under the reparations process is 5216, all of whom have, or will have, received legal advice about the consequences of signing a deed in acceptance of their offer.[73]

7.63 The Queensland Government also advised the committee about the substance of the legal advice that was provided:

> The advice to each eligible claimant related to ensuring the claimants understood their rights; that they understood the contents and effect of the claim form (in particular, the offer and deed of agreement); the claimants were also fully informed having regard to all the relevant circumstances

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69 Mrs Ruth Hegarty, *Committee Hansard*, Brisbane, 25 October 2006, p. 54.

70 *Submission 116B*, p. 3.

71 *Submission 116B*, pp 3 and 5.

72 *Submission 116B*, p. 4.

73 *Submission 116B*, p. 4.

> (including cultural and language requirements) of the claimant; and that the deed was executed correctly.[74]

Reliance on documentary evidence

7.64 To determine if a person had their wages or savings controlled under a protection Act, the Department of Aboriginal and Torres Strait Islander Policy considered only written evidence demonstrating control of a claimant's wages or savings in Queensland Government records, rather than attempting to reconstruct work or savings histories in order to establish eligibility.[75]

7.65 The committee has previously commented on difficulties that result from missing records, and the extent and complexity of the archives when locating records relating to individuals[76]. Where there is no written record of a person under the protection Acts, they are not eligible for the reparations offer. For example, Mr Colin Graham advised the committee about how a lack of documentary evidence meant he, and his family, were excluded from the reparations offer:

> Even though we were Queenslanders we were not dependent on any mission or Government assistance we are still Aboriginal people and that meant we were still under the Queensland Department of Aboriginal Affairs, and we still had to abide by their rulings.
>
> …
>
> But because I do not have documented evidence and cannot meet the Queensland Government guidelines, I still believe that people like my mother, and stepfather, my brother Raymond, Paul and three sisters Leonie, Roberta and Elsie, are entitled to the same payout and condition of the $4,000 + $2,000 that was made to certain applicants who meet the Government guidelines.[77]

7.66 Ms Pamela Meredith raised a similar concern, commenting that lax government recordkeeping practices have meant that her mother will never be able to prove her eligibility for the offer.[78]

7.67 Ms Christine Howes, Queensland President of ANTaR, provided further information of an instance where a potential claimant had been discouraged from applying for the reparations offer because they were told that their records were

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74 *Submission 116B*, p. 5.

75 *Submission 116*, p. 6.

76 See the section on Queensland, under the heading 'Disclosure of evidence and public access' in Chapter 6.

77 *Submission 61*, pp 2-3.

78 *Submission 18*.

destroyed in a flood.[79] Dr Ros Kidd explained to the committee that she believed that statements by the government that it could not find records should be treated with caution.[80]

7.68 Many witnesses considered it was unfair to place such a reliance on the documentary records, particularly when it was the responsibility of the Queensland Government, and not the individual worker, to keep and maintain the records. Mrs Margaret Marshall suggested the onus should be on the government to disprove an application for the reparations offer.[81]

Distribution of the remainder of the reparations allocation and the Welfare Fund

7.69 As at 9 October 2006, a total of $19.11 million had been paid to claimants as part of the reparations offer[82]. Much discussion occurred during the inquiry on how the remainder of the $55.4 million (the original $55.6 million less $200,000 for consultation) allocated for the reparations offer was to be spent.

7.70 The Queensland Government indicated that there had been a change in its original plan as to how the unspent balance of the reparations offer funds will be allocated:

> In 2003, the Government made a commitment that at the end of the process any unspent balance of the reparations amount will be placed into the Aborigines Welfare Fund with a proportion to be provided for the benefit of Torres Strait Islander people. The Government had decided that a foundation governed by a board of eminent persons would be established and will make decisions relating to the management of assets of the foundation. However, because of the quantum of funds now involved, further consultation is planned to seek the views of Aboriginal and Torres Strait Islander people in relation to the application of monies within the Aborigines Welfare Fund and the unspent funds out of the [reparations offer].[83]

7.71 Ms Tammy Williams drew the committee's attention to the distinction between the unspent reparations offer funds and the money that remains in the Aborigines Welfare Fund:

> …when we talk about reparation there are two sub-issues. The first issue is that there needs to be an appropriate reparation package in relation to the Aboriginal Welfare Fund because…the Aboriginal Welfare Fund was set up for the benefit of all Indigenous people, and therefore a reparation package must benefit the entire Indigenous community. The second issue is

79 *Committee Hansard*, Sydney, 27 October 2006, p. 50.

80 *Committee Hansard*, Brisbane, 25 October 2006, p. 3.

81 *Submission 123*.

82 Queensland Government, *Submission 116*, p. 6.

83 *Submission 116*, p. 6.

> in relation to the savings bank accounts … these were personal accounts which contained individuals wages and earnings. The Queensland government's $55 million reparation fund was set up for the purpose of providing compensation for the people who had their money in those savings accounts, so there is an issue in relation to the surplus of this money.
>
> It is my submission…that that money should be used for the primary and direct benefit of those old people whose money was taken. It should also be used to have a long-term positive effect on those people.[84]

7.72 Ms Tammy Williams was particularly critical of suggestions that the remainder of funds and the Welfare Fund monies be spent on initiatives which should rightly be funded by the Queensland Government, such as education kits and road signage.[85] Mr Kenneth Bone, Mayor of Cherbourg Aboriginal Community, also expressed his opposition to some of the suggestions which had been made for the unspent reparations offer money:

> We had a minister from the government up [at Cherbourg] last week. He spoke to the council. He said there was about $31 million left. With that we said we were thinking about setting up some sort of welfare fund to do with our children so that our children could get a good education to be able to face the future. I was not being rude but blunt. All I said was, 'Your government did not steal the money from my kids. They stole it from me, my mother and my father. So we want it back …'[86]

7.73 Mrs Ruth Hegarty advised the committee that she would 'love' to use the approximately $34 million remaining from the reparations offer to pay people what they were actually owed, but there has never been any suggestion that this would happen.[87]

7.74 The Queensland Government assured the committee that the money remaining from the $55.4 million allocation (the original $55.6 million less $200,000 for consultation) for the reparations offer would be kept separate from the Department of Communities' budget for general Indigenous programs and services. The Queensland Government during the public hearing reiterated its commitment to expend the money for the benefit of Aboriginal and Torres Strait Islander people in Queensland, and that expenditure would be done in consultation with the Indigenous people of Queensland.[88]

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84 *Committee Hansard*, Brisbane, 25 October 2006, pp 63-64.

85 *Committee Hansard*, Brisbane, 25 October 2006, p. 64.

86 *Committee Hansard*, Brisbane, 25 October 2006, p. 43.

87 *Committee Hansard*, Brisbane, 25 October 2006, p. 59.

88 *Committee Hansard*, Brisbane, 25 October 2006, p. 76.

7.75 Mr Patrick Hay, representing QPILCH, acknowledged the Queensland Government's proposal to consult with the Indigenous community over the spending of the funds remaining from the reparations offer and the Aborigines Welfare Fund, but cautioned the Queensland Government to undertake a 'proper' consultation.[89]

New South Wales - Aboriginal Trust Fund Repayment Scheme

Background

7.76 On 11 March 2004, the then Premier, The Honourable, Mr Bob Carr, formally apologised to the Indigenous people of NSW in relation to the management of monies paid into the Aboriginal Trust Fund, and announced that State Cabinet had agreed to develop a scheme to identify and reimburse the people who were owed money. The Aboriginal Trust Fund Repayment (ATFR) Scheme was to be developed in consultation with Aboriginal communities. In announcing the development of a scheme, Premier Carr also recognised the inherent difficulties in the task:

> This is a problem that has built up over generations. It will not be fixed overnight, and the records barely exist. But administrative complexities should not overshadow the need to discover the truth, and the Government certainly will do all it can to help find evidence that will support claimants' cases. In those cases where the evidence is sketchy, the Government, in consultation with the Aboriginal community, will develop rules for payment.[90]

7.77 In May 2004, the NSW Government established the first ATFR Scheme Panel (the first Panel) to consult with the NSW Aboriginal community and report back to the NSW Government on the design of a scheme to repay the wages and other payments that had been put in the Aboriginal Trust Fund.[91] The current ATFR Scheme Panel (the second Panel) provided evidence of the consultation undertaken by its predecessor:

> During 2004, the [first] Panel was briefed by government agencies on information known about records, categories of claimants and the history of developing a repayment scheme. A 1800 free call number was established and an Aboriginal Trust Fund Repayment Scheme web site set up. Information sheets were developed and circulated.
>
> The [first] Panel undertook a series of visits to locations across NSW to seek the opinion of Aboriginal people about how a payment scheme should work.
>
> … Approximately 538 people attended meetings with the [first] Panel in [15 regional locations].[92]

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89 *Committee Hansard*, Brisbane, 25 October 2006, p. 14.

90 Hon. Bob Carr, Premier of NSW, *Legislative Assembly Hansard*, 11 March 2006, p. 7164.

91 NSW Cabinet Office, *Submission 92*, p. 1.

92 The Aboriginal Trust Fund Repayment Scheme Panel, *Submission 79*, p. 2.

7.78 The first Panel received 13 submissions from individuals and organisations and meetings were held with NSW Government and non-government organisations to further explore issues raised in submissions.[93]

7.79 The first Panel presented its report to the NSW Government in October 2004.[94] This panel reported that the NSW Government's liability was not as great as had been previously estimated and stated that the number of eligible claimants would be unlikely to exceed 3,500 and '[all] indications are that total payments during the first three years of operation of the scheme may not exceed $15m'.[95]

7.80 The first Panel recommended that a scheme be established for the repayment of all wages and other money paid into the Aboriginal Trust Fund which had not been repaid during the period 1900 to 1968.[96] The first Panel noted that the money that was placed in the Aboriginal Trust Fund included wages and social security benefits such as maternity allowances and compensation payments.[97]

7.81 The proposals made by the first Panel were accepted by the NSW Government in December 2004, when it announced the establishment of the ATFR Scheme. The ATFR Scheme was administered by the Aboriginal Trust Fund Repayment Scheme Unit (ATFR Scheme Unit) and the second ATFR Scheme Panel, which consists of Mr Aden Ridgeway, Mr Sam Jeffries and Ms Robynne Quiggin.[98]

7.82 The ATFR Scheme officially commenced operation in February 2005. The second Panel was appointed in May 2005 and commenced work on 1 July 2005.[99]

7.83 The main features of the ATFR Scheme included:

- the repayment of wages and other money placed in the Aboriginal Trust Fund which has not been repaid, indexed to its current value;
- no cap on repayment amounts;

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93 The Aboriginal Trust Fund Repayment Scheme Panel, *Submission 79*, p. 3.

94 See Brian Gilligan, Terri Janke, Sam Jeffries, *Report of the Aboriginal Trust Fund Repayment Scheme Panel*, October 2004, available at http://www.premiers.nsw.gov.au/NR/rdonlyres/A1F8674E-2742-457C-825B-9C74413E89A3/0/ATFfinalreportDec05.doc, accessed 19 November 2006.

95 Brian Gilligan, Terri Janke, Sam Jeffries, *Report of the Aboriginal Trust Fund Repayment Scheme Panel*, October 2004, sections 2.5.1 and 2.6.

96 Brian Gilligan, Terri Janke, Sam Jeffries, *Report of the Aboriginal Trust Fund Repayment Scheme Panel*, October 2004, section 1.2.

97 Brian Gilligan, Terri Janke, Sam Jeffries, *Report of the Aboriginal Trust Fund Repayment Scheme Panel*, October 2004, section 1.3.

98 NSW Cabinet Office, *Submission 92*, p. 2.

99 PIAC, *Submission 76*, p. 3; The Aboriginal Trust Fund Repayment Scheme Panel, *Submission 79*, p. 3.

- claims to be paid where there is reliable evidence of money being paid into the Aboriginal Trust Fund and where there is no evidence, or no reliable evidence, that the money was paid out. Oral evidence may be accepted where gaps in written records exist;
- claims may be made by individuals who had their money placed into the Aboriginal Trust Fund (or their authorised representative), or, where the direct claimant is deceased, their descendents may make a claim;
- claimants are not required to sign an indemnity; and
- the provision of practical support and counselling for claimants.[100]

Operation of the Aboriginal Trust Fund Repayment Scheme

7.84 The NSW Government explained the process for making a claim under the ATFR Scheme:

> The ATFR Scheme Unit is responsible for receiving and investigating applications made pursuant to the Scheme, compiling all relevant information, and preparing an interim assessment for that claim. The interim assessment is sent to the claimant seeking their views as to whether they agree or disagree with the interim assessment. If claimants disagree, they are afforded an opportunity to provide additional evidence to the Panel.
>
> Once an interim assessment is agreed to, claims are referred to the ATFR Scheme Panel, which reviews each case and any evidence provided by claimants either via Statutory Declaration or through the provision of oral evidence. A recommendation is made to the Minister as to whether a repayment should be made.[101]

7.85 The NSW Government also provided a copy of the 'Guidelines for the Administration of the NSW Aboriginal Trust Fund Repayment Scheme' (ATFR Scheme Guidelines).[102] The NSW Government stated that the ATFR Scheme Guidelines retained some flexibility and were 'not binding on the Director-General of the Premier's Department, the [second] Panel or the Minister where they are satisfied that strict adherence to the guidelines would not be in the interests of equity for claimants or potential claimants'.[103]

7.86 The Public Interest Advocacy Centre (PIAC) described the investigations that the ATFR Scheme Unit carried out in preparing the interim assessment:

> The [ATFR Scheme] Unit forwards the claimant's details to the NSW Department of Aboriginal Affairs ('DAA') and State Records NSW ('State

100 NSW Cabinet Office, *Submission 92*, pp 2-3.

101 *Submission* 92, p. 2.

102 *Submission 92*, Attachment A.

103 *Submission 92*, p. 2.

> Records') to enable both agencies to undertake a search of all archived documents in relation to the claimant. The Agencies provide a list of all documents and copies of those documents they consider relevant to the claim.
>
> The [ATFR Scheme] Unit reviews the documents it receives from DAA and State Records. In particular the [ATFR Scheme] Scheme concentrates on documents that detail payments into and out of the claimant's trust fund account and makes an interim assessment of the amount owed to the claimant ('Interim Assessment').[104]

7.87 The NSW Government noted that various forms of evidence can be used to substantiate claims, including Aborigines Protection Board and Aborigines Welfare Board records; other government or independent written records; and oral evidence. The greatest reliance is placed on the records of the Aborigines Protection Board and Aborigines Welfare Board.[105]

7.88 The second Panel also provided an explanation of the work that it undertakes when considering claims:

> The Panel reviews all claims, the interim assessments prepared by the ATFR Scheme Unit and can either endorse or reject these for payment. The Panel has full discretion to review all the facts in each case using all available evidence, including oral evidence.
>
> …
>
> An important role for the Panel is that it can review decisions of the ATFR Scheme Unit at the request of claimants…the Panel may request further information or investigation by the ATFR Scheme Unit, ask for more information from a claimant, or recommend to the Minister that an ex gratia payment be made or not to the claimant in accordance with Part 8 [of] the ATFR Scheme Guidelines.
>
> The Panel can seek expert assistance in locating, collating or interpreting the records if it considers this would be of assistance in assessing the application. For example, in the case of a very complicated descendants' claim the Panel can, if it wishes, seek advice from the Public Trustee or legal advice from the Crown Solicitor's Office.[106]

7.89 The second Panel noted that in order to recommend to the Minister that an ex-gratia payment be made, the ATFR Scheme Guidelines required that the Panel be satisfied that:

- there is certainty, strong evidence or strong circumstantial evidence that an amount of money payable to or held on behalf of a claimant at any time was paid into the Trust Fund between 1900 and 1969; and

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104 S*ubmission 76*, p. 10.

105 NSW Cabinet Office, *Submission 92*, p. 3.

106 The Aboriginal Trust Fund Repayment Scheme Panel, *Submission 79*, p. 4.

- there is no evidence, or no reliable evidence, that the full amount of the money was paid to the claimant.[107]

7.90 The committee is disappointed that neither the NSW Government nor members of the second Panel were able to appear before it in order to further discuss the progress of the ATFR Scheme.

7.91 The committee notes evidence provided by the NSW Government that repayments under the scheme have varied between almost $1,000 and $24,000.[108] PIAC also provided the following information on the ATFR Scheme as at 31 August 2006:

- 290 claims lodged;
- 190 claims where an interim assessment has been completed; and
- the total value of the interim assessments is $385,325.[109]

Concerns about the Aboriginal Trust Fund Repayment Scheme

7.92 Evidence received during the inquiry indicates that, overall, the NSW ATFR Scheme has been better received than the Queensland Government's reparations offer.[110]

7.93 The committee was pleased to hear evidence from Mrs Valerie Linow, detailing her positive interaction with the second Panel when she challenged the interim assessment by the ATFR Scheme Unit:

> Going to the panel takes a load off you. If you went to court, it would be more traumatic. I thought the panel were out to knife me, but they were understanding and compassionate people. I did not realise that. I was brought up in an environment where non-Indigenous people turn against Aboriginal people. I did not realise that there are people in this world who have an understanding towards Aboriginal people. I found that the panel was very good. It was very easy for me – because, at my age, I am too old for this.[111]

7.94 Mr Darren Dick of HREOC described the ATRF Scheme process as empowering:

> In New South Wales you have people who have received settlements that are less than the resulting settlements in Queensland, less than $2,000 or

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107 The Aboriginal Trust Fund Repayment Scheme Panel, *Submission 79*, p. 5.

108 NSW Cabinet Office, *Submission 92*, p. 2.

109 *Submission 76A*, p. 1.

110 See Mr Darren Dick, HREOC, *Committee Hansard*, Sydney, 27 October 2006, p. 3; Mr Sean Brennan, ILC, *Committee Hansard*, Sydney, 27 October 2006, p. 35.

111 *Committee Hansard*, Sydney, 27 October 2006, p. 18.

> $4,000, and there does not appear to be dissatisfaction with that. Part of that is a process issue, I think – if people feel empowered through the process rather than disempowered.[112]

7.95 Despite these encouraging indicators, the committee is aware that some concerns remain in relation to the ATFR Scheme.

7.96 PIAC outlined that it believes that the ATFR Scheme may allow for a gross under-estimation of money owed to Indigenous people because of the starting point for calculations:

> In PIAC's experience, the Unit calculates the amount owed to the claimant by working backwards in time. It starts its calculations from the final recorded figure in the claimant's trust account. The Unit then investigates whether there were any invalid payments made from the account such as dental bills and then credits this amount back to the final available balance of the trust account.
>
> The Unit adopts this approach as it is limited by the boundaries of the Scheme as set out in the Guidelines…Accordingly, the Unit does not question whether the final amount in the claimant's trust fund account is an accurate assessment of the amount owed, that is, the amount that should have been in trust based on the person's work or other entitlements history. The Unit does not investigate whether all the wages were paid into the trust fund or invite the claimant to give evidence of the dates between which they were employed, their level of wages or whether they received payments from their trust accounts. In PIAC's view this approach is likely, in some cases, to lead to a gross underestimation of the amount owed to a claimant.[113]

7.97 PIAC also raised a number of other issues with the committee, including:

- the delay in developing the ATFR Scheme Guidelines;
- the prioritising of some claims on the basis of the time at which the first Panel was contacted by the claimant to indicate a possible claim;
- that claimants do not receive all records about them held by the Department of Aboriginal Affairs and State Records New South Wales as part of the process;
- the lack of funding for practical assistance, in particular legal advice for claimants who have received an interim assessment; and
- the lack of information available to potential claimants and the public about the ATFR Scheme.[114]

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112 *Committee Hansard*, Sydney, 27 October 2006, p. 8.

113 *Submission 76*, p. 11.

114 *Submission 76*, pp 12-15.

7.98 Ms Sally Fitzpatrick, a representative of ANTaR, stated that there was concern in the Aboriginal community that the ATFR Scheme did not address the repayment of pocket money which apprentices may not have received.[115]

7.99 Mr Sean Brennan of the ILC commented on the operation of the ATRF Scheme and said the 'judgement of the jury is still out':

> There has been some concern about delays and that is very understandable. There is a concern about the degree to which written evidence may drive the conclusions of the panel and that is an issue that has continued to be worked through in individual cases for the moment.[116]

7.100 Mrs Marjorie Woodrow provided further comment on the ATRF Scheme and expressed her dissatisfaction with the scheme and the interim assessment of her wages:

> I went and saw the panel with my lawyer. My son was with me. My son said, 'No, that is not my mum's signature, I can vouch for that.' He said: 'My mum is not a very tidy writer, she's very sloppy in her handwriting. That is not her signature.' But they still said that I was paid out. We went home, and then my brother passed away a couple of months ago and we had to bury him. He did not have any money. And because they found out I was looking for money they offered me $2,060, because they thought I would take it. I said, 'No, I would battle it out and bury him the best way we could,' which I did.[117]

7.101 Mrs Woodrow indicated that she did not intend to pursue repayment of her wages further through the ATFR Scheme, because 'they will probably want to offer me less'.[118] Further:

> …I am not running after them. I have done enough running. I think it is up to them to do the running from now on. I am there waiting for my wages. If I have to go to court, well, court it will be.[119]

Experience in other jurisdictions

7.102 The committee received some evidence in relation to mechanisms that have been implemented in other jurisdictions with similar histories of Indigenous protection regimes in order to redress injustices.

7.103 ANTaR and the NSW Stolen Wages Working Group noted that both Canada and the United States have similar histories of Indigenous protection regimes:

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115 *Committee Hansard*, Sydney, 27 October 2006, p. 54.

116 *Committee Hansard*, Sydney, 27 October 2006, p. 35.

117 *Committee Hansard*, Sydney, 27 October 2006, p. 26.

118 *Committee Hansard*, Sydney, 27 October 2006, p. 27.

119 *Committee Hansard*, Sydney, 27 October 2006, p. 26.

> While the 'protection' systems that operated were not identical to those in Australia, they do share significant similarities with Australia's, and research into approaches they have taken to redressing the damage of 'protection' regimes could be useful.[120]

7.104 The NSW Stolen Wages Working Group suggested that North American approaches to redressing the damage of 'protection' regimes could assist in developing an appropriate Australian approach to the stolen wages issue.[121]

7.105 Ms Thurlus Saunders suggested that a similar approach to that taken in Canada in relation to the Inuit people might be followed in Australia:

> One example of responsible government handling of a similar situation with the Inuit people of Canada, is that the people now have a percentage of the GDP, self-governance, recognition and respect as traditional owners, and the opportunity of true sustainability and self-reliance and working out past and current issues in the way they need to themselves. Our country would do well to emulate or even better that situation for the Aboriginal peoples of Australia.[122]

7.106 Ms Yvonne Butler also noted that the Canadian Government has instituted formal restitution to Indigenous peoples who have suffered discriminatory policies.[123]

7.107 Dr Ros Kidd informed the committee that, in 1992, the United States' Senate 'commissioned a report into more than a century of mismanagement of Indian monies held in trust by federal governments'.[124] Dr Kidd submitted that the Synar Report[125] 'has formed the basis not only for subsequent pressure in the Senate to achieve justice on this matter but also for court action to the same ends'.[126]

7.108 Further, according to Dr Kidd:

> The District Court of Columbia [has] stated [that] the government will be held to the same standard of accountability as any financial institution and in 2003 it required the government to account for all funds deposited or

120 *Submission 78*, p. 18; *Submission 91*, p. 15.

121 *Submission 91*, p. 15.

122 *Submission 22*, p. 2.

123 *Submission 21*, p. 8.

124 *Submission 49*, p. 35.

125 M. Synar, *Misplaced Trust: The Bureau of Indian Affairs Mismanagement of the Indian Trust Fund*, Seventeenth Report by Committee on Government Operations (HR 102-499, 102d Cong, 2d Sess), April 1992.

126 *Submission 49*, p. 35.

> invested since the trust commenced in 1887, including also for deceased beneficiaries.[127]

7.109 Dr Kidd argued that Australian governments should be held to the same standard of accountability, and be liable for the same redress as other major financial institutions.[128]

7.110 Some noted that courts in other jurisdictions such as the United States and Canada have relied upon the existence of fiduciary duties in holding governments liable for abuses of powers exercised over Indigenous people placed in positions of vulnerability. The Castan Centre for Human Rights Law and Australian Lawyers for Human Rights asserted that the most promising argument for stolen wages claimants in Australia 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.[129]

7.111 Professor Anna Haebich submitted that Australia 'should be looking to examples overseas – Native Americans, Jewish families, and former slave workers for the Nazi regime'.[130]

7.112 Ms Butler drew the committee's attention to the plight of Jewish people in the Second World War and noted that:

> Shortly after the end of the Second World War, reparations negotiations commenced against Germany and its allies. The international Jewish community have been the recipients of huge amounts of funds stolen from its members during the holocaust. The tracing of these funds cost in excess

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127 *Submission 49*, p. 35. The committee understands that the United States case of *Cobell v Secretary of the Interior* (also known as the Individual Indian Monies case) has dealt with the issue of the United States Government's accounting for money held on trust for Native American Indians. In the late 1800s, the United States Government divided up tribal lands and allocated Native American Indians with personal allotments. The United States Government was the statutory trustee of the legal title for each of the allotments and income from allotments (derived through exploitation of natural resources) was held in 'Individual Indian Money' (IIM) accounts for the owners of the allotments. In 1996, six applicants commenced an action against the United States Government on behalf of around 500,000 people, alleging that the government had breached its duty as trustee of the IIM accounts. A brief overview of the proceedings is available on the plaintiffs' website: 'Indian Trust, Cobell v Norton: an overview', at http://www.indiantrust.com/index.cfm?FuseAction=Overview.Home accessed 10 July 2006

128 *Submission 49*, p. 35.

129 *Submission 11*, p. 25; *Submission 80*, p. 9. However, the Australian Lawyers for Human Rights noted that 'Indigenous people in Australia have had very little success in bringing claims based upon fiduciary duty, largely by reason of the fact that Australian courts have been reluctant to find that a relevant fiduciary relationship existed. It cannot, in those circumstances, be said that this avenue constitutes an 'accessible and effective remedy' for those seeking redress in relation to stolen wages': *Submission 80*, p. 10.

130 *Submission 19*, p. 5.

of US$12 billion, and was funded by various parties including the Swiss Bankers Association.[131]

7.113 Ms Butler also submitted that:

> The World Jewish Restitution Organization (WJRO) extends beyond the recovery of Jewish gold and money and currently has listed 14,083 properties in Europe which it is in the process of recovering, in addition to ongoing financial claims against many governments. These properties are where claims can be made to the origin of ownership being secured by Jewish funds.
>
> Although many governments and banks have repatriated funds to Israel and the WJRO, many claims are being actively pursued nearly 70 years after these monies and properties were appropriated.[132]

7.114 The document prepared by the Queensland Aboriginal and Islander Legal Services Secretariat (QAILSS), containing the proposal to the Queensland Government for the repayment of stolen wages, provided information on precedents in Germany and Switzerland in relation to individual reparations payments made to claimants who were subject to enforced work schemes.[133]

7.115 Ms Butler and Ms Lillian Willis pointed to the possible relevancy of the Treaty of Waitangi in New Zealand;[134] as well as to the Diego Garcia case in the British High Court in which 'several rulings have been made in favour of handing back sovereignty to dispossessed Indigenous peoples'.[135]

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131 *Submission 21*, p. 8.

132 *Submission 21*, p. 8.

133 The QAILSS Proposal, pp 36-37.

134 For further information, see http://www.treatyofwaitangi.govt.nz/, accessed 30 November 2006.

135 *Submission 21*, p. 8; *Submission 48*, p. 5. The native inhabitants of the island of Diego Garcia in the Indian Ocean (known as the Ilois or the Chagossians) were forced to relocate between 1967 and 1973 so that the island could be turned into a United States military base. In 2000, a British court ruled that the order to evacuate Diego Garcia's inhabitants was invalid, but the court also upheld the island's military status, which permits only personnel authorised by the military to inhabit the island. The Chagossians also sued the British Government for compensation, but in October 2003 a British judge ruled that their claims were unfounded. Further, and as a result of strong pressure from the United States, the British Government issued an 'Order of Council' in 2004, prohibiting islanders from ever returning to Diego Garcia. However, in May 2006, the British High Court ruled that the Chagossians may return to other Chagossian islands, and called the British Government's conduct in the case, 'outrageous, unlawful and a breach of accepted moral standards': see further B. Brunner, 'Where in the World Is Diego Garcia?' at http://www.infoplease.com/spot/dg.html accessed 29 November 2006.