

Repaying the Trust:
A history of the operation and outcomes of the
NSW Aboriginal Trust Fund Repayment Scheme
2005 to 2011

Marilyn Hoey

Submitted in fulfilment of the requirements for
the degree of Masters of Arts in Humanities and
Social Sciences (Research)

University of Technology Sydney
2017

Certificate of original authorship

I certify that the work in this thesis has not been previously been submitted for a degree, nor has it been submitted as part of the requirements for a degree except as fully acknowledged within the text.

I also certify that the thesis has been written by me. Any help that I have received in my research work and the preparation of the thesis itself has been fully acknowledged. In addition, I also certify that all information and sources used are identified in the thesis.

Signature of candidate

Date:

Acknowledgements

This project could not have been completed without the support and dedication of many people. My unwavering thanks goes to all those who so generously gave up their time to be interviewed and who freely and fearlessly shared their stories and opinions.

For her patience, generosity and wise advice I would like to thank my supervisor Anna Clark, I could not have completed this thesis without her encouragement and support.

For indispensable assistance, far beyond the call of duty and friendship, I would like to acknowledge Pauline Garde, Claire Stanley, Uncle Lyall Dennison, Cassie Willis, Malcolm Skewis, Kirsten Thorpe, Robynne Quiggin, Frank Greathead, Nathan Boyle and Elaine Hughes.

For moral support and encouragement, I thank Margaret Bail, Paul and Casey Van Reyk.

This research was inspired by many former colleagues in the public service, particularly those who work in the always challenging area of social justice.

Finally, I would like dedicate this research to my parents, Dilys and Gordon, who inspired me with their kindness and empathy for others, their insistence on the importance of reading and most of all their passionate commitment to social justice.

Contents

Abbreviations.....	v.
Abstract.....	vi.
Introduction: Literature review, framework and methodology.....	1.
• Background.....	1.
• Australian Indigenous history.....	4.
• Aboriginal Trust Funds and the ATFRS.....	7.
• International human rights law and reparations theory.....	10.
• The framework and methodology.....	14.
• Memoir and voice.....	15.
• Searching for validity – triangulation.....	16.
• The interviews.....	17.
• Official reports useful but - autobiography, reflection and transparency.....	19.
 Chapter 1 - The history of Aboriginal Trust Funds in New South Wales.....	 23.
• The Aborigines Protection Board 1883 to 1940.....	23.
• The Aborigines Welfare Board 1940 to 1969.....	29.
• The ‘lost’ decades.....	32.
• The Apology.....	36.
 Chapter 2 - The right to the truth.....	 40.
• The archival records and ensuring access.....	40.
• Informing the Community.....	47.

Chapter 3 - Addressing historical wrongdoing including diligent, impartial investigations and the need for cultural sensitivity.....	52.
• Indigenous representations and cultural awareness.....	52.
• Implementing appropriate and respectful policies and processes.....	55.
• Investigations by the ATFRS: questions of diligence and impartiality	58.
• Timing and the establishment of the Scheme.....	60.
• The importance of Section 1.8.....	62.
• The Kinchela Boys.....	64.
 Chapter 4 - Did the ATFRS provide adequate monetary reparations?.....	70.
• Consideration of levels of repayment.....	70.
• Other financial avenues pursued by the ATFRS.....	74.
 Conclusion.....	80.
 Appendix One- Interview Questions.....	90.
 Bibliography.....	93.

Abbreviations

APB	Aborigines Protection Board
ATFRS	Aboriginal Trust Fund Repayment Scheme
ATO	Australian Tax Office
AWB	Aborigines Welfare Board
DAA	Department of Aboriginal Affairs
DoCS	Department of Community Services
HREOC	Human Rights and Equal Opportunity Commission
ILO	International Labour Organisation
OPC	Office of the Protective Commissioner
PIAC	Public Interest Advocacy Centre
the Boards	the Aborigines Protection Board and the Aborigines Welfare Board
UN Basic Principles	United Nations General Assembly Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law
UTS	University of Technology, Sydney

Abstract

This thesis poses the question: using the NSW Aboriginal Trust Fund Repayment Scheme (ATFRS), as a case study, has the NSW Government addressed the issues of human rights abuses of past government policies affecting the Indigenous people of New South Wales?

It outlines the story of the ATFRS, its objectives, challenges, achievements and failures and draws on the researcher's experiences as the Director of the Scheme from 2004 to 2011. It also uses the archival records of the Aborigines Protection and Welfare Boards, and semi structured interviews with others involved in the work of the Scheme, along with Indigenous claimants.

It shows that there is extensive academic research on many of the issues relevant to the work of the ATFRS such as the 'Stolen Generation', stolen or underpaid wages, misappropriated welfare endowment payments and monies missing from Trust Fund accounts managed by the various protection boards. It also concludes that the wide ranging modern understanding and application of human rights and reparations theories can be applied in considering the work of the ATFRS. There remains, however, a gap both in the literature and from government sources on the operations or outcomes of the Scheme after it completed its work in 2011.

The thesis concludes that within the legal and political framework set by the NSW Government, the ATFRS did successfully meet many of the elements of international human rights reparations. But in determining that the Scheme could only make repayments to individuals who could prove they were owed money from their Aboriginal Trust Fund accounts, the NSW Government failed to properly address the broader need for just reparations on a collective basis for the historical wrongdoings between the State and the Indigenous people of NSW.

INTRODUCTION

Literature review, framework and methodology

Background

December in Australia, with its promise of Christmas and summer holidays, has long been a hectic time in the public service: everyone trying to finalise those persistent but unfinished projects, usually identified in the quadrant of systems management jargon as ‘important but not urgent’, which stubbornly occupy in-trays; the projects that need to be dealt with to ensure a clean slate for the upcoming year; there are also the usual round of official and unofficial Christmas parties to attend, along with organising holidays and staff rosters to ensure Departments don’t totally shut down.

December 2004 was no exception, but held an additional challenge. The New South Wales (NSW) Cabinet on 22 November made the momentous decision to repay to Aboriginal people and their descendants money that had been held by the State in the Aboriginal Trust Funds. I was appointed Director of this project and it occupied my working life for the next six years. It was one of the most rewarding experiences of my life.

The NSW Aboriginal Trust Fund Repayment Scheme (ATFRS) quietly commenced work in 2005 and just as quietly ceased operations in 2011 with the vast majority of the general public totally unaware of its existence.

It is important that the story of the ATFRS is written because of its role in the history of the interactions between the NSW State and Indigenous people. Determining the methodology to use in writing about the Scheme was challenging, as its work falls into many academic disciplines: history, Indigenous studies, domestic and international law, political science and public policy. I have taken an interdisciplinary approach that draws on aspects of historical institutionalism methodology, which seeks to explain how aspects of organisations produce societal change over time. My research considers the political and policy history of the ATFRS within the context that change evolves within social, political, economic and cultural settings. As political scientist Sven Steinmo (2008) states, historical institutionalism attempts to situate these variables in the appropriate framework and with the understanding that those same institutions are also moulded by the past.

Another distinct strand of historical academic study considered in this thesis is that of ‘settler colonialism’ (Wolfe, 1999; Tahiwai Smith, 2012; Moreton-Robinson, 2013). The Australian historian Patrick Wolfe’s influential theoretical argument is that “settler colonisers come to stay: invasion is a structure, not an event”. Such settler societies can only evolve through the elimination of Indigenous peoples. The history of the interactions between Indigenous peoples and the State make clear the logic of such extermination: the invasion and dispossession of Indigenous lands and resources, the permanent removal of Indigenous people from their lands and the loss of their sovereignty, self-determination and culture (Wolfe, 1999: p.163) In this context it is important to note that the policies of assimilation pursued by the Boards touched on in this thesis need to be considered as part of ‘settler colonialism’ practices. The policies of assimilation pursued by the Boards was an ideology of elimination of Indigenous people through processes designed to amalgamate them, their culture and their lands into the body of the settler colonial nation (Morgensen, 2011).

The complex context of the AFTRS demands this analysis and approach, since it covers the histories of the Aboriginal ‘protection’ policies in NSW, ‘stolen wages’ and the use of the Aboriginal Trust Funds.

In and of themselves, however, these two strands of historical studies—a critical settler colonial reading of the ATFRS and an institutional history—were insufficient to tell its story. Due to the absence of official documentation about the Scheme I have also used memoir writing and oral history in my thesis, which locates this personal account in a wider institutional and historical context. Taken together, I argue that this multivalent methodological reading of the AFTRS enables a more thorough historical account, as well as a critical reading of its operation.

My decision to write about the ATFRS is not only motivated by a desire to record the past, but also interrogate it from a social justice perspective, analysing its work within the framework of international human rights law and reparations theory with the view to developing reparations policy into the future. As such, the use of modern reparations theory to analyse the work of the Scheme, in addition to the historical approaches outlined above, is important because the issue of reparations and ‘stolen wages’ remains an important issue on the political agenda for Indigenous Australians, as evidenced by State governments in Queensland, South Australia, Tasmania, Western Australia and New South Wales establishing reparation schemes. This framework allows for a more critical method to consider its operations, and it is my hope this thesis will prove useful for future researchers and activists. The history of the NSW

Aboriginal Trust Funds and the creation of the ATFRS as a specific Government policy and its impact is a small part of the larger mosaic revealing and defining the truth about the treatment of Indigenous people in Australia.

Italian lawyer and UN Rapporteur on the Rights of Indigenous Peoples, Federico Lenzerini (2008), noted that whilst the disclosure of truth is essential, there is also an important corollary – a ‘duty to remember’. He argues for the need to be forearmed against historical revision, for the history of oppression is a part of a people’s national heritage and as such must be preserved. In her essay on the contest over the stories told about our national past in the ‘History Wars’, Australian historian Inga Clendinnen (2006: pp. 148-157) highlighted that narratives made from history always have political implications. A similar observation has been made by the senior Canberra press gallery journalist Laura Tingle (2005). In an insightful essay on the role of memory in politics and policy making, she notes the dangers of having little, if any, memory of what has gone before. She has labelled this in the current political environment as ‘political amnesia’. The issue she raises is the historical importance of there being a memory of how governments dealt with problems in the past and how and why they took the decisions they did. This thesis provides just such information in relation to the gestation and operations of the ATFRS.

This thesis also highlights my belief that for many people working on public policies relating to issues of social justice, the challenges of bringing them to fruition is one of the enduring joys of working within the public service, even if it is rarely expressed. As noted by one ex-head of the Commonwealth’s Department of Prime Minister and Cabinet, ‘few Australians realise the extent to which public servants in quite junior positions wield extraordinary power over people’s lives’ (Button, 2012: p. 139). In my experience, the establishment and work of the ATFRS is an example of a phenomenon often experienced by public servants in the development of social justice initiatives. Governments frequently announce new social justice projects, such as the Scheme, in the broadest terms, leaving the detailed implementation of policies and procedures to the relevant bureaucracy. It is in this implementation stage that crucial decisions are made that have far reaching implications about the scope of what social justice aims are achieved. What often emerges from these processes is what human rights lawyer Fionnuala Aolain (2013) has observed as highly pragmatic operational responses, but she recognises that such pragmatic alignment is readily identifiable to those operating at the coal-face of transition. To locate the Scheme in this context, the political limitations placed on the ATFRS did not allow it to address some of the broader aspects of reparations for historical wrongdoings experienced by Indigenous people in NSW.

But as outlined in this paper, the policies and procedures developed during the establishment and operational stages of the Scheme, did work to implement important aspects of reparation justice, despite such constraints.

It is because the ATFRS is broadly unknown and unlauded that I decided to write a thesis about its genesis, its operations and outcomes. It is an important public policy initiative within the fraught area of providing social justice to Indigenous people in New South Wales. More than that, it is a case study in what can be achieved and what can go wrong when attempting to bring justice to those hurt by historical wrongdoing.

Australian Indigenous History

The story of the Aboriginal Trust Funds can only be understood if viewed within the context of the lives and historical experiences of Aboriginal people in Australia. Academic research into Australian Indigenous history is extensive. The ‘civilising’ imposition of Christianity, assimilation, the establishment of Aboriginal missions and reserves, the removal of Aboriginal children, the loss of land and the banning of language and culture were all undertaken under the umbrella of various State and Commonwealth legislation. Many of the harms inflicted on Indigenous Australians relied on the law and were sanctioned by the state. The Canadian ethnographer and historian Scott Morgensen (2011) notes that the European ‘settler colonies’ such as Australia and Canada established Western law to govern these colonies, but then permitted exemptions to those laws allowing for the elimination of Indigenous peoples through their removal from their lands and the removal of their children.

Whilst this literature is important in providing information on how and why Aboriginal Trust Funds were established and used, the focus is on a specific range of issues directly associated with Aboriginal Trust Funds. These are the ‘Stolen Generation’ and apprenticeship wages, the management of Aboriginal people’s welfare entitlements and the issue of ‘stolen wages’ and its impact on the Scheme.

As the ATFRS operated in NSW only, it is important to note that there are variations among the Australian States in the treatment of Aboriginal people (McGrath, 1995a). Contact experience in NSW and Victoria differed from that in Queensland, Western Australia and the Northern Territory depending on variables such as the date and speed of the invasion, the number of intruders and what technology and weapons they had, what land was used for, demand for labour and government policies including racial ideology (Goodall, 1995; Godfrey, 1995).

In addition, there is a growing and more nuanced understanding of the role of the state in injustices perpetrated, or covertly tolerated on Indigenous peoples and culture throughout Australian history (Reynolds, 1987; Broome, 2010; Bottoms, 2013). Issues associated with the 'Stolen Generation' were important in the work of the ATFRS. These children taken from their families and communities by the Aborigines Protection Board (APB) and the Aborigines Welfare Board (AWB) (referred to as the Boards) comprised the bulk of the direct claimants to the Scheme. The often shattered lives of the 'Stolen Generation' are now well documented in several history texts (Broome, 2010; Godfrey, 1995) and in the seminal report *Bringing Them Home* (Human Rights and Equal Opportunity Commission, 1997). For many of these Aboriginal children it was their removal to institutions such as Cootamundra Girls Home and Kinchela Boys Home and their later work placements that led to the establishment of the Trust Funds to manage their wages. As Australian historian Anna Haebich in her study of Indigenous child removals in Australia notes, assimilation is a core doctrine and apparatus of settler colonialism. Furthermore, she argues, "removing children from their families to institutions to be assimilated drove (and drives) ongoing dispossession, cuts transmission of knowledge and culture down the generations and contributed to the elimination of local populations by preventing their reproduction" (2015: p. 21).

The historian Peter Read, who undertook ground-breaking Indigenous research and who also co-founded LinkUP NSW (an organisation which assisted the 'Stolen Generation' find their families and communities), suggests it was the first wave of Indigenous people writing their own experiences of separation that played a crucial role in educating people of the political nature of the State's removal policies (Read, 1995; Tucker, 1983; Barker, 1988; Edwards, 1982). This created space and confidence to allow Indigenous people to tell their own stories and publicise the injustices related to the use of Trust Funds (Bird, 1998; Edwards & Read, 1989; Houston, 2004). Other researchers have focused on the education and later employment of the 'Stolen Generation' of Indigenous children, the gender biases in the policies of the Boards, and their control (or not) through Trust Funds of the wages and lives of these young people (Goodall, 1990; Haskins, 1998; Cole, 2005; Haskins, 2005; McGrath, 1995b).

Walden (1995) highlights the so-called 'moral' underpinnings of the Boards' removal of Aboriginal girls, particularly those seen as 'half-caste', and their attempts to assimilate them into white society through their apprenticeship schemes. It was these 'morality' issues that led to the Boards' greater control over the lives of these young women, with the result that many more archival records exist historically for this group.

The management of apprentices by the Boards was problematic, as was their use of Trust Fund accounts. The literature outlines a range of difficulties faced by apprentices in their interactions with the Boards, including low wages, mistreatment by employers, poor supervision of their interests by the Boards, non-payment of pocket money and difficulty in getting the Boards to pay them money from their Trust Fund accounts (Brennan & Craven, 2006; Haskins, 2005). Besides the apprentice wages of the 'Stolen Generation' and other young Indigenous people from missions and reserves, the other main source of money held in NSW Trust Fund accounts was family endowment payments. In 1927 New South Wales not only established a family endowment payment but also ensured that the payment was available to Aboriginal women. By 1928, however, the Aborigines Protection Board was controlling all family endowment payments to Aboriginal families.

Susan Greer (2009), an academic in accountancy at the University of Sydney, used family endowment payments as a case study to examine the interaction between Aboriginal people and successive NSW Governments, and argued that accounting practices were used to extend the political domain over Aboriginal women. Accounting practices created the necessary information to allow such exercise of power, but her research posits that it was actually continual cuts to the Boards' budgets, and Treasury directives to curtail spending, that led the Boards to manage family endowment payments. By controlling these payments through a central Trust Fund account, the Boards could use these funds to offset the cost of rations on missions and reserves as well as for building maintenance.

This point is supported in the research of the Indigenous Law Centre, which notes that the Boards managed these payments through a system whereby it issued orders at local stores nominated by the individual recipient, although it appears that often this nomination was ordered by mission and reserve managers or police. The Boards (at the direction of the NSW Treasury) undertook to manage payments in this way as it allowed them to 'offset' the allocation of rations and blankets to anyone receiving endowment payments (Brennan & Craven, 2006).

Along with the 'Stolen Generation', the issue of 'stolen wages' is also important – as a catalyst that forced political action on the issue of unpaid monies in Aboriginal Trust Funds, and as a somewhat fraught issue in the operations of the ATFRS. The literature reviewed below examines the varying definitions of 'stolen wages' (Senate Standing Committee on Legal and Constitutional Affairs, 2006; Banks, 2008; Anthony, 2007b), and notes that the national use of varying 'stolen wages' definitions disguises State

differences (Brennan & Craven, 2006; McGrath, 1995a). The research by Rowse (2012) in the context of the 'Stolen Generation' was informative in understanding why the phrase 'stolen wages' became a metonymic; a figure of speech in which a phrase is substituted for another with which it is closely associated.

Aboriginal Trust Funds and the ATFRS

Research on the use of Trust Funds by State Governments to control Aboriginal people's money is relatively recent and in 2006 three important reports on this issue were published. The first was by Dr Rosalind Kidd (2006), who undertook extensive investigations into the files of the Queensland Department of Aboriginal Affairs and who was a key participant in the Senate Inquiry into 'Stolen Wages'. Her seminal work outlined in graphic detail the ways in which successive Queensland governments and other State agents or collaborators such as Churches, station owners and police protectors controlled Aboriginal people's savings and wages via Trust Fund accounts from the 1840s through to 1988. Queensland established an Aboriginal Welfare Fund in 1943 into which levies from Aboriginal wages and enterprises as well as Commonwealth welfare benefits were funnelled and used to subsidise the Department of Aboriginal Affairs budget until the 1990s.

Whilst aspects of this research are useful in relation to NSW Trust Funds, it deals exclusively with the situation in Queensland. The coverage of legal avenues that might be pursued to remedy historical wrongs by successive Queensland governments can be applied to the NSW situation. However, the actions of the NSW Boards did not appear to be as extreme as those in Queensland and did not last as long (Brennan & Craven, 2006).

The second report was released by the Senate Inquiry into 'Stolen Wages', which noted that the submissions they received highlighted the lack of knowledge about the NSW Aboriginal Trust funds, quoting McGrath in her submission that 'little is known of the concrete details of how the Trust Funds operated in NSW' (The Senate Standing Committee on Legal and Constitutional Affairs, 2006). The third report was from the UNSW Indigenous Law Centre, which detailed the legal framework that governed State actions in relation to Indigenous people in NSW and the control of their money. It set out the categories of monies which might have gone into Trust Fund accounts, such as apprentices' wages, a wide array of both State and Commonwealth welfare payments, lump sum payments, adult wages and working for rations (Brennan & Craven, 2006).

Regarding the question of how the domestic legal system fails to address the injustices done to Aboriginal people in relation to unpaid monies held by Governments in Trust Funds, the literature sets out numerous domestic legal avenues that might be pursued by Aboriginal people seeking justice on a range of issues. These include stolen or underpaid wages, misappropriated welfare endowment payments and monies missing from Trust Fund accounts (Human Rights and Equal Opportunity Commission, 1997; Brennan & Craven, 2006; Kidd, 2006; Senate Standing Committee on Legal and Constitutional Affairs, 2006; Thornton & Luker, 2009). Such avenues involve actions in tort and equity due to breaches of the duty of care, negligence, breaches of statutory duty and Government breaches of various fiduciary duties to Indigenous workers. In her study Kidd (2006) concludes that, as successive governments had wielded unlimited control over Aboriginal lives and money, the State is legally accountable for breaches of trust in equity. Thalia Anthony (2007a) further outlines grounds for actions in equity and tort in her research on compensation for 'stolen wages' relating to Indigenous cattle workers in the Northern Territory. Meanwhile, Cunneen (2005) adds to that list wrongful imprisonment.

Reporting on the management of Aboriginal monies in NSW, Australian lawyers Brennan and Craven (2006) argue that the *Aborigines Protection Act 1909 (NSW)* imposed statutory obligations on the State to protect Aboriginal people. In addition, they found that the *Audit Act 1902 (NSW)* contained broad provisions that meant Trust Fund accounts had legal accounting, reporting and auditing requirements attached to them. There should be a substantial paper trail outlining the Boards' management of wages and welfare entitlements across a range of government agencies; and in earlier Court decisions about failures to return people's money, there is a strong indication of major breaches of statutory obligations by the State. Others take a more critical view of seeking justice in civil actions such as breach of fiduciary duty. Thornton and Luker (2009) argue that legal action based on anti-discrimination legislation provides more recognition to Indigenous claimants but also highlights a major difficulty – racial discrimination legislation was only introduced in the 1970s and cannot be used for claims prior to that period.

The potential to undertake action through Australia's obligations under the International Labour Organisation (ILO) Conventions in relation to under- or non-payment of Indigenous wages and possible violations of the Slavery Convention has been canvassed by academics and within the media (Anthony, 2007b; Graham, 2007). This concept of slavery in relation to Indigenous Australians is not new. In the 1940s complaints were made to the UN Association of Australia about the non-payment of

cash wages to Indigenous workers (Anthony, 2007b). In his 2007 article, legal researcher Stephen Grey (2007) suggests the debate over whether Indigenous people in Australia were slaves revolved around the issue of whether their labour was 'unfree' (Evans, 1984) or 'free' (Reynolds, 1981; Reynolds, 1987; McGrath, 1995b; Anthony, 2004). Cunneen (2005) only touches on the issue of slavery in passing to say that 'slavery was different to the dispossession of Aboriginal peoples', although institutionalised racism was a common element. Grey (2007) argues that if the strong historical evidence he has researched for a finding that slavery existed, such recognition could be an important issue in the consideration of reparations law as applied to 'stolen wages' (and hence Trust Fund accounts).

However, as Belgian legal academic Pierre d'Argent (2006) highlights, to claim reparations as a matter of law (as opposed to morality or politics) it must be proven that there was the existence of an illegal act and to date this does not appear to be the view of Australian courts. Australian courts have proven to be very conservative when considering issues of fiduciary duty and possible breaches of this duty by Governments (Kidd, 2006). The barrister Geoffrey Robertson QC, Professor in Human Rights Law at the University of London, notes that Australia has lagged behind other countries in class actions, although he also argues that these are often a clumsy mechanism to rein in Governments (Kidd, 2006).

Despite often wide ranging research into the range of potential legal remedies for Indigenous people seeking justice in the non-payment of Trust Fund accounts, researchers across a range of disciplines such as history, legal studies and Indigenous social justice unanimously conclude that such legal action faces almost insurmountable barriers. These include the statute of limitations, limited evidence due to poor or no records, the cost and length of time taken to determine cases, the need to establish specific liability, the trauma faced by claimants (Cunneen, 2005; Banks, 2004), and the death of possible claimants and witnesses (Cunneen & Grix, 2004; Thornton & Luker, 2009).

These barriers have been defined as 'the defence of history'. This, Cunneen (2005) argues, has two possible meanings: firstly, it is history as a legal defence – not judging the past by current standards, statutory limitations on actions and standards of proof which are difficult to meet because of the loss of records and witnesses; secondly, it is history as justification, a moral rather than a legal stance, 'historical truth becomes the truth of imperial power', a colonial history. This position is not unique to Australia. In her research into the Canadian Residential Schools Settlement scheme, the legal

academic Menkel-Meadow highlights the limits of the traditional legal system when wrongdoers (and possibly victims) are no longer alive, and where often both government and other institutions such as the churches are immune from law suites under common law (Menkel-Meadow, 2014).

The conclusion in most of the reviewed literature is that the best option within Australia is for the state to establish a reparation or redress scheme to provide compensation in recognition of the moral and economic injustices suffered by Indigenous peoples and communities (Cunneen, 2005; Anthony, 2007b; Banks, 2008). In light of this finding I now turn to consideration of international human rights law and reparations theory and how these theories assist in reviewing the ATFRS.

International Human Rights Law and Reparations Theory

The need to review the literature relating to international human rights and reparations theory is necessary to answer a key question: can the ATFRS be viewed as a reparation/redress scheme? Reparations are often thought of in the context of avenues of justice arising from conflict between states or non-democratic and violent political transitions. The literature shows this is no longer the case. As Australian historian Klaus Neumann and philosopher Janna Thompson note in their work on historical justice and memory, the beginnings of the movement for historical justice arose from international tribunals established in post-World War II Europe to deal with the Nazi genocide against Jews and other peoples. The search for a new range of avenues to prosecute human rights violations emerged from the 1980s including truth commissions, apologies and reparations; by the 1990s the focus had shifted into attempts to mend the social fabric through truth and reconciliation and symbolic reparations. They argue that reparations in various forms are now the norm in dealing with historical injustices (Newmann & Thompson, 2015).

The adoption by the UN General Assembly in December 2005 of the Basic Principles and Guidelines on the Right to a Remedy and Reparations for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law (these will be referred to as the UN Basic Principles) sets the international benchmark for reparations (United Nations General Assembly, 2005). The Basic Principles set out three rights for victims of international human rights abuses: access to justice, adequate reparation and access to information. And it identifies five major forms that reparation may take: restitution, compensation, rehabilitation, satisfaction, and guarantees of non-repetition (Daly & Proietti-Scifoni, 2011). Similarly, d'Argent (2006) notes in relation to the UN Basic Principles that the

contemporary notion of ‘redress’ arising from reparations has become very large, including not only compensation but also how victims are treated, rehabilitated, their access to justice and their right to know the truth through prompt and impartial investigations.

Research shows considerable international growth in the number of countries tackling the issue of addressing historical injustices, either by their actions externally or in the treatment of minority groups internally. Indeed, Fionnuala Ní Aoláin (2013), a member of the Irish Human Rights Commission, sees the broad field of transitional justice (from which many of the elements of reparations and redress flow) as now being an ‘industry’, while Torpey (2001) identifies the spread of ‘reparations politics’. Researchers considering Canada’s reconciliation processes similarly note the growth of international reconciliation processes, but stress that all such processes reflect the unique circumstances of each nation state (Henderson & Wakeham, 2013). They further argue that the meaning of reconciliation and redress can, and does, change over time.

It is in this revised and expanding context of human rights and reparation theory that the work of the ATFRS is reviewed in this thesis. Cunneen (2005) argues that reparations are needed as a moral and legal response to unacceptable past practices such as missing monies from Trust Fund accounts and denial of social and political rights. The South African anti-apartheid lawyer and Director of the Australian Human Rights Centre also argues that there can be no reconciliation without reparations (Durbach, 2008) and a similar position is held by the Canadian journalist and legal researcher Linda Popic (2008).

Whilst the literature on reparations is extensive, the recent work of the political theorist Stephen Winter (2014a) into transitional justice provides useful insights into how reparations and state redress might be considered within settler democracies such as Australia. His central contention is to focus on how state redress repairs the damage that authorised wrongdoing inflicts on political legitimacy. State redress is political and relates to citizenship, practices of democracy and political underpinning of the rule of law. It sits within the broader framework of transitional justice, although it usually encompasses a narrow field of action which works to increase political legitimacy by ensuring that where state wrongdoing took place, such wrongdoing is acknowledged and survivors are provided with some justice. Importantly, Winter defines state redress broadly: it is a moral response, it is a form of justice for individuals affected by the wrongdoing. Thus, the very specific framework of the ATFRS in identifying and

repaying monies owed from Indigenous Trust Funds can be considered within this broad definition of state redress.

A further element to consider about redress schemes such as the ATFRS is highlighted by Rowse (2012), who argues that there has been a dissonance between two recognitions and concepts of social justice for Indigenous Australians. They are whether the policy is focused on 'peoples' or 'populations' or, to define it slightly differently, whether or not state actions are directed towards addressing injustices relating to breaches of Indigenous peoples' individual or collective rights such as self-determination. This concept is useful in the consideration of reparations theory to the work of the ATFRS and its impact on individual Indigenous claimants and the broader Aboriginal community.

Assessing the work of the ATFRS within reparation theory requires consideration of a number of key reparation elements. Firstly, the issue of the need for the state to apologise for historic wrongdoing is clearly an important step in reconciliation, and the literature highlights the debate around how such apologies are viewed (Cornwell, 2009). The HREOC Inquiry into the 'Stolen Generation', for example, saw an apology as the first step in healing relationships between Indigenous and non-Indigenous Australia (Pritchard, 1998: p. 261). Alternatively, the Canadian philosopher Alice MacLauchlan (2010: p. 374) argues that many researchers consider such apologies to be merely cheap gestures based on political self-interest entered into to placate the demands for justice by minority groups. In their review of official apologies, Jeff Corntassel and Cindy Holder (2007: pp. 1-5) set out several criteria against which the authenticity of political apologies might be judged and these are considered in greater detail later in my thesis. Other researchers consider the importance of apologies to lie in what they do, not what they say (Winter, 2014: pp. 11-12; Henderson & Wakeham, 2013: p. 10; MacLachlan, 2010: p. 377; Nobles, 2008).

Then there is the need for access to information, and the right to the truth (Lenzerini, 2008). The state of the archival records and the potential problems in relying on these records for evidence are commonly referred to in research (Banks, 2008; Mawuli, 2010b). Evidence is often patchy or non-existent due to the poor state of government records, and poor records mean that establishing specific liability can be almost impossible (Cunneen, 2005). Whilst there should be extensive records on the management of the NSW Trust Fund accounts, the records are either non-existent or very poor, despite the responsibility of successive Governments to keep adequate records (Brennan & Craven, 2006; New South Wales, Legislative Council, 2016; Greer,

2009). Prior to the *Archives Act 1960 (NSW)* there was no government legislation requiring the retention of government records and, undoubtedly, records were also lost or destroyed after that date (Mawuli, 2010a).

Other issues relate to the effectiveness of monetary compensation for historical injustices (Vermeule, 2005), and whether state reparation payments as ‘ex gratia’ payments are a mismatch with corrective justice since those payments do not recognise the right of the victims to full compensation (Winter, 2009). In addition, consideration is given to the scope of reparation schemes including eligibility and procedural issues such as the burden of proof and appeals mechanisms (Cunneen & Grix, 2004). These are all matters that touched on the work of the ATFRS and are considered more fully in the thesis.

As outlined above, research on the establishment and operation of the ATFRS is not a topic that has received widespread academic attention, and can be approached historically, politically or from a legal perspective. For reasons outlined earlier in this chapter I have applied an interdisciplinary approach to its inception and operations.

While the extensive 2006 report by the Indigenous Law Centre mentions briefly the introduction of the ATFRS, it makes no analysis of its work (Brennan & Craven, 2006). The Senate Inquiry into Stolen Wages reviewed a number of projects initiated by various States to deal with the issue of ‘stolen wages’, including the NSW Scheme, and recommended that the NSW model be replicated by other States (Senate Standing Committee on Legal and Constitutional Affairs 2006). This did not receive unqualified support. Robin Banks, lawyer and CEO of Public Interest Advocacy Centre (PIAC), stated that whilst the NSW Scheme had some advantages over Queensland Trust Fund scheme, it was not a complete model and should not simply be a template for other States to replicate (Banks, 2008). The Indigenous journalist and coordinator of the ‘stolen wages’ campaign in Queensland, Christine Howes (2005), reviewed the early work of the Scheme and stated it was a fairer scheme than the Queensland scheme to repay monies placed into Trust Funds, although she questioned some of the details of the Scheme and noted progress had been slow.

PIAC undertook a detailed assessment of the processes and operations of the Scheme in 2008 although this discussion was framed in a discussion of ‘stolen wages’. This research listed several criticisms and questions about the ATFRS (Banks, 2008) and, along with the research undertaken by Margaret Thornton and Trish Luker, it questioned the State’s failure to address the issue of inadequate wages.

The New South Wales Legislative Council General Purpose Standing Committee No 3 (2016) released a report on its inquiry into reparations for the 'Stolen Generation' in NSW. The Committee reviewed the ATFRS and found it was an important milestone taken by the NSW Government and it was considered somewhat of a success. It noted, however, that there were concerns about the Scheme. These included that the name of the Scheme did not resonate with Aboriginal people and that it was poorly publicized. In addition, it received submissions arguing that the closure of the Scheme resulted in some people missing out on the opportunity to claim what was rightfully owed to them or their parents. The Committee highlighted that submissions it received raised concerns relating to the fact that the Scheme was evidence based when in reality many archival records were lost, destroyed or simply never existed and that some claimants were re-traumatised by receiving copies of records provided in the processing of their claim.

The main criticism appearing in the literature relates to the argument the ATFRS was a failure because it did not provide compensation to Indigenous people in NSW for 'stolen wages'. I have reviewed the veracity of the detailed criticisms outlined in the literature in my thesis.

The Framework and Methodology

Given the scope of a research question that assesses the impact of the AFTRS, it became clear that I needed a framework in which to view the work of the ATFRS and to write about my own personal involvement in the Scheme as memoir writing. My original thinking about how I would approach this topic was naive: I imagined I would simply outline the origins of the ATFRS and then describe its operations and outcomes, a straightforward linear narrative account. A workshop on a design framework adapted by UTS's Nick Hopwood based on the work of Hammersley presented a better approach, one which allowed me to better incorporate key elements of reparation theory (Hammersley, 1998). The elements contained in this approach stress consideration of exactly what is the main focus of the research; what strategy and what approach to use in sampling; what evidence will this provide and what methods to use to generate evidence on which to make claims about my topic; and, finally what conclusions my thesis might bring to bear on the focus of my research.

Thinking through these elements led me to a somewhat paradoxical result which both broadened my research question yet allowed me to better focus my research: by rethinking my topic within this framework, I decided my research question was whether the NSW Government had addressed the issues of human rights abuses of past

government policies affecting the Indigenous people of New South Wales. The case study for my thesis is the NSW Aboriginal Trust Fund Repayment Scheme and the degree to which it brought restorative justice to Indigenous people in NSW. A specific project which, as outlined shortly, is a study that resonates personally. This revised approach enabled my research to not only outline the work of the ATFRS but also to discuss the context in which democratic states such as Australia deal with historic wrongdoing to their Indigenous citizens and to highlight the issue identified by Rowse (2012) as to whether the state scoped its response to these issues in terms of the individual or the collective as this has an impact on the conclusions of my thesis.

Memoir and Voice

The suggestion that I consider elements of memoir writing in my thesis was exciting but frankly the idea of projecting my ‘voice’ into this thesis has been daunting. My experiences both in the bureaucracy and in earlier academic studies all required a very different form of writing. For me to consciously insert my own voice and experiences into my thesis was challenging. As memoir scholar Judith Barrington highlights, an important skill in memoir writing is determining the theme or subject of your writing and the ability to set boundaries around it. She also stresses that in writing memoir it is important to write about what you have actually experienced (Barrington, 2007). This demand for honesty and ‘truth’ as part of an implicit contract with the reader is one I have tried to fulfil in my writing whilst acknowledging (as discussed in more detail later in this chapter) that ‘truth’ and ‘memory’ are difficult concepts (Cline & Anger, 2010; Larson, 2007).

I have had a very close and extensive personal involvement with the ATFRS. It began in 2002 when, as an advisor to the Minister for Community Welfare, I had a peripheral role in negotiations relating to the first attempt to deal with the issue of Aboriginal Trust Funds. My involvement deepened in 2004 as I organised meetings and travelled with the first ATFRS Panel into Aboriginal communities to canvas their views on the Trust Funds issue. I met with a range of Aboriginal organisations and key NGOs such as the Public Interest Advocacy Centre and LinkUP NSW to explain the Government’s proposals and seek their views on its framework. Following that work I wrote the second submission to NSW Cabinet, which established the Scheme, and was appointed Director of the Scheme from 2004 to 2010. Unfortunately, my retirement meant that I was unable to see the project through until the end and my successor undertook the challenging task of processing and repaying descendant claims.

In searching the literature, I sought to find an example of a bureaucrat writing about the development of a project from an ‘insiders’ perspective with little success. However, I did find a PhD written by a Minister in the New Zealand government outlining the changes in public policies during his time in office (Gair, 2010). Whilst his was a parliamentary perspective and mine was bureaucratic, the methodological challenges he struggled with resonated with my own thinking.

The issues highlighted by Gair and used in my methodology can be encapsulated into three areas. The first is how to set a framework around a public policy initiative which had almost limitless possibilities to better judge its impact. I say almost limitless, as the work of the ATFRS touches on many disciplines, Indigenous studies, public policy, legal studies, economics and history to name the most obvious. As outlined earlier, the framework used in my research aims to produce a type of organisational history that draws on the fields of historical institutionalism and international human rights reparation theories. The second issue is how to explain the intricacies of the implementation and operations of the Scheme in the face of a scarcity of official reports on the Scheme and the fact that what public information is available lacks a deeper understanding of what took place and why. The third issue is the inclusion of autobiographical knowledge and how to ensure reflectivity and transparency in addition to dealing openly with issues of subjectivity and objectivity. The lack of official reports and academic research into the Scheme means that parts of this thesis are a mixture of memoir narrative and storytelling written to explain aspects of the ATFRS which otherwise would be unknown.

Searching for validity: triangulation

The method I use to ensure validity in my research in the absence of official documentation about the ATFRS is ‘triangulation’. Researchers use systems of ‘triangulation’ as a means of testing the validity and reliability of their research (Denzin 1978). The points of triangulation I use are information received through Freedom of Information requests to the NSW Department of Premier and Cabinet, the AWB and APB archival records, material from both the NSW and Commonwealth parliaments and academic research on the work of the Scheme. Secondly, I used my own recollections. Thirdly, I incorporated the views and opinions of others involved in the Scheme, either as bureaucrats, Panel members or claimants, garnered through interviews. As discussed earlier, the lack of official reports on the Scheme and the very limited information provided from official sources about the ATFRS has made triangulation difficult in some instances where I have had to rely on memoir writing.

The Interviews

International human rights reparations theory helped frame my research question and enabled me to develop a set of questions focused on the actions that constitute reparations for victims contained in the UN Basic Principles and more contemporary research. These elements are restitution, compensation, rehabilitation, and satisfaction, along with the elements of modern redress schemes such as how victims are treated, their access to justice and their right to know the truth through prompt and impartial investigations. Using these principles to review the work of the ATFRS strengthened the somewhat evaluative narrative of the thesis and provided a solid framework in which to consider multiple aspects of the Scheme and its impacts. It was also instrumental in developing my interview questions and process.

The use of interviews within my research also brought to the fore the need to be cognisant of theories of oral history, several elements of which are not dissimilar to those discussed later in this paper concerning memoir writing – subjectivity and objectivity, the meaning of the “truth” in oral history research and the need to reflect closely on interviewees’ responses. Italian historian Louise Passerini (1979: pp. 68-69) highlighted in her work in reanalysing interviews with survivors of totalitarian political systems that researchers need to be aware of the ‘silences’ in people recounting their experiences. She believes that this is the result of their profound and frightening experiences and argues that historians must not deny these aspects of interviews. I am aware that this is an important issue within the Australian context of a settler-colonial society, as it can be argued that in both contexts the societal pressure is towards the eradication of memory. As Canadian anthropologist Julie Cruikshank (1994: p. 403) states, the critical question is ‘who gets to frame and tell the story - whose voice is prominent’. Within my research I have reflected on modern oral history’s theoretical understanding that the interviewer’s personal beliefs and relationships with interviewees can affect their findings and that, as the American oral historian Valerie Yow (1997: p. 404) acknowledges, ‘every historian manipulates the evidence to some extent, intentionally or not because of who they are or are not’.

Having decided that interviews with others involved in the Scheme were an important point of triangulation for my research, I undertook semi-structured interviews with individuals associated with the Scheme and claimants using the focused set of questions against which the people I interviewed could consider the structure, policies and implementation of the Scheme. I decided to undertake semi-structured interviews instead of surveys as the participants have important experiences – both unique and

shared – regarding the formal and informal aspects of the Scheme which would not have been reflected in a standardised survey.

I provided the interviewees with the list of questions prior to the interview and allowed the interviewee to expand or deviate from this structure if it led to unexpected insights into the work of the Scheme. Interviews were taped and transcribed promptly. Undertaking semi-structured interviews with key ATFRS staff and Panel members along with Aboriginal claimants to the Scheme introduced an element of qualitative research into my thesis.

An important ethical issue to consider in these interviews was that, as the Director of the Scheme, I had pre-existing relationships with most those I interviewed as work colleagues and friends. I also had a strong working relationship with the members of the Scheme's Indigenous Panel. The number of people with direct experience of the ATFRS is limited, less than 20 key individuals. An arm's length recruitment process was implemented for participants known to me with a letter seeking agreement to be interviewed being sent by my supervisor. All but one person agreed to be interviewed.

The other element of this issue was that I was cognisant that interviewees might temper their interviews out of friendship. It was partly to counter this that the semi-structure interviews were based on a series of very specific questions as outlined earlier. At the commencement of the interviews I explained to the participants that I would like them to answer the questions without any initial discussion with me but that we could proceed later to discuss their categorisation of the questions and their reactions.

Between 2014 and 2016 I interviewed seven key individuals who worked on various aspects of the Scheme during its six years of operation. I have also interviewed two Aboriginal claimants to the Scheme, one agreeing to a formal interview and the other discussing their experience informally. I have also drawn upon the evidence given by ATFRS claimants to the New South Wales Legislative Council's inquiry into reparations for the 'Stolen Generation' (2016) and the Commonwealth Senate's report on 'stolen wages' (Senate Standing Committee on Legal and Constitutional Affairs, 2006). Claimants were contacted in a variety of ways, through personal contacts, via family members and/or Indigenous workers from the ATFRS. My research on the work of the ATFRS is framed within consideration of its work within a reparations framework, therefore the opinions and voices of the Scheme's Indigenous staff and Panel members along with claimants are critical and more important than a statistical analysis. These interviews were of an hour to two hours' duration and took place in a variety of locations. Interviewees were from the NSW Department of Premier and Cabinet, NSW

State Records or were members of the ATFRS Panel and claimants and they were open and frank about their views on the work of the Scheme and brought their own, sometimes surprising, views of whether or not elements of the Scheme could be considered as reparations.

The incorporation of the views and comments of others involved in the ATFRS is critical not only as a point of triangulation in researching the Scheme but also as it reflects the work of a team of committed bureaucrats, as well as the Scheme's Indigenous Panel, whose dedication, visibility and standing within the Indigenous community greatly facilitated its work.

Official reports useful but ... autobiography, reflection and transparency

The third issue highlighted in Gair's (2011) work and reflected in the methodology is the inclusion of my own autobiographical knowledge of the Scheme and how to ensure that my thesis is reflective and transparent as well as dealing openly with issues of subjectivity and objectivity. It quickly became clear that I needed deeper reflection about the dichotomy around subjectivity and objectivity as it related to my goal to try and tell the 'true' story of the ATFRS. How would the thesis be viewed in terms of its objectivity, given my role in the work of the Scheme? Is it possible for me to be objective about a project that I was so intimately involved in creating and operating? I am also very aware that memory can be a slippery concept, as expressed in the classic insight from George Eliot (1873), 'the memory has as many moods as the temper, and shifts its scenery like a diorama'.

As my thinking and research developed I increasingly identified with the philosopher Linda Alcoff (1991-1992), who notes that our understanding is affected by where we stand and our own history. Where one speaks from affects the truth and meaning of what is said. The more I researched subjectivity versus objectivity in social research, the less this seemed to be an issue. In fact, I believe that undiluted objectivity in the social sciences is probably not possible and that there are positive benefits in writing about the ATFRS with an insider's knowledge.

Writing on the issue of objectivity and subjectivity, the American historian Susan Crane (2006: p. 456) states that subjectivity is not the opposite of objectivity in the writing of history, arguing that 'if all histories are but pieces of the shattered unity that was the past, these subjectively framed pieces are no more and no less essential than the others'. American oral historian Valerie Yow (1997: p. 59) notes that not only must subjectivity be acknowledged but that it can be used to enhance understanding of the

research process. US political scientist Gary Okihiro (2009: p. 14) wrote that ‘authors and their texts are not autonomous entities but exist within particular places and times, ... in that sense, all writing and lives make claims and express implicitly or explicitly points of view. They bear the mark of affiliation’. Gair (2011: p. 45) appeared to reach a similar position noting that objectivity is seen as having a special advantage but it can be seriously flawed; it lacks the firsthand knowledge of participants and can be as subjective as the views of those presumed to be disadvantaged by being active participants.

In light of this research I believe the inclusion of autobiographical knowledge can strengthen and consolidate my research, although it also points to an enduring tension between personal reflection and scholarly transparency. Whilst the interviews I undertook are critical in explaining the work of the Scheme, they are not (and could not be) random since interviewees either worked on the Scheme or were claimants themselves. I am also aware that whilst my role gives me unique insights into the establishment and work of the Scheme, I am researching and writing from a privileged position.

I have provided insights into the work of the ATFRS and these, of necessity, reflect my own views on how to tell the story of the Scheme beyond the relatively limited public documentation. My thesis concentrates on the Scheme as a matter of public policy, but a key concern to me is writing about Indigenous issues as a white Australian. This is clearly and correctly an ongoing issue to both Indigenous and non-Indigenous researchers. Whilst I can intellectually understand and be empathetic to the impact State legislation and processes had on the lives of the Scheme’s claimants, the truth is that I can never truly know how Indigenous people felt and feel about their treatment at the hands of the state and its impacts throughout the generations.

In her thesis ‘White Writing Black’, Australian social science researcher Linda Miley considers key issues such as authenticity, otherness and ethical dilemmas around who speaks for whom and states that the reality is that the future of Aboriginal and non-Aboriginal discourse lies in mutual obligation and respect (Miley, 2006: p. 24). Indigenous academic Marcia Langton (1993: p. 26) similarly believes that ethical practice from non-Aboriginal people is possible but argues strongly that such writers must understand how colonialism affected both the coloniser and those colonised and an anti-colonial perspective is imperative. In an article responding to criticisms of her work on non-Aboriginal adoptive mothers of Aboriginal children, Denise Cuthbert (2008: p. 3) discusses the politics of voice and the privileging of whiteness. She

concludes that ‘understanding is a necessary pre-condition for countering and dismantling the deep persistent, and at times very subtle, cultural and political logic of colonialism and racism ... as they bear on the past and present of Indigenous-settler relations in this country, and the myriad injustices which flow from the inequities structured into these relationships’. In other words, in the blunt opinion of Aboriginal poet Jennifer Martiniello, ‘for many issues there is also a white story, not just a black story after all, we didn’t create the last 200 years of crap all by ourselves’ (Cuthbert, 2008: p. 3).

Whilst some aspects of Indigenous history are included in my thesis, I have written about, not from, an Indigenous viewpoint. Australian political scientist and historian Lorenzo Veracini discusses the evolution of “settler colonialism” as a distinct field of academic study and argues that it was the demand by Indigenous people in white settler nations for recognition and self-determination and the studies of their historical experiences that has led to the modern understanding that colonialism is still operating within settler colonies (Veracini, 2013). It has been important for me in writing this thesis to understand and reflect on the voices and views of Indigenous peoples that the colonial era has never ended. Any comments about the Scheme from an Indigenous perspective are only included when they are from Indigenous claimants or people who work with the Scheme. But the thesis also acknowledges that mine is only one voice among many; several others who worked on the Scheme allowed themselves to be interviewed and their voices can be heard via material gathered in semi-structured interviews. As outlined earlier, I have included several other areas of triangulation within my methodology to ensure as far as possible that my research is reflective and transparent.

Conclusion

Many of the issues relevant to the work of the ATFRS such as the ‘Stolen Generation’, stolen or underpaid wages, misappropriated welfare endowment payments and monies missing from Trust Fund accounts managed by the various protection boards have received extensive academic attention. Critically, the wide ranging modern understanding and application of human rights and reparations theories can also be applied to my research.

However, there is a gap in the literature. Whilst the early operations of the ATFRS have been the focus of some research there is only one report dealing specifically with the Scheme which appears between 2008 and the closure of the Scheme in 2011 (Mawuli, 2010a). The establishment and operations of the Scheme were reviewed by New South

Wales Legislative Council General Purpose Standing Committee (2016) in its report on reparations for the 'Stolen Generation'. Despite the ATFRS Indigenous Panel providing two reports to Government, these have never been released and there is very limited official Government information about the Scheme. It is this gap in the historical record, along with a critical evaluation of Indigenous reparations in NSW, that the research question posed in my thesis will address: using the NSW Aboriginal Trust Fund Repayment Scheme as a case study, has the NSW Government addressed the issues of human rights abuses of past government policies affecting the Indigenous people of New South Wales?

CHAPTER ONE

The History of Aboriginal Trust Funds in New South Wales

It is axiomatic that the ATFRS had as its core responsibility the repayment of money placed into Aboriginal Trust Funds by successive NSW Governments and never repaid. Yet when I started working with the Scheme, it seemed that the concept of the Aboriginal Trust Funds was mostly unknown in the broader consciousness of NSW society. That is not to say that Aboriginal people were unaware of the issue – far from it. As one Indigenous interviewee explained, ‘I always knew, when I was brought up, people always said where did the money go? That was always in people’s awareness, that there was money’ (Interviewee 3). It was just that the concept of Trust Funds was somewhat alien, more common was reference to ‘stolen wages’ or simply – money was missing.

The antecedents of the Aboriginal Trust Funds span more than a century of interaction between Indigenous people and the State of NSW from the late colonial period until the abolition of the AWB in 1969. This chapter does not attempt to describe in detail the Indigenous history of NSW. Rather, it considers the Aboriginal Trust Funds in detail, who established and controlled them, who was affected, and why. It will chart use of Trust Funds by the APB and AWB, outlining briefly the history of the activities of the Boards and their impact on the Indigenous population in NSW prior to 1969 when the *NSW Aborigines Protection Act 1909* was abolished along with the AWB. And it explores why the NSW Government decided to establish the ATFRS to deal with the issue of the Trust Funds more than three decades after the abolition of the AWB.

The Aborigines Protection Board (APB) 1883 to 1940

The first legislation passed to bring Indigenous Australians under government control was enacted in 1838 after violent clashes between white Australians and Aboriginal people culminated in the Myall Creek Massacre. In 1883 the APB was established and it existed in turbulent times – Australia’s emergence from its colonial beginnings at the turn of the twentieth century, the enormous societal disruptions of the World War I, the Great Depression in the 1930s and the turmoil leading to World War II.

The earliest reference I can find to the Board’s use of Trust Funds is that they were established to manage the wages on behalf of young people from the orphanage at Brewarrina Station. The Board’s 1904 annual report stated ‘unfortunately, the parents

of the youths and girls apprenticed from other stations show a disinclination to any portion of their children's wages being thus saved for them, and it is to be regretted that the Board has no authority to compel them to do so' (Aborigines Protection Board Annual Report 1904: p. 2). Initially the Board did not have a legislative base and was unable to compel young people into apprenticeships or to take control of their wages.

The early Trust Funds were established to control the wages paid to Indigenous young people sent out to work from missions and reserves. As early as 1904, the APB was seeking to increase its powers, in particular the authority to remove and train Aboriginal children in reaction to fears being generated in the white community about the growth of what was termed the 'half caste' population (Goodall, 1995: p. 73).

The Board sought to place as many young people as possible in employment and sometimes used coercive measures to achieve this. For example, in 1905 the Manager at Brungle in southern NSW was instructed to threaten boys and girls refusing employment with expulsion from the Station (APB Minutes, 1905). The Board is also recorded asking local police to prevent parents from interfering with their children whilst in employment or from removing them from their positions (APB Minutes, 1890; APB Minutes, 1898; APB Minutes, 1899).

The NSW Aborigines Protection Act 1909, its associated regulations gazetted in 1910 and five later amendments from 1915 to 1936, allowed the APB to indenture Aboriginal young people into apprenticeships. The APB was also empowered to determine the pay and conditions for the apprenticeship and required employers to submit all wages, excluding pocket money, to the Board quarterly. These wages were to be placed into a Trust Account and paid to the apprentice at the end of their apprenticeship or at other times, if approved by the Board. However, the Board retained the right to expend these wages, as it thought fit, in the interests of the child.

As a point of clarification, it should be noted that the Trust Funds were not individual accounts but rather individual apprentice's wages were held in one large Trust Account established in 1897 and later transferred to the Rural Bank. The Board retained tight control over these funds: apprentices could not access their money without their employer's written support or, if the apprenticeship was over, the support of their local reserve manager or police, and they needed to provide a detailed explanation of their intended use for the money (Haskins, 2005: p. 149).

In early research undertaken by the ATFRS staff at State Records, it became apparent that once the APB was given new legislative powers it immediately redoubled its efforts

to impose apprenticeships onto Aboriginal children. In May 1908, the United Aboriginal Mission had established the Bomaderry Children's home and was receiving babies and young Aboriginal children who had been removed from their families by the APB. The process seemed to be that the very young children were placed at Bomaderry until they reached 10, 11 or 12 years of age when they were then sent to either the Cootamundra Girls Home or Kinchela Boys Home to be trained in domestic or agricultural work.

It was under the auspice of the APB that several institutions were established to house and train Aboriginal children removed from their families. In 1912 the Board opened Cootamundra Aboriginal Girls Training Home and appointed a home-finder. The home-finder would visit stations and camps to induce parents to allow their children to be apprenticed out, or (if they were not old enough to be sent straight out) to allow them to enter Cootamundra Home for training to fit them for situations in suitable homes (APB Annual Report, 1912: p. 4).

In 1918 a similar institution was established for young Aboriginal boys, initially known as the Singleton Boys' Home, which was then moved in 1924 to the Kinchela Aboriginal Boys Training Home near Kempsey. These institutions accommodated young Aboriginal girls and boys who had been removed from their families under the Aborigines Protection Act. The young girls and boys were trained to work as domestics or to undertake manual or agricultural work, usually around 15 years of age, and any wages they received were held in Trust Accounts by the Board.

Research of the Board's Minutes show that it was ruthless in dealing with any complaints about its actions. It generally dealt with opposition by threatening eviction from stations and then subsequent prosecution. For example, when approving the removal of two girls from Warangesda Station to Cootamundra Girls Home, the Board ordered 'if the children are not allowed to go, parents to be expelled and children then proceeded against under the Neglected and Juvenile Offenders Act' (APB Minutes, 1914: p. 4).

The effect of these legislative and administrative changes was the forced apprenticing (or placement in juvenile employment) of nearly all young Aboriginal people from reserves and stations. In 1921 the Board stated:

The excellent work, however, of keeping the Reserves free of girls and boys above fourteen years of age, and of neglected children, was given special attention ...

Indeed, it would be difficult to find any child over school age out of employment or not an inmate of the Board's Homes (APB Annual Report. 1921: p. 1).

It appears clear that originally the establishment of Trust Fund accounts was a consequence of the Board's regime of policies designed to control Aboriginal people. Young people were forced off reserves and missions to work or removed entirely by the Board and made wards of the state. Once in work, their wages were controlled by the Board through Trust Fund accounts.

In this period prior to the late 1920s, there does not appear to be any intrinsic internal financial benefit to the Board in its management of Trust Funds. Whilst the Board could use money in these Trust Fund accounts on goods and services considered to be in the best interests of the young person, it did appear that the money was eventually paid to the young people, albeit after they had jumped through some administrative hoops.

That changed dramatically in 1927 when the Lang Government introduced a family endowment payment available to all eligible mothers, including Aboriginal women. Initially these payments were paid as a direct payment and families were left to manage their own money. This did not last long, however. The Commonwealth Government had commenced its own family endowment scheme and in January 1928 it approached the APB seeking the Board's agreement to administer the distribution of family endowment payments to Aboriginal and part-Aboriginal children, arguing that there had been reports of the money being 'squandered' by recipients.

The Board was initially reluctant to undertake this task. In a letter to the NSW Treasury the Board's Secretary stated that:

These people are understood to be legally entitled to such money, it is not quite clear to the Board what advantage would accrue by bringing a third party into the transaction, especially in view of the fact that it would involve additional work for the Board's limited staff ... It may be mentioned that, so far as Aborigines living outside reserves are concerned, the Board must be careful not to do anything which might impinge upon its policy of encouraging Aborigines to go out and be self-supporting like their white brethren ("Correspondence AWB and Chief Secretary's Department", 1929: pp. 7-8).

The Board proposed that it could administer large payments of endowment money that was in arrears by placing it into Trust Accounts for the interest of the children. The

Commonwealth was unsatisfied with that recommendation by the APB and remained keen to see the Board take greater control. It appears from the records that the financial inducements offered finally overcame the Board's reluctance, with some pressure from the NSW Treasury. At a meeting between the APB and the Commonwealth Family Endowment Department in December 1929, the Commissioner of Family Endowment argued:

The adoption of the proposal will enhance the control of the Aborigines by the APB and assist in the retention of these people in their reserves ... it will have the effect of a saving of the funds of the Board because the corresponding relief afforded by the spending by the Board, of endowment moneys, on suitable, wholesome necessities of life and education for the children of claimants ("Correspondence AWB and Chief Secretary's Department", 1929: p. 4).

In the end, the financial enticement of the expected reduction in State funding on rations for children in receipt of family endowment, along with the Commonwealth's offer that any administrative costs related to the distribution of this Commonwealth benefit could be met from this funding, was overwhelming. A memo from the Secretary of the Board to the Board's Chairman stated, 'it is safe to assume that a saving will be effected in the Board's ordinary expenditure, and the Colonial Treasurer has asked that this be taken into consideration when the Board is framing Estimates for next year' ("Correspondence AWB and Chief Secretary's Department", 1929: pp. 43/44).

And by mid 1930, a memo from the APB to the Chief Secretary's Department stated that 'the administration of these endowment moneys by my Board is resulting, and will result, in considerable saving of the Consolidated Revenue, and such administration is proving to be a most desirable thing from every angle' ("Correspondence AWB and Chief Secretary's Department", 1929: p. 158).

The Board's ability to access funds through its management of Trust Fund accounts was critical in the face of the 30 percent funding cuts imposed by the NSW Treasury in the ten years prior to 1937 (Greer, 2009: p. 176). The Board's management of Trust Fund accounts allowed them to offset the cost of rations and undertake building maintenance on its reserves and missions.

Unsurprisingly, the satisfaction of the Board was not matched by Aboriginal communities. The 1920s and 1930s saw a growing dissatisfaction in Aboriginal communities and there was discontent and anger about the operations of the APB. The 1930s Depression saw more and more Aboriginal people under the control of the

Board, with 30 percent of the known Aboriginal population at the time forced on to reserves and missions by 1935. This caused immense problems, such as overcrowding, poverty and epidemics of respiratory and eye diseases on managed stations between 1934 and 1936 (Goodall, 1995: p. 895).

In the face of growing resentment by Aboriginal people the Aborigines Progressive Association was established in 1937 in Dubbo by the Aboriginal shearer and unionist, William Ferguson, to fight for full equality and political rights for Aboriginal people (Parbury, 1986: p. 92). One of the issues it highlighted was the Board's payment of under award wages and the need for equal unemployment and social service benefits, but the Aboriginal Trust Funds were not specifically pursued (Parbury, 1986: p. 94).

The extent of the control exercised by the state was all encompassing. Richard Broome states that life for Aboriginal people under the Boards was like a police state (Broome, 2010: p. 173). While not expressly articulated, that view can be seen in the 1940 Public Service Board report into Aboriginal protection in NSW, which noted that

the Police Force of this State has been utilised largely in the control of the aborigines, culminating in 1909 in the constitution of a statutory board with the Commissioner of Police as Chairman. Police officers are virtually in control of reserves, ... they are regarded as having an oversight over stations; ... they are responsible for the conduct of those aborigines resident off reserves and stations. They issue relief, blankets and clothing; they furnish reports regularly ... to the Aborigines Protection Board (Aborigines Protection Report and Recommendations of the Public Service Board of New South Wales, 1940: p. 22).

In 1936, a NSW Parliamentary Select Committee inquiry was established to review the actions of the APB and conditions on Aboriginal missions and stations. It failed to produce a report into what the evidence showed were disastrous conditions in Aboriginal communities. In light of this failure, the Select Committee of the Public Service Board commenced its own inquiry into the Board in 1938. Whilst the Select Committee's report made no mention of apprentices' Trust Fund accounts, it did note that there was a 'large accumulation of family endowment funds in the hands of the Board ... (and that) these should be reviewed regularly with a view to their reduction ...' (Aborigines Protection Report and Recommendations of the Public Service Board of New South Wales, 1940: p. 16). In fact, some 623 people were listed as having family endowment held in Trust Accounts in 1938, although four of the people listed were noted as debtors. This accumulation of family endowment money was substantial. In

work undertaken by the ATFRS, it was estimated that the value of these funds in 2009 was approximately two million dollars.

Aborigines Welfare Board (AWB) 1940-1969

By 1939, many economic and political issues combined to lead to the abolition of the APB and its replacement by the AWB. The damning findings of the Public Service Board report about the administration of the APB, their publication and the resultant publicity were critical. Goodall also points to the strong increase in non-Indigenous support for the Aboriginal organisations calling for full rights as citizens, which pushed the Government into abolishing the old Board and creating the AWB. Australia's involvement in WWII saw immense changes in the Australian economy and Aborigines could distance themselves economically from the AWB. By 1948 only 21 percent of the Aboriginal population remained on stations and 96 percent of Aboriginal men were employed (Goodall, 1995: pp. 88-89).

The new Aborigines Welfare Board had a greater focus on 'assimilation' but continued to operate under repressive legislation with extensive control over all aspects of the lives of Aboriginal people within the State. Broome (2010: pp. 172-173) argues that in the period from 1900 to the mid 1960s, control was established in two ways. Firstly, by the Boards, under specific legislation which kept Aboriginal people on reserves and missions, managed their daily lives and work, allowed for the removal of their children and actively suppressed their human rights. About half of the 22 reserves in NSW had managers; the rest were loosely controlled by local police. Secondly, he states, racial discrimination based on skin colour and caste acted as a form of unofficial customary discrimination.

One issue that the newly established AWB did appear to deal with as a matter of priority in the early 1940s was the large accumulation of family endowment funds held in Trust Fund accounts. In a survey undertaken by the ATFRS on people named in the 1938 list of Trust Fund accounts, it appeared from several 1941 files that quite extensive efforts were made to locate endowees and pay out unexpended balances of family endowment.

The policy was that accounts that had not been operated on for some time were to be paid out by cheque, unless orders were recommended by the Manager or a senior Police Officer. In some cases, where the children for whom endowment was paid were no longer in the parent's care or the endowee was deceased, payment was divided among the children or paid to the current guardian, or if the children were no longer minors,

direct to them. In some cases, payments were transferred to the Child Welfare Department to be credited to the Trust Accounts of the children. In most cases where endowment was administered by the AWB, any outstanding credit was issued as orders for food, furniture, clothing or other items used for the benefit of the children.

Other important and extensive research on the use of Aboriginal Trust Funds and the management of family endowment payments was undertaken by Susan Greer (2009). She argues that Aboriginal people were racially categorised depending on degrees of Aboriginality and that over time this categorisation melded into stereotypes of economic differences. This allowed governments of the day to use what they called, the 'natural improvidence' of Aboriginal people, to justify control of family endowment payments.

The NSW family endowment payments ceased with the introduction of the *Child Endowment Act 1941* by the Commonwealth Government. Initially this Act allowed child endowment to be paid to an authorised third party 'in order to ensure the proper application of an endowment granted to an aboriginal native of Australia', and the AWB was allowed to continue to use Trust Fund accounts to manage these payments.

There was, however, a growing movement to make direct payments of child and family endowment. By 1955 the Board managed only 56 child endowment Trust Funds. Greer (2009: pp. 177-178) notes that this change was underpinned by the Board's belief that Aboriginal people in metropolitan areas were 'more or less assimilated' and could be trusted to receive cash payments. She also suggests it might reflect the fact that the Board's overwhelming problem at that time was Aboriginal housing and this led to a concomitant lack of attention to other social issues.

If the AWB's control over the use of child and family endowment payments through its system of Trust Fund accounts declined in the decades after WWII, the same cannot be said of apprentices' wages. The Board's powers to forcibly apprentice young Aboriginal people were significantly curtailed by the revisions to the NSW Aborigines Protection Act in 1940, which limited the Board's power so that they could only apprentice Aboriginal 'wards'. Stripped of their former sweeping powers, the Board could now only control the apprenticing of young people who had been admitted (by their parents) or committed (by the courts) to the control of the Board.

Despite the changed legislative reality, the Board remained fully committed to its established policy of forcing the removal of young Aboriginal people into employment and the use of Trust Fund accounts to manage their wages. This aim was linked to a

new ideology of 'assimilation'. The Public Service Board's 1938 report stressed the need for education and training if Aboriginal people were to be fully assimilated into the economic and social life of the broader community.

When the newly constituted Board sat following the 1940 Act to decide on its future policy, it resolved not only that 'special attention to be given to the problem of the youths... (but also) the apprenticeship system to be closely supervised and extended' (AWB Minutes, 1940: pp. 584-85). The Board's preference was for apprenticeships be used to employ young Aboriginal people:

It is not desirable that aboriginal children remain in idleness on the Station upon attaining school leaving age. Endeavour should be made to secure suitable employment for them, preferably under the conditions of employment laid down for aborigines (apprenticeships under the Board's regulations) (AWB Manual, 1941: p. 79).

The Board could now only apprentice 'wards' and their parents' consent was needed if they were to be apprenticed. The Board had little success in getting this consent. Even before the new policies were introduced, the Manager of the Taree Station wrote to the Board, 'to point out to the Board how much the people here are against letting their children go out to service' (Manager, Taree Aboriginal Mission, 1940: p. 6).

Parents did not want their children sent away into positions where contact with their families was restricted, where they were poorly paid, and where the Board controlled their wages. The reaction of one mother to the attempted apprenticing of her son was illustrating: 'Mrs X stated that she herself was apprenticed and treated like a dog, and she did not want her son treated in a similar manner' (Manager, Burra Bee Dee, 1943: p. 5). The Board, faced with its failure to persuade parents to send their children into apprenticeships, replaced the parental consent forms with a more absolute measure of control requiring parents to admit their children to the Board's control.

There is evidence that the Board's increased interference in and surveillance of Aboriginal families beyond the missions and reserves (through the introduction of District Welfare Officers) led to an increase in the number of Aboriginal children removed from their families in the 1950s and 1960s. Some disappeared into the Child Welfare system but many more were taken into AWB institutions. In the decade between 1951 and 1961, the number of children in these homes increased from 170 to 300. When these children reached their mid-teens, the Board then attempted to place

them in apprenticeships, either as domestics or in agricultural jobs. Their apprentice wages were set and controlled by the Board using Trust Fund accounts.

The last archival records of the Board's Aboriginal Trust Funds that the ATFRS could find was dated 30 May 1969. This list contained the names of 33 people and showed a total of \$4,586 remained in the Trust Fund account on that date. The declining number of people listed as being owed money from their Trust Funds in the late 1960s, along with articles published by the Board in its magazine *Dawn* and later in the *New Dawn*, implies that as it became clearer the Board would be abolished, attempts were made to find and repay money held in Trust Fund accounts for its wards although no rationale for this decision has been found in the records. An article in the *Dawn* in June 1967 announced that it was holding almost \$14,000 in these accounts for 92 people. It sought information about the people named so that it could return the balance of their Trust Fund accounts to them, and it appears from the far fewer names appearing on the 1969 list that some 59 people appear to have had their Trust Fund monies repaid.

The Aboriginal Trust Fund accounts were used by the Boards for over six decades to exert financial controls on the Indigenous population in NSW. The use of Aboriginal Trust Fund accounts swung full circle from their initial establishment as an instrument to control the wages of young Aboriginal people, through to their use in managing Aboriginal people's money by control of child and family endowment payments. This control declined from the 1950s onwards as the Commonwealth Government increasingly paid the child and family endowment direct to Indigenous recipients. By the 1960s, the Trust Funds again appeared to be used exclusively as an instrument to control Aboriginal apprentices' wages.

The 'lost' decades

With the abolition of the AWB in 1969, the Aboriginal Trust Funds seemed to disappear completely from the bureaucratic and political landscape for more than three decades. While research into what happened to the Trust Funds in that period provided little concrete information, this was not true within the Aboriginal community, where many questioned what had happened to the money they believed had been placed into Trust Funds on their behalf.

In 1969, on the Board's closure, some of its responsibilities including the Trust Funds were transferred to the welfare department. Aboriginal people were informed in 1967 that the Trust Funds were being frozen during the abolition of the Board and that they should make further inquiries later. When they did, they were told the funds were no

longer available. In researching this issue for the first ATFRS Panel's report I found unpublished Departmental records indicating that, in 1970, the then welfare department received a total of \$5,034.95 from the Aboriginal Trust Funds account. This was sent to the NSW Treasury and paid into the Unclaimed Monies Account.

Bureaucratic opposition to dealing with the issue of Trust Fund accounts appeared to be either on the basis that there was inadequate legal proof that money was owed or that too much time had passed for the claim to be viable. According to one report as late as 2003, the then Treasurer wrote to one Aboriginal campaigner that:

Searches of Treasury records have failed to reveal the existence of these funds being transferred to NSW Treasury... It can only be assumed that the monies involved were paid to the rightful owners. Therefore, unless you or others can show the rightful owners were not paid, there is little more that Treasury can do to assist with the claim (Brennan & Craven, 2006: p. 2).

If the Aborigines' Trust Funds were not a matter of political or bureaucratic concern this was not true of the Aboriginal community, and a key group of Aboriginal people continued to agitate for the return of the money they believed they were owed from Trust Fund accounts. Most of these requests were made to the relevant welfare department and by the late 1990s, work had commenced within the Department of Community Services to try and address this issue.

I had some involvement in this earlier proposal while working as a Ministerial Advisor in the office of the Minister for Community Services. I attended negotiations between Departmental officers and central agencies such as Treasury and the Department of Premier and Cabinet. Unfortunately, this proposal failed when presented to the NSW Cabinet in 2001.

The reasons for its failure are unclear as the matter is Cabinet in Confidence. Discussions I had with other Ministerial officers concerning its failure to pass Cabinet lead me to believe that two elements of the proposal raised worrying questions for the Government. These were, firstly, the uncertainties around the amount of money that might be owed (some estimates were as high as \$70 million) and, secondly, the fact that the number of potential claimants was unknown. These uncertainties, in my experience, would raise major financial concerns within Treasury about the ambit of the Scheme, which in turn would likely lead to the submission being rejected.

Despite this unsuccessful first attempt, the issue of justice for Aboriginal people in relation to the administration of their Trust Fund accounts was a moral issue for the State and one that showed no sign of disappearing. Why then was there this sudden governmental 'turnaround' to this issue? Researchers at the Public Interest Advocacy Centre (PIAC), along with others such as the Indigenous Law Centre, argue that a culmination of key community, legal and media pressures pushed the Government to tackle this issue (Banks, 2008; Mawuli, 2010; Brennan & Craven, 2006; Howes, 2005; Graham, 2004).

For example, several Aboriginal people who believed that they were owed money from Trust Fund accounts increased action in their long running campaign for justice (Brennan & Craven, 2006). One claimant approached PIAC to seek legal assistance, which instigated a freedom of information request seeking documents from the Department of Community Services (DoCS). It was these documents that brought into the public arena the previous work undertaken by DoCS to establish an Aboriginal Trust Funds Payback Scheme (Mawuli, 2010b: p. 8).

Several events in February 2004 also brought Aboriginal Trust Funds into critical political focus. On the 26 February 2004, Ian Cohen, a member of the NSW Legislative Council, sought leave to table a document he identified as the 'Aboriginal Trust Funds Payback Scheme Proposal' along with all attachments. Cohen stated his motion was intended to set the ball rolling to get justice for the hundreds of Aboriginal workers in New South Wales who had had their wages stolen by New South Wales governments prior to 1969. He said that in 2001 the Government compiled an actuarial report on the amount of money stolen from Aboriginal workers up to 1969 and the current value of this money which was estimated to be in the millions of dollars, a list of people known to the Government who are owed money, and a scheme under which the money can be paid back. Yet nothing had been done to progress the proposal to pay back the 'stolen wages' to the Aboriginal workers or their descendants. Cohen's motion sought to table those documents in Parliament to provide the first public acknowledgement of the 'stolen wages' of Aboriginal people of New South Wales and allow for a public reckoning on this issues. Once tabled, the document would be authorised to be made public (New South Wales, Legislative Council, 2004: p. 6670).

What was this document? While Cohan's motion does not actually identify it, in all probability it was the leaked 2001 Cabinet Minute along with an analysis by the consulting firm, Ernst & Young, on what might be owed from the Trust Funds which they estimated ranged between \$11.8 million and \$69.4 million. Cohen identified that

document as the 'Aboriginal Trust Funds Payback Scheme Proposal', the identical name of the proposed project in the Cabinet Minute. In the same month, a story appeared in the *National Indigenous Times* outlining information it had received from a 'leaked' copy of the Cabinet Minute establishing that a scheme to repay Trust Fund monies had been conceived but never established (Graham, 2004: p. 7).

While it is conjecture on my part, it seems to me these two events created a great deal of political unease in the Premier's office. This was a Premier who was justly proud of the fact that the fifty-first NSW Parliament on 18 June 1997 made the first parliamentary apology to the 'Stolen Generations', and yet his Government's inaction on providing justice in relation to the Aboriginal Trust Funds was potentially about to become very public knowledge.

This became one of those moment in time identified by the journalist and speechwriter James Button (2012: p. 136) in his consideration of bureaucratic policy development – that rare instance when 'imperatives of policy and politics, the rational and the irrational have to converge'. This public release of information about Trust Fund accounts and unpaid monies led to growing public and political pressure on the NSW Government to act. In addition, as outlined earlier, not only was there pre-existing policy work on this issue undertaken in support of the first attempt to deal with the Trust Fund issue in 2001 but also there was widespread support within key Departments such as the Department of Community Services (DoCS) and the Department of Aboriginal Affairs to deal with the Trust Funds issue.

Along with PIAC, other organisations such as Australians for Native Title and Reconciliation (ANTaR), the Indigenous Law Centre and the Women's Law Centre joined with Aboriginal people to seek the establishment of a Trust Fund repayment scheme (Mawuli, 2010b: p. 8). PIAC also met with the Director-General of DoCS and the staff of the Minister for Community Services in early March 2004 to advocate the importance of establishing a repayment scheme for their clients and stressed the potential for expensive and protracted litigation if the NSW Government did not address this issue (Banks, 2008: p. 56).

This interaction between community, bureaucratic and political forces in NSW around the issue of the Aboriginal Trust Funds demonstrates that, despite the common illusion that states act as coherent whole orchestrating political action (what political anthropologist Professor Begona Aretxaga calls the 'imagined nation state'), the reality is that the state is a much more diverse reflection of power with interactions both ways. It is always useful to look at the broad spectrum of players and movements in any

movement towards redress and reconciliation, because redress can change and shape historical understandings and politics (Henderson & Wakeham, 2013: pp. 7-10).

The Apology

It was in this climate of heightened political and community activism that the then Premier, Bob Carr, on the 11 March 2004, made an announcement to the NSW Parliament. He stated that, whilst NSW had been the first Government in 1997 to make a public apology to the 'Stolen Generations', there was another outstanding legacy of misguided paternalism that the Government needed to address, and that was the issue of Aboriginal Trust Fund accounts:

I invite the House to turn its attention ... to the fate of Aboriginal trust funds. I take this opportunity to formally apologise to the Aborigines affected and offer the assurance that any individual who can establish they are owed money will have it returned. 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 (New South Wales, Legislative Assembly 2004).

There is some disagreement among researchers as to how this apology should be considered in terms of addressing the historical wrongdoing associated with the Aboriginal Trust Funds. The literature on the role of apologies by states as part of reconciliation and redress processes show it to be a somewhat contested concept. The Canadian philosopher, Alice MacLauchlan (2010: pp. 373-734), states many commentators are cynical about apologies, believing them to be cheap gestures based on self-interest that enable governments to defuse demands from minority groups without committing resources to address these injustices. She also notes that the modern era has been called the age of apology. Yet public apologies are not a totally modern phenomenon. The Alliance for Historical Dialogue and Accountability website hosts a historical List of Political Apologies. Whilst it is true that the number of apologies increases in the modern era, some are very old; the first listed is in 1077 when the Holy Roman Emperor apologised to Pope Gregory VII for church state conflicts by standing barefoot in the snow for three days (Dodds, Political Apologies Archive, 2016).

The role of 'apologies' by the state for past wrong doing is often criticised. Corntassel and Holder (2007: pp. 1-5) point out that apologies usually fall short of actually rectifying injustices in relation to loss of lands and self-determination for Indigenous

populations. They suggest an authentic apology should be officially recorded, accept responsibility and regret, promise no repetition, not demand forgiveness, not be hypocritical or arbitrary, morally engage with the people wronged through publicity, ceremony and concrete reparation.

Others are less concerned about arguments that state apologies should be viewed as cynical and manipulative. Winter considers arguments about whether apologies are 'sincere' are not important; what is important is what any particular state redress scheme achieves (Winter, 2014: pp. 11-12). Similarly, in reviewing Canada's reconciliation policies, Henderson and Wakeham (2013: p. 10) argue that 'the importance of redress is not what it says but what it does', and MacLauchlan (2010: p. 377) states that whilst there is not yet a conclusive method for understanding all instances of public apologies, rather than asking about the meaning of any specific apology, a better approach might be what does such an apology mean, in this context and in these circumstances.

The political scientist, Melissa Nobles (2008), presents a more nuanced political slant on the issue, and argues that although individual politicians may have varied motivations for an official apology, ultimately such apologies function as part of ongoing efforts to reshape the terms of membership in a political community. Apologies differ from other responses to wrongdoing, such as reparations, in that they are symbolic and do not offer financial or material relief. The need for an apology and an acknowledgement in response to historical wrongdoing on the part of the state is a key requirement for any attempt at reparation. As noted by the Human Rights and Equal Opportunity Commission (HREOC) inquiry into the 'Stolen Generation' the first step in healing must be an acknowledgement of the truth and the delivery of an apology (Pritchard, 1998: p. 261).

The apology by Premier Carr in relation to the Aboriginal Trust Funds met many of the requirements for an authentic apology. It was made on behalf of the State of NSW to its Indigenous citizens and was official recorded, it accepted responsibility and regret for past wrong-doing by the State, did not demand forgiveness and was not hypocritical or arbitrary. And finally, it offered to repay any monies owed.

There are, however, some aspects of the apology that need to be noted as they created immense problems for the ATFRS at that time, as well as in analysing its work as a reparation scheme. These elements are, firstly, that the apology stated 'only individuals who can establish that they are owed money would have it returned' and, secondly, it noted the potential problems with obtaining such evidence in acknowledging that the

records relating to the Trust Funds 'barely exist'. The impact of both these elements will be analysed more fully in the following chapters.

As to whether it morally engaged with the people wronged, I argue that many of the operational aspects of the Scheme attempted to do just this. An early example was by ensuring that the Ministerial letter accompanying any repayment made to successful claimants included a personalised apology for the fact that they had money placed into Trust Funds which had not previously been repaid to them by successive Governments. It is symptomatic of the lack of information about the ATFRS that the New South Wales Legislative Council's report on reparations for the 'Stolen Generations' recommends that individual apologies be made, apparently without any knowledge that such a letter was provided by the Scheme to successful claimants (2016: p. 65).

Whilst there may be theoretical disagreement about the role of an official apology for the State's mismanagement of Aboriginal Trust Funds, several Indigenous individuals interviewed expressed a belief that the apology was important. As one stated 'that was my recollection, that Bob Carr did that ... it's important to the individual I think. ... And, you know, Premier's Carr's apology appeared to me to be a heartfelt and genuine and decent apology' (Interviewee 2). Another noted 'I think that the letter was significant ... you know if those experiences had happened to me directly and I received that (letter) ... signed by the Minister, yeah I think people took (that with) a lot of weight. So, to me the letter was a step in that direction' (Interviewee 3).

Talking to claimants leads me to believe that for many it was an important statement. It touches on what the Canadian sociologist Tavuchis terms the 'apology paradox': that is, that an apology does not and cannot undo what has been done. And yet in a mysterious way and according to its own logic, this is precisely what it manages to do (Corntassel & Holder, 2007: p. 3).

It was the experience of all who worked on the Scheme that many times claimants, even unsuccessful ones, thanked Scheme workers and said that for them it had not been about the money. Rather, the Scheme was important because it allowed them to tell their stories and that their experiences were believed, and many indicated that it was a life changing experience. Moreover, many felt the formal Government apology was a critical element in the acknowledgement of the historical injustices that they had experienced.

Conclusion

This chapter reviewed a century of interaction between Indigenous people and the State of NSW, with a focus on the Aboriginal Trust Funds and how they were used by the Boards, who was affected and why. While the issue of the Aboriginal Trust Funds appeared publicly to lie dormant after the abolition of the AWB in 1969, the need for a just solution continued to percolate throughout the Aboriginal community for more than three decades and culminated in a public apology by the Premier in relation to the Aboriginal Trust Funds and the establishment of the ATFRS in 2004.

The following chapters examine aspects of the ATFRS through other aspects of international human rights reparations theory. Each chapter will consider the work of the Scheme as it relates to a broad group of issues of importance in reparation theory. Did Aboriginal people have full access to information about this issue and the establishment of the Scheme? Did the Government provide adequate reparations or redress including identification of potential claimants, appropriate eligibility criteria and levels of compensation? How well did the Scheme treat the claimants in relation to Trust Funds misuse? Did the right of Aboriginal people to know the truth emerge through prompt, diligent and impartial investigations and how were issues such as the burden of proof and appeals mechanisms dealt with by the Scheme?

CHAPTER TWO

The Right to the Truth

In her research on repairing moral relations after human rights wrongdoing, the American philosopher Margaret Walker (2015) noted that the UN Basic Principles include the right to know the truth about human rights violations and that this right is both individual and collective. Successful reparations require that States ensure victims seeking justice for past wrongs should have unfettered access to any relevant archival material. Like many aspects of reparations, such as the requirement to provide ‘satisfaction’, the right to the truth can be viewed not only very specifically, but also as a broader and more elastic concept – the need for information.

This chapter considers the actions of the ATFRS regarding the need for truth telling, and it outlines some of the issues faced in dealing with the archival material held by NSW State Records. It also examines the steps taken to ensure that Aboriginal people who believed they were still owed money from the Aboriginal Trust Funds learnt of the Government’s decision to repay this money.

The archival records and ensuring access

Understanding the nature of the archival records relied on by the Scheme is important. The historian Antoinette Burton (2005: p. 1) defines archives as ‘traces of the past collected either intentionally or haphazardly as evidence’. This concept of haphazardness resonates with the Board’s archival records. One of my interviewees, a bureaucrat, made a pertinent analogy about the archival material the Scheme relied on saying that ‘the records were the mystery that confronted us at the heart of the Scheme’ (Interviewee 1).

The records of the APB and AWB were the crux of the Scheme’s attempt to repay Trust Fund money; it was always an evidence-based scheme. Despite the ATFRS Guidelines allowing the Panel some flexibility in their ability to review claims and to take oral evidence, this requirement for archival evidence of a Trust Fund remained central in any attempt to make repayments.

The truth was that in the early days of developing the Scheme, whilst we had undertaken test surveys of the records, we did not have a clear picture of what the records would tell us. It should be stressed that most of these records were, and are, closed to public access for 100 years. Furthermore, not only had no-one else had the

kind of access that we were given, no-one had examined them with the forensic intensity we employed. Even at the commencement of the Scheme, it was known that many of the records of the Boards had not survived due to poor record keeping or loss. As much of the academic research into the NSW Trust Funds notes, given statutory requirements on the State to protect Aboriginal people and the *Audit Act 1902 (NSW)* requiring that Trust Fund accounts be managed with legal accounting, reporting and auditing requirements attached to them, there should have been substantive records (Brennan & Craven, 2006). This was not the case. And those gaps in the records, and the difficulties posed by relying on them for evidence, is widely referred to in the research (Banks, 2008; Mawuli, 2010b; Cunneen, 2005; Greer, 2009; Mawuli, 2010a; Pritchard, 1998: p. 265).

This is not a problem unique to Indigenous records. Australian Senator Andrew Murray (2008), who instigated inquiries into child migration to Australia and child institutional care, asserts that the destruction of records has been an enormous problem in most Australian States. To address the many problems associated with care leavers searching their past through records held by both government and non-government agencies, 19 recommendations were made in both the Senate's Child Migrant and Forgotten Australians reports.

Significant gaps also exist in the Boards' records. For example, only the AWB Correspondence Files for the period 1949 to 1969 survive, leaving a decades long gap where supplementary records remain as the only evidence of the Board's administration and policies. Despite this, as I found when commencing work with our Indigenous Archivist, there was still a considerable number of records available to the Scheme. These basically fell into two distinct periods divided by key events – the first the period from the turn of the century until World War II and the abolition of the Aborigines Protection Board, and the second from 1940 following the creation of the Aborigines Welfare Board until its demise in 1969.

For the period 1897 to 1938 we had what State Records refer to as the APB 'ledgers'. These are financial accounting registers which included Trust Account and Salary Registers and a 1938 Child Endowment Trust Account list. Far more useful and extensive are the AWB's Correspondence Files from 1949 to 1969. These records proved very significant in our search for evidence to support claims. They comprise 292 boxes of records, covering approximately 14,000 files (500,000 pages) relating to the administration of the AWB over this period. Often significant details of individuals, including financial transactions, are contained in these files.

In early 2006 something happened that had immense ramifications not only for the Scheme, but also for Indigenous communities in NSW. We were informed that State Records had found 138 boxes of previously unknown records at its Kingswood Repository. These boxes had been mislabelled as containing records from the Chief Secretary's Department, but it appeared that approximately three quarters of the material in the boxes consisted of APB and AWB records for the period 1938 to 1949.

One immediate consequence of this advice was that it brought to a head a problem with the existing files, which were only indexed to file level. This meant that processing claims was very time consuming. Furthermore, the indexing of these records at the Department of Aboriginal Affairs (DAA) was proceeding at a glacial pace: I calculated that it would take 15 years to finish the indexing of the already known records – an impossible situation for a Scheme that was expected to run for only five years.

After departmental briefings on the unexpected discovery of new records and the problems being experienced with indexing the current records, it was agreed that additional funding and staffing were required to digitise and index all the records relating to the Boards. Indexing of the previously unknown records commenced in October 2006, and when the project finished in November 2007, 168,688 pages of records had been digitised and records for 36,000 Aboriginal people had been identified from 3,700 files. The successful outcome of this project enabled the continuation of additional funding to State Records to ensure that all the earlier Boards' records were likewise digitised and professionally indexed by June 2008. Where necessary, earlier claims were reassessed at the completion of all the indexing work in 2008.

The importance of this work meant that if Indigenous claimants were mentioned in the records, they were found. As one archivist commented, 'I know ... the fact that we had that investment of resources in going through the records and identifying every name, every place that we possibly could. And the sense that we could document and make information discoverable at that level. If anything was valuable, then we found it' (Interviewee 3). Another interviewee emphatically stated when responding to my question as to whether the Scheme had ensured that all available information in its possession was made available to claimants responded, 'Yes, that was one of the ... God! That's absolutely one of the things that you can say an unequivocal yes in that one' (Interviewee 1).

As Margaret Walker (2015: pp. 142-143) highlights, important factors in the reparative powers of truth telling lie in both the dissemination and preservation of 'truth', and that

it is necessary to secure records for the future and ensure the preservation of records appropriately to secure public accessibility. The results of this work fall within Walker's definition of reparative truth telling: for the first time, Aboriginal people searching for their history could find every reference to themselves or other family members down to page level. This was an immense improvement from having to search hundreds of pages within a file as was previously necessary. Biber and Luker (2015: p. 9) note there has been increasing attention given to archives arising from legal cases relating to historical injustices and Aboriginal people are increasingly accessing these records whilst trying to establish their identity and connections to family and country. The professional digitisation and indexation of the Boards' records is arguably the most important and lasting legacy for Indigenous people in NSW from the work undertaken by the ATFRS.

Despite that important archival milestone, handling and reading these records could also bring forth a range of emotions for claimants and ATFRS workers alike. To read and hold these records, some of which were more than a century old, was often daunting, and many contained stories that were painful and distressing. Andrew Murray (2008) records similar emotions generated by the Senate inquiries on the Forgotten Children. They 'impacted heavily on everyone involved, from the Senators and their staff to the committee secretariat and Hansard', he acknowledged. 'We became privy to heartbreaking stories of families torn apart, and of vulnerable children exposed to an alien and usually cold institutional life. Fear, neglect and the longing for love were constants in the written submissions and oral testimonies, as were stories of widespread and systemic abuse'.

Stories of the casual cruelty perpetrated on the young boys at Kinchela Boys Home were illustrative: not only did they lose their names, being only referred to by a number, they also received physical punishments for minor infractions of rules. In one case (still etched in my memory almost a decade later), a young man labelled by the workers as having 'girlish' tendencies because of his love of working with animals was dispatched as an apprentice to work in the local abattoir. We managed to find that money was owed to this claimant only a few years before his death and he told us that once he had managed to get out of Kinchela he spent many years later in life attending schools to talk to the children about his experiences as an Indigenous man.

As one interviewee said,

I suppose the thing that I was always shocked about is the (number) of young girls being sent to wealthy families in Sydney ... It was sort of the stories of

people being sent at fourteen years of age from a Mission – where they'd never been off the Mission to Double Bay ... or Vaucluse. Never having seen money, never really having had ... material goods not even having shoes and being sent to these mansions and expected at 14 years of age to run a household and look after young children. And some of the stories of complete alienation of these young girls but it was sort of the bizarreness of a society expecting a 14-year-old, a country 14-year-old to be able to cope in these circumstances. I suppose that, and the fact that all these Aboriginal young girls were basically the domestic staff for the wealthy in Sydney, is something that I really had not anticipated finding that out (Interviewee 1).

The records resonate with the pain of Aboriginal mothers and fathers pleading with the Boards to return the children they had removed. There are letters from fathers who had been fighting in the war only to find on their return their families in dire circumstances and, in some cases, their children removed even though their army wages had been paid to their families. There were also tales of determination as Indigenous people fought for their rights. Certainly, our searches of the records reflect the realities identified by Haebich from empirical cases studies grounded in Indigenous epistemologies and narratives. These show the diversity of resilience undertaken by Indigenous families, who fought authorities in various ways to keep their children; employing a range of strategies including political negotiation, letter writing and impromptu concealment, sometimes denying their own identity to keep their children safe (Haebich, 2015: p.21). The determination of Indigenous people not to be victims was striking. Some were successful, such as the Indigenous woman who established she had been the victim of fraud by a local shopkeeper and had endowment monies returned to her Trust Fund account. One claimant shared with us her story of raiding the pantry at Cootamundra Girls Home during the night and taking a box of biscuits into the dormitory for the younger children who were hungry. She said she was punished by the Matron but was unrepentant.

Unsurprisingly, getting copies of their records also had a profound impact on claimants themselves. As noted by Indigenous archivists, researching the records can result in profound, embarrassing or shocking discoveries as well as raise questions about the accuracy of the records themselves (Williams, Thorpe & Wilson, 2005). One instance related to the smallest repayment we made early in the Scheme, which was \$120 for the return of one pound cheque. This claimant had been adopted from Bomaderry Children's Home at six years old. Her 16-year-old mother had been forced to give her up. She worked as a domestic servant and had saved up one pound to send to her

daughter on her birthday, which on our calculations was probably about three or four weeks' wages for her at that time. The cheque was sent to the adoptive parents and, in a scathing letter to the Board, the adoptive mother returned the cheque saying that the Board must take all and any actions necessary to stop the natural mother contacting her daughter. The Board put the cheque into a Trust Fund account and it languished there until we found evidence of it in our review of the records.

What made this case particularly memorable was that the claimant aged in her 60s finally found evidence in the records that her mother had been looking for her and loved her and that she had not been abandoned. She reconnected with her natural mother three or four years before her mother died, but neither had mentioned the cheque. Forty years later, the claimant rang and said, as many claimants did, that ATFRS process was not about the money, but that access the records was life changing.

American sociologist and historian John Torpey (2015) similarly highlights that there are many non-monetary measures involved in reparations that provide the 'satisfaction' required in the UN Basic Principles and that the claim is frequently made by those seeking reparations that 'it's not about the money'. For many such claimants, the non-economic forms of reparations suffice. Torpey's argument highlights the very real importance to many victims of historical wrongdoing of non-monetary and symbolic actions, despite the danger that it can be used by politicians and policy makers to view symbolic gestures as sufficient redress. As Canadian journalist and legal researcher Linda Popic (2008) also argues, symbolic measures may be vital in restoring dignity and respect but any actions without compensation may be seen as mere political manoeuvring.

In addition to the Boards' records, another important archival resource emerged in the work undertaken by State Records. These were photographs taken by the Boards to publicise their 'good' work on behalf of the Aboriginal communities. These photographs were the basis of the *In Living Memory* exhibition, the details of which are discussed later in this chapter. The archives contain approximately 1000 photographs of Aboriginal people taken between 1919 and 1966 within the Boards' files. As the project travelled the State people could identify family members and were provided with copies of the photographs. For some Indigenous people, these were the only photograph they had of themselves as a child or of their mother, father, sibling or grandparent.

One ATFRS worker discussed in her interview how her ability to attend these exhibitions was particularly gratifying as it allowed her to have contact with claimants she knew through the records.

I think that for me personally, and I can't speak for anyone else, but to have contact with the claimants kind of gives you a sense that people survived. And I think we felt, you know, we had to keep the information confidential ... but to not be able to see that people were still laughing or you know that there was some other kind of living aspects ... sometimes it felt that you were just reading all of this incredibly traumatic material and you knew it (was) out of date and what happened to those people? And I know for me that we had the exhibition *In Living Memory* and it was always kind of nice because people were coming in for that and I would in my mind say, 'Oh, I'm glad to see you'. Yeah, I think there was a little bit of peace in that (Interviewee 3).

Despite the work undertaken by the ATFRS on the records, however, the records of the NSW Trust Fund accounts are either non-existent or very poor, and this raises potential legal issues for the Government (Cunneen & Grix, 2004; Brennan & Craven, 2006: pp. 50-61). Legal findings in relation to failures to return people's money mean there is a strong implication of major breaches of statutory obligations by the state (Brennan & Craven, 2006: pp. 50-56). Discussions with Panel members highlighted the fact that, despite the ATFRS Guidelines providing the Panel with discretionary powers to review all claims and to accept oral evidence from claimants, in reality the lack of records did lead to the exclusion of many claims, simply because there were no records. Approximately 60 percent of claims were rejected in the first three years of operations. Those interviewed for my research highlighted some specific categories of claimants who were particularly affected, for example the Kinchela Boys.

It is known even from contemporaneous reports such as the Boards' Annual Reports that record keeping at Kinchela was very poor. The Scheme could find very few records relating to the work experiences of these young men and fewer instances of evidence of Trust Fund accounts being established for them. As one interviewee said

[It] was highly dependent on who the person was that was taking the notes ... and you could see in the records of the Cootamundra Girls – the matrons, you know kept ... they probably went back to their room of a night after everything else and then thought, you know, I need to do the administration but that care wasn't there with the Kinchela Boys. ... Yeah there was no effort put into documenting what was happening and the kind of work that they were involved in (Interviewee 3).

Furthermore, for many claimants there were simply no records to be found. Or as one archivist explained:

There was a lot of effort in acknowledging a past injustice but from my perspective, working as an archivist, I think that their failure to keep good records was a crucial issue ... you know we were mining for stuff that we were never going to find ... I know that we danced around it all the time. We tried to find the bits that were there but we didn't look at what were the accountabilities of government to ensure that good records were kept ... And I think it became so complex in the end because of that failure of keeping good records. You know we'd done everything that we possible could to retrieve, to contextualise, to make good access but the information was never there (Interviewee 3).

Having reviewed the Scheme's work in attempting to fulfil the requirement that the State provide both preservation and access to all information in records held, this chapter will now outline the actions taken to ensure that Indigenous communities in NSW and beyond were informed about the Government's decision to act on the issue of the Aboriginal Trust Funds.

Informing the Community

Providing information to Indigenous communities commenced immediately after the Premier's apology. The first tranche of advertising in early 2004 publicised the community consultations to be undertaken by the first ATFRS Panel throughout that year. Aboriginal staff at the Department of Community Services assisted by liaising with Indigenous communities and local Land Councils about the Panel's consultations and to ensure that the message was disseminated to local communities. A website and an 1800 free call information number were established and retained for the life of the Scheme.

Advertising was placed in the *Sydney Morning Herald*, the *Daily Telegraph*, the *National Indigenous Times*, the *Koori Mail* and local media in twelve regions along with media briefings. Panel consultations took place in 16 key rural towns, such as Moree, Kempsey, Dubbo, Lismore, Broken Hill, as well as areas of Sydney with high Indigenous populations such as Redfern and Mount Druitt. Approximately 538 people attended these meetings and the ATFRS workers ensured those who wished to be registered as potential claimants had their contact details recorded. This group became the initial core claimant list. Besides outlining its brief from the Government at these meetings, Panel members also made themselves available to meet with individuals or family groups who wished to talk more about their experiences. The second tranche of advertising took place after the Government's announcement in December 2004 that the ATFRS would be established. News releases were distributed to appropriate media

outlets and information sheets about the Scheme and claim forms were developed and circulated.

I did have concerns that publicity about the Scheme's establishment and registration process might not reach the more isolated Indigenous communities throughout NSW. To spread information more effectively at the local level, the decision was made to use the network of the Department of Aboriginal Affairs (DAA) regional offices as well as the ATFRS worker funded within LinkUp NSW. The LinkUp worker travelled extensively throughout the State and continuously over the life of the Scheme. She provided information sessions including visiting Aboriginal people in nursing homes to inform and assist them in making a claim to the Scheme. Despite extensive efforts to publicise the Scheme, we were criticised for not undertaking sufficient advertising. A 2008 article by the CEO of the Public Interest Advocacy Centre (PIAC) argued that there was limited information available to Aboriginal claimants about the Scheme and the claim process (Banks, 2008: p. 63). This aspect of the Scheme's work was considered in the New South Wales Legislative Council's report on reparations for the 'Stolen Generation' and it suggested that better communication strategies might have been used (2016: p. 91).

Views on whether the Scheme was sufficiently publicised are mixed. The ex-ATFRS staff and Panel members interviewed are mostly of the view that the campaigns were good. As one elaborated:

I think that we did everything we could to possibly publicise the Scheme ... Also, I think the fact that we had a limited amount of time was also problematic because those sorts of things can percolate through slowly and people may not want to (make a claim) ... especially if it's associated with a great deal of pain, a painful experience either for themselves or their family; then they might take a bit of time ... which I think happened with a few people, they took some time to actually put their application in or get around to doing it (Interviewee 1).

One issue that was neglected by PIAC criticisms is that the Scheme's advertisement needs to be understood within the context of its establishment. In the early life of the ATFRS, Australia was governed federally by a conservative Liberal-National Coalition, with a Prime Minister whose political strategy was to project a proud, heroic and benign version of Australian history and who argued forcefully against the supposed 'black armband' approach to Australian history (McKenna, 1997). Prime Minister Howard (1997) in a response to the 'Stolen Generations' report and broader

debate on Indigenous issues infamously said that ‘Australians of this generation should not be required to accept guilt and blame for past actions and policies over which they had no control’.

While the term ‘history wars’ was not uniquely Australian (Curthoys & Docker, 2006: p. 221), they were in full flight nationally in 2005. It was an extremely toxic environment into which we were taking the first tentative steps to establish a scheme which not only acknowledged past injustices against Indigenous people but also intended to use taxpayers’ money to make repayments. I was very conscious of a need to avoid adverse publicity as much as possible. I had great concerns in the sensitive early stages of developing a process to repay Indigenous people money retained in Trust Fund accounts, that the issue would become a ‘whipping boy’ in the hands of populist radio ‘shock jocks’ and that any adverse public backlash might potentially derail the Scheme. For these reasons, it was critical that any publicity was focused more to Indigenous communities than to the mainstream media. As noted by one researcher studying the ‘history wars’, the various views of the past were gleefully seized upon by media coverage highlighting and perpetuating tension and conflict. Controversy was actively pushed by the media, along with strident opinion pieces. ‘The moments of historical controversy that characterise the ‘history wars’ are not simply captured by the media, but mined for all they are worth’ (Clark, 2013: p. 165).

The third and final intensive media campaign took place in early 2009 to inform communities about the changes to the Scheme’s guidelines and to encourage people to make claims before the new closing date for claims – 31 May 2009. This campaign included advertisements in metropolitan and rural newspapers as well as a series of radio advertisements. LinkUp NSW continued its extensive community consultations throughout rural and regional NSW.

Besides direct media advertising, another important avenue to publicise the Scheme might be considered as ‘soft diplomacy’. ATFRS in conjunction with State Records provided funding for a travelling exhibition of photographs from the Boards’ records called *In Living Memory*. These photographs were taken by the APB and AWB to document their work and included studio photographs of young Aboriginal women apprenticed as domestics to families in Sydney. They revealed the poverty and hardship of children’s homes; the bleakness of housing and education and the hard labour for Aboriginal men and boys working on the land. The exhibition toured at Nowra, Moree, Walgett, Brewarrina, Quirindi, Armidale, Ballina, Kempsey, Penrith, Hurstville, Newcastle, Moruya, Bega, Wagga Wagga, Cootamundra, Dubbo and Broken Hill (*In*

living memory: exhibition catalogue, State Records, 2007: p. 3). It attracted the greatest media coverage, visitor interest and community support of any previous State Records exhibition and ran from 2006 to 2012. The exhibitions were used as an avenue to provide information about the Scheme and assist people to make a claim. It became another important way in which information about the Scheme was provided directly into Aboriginal communities.

In addition to the Scheme's own publicity campaigns, a number of other bodies, mostly led by PIAC, were undertaking concerted campaigns to brand the scheme as being about 'stolen wages'. The debate around 'stolen wages' was a difficult issue for the Scheme, the details of which are explored more thoroughly in the chapter of this thesis dealing with the adequacy of repayments made. In summary, the main difficulty was that it led to impossible expectations in some sections of the Aboriginal community. The NSW Legal Aid Commission also provided information and outreach to rural and remote areas (Legal Aid NSW, 2009). Koori Radio donated free air-time and aired advertisements featuring ATSIC Social Justice Commissioner, Mr Tom Calma. In addition, PIAC launched what it called a 'stolen wages' Helpline in 2009 to provide free information and advice. Despite my belief that these groups' insistence on defining claims as being about 'stolen wages' had detrimental consequences, I acknowledge that it was also an extensive and far reaching campaign.

Given my subjective position, it is difficult to answer how much publicity is enough. Yet every attempt was made to publicise the Scheme throughout Indigenous communities in NSW, and extensive efforts were made to ensure that Indigenous communities learnt about the ATFRS. As one interviewee stated:

I thought it was a pretty good campaign and you can't reach everybody. There will still be people presumably, that will come along and say I didn't know anything about it, but it's a bit of an imperfect science and ... you can only really get out there as much as you can and I think, you know, a lot of effort was put into that ... And PIAC, for all their sort of oppositional approach, that was part of that as well - the fact that they were out there (Interviewee 2).

The cumulative efforts were effective and this can be shown by the fact that the number of people registering to make claims was at the upper end of the estimated number expected by the first Panel, i.e. the expected highest number of claimants was 11,500 and in fact 9,019 claims were finally registered.

Conclusion

How well did the ATFRS perform in providing claimants with access to their personal records held by the state? On one level, the Scheme provided an excellent example of one necessary element of state redress – the requirement that the state provide access and information on all state held records. The professional digitisation and indexing of the archival records also satisfied the obligation highlighted in the UN Basic Principles – the right to the truth about historical wrongdoings by states. In her consideration of truth telling as reparations, Margaret Walker (2015: p. 131) argues that states are obliged to preserve ‘collective memory from extinction’. Federico Lenzerini (2008: p. 15) further notes that an essential element of reparation is disclosure of truth, and the critical importance of this has been emphasised many times in international law. It is an individual right but also a collective right drawing upon history to prevent violations from recurring in the future. In the light of the ‘history wars’ debates, it has an equally important corollary – the ‘duty to remember’ on the part of the state, ‘which allows it to be forearmed against the provisions of history that go under the names of revisionism or negativism, for the history of its oppression is part of a people’s national heritage and as such must be preserved’ (Walker, 2016: pp. 130-131).

On a more macro analysis of the reparation aspects of the ATFRS, this chapter highlights how the gaps within the archival records of the Boards disadvantaged many claimants. This is because within the framework of redress as defined by the NSW Government in relation to the ATFRS, there had to be evidence of the existence of a Trust Fund. Yet the State’s failure over decades to properly record its actions in relation to the Aboriginal Trust Funds meant that justice was not reached for many claimants. The consequences of this on evaluating the ATFRS as a reparation project will be further explored in the conclusion to this thesis.

CHAPTER THREE

Addressing historical wrongdoing including diligent, impartial investigations and the need for cultural sensitivity

In acknowledging historical injustices associated with the operations of Aboriginal Trust Funds in NSW and the establishment of a repayment scheme, the NSW Government fulfilled an important component of the UN Basic Principles relating to reparations – a public apology.

This chapter considers another key area of reparations theory: how ATFRS claimants as victims of historical wrongdoing were treated. The Australian lawyer, Sarah Pritchard (1998: p. 265), reviewed the broader aspects of reparations contained in the recommendations of the ‘Bringing Them Home Report’ and noted that ‘experience further suggests the importance of ensuring the application of culturally appropriate assessment criteria, as well as procedures which are expeditious, non-confrontational and non-threatening, and which respect and accommodate cultural and linguistic needs’. (See also Lutz, 1988). It is within this context that many important areas of the Scheme’s work are considered:

1. Indigenous representation and cultural awareness
2. implementing appropriate and respectful policies and processes
3. the diligence and impartiality of the ATFRS investigations
4. timing and the establishment of the ATFRS
5. the importance of Section 1.8. and the Kinchela Boys.

Indigenous representation and cultural awareness

In establishing the Scheme, it was clear that strong Indigenous representation was essential to ensure it was sensitive to the needs and cultural sensitivities of the Indigenous community and that claimants felt comfortable in contacting the Scheme. I set about ensuring this happened in two ways. Firstly, by recruiting Indigenous staff into the Scheme wherever possible and, secondly, by ensuring that the Scheme had a fully Indigenous Panel. The importance of the work done by the ATFRS to ensure that people who suffered harm could participate was vindicated by the Australian lawyer,

Amanda Cornwell (2009), in her consideration of reparations for the 'Stolen Generation'. She argued that applicants 'need to know what to expect and, to some extent, should be able to shape the process to ensure it meets their needs and those of their community'.

Strong Indigenous representation throughout the Scheme was an important aspect of accommodating cultural needs and there is no doubt that our claimants were more comfortable when talking to another Indigenous person when they rang the Scheme. Although the ATFRS unit was small, with four staff located within the Department of Premier and Cabinet but based at Redfern, it also funded staff in State Records and the Department of Aboriginal Affairs (DAA) to assist with record searches. While staff numbers did vary slightly over time, 82% of the key staff were Indigenous and included State Records' Indigenous Archivist, whose detailed knowledge of the APB and AWB records was invaluable. One of the large legal firms who worked closely with the Scheme stated in their submission to the New South Wales Legislative Council inquiry into reparations for the 'Stolen Generation' that Aboriginal leadership and engagement was a key aspect of the ATFRS, as it had both Indigenous staff and a fully Indigenous Panel. It said that 'this was a key element in the accessibility of the scheme and helped claimants to feel more at ease throughout the process', and added that it also 'gave decisions of the ATFRS a sense of cultural legitimacy' (2016: p. 116).

The importance of the Scheme's Indigenous staff was referred to in many of the interviews I undertook. As one interviewee noted, one of the strengths of the Unit was the commitment of the Indigenous staff and the important role they had in providing bridges to the community (Interviewee 5). Another stated:

I think for us we were always concerned about community ... You know, you were there for a reason ... if you went to go home at five o'clock you thought, oh, you know there are a hundred claims there. You would tend to stay back to do it because you knew that that directly impacted people. And I don't know that you have very many jobs that you have that same kind of sense of urgency I think that we all ... put in a hundred, two hundred percent to get it done (Interviewee 3).

The second aspect of Indigenous involvement with the Scheme was the appointment of an Indigenous Panel as an advisory and review body to the work of the ATFRS. The Panel was expected to make the final decision in relation to all claims and also provide claimants with an independent Indigenous appeals mechanism. A challenge faced in establishing the second ATFRS Panel was that whilst the Government had indicated its

support for such a body, there were covert indications that senior management preferred the Panel to have a non-Indigenous Chair, a position that would be unacceptable to the Aboriginal community.

I undertook extensive research on possible candidates for the Panel and after widespread consultation with key Indigenous, public sector and legal organisations, submitted three recommendations for appointments to the Panel. These received Cabinet approval and the new Panel was announced in July 2005. The new Panel members had an extensive range of political skills, both as elected parliamentarians and within national Indigenous organisations such as ATSIC, the Murdi Paaki Regional Council, LinkUP NSW and human rights law. The Chair of the Panel was Aden Ridgeway, along with Sam Jeffries and Ms Robynne Quiggin. Mr Jeffries' involvement in the first ATFRS Panel also provided invaluable continuity in his understanding of the Scheme.

The Scheme benefited greatly from the experience and the six-year commitment given to the work of the ATFRS by the Indigenous Panel members. This belief was also widespread among my interviewees and there was general acknowledgment that having such high profile Indigenous Panel members was very important to claimants. One interviewee who had been co-opted to undertake an evaluation of the Scheme after its first three years of operation stated:

One of the real strengths was the Panel was that it was highly qualified, expert in a broad sense and committed ... having three Aboriginal people ably chaired, the individual members and collectively were always accessible and that helped on day to day management. I think that was an important conduit also to the community, to the Aboriginal community, if you hadn't had that ... it probably wouldn't have been as successful as it proved to be. I'd just like to laud them; they were very good to deal with. The same membership right through. I'm looking at it from a manager's point of view; they were exceptional and I've done lots of work with similar boards or committee type structures but they were a very able group. I'd just like to put that on the table (Interviewee 5).

My experiences in working with my Indigenous colleagues in the Scheme and with the Panel was that their extensive connections within the Aboriginal community were critical in ensuring Indigenous input into many aspects of the Scheme. Federico Lenzerini (2008) argues, in his work on best practices for indigenous reparations, that it is essential that those who experienced the wrongdoing are involved in the processes. In order to be effective, they need to be actively involved. Strong Indigenous

involvement in the Scheme at all levels was important, and especially crucial in the next component of the Scheme's work to be considered – the treatment of claimants.

Implementing appropriate and respectful policies and processes

If any reparation or redress scheme is to be considered as a genuine attempt by Governments to address historical wrongdoing, there is no more important element than how victims are treated. This goes beyond any formal apology to question the basis on how people are treated in day-to-day interactions with any such scheme. The Guatemalan psychologist, Gomez Nieves (2008), argues for the importance of the consideration of psychological aspects of reparations which necessarily complement other forms of reparations. While his research deals with devastation and genocide within Latin American indigenous communities, it is a key aspect of any reparation scheme.

In early 2005, my team and I participated in a series of meetings to decide on the operational details of how to implement the Government's decision to establish the Scheme. We reached agreement on what were the most important and fundamental principles on which all our policies and procedures would rest. The ethical principles were very simple: that the ATFRS operations and processes had to be open and transparent and that Aboriginal claimants had to be treated at all times with the utmost respect. While it was not initially conceptualised as such, these principles which underpinned so much of the Scheme's work reflected its attempts to 'operationalise' the formal apology given by the NSW Government. The need to prioritise the rights of victims is a constant consideration in much of the research on reparations theory, as the Redress Trust (2006), a UK human rights NGO, outlines in its handbook: 'the rights of victims are paramount, and their interests and concerns ought always to be at the forefront of laws and practices ... This victim-oriented perspective is fundamental if the physical and psychological wounds of those who have suffered are to be recognised'.

A practical example of these processes in action is highlighted in the Scheme's approach to the processing of claims. My initial concept that Aboriginal claimants would register with the Scheme to make a claim and provide supporting documentation was abandoned almost immediately. This was because, in reality, claimants' capacity to find supporting evidence was very limited. If they approached State Records seeking assistance, they found most records almost inaccessible due to poor indexing. The other barrier was geographical: most of the archival material was held at NSW State Archives in Kingswood, a somewhat isolated Sydney suburb

difficult to access even for city dwellers, and it would require specific travel to Sydney for Aboriginal people from rural and regional areas. This was a costly and physically daunting prospect for claimants, many of whom were no longer young and, for some, literacy levels were also a problem.

Rather than expect claimants to provide documentary evidence in support of their claim, and after discussions with State Records, we decided a more just approach would be for the archivists at State Records to undertake the search and provide all the relevant documents to the Unit for an initial assessment. This approach is in line with Susan Pritchard's research highlighting the need for flexibility around the filing of claims and rules of evidence, as in many cases evidentiary material such as records may be difficult to obtain or have been destroyed. In such case the burden of proof should be on governments (Pritchard, 1998: p. 265). A member of the ATFRS team then examined the records with forensic intensity. I do not use this phrase lightly, as even if it appeared on the face of the records that the Trust Fund had been repaid, we reviewed the records very carefully as there were still grounds on which we could find that money was owed.

These additional avenues to finding money owed to claimants arose from early preliminary research on the records. This highlighted the fact that the Boards had allowed money to be expended from a young person's Trust Fund by employers or staff at Board institutions on food, clothing, lodging and medical care. I successfully argued in negotiations on the Scheme's guidelines that any such deductions should be refunded on the basis that, as these young Indigenous people had been removed from their families and were in effect 'State Wards', the State should bear the responsibility for these costs. Section 12.3 of the ATFRS Guidelines allowed us to make such reimbursements.

We also searched for questionable deductions and reviewed closely any handwritten notes in the files, since they sometimes indicated that the final cheque had been returned as undeliverable. Although fraudulent deductions by employers did not appear to be endemic, our record searches identified some audacious claims. As one interviewee said 'the one I remember ... (the employer) was claiming for Pony Club outfits. [The claimant] was a domestic during the week and she would go off to Pony Club, yeah right, on the weekends with the daughter and (there was) also a claim for a gold watch as well, which they took out of her wages' (Interviewee 1). When this was discussed with the claimant, she was initially speechless and then burst into peals of

laughter and said she'd never been on a pony in her life. Deductions such as these were refunded by the Scheme.

A one-page initial assessment was prepared and sent to a claimant for his or her consideration. I felt it was extremely important that claimants not feel such assessments – about whether or not money was owed to them – appeared as just another decision about their lives from a faceless bureaucracy, because they personally had no records on which to judge the fairness of any decision. So, along with the assessment, they received a copy of all the records that we had relied on to make this decision – they saw everything that we saw. In the case of descendant claims, a copy was provided to the most senior family member. Along with copies of the records, the claimants also received a report listing any other records held by State Records where they were mentioned but which did not relate to Trust Fund accounts.

Care for claimants in relation to the records provided were a matter of concern because, as Australian Indigenous archivists Loris Williams, Kirsten Thorpe and Andrew Wilson (2005) highlight in their research, these records are generally written by officials on behalf of the Boards, and were never intended to be viewed by the subjects or their descendants. The records are often bureaucratic in nature, reflecting the attitudes of the Boards at the time, and people seeking information in these records are exposed to personal and sensitive information that could potentially cause them further harm. In cases where we remained concerned, rather than merely posting the material, an Indigenous team member and an ATFRS worker who was also a social worker delivered the material personally and provided support and advice to the claimant. Recent Commonwealth Government research from the 'Closing the Gap Clearing House' notes that trauma research specific to Indigenous Australian children and their families is in its infancy (Atkinson, 2013) but my research has provided me with a greater understanding of trauma and referred trauma and its effects on Aboriginal people, their families and communities. If I was developing procedures for the Scheme today, they would be adapted to better reflect claimants' traumatic experiences. This view is also canvassed in the comments from one of my interviewees:

In hindsight, it might have been useful for us to have acknowledged some of the emotional harm more than just the three of us were capable of. I wonder if we could have done more in some of those cases, some of the most vulnerable individuals retelling the most harrowing things in their lives to three untrained people who cared but who were not in the role of counsellors or

judges ... we had a sort of strange unnamed role in a way. Apart from acknowledging and being there – to hear and witness, show the respect that we felt for people. In a perfect world, I think that we would have had some kind of process that was a bit more built around acknowledging the trauma that people were bringing (Interviewee 2).

Whilst I now understand that the Scheme should have provided more professional support to claimants, these issues do highlight the tensions between ensuring transparency in dealing with claimants and the need to develop trauma-informed services and care. Providing copies of all the records was important because not only could Aboriginal claimants review the material themselves, but the process allowed them to refresh their memories about what gaps in the records or errors the Boards might have made. It also meant that they could request the Panel to review the interim assessment if they wished. Our approach was proactive: where we knew it was highly likely that the Panel would find that they were owed money if they requested a review of the initial assessment, ATFRS staff rang claimants or met with them to discuss what we had found and encouraged them to seek a review.

I think the importance of this approach was highlighted by comments from a Human Rights Commission spokesperson giving evidence to the Senate Inquiry into ‘Stolen Wages’ when he described the Scheme processes in the following terms:

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

Providing claimants with all the results of the professional search of the records is indicative of how the less formal operational components of the Scheme had an enormous impact on meeting key reparation elements such as processes being open and transparent and, critically, the need to ensure Aboriginal claimants were treated respectfully at all times, given their past experiences in interaction with state institutions.

Investigations by the ATFRS: questions of diligence and impartiality

The answer as to whether the ATFRS undertook diligent, prompt and impartial decision-making requires a nuanced response and depends on where one stands in relation to the Scheme. At the most basic level, the fact that the NSW Government

acknowledged that money was owed from the Aboriginal Trust Funds and took action to address this historical injustice in 2004 – some 35 years after the AWB was abolished – can in no way be seen as the State taking prompt action.

The further question as to whether the operations of the ATFRS met these requirements is a different matter. This section of the chapter reviews aspects of the Scheme that perhaps are less well known but important when thinking about whether the Scheme undertook prompt, diligent and impartial investigations and considers issues such as the establishment of the Scheme and impartiality of the Scheme's appeal mechanisms including the application of s1.8 of the ATFRS Guidelines.

The impartiality of the Scheme's work was central to an issue in the forefront of my thinking when creating the Scheme under existing administrative powers. Several submissions to the first Panel including from PIAC, recommended that the Scheme should have a statutory framework to provide governance including a merits review and an appeals mechanism (Gilligan, Janke & Jeffries, 2004: Appendix C). I found it unclear as to why legislating for a repayment scheme was superior to one established administratively and, in fact, there were overriding imperatives that favoured the administrative option. The Government decided in line with its then policies to establish the ATFRS using administrative powers rather than introducing new legislation. This decision, however, meant that the Scheme would lack a statutory appeals mechanism. Whilst it was true that the Scheme did not require any claimant to sign away any of their legal rights, without building an appeal mechanism into the ATFRS Guidelines, the only existing avenue of appeal for claimants would be through the courts. This I considered to be problematic as seeking legal justice through the courts is a costly, often lengthy and fraught exercise, and not always an avenue for true justice.

The Scheme would be judged not only on the formal mechanics of how it treated claims but also on claimants' perceptions of fairness. The obvious and most transparent appeal mechanism was to give the independent Indigenous ATFRS Panel strong oversight of the work of the administrative arm of the Scheme. The Guidelines agreed to by Government did just that. The ATFRS Unit had no discretionary powers when assessing claims but was required to act only on the evidence contained in the records. Our commitment to an open and transparent process by providing copies of all the records relied on when assessing claims as outlined earlier was an important element in impartiality and diligence. It allowed claimants and Panel members to review all the evidence the Scheme had relied on in relation to their claim.

The original ATFRS Guidelines enshrined the Panel's absolute and impartial power over all claims in two ways. The Panel's endorsement was required in all cases where it was found that money should be repaid, i.e. where there was certainty, strong evidence or strong circumstantial evidence of money being paid into a Trust Fund account between 1900 and 1969 and no evidence, or unreliable evidence of that money being repaid. More importantly, and critically in terms of an appeals mechanism, the Guidelines gave the Indigenous Panel members absolute discretion to review the facts in each case using all available evidence, including oral evidence from claimants. They could endorse, question or reject any of the Unit's interim assessments (Guidelines for the Administration of the NSW ATFRS, 2006: Section 3).

The importance to claimants in having the Indigenous Panel as a review body was highlighted in the Senate Report on Indigenous 'Stolen Wages', where one claimant provided evidence about her interaction with the Panel when she challenged the ATFRS interim assessment of her claim. She stated:

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 (Senate Standing Committee on Legal and Constitutional Affairs, 2006: p. 114).

It was these cumulative powers that allowed the Panel to operate as much as possible as an impartial, independent and culturally appropriate review body for claimants who otherwise would have had to take legal action to get their cases reviewed.

This chapter now considers another important aspect of the treatment of victims of historical wrongdoing, i.e. the imperative to ensure that the Aboriginal community was informed that a scheme to repay this money had been established so that victims of the Boards' misuse of Aboriginal Trust Funds could register to make a claim.

Timing and the establishment of the Scheme

The first issue in relation to prompt action relates to the speed with which the Scheme could commence work once the Government decision to repay monies held in Trust Fund accounts was announced. Establishing the Scheme under existing administrative

powers reduced costs and allowed it to commence immediately after receiving Government approval. This was an important consideration as there were concerns about possible delays in introducing legislation, including having to deal with potential political roadblocks within Parliamentary processes in the Legislative Council, the NSW Parliament's upper house. Critically, it also allowed for future changes to the Scheme should new information become available once work began in earnest on processing claims and undertaking research into the Boards' archives.

The need for the Scheme to commence its work as quickly as possible was not a minor consideration, since the still living Aboriginal claimants we were attempting to help were no longer young. Because the Aboriginal Trust Funds were abolished in 1969 I estimated that the youngest living direct claimant in 2006 would be approximately 53 years old.¹ Many were much older, and given the poor life expectancy rates for Indigenous people (estimated in 2005 to be 59.4 years for men and 64.8 years for women), it was critical to start processing claims as quickly as possible if they were to live to see justice in relation to their Trust Funds.

There were certainly expectations within the Indigenous community that the Scheme would emerge fully formed once the Government announced its intention to establish a repayment scheme in late 2004. That was far from the actual situation. From the announcement of the establishment of the ATFRS in December 2004 to the real start of the Scheme with the publication of the ATFRS Guidelines in early 2006, there was an enormous amount of behind the scenes work undertaken. This included establishing and staffing the ATFRS Unit in Redfern. Guidelines to ensure prudent financial and legal processes for the Scheme were developed in consultation with the Crown Solicitor's Office. No claims could be finalised prior to the ATFRS Guidelines being approved by Cabinet and this did not take place until February 2006. The other critical issue was finding suitable candidates for the new Indigenous ATFRS Panel and getting Government approval for their appointment. The new Panel was announced in July 2005.

Other tasks undertaken throughout 2005 included:

- resolving issues relating to potential difficulties for claimants in relation to taxation and social security payments;

¹ Assumption was that the youngest age that the Board would apprentice a ward was 16 years of age in the 1950s.

- negotiating changes to existing privacy legislations with 52 NSW government agencies to allow myself and other staff access to the Boards' records;²
- establishing memoranda of Understanding with the Registry of Births, Deaths and Marriages, the Department of Community Services, the Public Guardian and the Office of the Public Trust;
- development of confidentiality and conflict of interest policies in conjunction with the NSW Ombudsman's Office; and
- negotiating with and providing funding to LinkUP (NSW) to fund a specific ATFRS worker who was available to provide counselling and practical assistance for claimants.

There is little doubt that claimants did feel frustrated at the time it took to start processing their claims and they would not have described the establishment of the Scheme as prompt. But they were usually unaware of the work needed to meet the governmental and legal requirements that had to be implemented before the Scheme could start. Research by the UK Institute for Government noted this lapse between governments' announcements of new policies and projects and the need for a framework to ensure good implementation (Hallsworth, 2011). This is a common challenge for many Western bureaucracies and the establishment of the ATFRS was no different. An additional imperative for ATFRS staff was their awareness of the urgency in providing justice for elderly Indigenous people in relation to their missing Trust Fund monies. The complexity of modern governance means it is unlikely that any project emerges perfectly designed, so that nothing will go wrong or need to be revised. And the UK Institute for Government report quoted one senior civil servant as claiming that '90% of success is in the articulation of the task' (Hallsworth, 2011: p. 43).

The importance of Section 1.8.

Section 1.8 of the ATFRS Guidelines allowed the Director-General of the NSW Premier's Department, members of the Scheme's Indigenous Panel or the Minister to depart from the Guidelines if they believed it was in the interests of justice and equity

² This was achieved in 2006 with the introduction of the *Privacy and Personal Information Protection Amendment (Aboriginal Trust Funds Exemption) Regulation 2006* and a similar change with the *Health Records and Information Privacy Amendment (Aboriginal Trust Funds Exemption) Regulation 2007*.

to do so. It is an important consideration in whether diligence was applied to the operations of the Scheme. Diligence has several definitions: the earnest and persistent application to an undertaking; attentive care; heedfulness. However, the legal definition is the degree of care required in a given situation and it is within this understanding of diligence that the effect of s1.8 is considered. Working with the Crown Solicitor's Office in 2005 on the challenges of taking the broad mandate for a repayment scheme announced by the Government and developing its operational guidelines, I had one legal principle firmly in mind. It is impossible to draft guidelines that can take account of every possible factual situation, likely or unlikely, that might arise and ensure that every eventuality is provided for in a single set of rules.

This was particularly apt in relation to developing the Guidelines. We were still very unsure about what any searches of the Boards' archival records would reveal. It was critically important to ensure that the Guidelines had some measure of flexibility to allow the Scheme to adjust to any atypical situation that might arise and to accommodate changes that we could not currently envisage. It was with this principle in mind that I fought to include a provision in the Guidelines that gave the Panel, along with a senior public servant and the Minister, license to depart from the Guidelines where they were satisfied that it was in the interests of justice and equity to do so.

The inclusion of s1.8 into the Guidelines did face difficulties as it represented a complete departure from all the rules governing the Scheme, allowing for decisions to be made wholly on the basis of justice and equity. This section also received some criticism from PIAC in their early review of the Scheme arguing that binding guidelines in relation to beneficial discretion would be more appropriate (Banks, 2008: p. 62). Although this is an argument I disagree with for the reasons of flexibility as outlined earlier.

I must confess to some disappointment that the Panel did not make use of this section of the Guidelines as adventurously as I had envisaged. Many of the submissions made to the Panel by the ATFRS Unit did argue for its application, but ultimately the Panel acted conservatively in cases where there was simply no evidence of a Trust Fund being created. There were, however, cases where reviewing the archives presented us with clear evidence for action in the interests of justice and equity. Examples of the use of s1.8 both in relation to an individual claim and in attempting to assist a particularly disadvantaged group of claimants (the Kinchela Boys) are outlined below.

An example relating to an individual claim where the Panel recommended a repayment using s1.8 occurred when evidence came to light in relation to a dispute between the

AWB and an employer in 1956 relating to payments of £26.16.6. The employer had written to the Board stating that he had paid the apprentice that amount when she left him and returned to Cootamundra Girls Home. The Cootamundra Matron informed the Board that the young girl had returned with only £2 and discrete enquiries by Board employees regarding this employer found that although 'he is reputed to be a wealthy man; he is believed to be living beyond his income and to be unfavourably regarded by his creditors... I am of the opinion that the amount in question was not paid by him to the girl'. The AWB placed the matter with the Crown Solicitor's Office in 1958 for action, but there was no evidence in the record search undertaken by ATFRS that this money (\$3,860 in current dollar value) was ever recovered or placed in the claimant's Trust Fund. The claimant provided the ATFRS Panel with a Statutory Declaration that she had never received these wages and the Panel successfully recommended to the Minister that a repayment should be made under s1.8 of the Guidelines in the interests of justice and equity taking into account all the elements of this claim.

The Kinchela Boys

The use of s1.8 as it applied to a particularly disadvantaged group of claimants is highlighted in the case of the boys and young men sent to Kinchela Boys Training Home. As we undertook record searches on their behalf, it became clear they were hindered by historical bureaucratic mismanagement of their records along with the consequences of the gendered policies of the Boards as they applied to the young men and women under their wardship. They were also disadvantaged by the principal requirement of the Scheme that there had to be some evidence of a Trust Fund being created for them. Whilst it was usually clear that they had been at the Home, our experience was that there were virtually no existing records relating to any work or apprenticeships undertaken by these young men and hence no evidence of any Trust Fund accounts.

As we explored these deficiencies further it became clear this was not a recent phenomenon. Floods in 1949 and 1950 destroyed many records at Kinchela according to the AWB Annual Report in 1950 and one welfare officer noted that he was 'surprised to find that the personal records at the Home on each child were very inadequate ...' (Felton, 1950). Although, given the Scheme staff's growing knowledge about the poor practices at Kinchela, there was always the suspicion that these floods may have fortuitously hidden poor administrative practices.

As we continued to process claims, we were far more successful in finding records for female claimants than for the Kinchela men. Research highlights some of the reasons for this. It was partly because the policies relating to the apprenticeship of young Aboriginal people were not uniformly applied by the Boards and had a definite gendered component. It appears that despite the Boards' desire to have all young people trained for employment, the records show that there was also a 'moral' imperative to remove young women from stations and reserves.

In 1916, Mr Pettit, Secretary of the Aborigines Protection Board, wrote that:

Up to the present time, the Board have been dealing mainly with the girls, and as a consequence over 150 are now either undergoing a period of training at Cootamundra Home, or are out at domestic service in the suburbs of Sydney and elsewhere. The Board's Officers think that the crux of the Aboriginal question is on the one hand the saving and training of the girls, and on the other the training of the boys, with a view to their later marrying, and supporting their wives and families independent of the Government (Goodall, 1990).

While boys had merely to be trained, girls had to be 'saved' as well. Goodall (1995: p. 77) argues that in the period prior to World War II, societal racist dogma encouraged fears about the sexuality of young Aboriginal girls, whose fertility was seen as a threat to the goal of reducing the overall Aboriginal population. The result of this attitude could be seen in the far greater involvement of the Boards in the lives of young Aboriginal women, including the greater detail in the records compiled on those sent out to work including details of their Trust Fund accounts.

Goodall also notes a change in the post war years where it appears equal numbers or more boys were taken by the Board in the 1950s, which she suggests was linked to anxieties about 'juvenile delinquency', a concern that usually focused on young males as the greatest threat. Goodall (1995) stresses that in viewing the actions of the Boards, there was 'no simple determinant of policy and practice relating to Aboriginal children. It was instead an interaction between prevailing anxieties about race and gender, labour market needs and pre-existing administrative precedents ... which shaped the effects on Aboriginal communities of the removal policies'.

This stress on the need to understand the range of pressures faced by the Boards was upheld in the information we obtained through the record searches. Whilst it is clear from the records that the Boards wanted apprenticeships for all young people, it is also

clear they faced additional challenges in relation to the young men, in part because of the industries in which they sought to apprentice them.

Employers were unwilling to take on male apprentices. Many managers of farms and stations preferred casual workers who they could employ according to changing seasonal needs. For example, in 1944 the Superintendent wrote to managers of Aboriginal stations appealing to them to find positions for a group of boys from Kinchela, which produced only one application. The responses from managers are illuminating. 'I have always found that rural people are very reluctant to sign their names to any formal agreement, especially when such an agreement is with a government department', noted one. Another responded by saying 'indications are that they prefer labour as the season demands, that is of a temporary nature, so that they can "hire and fire" as it suits them. In this connection, I would point out that I have so far been successful in placing all boys who have left school recently and there are none out of work' (AWB Minutes, 1941: p. 611).

Searches of the records revealed that many inmates of Kinchela ended up being sent directly into employment, rather than into apprenticeships. From 1920 the Board endorsed the 'loaning out' of Kinchela boys to local farmers (APB Minutes, 1920: p. 687), although this appears to have ceased in 1935 following a Departmental Inquiry into the manager's ill-treatment of the boys (APB Minutes, 1935: p. 169). A 1939 memorandum from the Manager to the Superintendent of the APB stressed that the 'lads here have very little leisure time, in comparison with white children. Duties occupy approximately 5 hours daily in addition to the 4 and a half hours of school. ... (there is a) lack of adequate staff and the tremendous amount of development and maintenance work to be done' (Williams, 1939: p. 215). Kinchela Boys Home also implemented a system where the young men who had finished their schooling were employed or 'apprenticed' at the home as 'work boys'. A welfare officer described the system in a 1952 report which also highlights the problems with the payment of wages. He noted that there were two boys employed as 'work boys' and another working as an apprentice cook all being paid different rates of pay and he suggested that to avoid any resentment they all be paid at the same rate. He also reported that the young apprentice was 'very hazy' about his rate of pay and the fact that he had a Trust Account being kept for him at Head Office (Felton, 1950: p. 232).

For the young Kinchela boys, their work environments were not well regulated, their rights as workers were not made clear to them and they were extremely vulnerable to mistreatment and fraudulent practices by employers. In these situations, the young

men were expected to be paid directly by their employers and this often meant that there were no Trust Fund accounts established for them. This was yet another, albeit more contemporary bureaucratic barrier for the Kinchela claimants to the Scheme because under the ATFRS guidelines no repayments could be made unless there was evidence of money going into Trust Fund accounts.

The issue of trying to get justice for the Kinchela boys remained an active issue for the Scheme's staff and the Panel over the life of the Scheme. In its first report to Government in 2008 this was one of many issues the Panel had raised with Government, flagging its concern that the problem of government record keeping in the past was a significant issue affecting the stated objectives of the Scheme.

The ATFRS Unit developed many issues papers for the Panel in support of individual Kinchela claimants. This work was supplemented in 2010 in a 'class' action submission by lawyers acting for the Kinchela claimants. The arguments posited by both the Scheme staff and the lawyers on behalf of Kinchela claimants were similar and included:

- That they were the legal wards of the Boards as a consequence of being placed in Kinchela;
- That their extensive and mandatory work at Kinchela was, in fact, an apprenticeship and hence the Boards should have established and paid into Trust Fund accounts the wages of these young men, and there was no evidence of these wages being repaid due to the acknowledged poor record keeping at Kinchela; and
- A similar argument was mounted in relation to the young men 'lent' to neighbouring farms to work, as well as arguments relating to Government breaches of fiduciary duty in relation to money that should have been held in trust.

The basis of all these arguments was that the factual content of the claims would allow the Panel to determine under s1.8 of the Guidelines that it was in the interests of justice and equity to allow these claims. The lawyers acting for the Kinchela Boys argued that if the Panel was to deny these claims for the very reason of the legal, administrative and moral failure of the perpetrators of the initial wrong, this would be a second, compounding act of arbitrary denial of their rightful entitlements and a profound denial of basic justice. Mostly, however, all attempts reached the same impasse - there

was simply no archival evidence of Trust Fund accounts being established for these young men and hence no repayments could be made. This was a particular difficulty in the early years of the Scheme when it was only possible to recommend a repayment calculated on what specific amount the record search suggested was owed. In cases, such as these, where there were no records, it was impossible to calculate what repayment could be made. This situation changed in 2009 when the ATFRS Guidelines were amended to allow for a standard lump sum repayment of \$11,000.

Attempts to try and get justice for the Kinchela Boys continued throughout the life of the Scheme and eventually, as the Scheme's tenure was coming to an end, the work undertaken on behalf of the Kinchela claimants was successful. The Panel, using the powers contained in s1.8, recommended that their claims be recognised and a level of justice was achieved when they received repayments of \$11,000 each.

As outlined, s1.8 was a rarely used option, but where it was used it is an example of the diligence brought to these cases by the Scheme. Although it was only used in cases where the factual situations in the claims were very specific and highlighted serious inaction by the Boards usually relating to unpaid apprentices' wages, the battle to retain this clause was well worth the fight in terms of allowing the Scheme to right some historical injustices that otherwise could not have been remedied.

Conclusion

It is clear the NSW State cannot be seen to have acted promptly on the issue of unpaid monies in the Aboriginal Trust Funds 35 years after the abolition of the AWB. This chapter acknowledges that there was some public frustration at the delay between the Government announcing that it would tackle this issue and when the Scheme commenced processing claims. Yet it also outlines why, due to legal and administrative requirements, this delay was inevitable.

Furthermore, I suggest that the steps taken to ensure strong Indigenous representation in the Scheme meant that, as much as possible, Aboriginal people approaching the Scheme would find it non-confrontational, non-threatening and respectful of their cultural needs. The importance of impartiality in the work of the Scheme has been highlighted through the explanation not only of the Panel's administrative oversight of the ATFRS work, but also, even more critically, its role as an independent Indigenous appeals mechanism for claimants to the Scheme. The application of the ethical principles of openness and transparency, along with the need to ensure that Aboriginal claimants were treated with the utmost respect, are explained. The Scheme's policies

relating to record searches on behalf of claimants, and the practice of providing them with copies of all records relied on by the Scheme, ensured that they were not further disadvantaged by the passage of time and their lack of access to records. Record searches were extensive and thorough, and although it did mean that the processing of claims appeared slow it was important to apply the principles of diligence and impartiality to our work.

Finally, examples have been given of how ‘diligence as persistence’ was applied in attempting to address some of the wrongdoings discovered whilst researching the archives and the importance of s1.8 in providing flexibility and justice in the application of the ATFRS Guidelines. The next chapter considers issues relating to the question of monetary reparations, the financial repayments made by the Scheme and their adequacy.

CHAPTER FOUR

Did the ATFRS provide adequate reparations?

The historical wrongs which led to international demands for reparations and reconciliation during the twentieth century are extensive, often the consequence of war and colonialism (Torpey 2001). They also include many issues faced by Indigenous claimants in relation to their Trust Fund accounts, such as racial discrimination, labor exploitation, lost economic opportunities, loss of culture and intergenerational injustice (Menkel-Meadow, 2014; Pritchard, 1998; Cunneen, 2005; Anthony, 2007b; Brennan & Craven, 2006).

Researchers note that the sheer diversity and extent of actions which demand reparations mean that there is no one agreed solution to what reparations are appropriate, be they apologies, monetary compensation, land rights or other actions (Popic, 2008; Pritchard, 1998; Henderson & Wakeham, 2013). This chapter will concentrate specifically on consideration of whether the monetary repayments made by the ATFRS provided adequate reparations, as well as the policy considerations that came into play in determining the level of repayments. It will outline the Scheme's eligibility criteria and the negotiations undertaken with other institutions in support of claimants facing bureaucratic impediments to reclaiming their money.

Consideration of levels of repayment

The issue of determining compensation was not a policy question I initially had to consider, as the Government's decision in establishing the ATFRS was clear. It would repay any money owed from Trust Funds but it was not a compensation scheme. A decision did need to be made, however, on what was a fair rate of interest to be paid to compensate Indigenous people whose money had been held over many decades in the Aboriginal Trust Funds. After consideration of economic advice, the first ATFRS Panel recommended that the interest rate used by the Office of the Protective Commissioner (OPC) be applied. This was substantially the most advantageous rate for claimants as applying the OPC interest rate to \$100 held in 1969 meant a return of \$3,338 in 2004, whilst the lowest rate considered would have returned only \$858 over the same period. The ATFRS Panel's recommendation was agreed to by the Government (Gilligan, Janke & Jeffries, 2004).

There were two different approaches taken to determining the levels of repayments made during the life of the Scheme. Initially, where it was found that money was

owed, it was repaid in total and indexed to current dollar value. Research in 2008 showed that the average repayment was \$10,209 but there were large variations in repayments, the lowest being \$162 and the highest \$30,005. This research also highlighted gender differences with 78% of successful claimants being female but only 22% male. There was also a difference in the money owed, with the average female claimant receiving \$10,773 and male claimants \$8,753.

Up until 2009, the work of the Scheme had focused on the claims of the direct claimants – those Aboriginal people still living who had been directly affected by the Boards' administration of Trust Funds. But it had become very apparent as the records were analysed that dealing with descendant claims, as set out in the original guidelines, was going to be enormously challenging and complex. It was for this reason that in 2009 a flat repayment of \$11,000 for any successful claim was introduced in the Scheme's revised Guidelines. As a matter of equity claimants who had received less than this amount prior to 2009 received a top-up payment. This change was criticised by Vavaa Mawuli (2010b), a senior PIAC solicitor, who argued the flat repayment disadvantaged claimants who might be owed more. The PIAC criticism was not quite correct as the revised guidelines allowed applications that had been substantially assessed as at 30 March 2009 to be finalised under the original Guidelines allowing for a larger repayment, but it was correct that descendant claims that had not commenced in early 2009 would receive only the flat repayment if successful.

Thornton and Luker (2009) argue that schemes that make predetermined repayments discriminate by treating everyone the same without regard to individual circumstances. The difficulty of this approach is that their definition of 'stolen wages' is so broad it is difficult to see how any government could ever determine individual eligibility and amounts to be repaid as it would be almost impossible to find out who worked where, for how long and at what rate of pay. Considering reparations for colonial injustices towards Australia's Indigenous population, lawyer Chris Cunneen (2005: p. 79) outlines many difficulties, including the problems of quantifying harm and defining eligibility, and suggests that the challenges are too diverse for just one body to tackle.

The reasons behind the changes introduced in the revised 2009 Guidelines need to be understood through the prism of the administrative challenges facing the Scheme but also in the light of the political situation in NSW at the time. The Scheme had 9019 registered claims, of which 13% or 1177 claims were from direct claimants, but the bulk,

87% or 7842 were descendant claims relating to 5595 Trust Funds. By early 2009 the Scheme had processed only 13% of registered claims, leaving 87% of claims to be finalised in the 18 months leading up to the Scheme's original closing date of 30 June 2010. The added complication was the complexity in the original guidelines for processing these descendent claims. By 2009 that it also appeared inevitable that the NSW Labor Government would lose government in the upcoming election, less than two years away. This was a concern for the Scheme's staff, because it was not clear that any new Government would continue to support the need to address the historical injustices associated with the Aboriginal Trust Funds.

It was in this environment that the Government in 2009 extended the life of the ATFRS for twelve months until 2011 and decided that introducing a flat repayment of \$11,000 allowed for a simplification of the descendant assessment process. It was no longer necessary to undertake forensic examinations of the records to calculate the actual amount owed; it was simply necessary to establish that some money was owed and a repayment of \$11,000 repayment could be made.

How successful was the Scheme at making repayments? It has proved impossible to get a detailed breakdown, despite freedom of information requests I made to the Department of Premier and Cabinet. What is known is that by March 2008, the majority of direct claims had been assessed and repayments or offers of repayment had been made to 93 direct claimants for a total of \$978,025. These figures suggest that only 24% of direct claimants were successful, the remaining 76% failed in their claims either because there were insufficient or no records or because the records showed that their Trust Fund monies had in fact been repaid to them by the Boards. While accurate figures for descendant claims are not available, it is known that there was a high failure rate in these claims also. Official documentation indicates that ex-gratia repayments totalling \$12.9 million were made over the life of the Scheme, suggesting that there were approximately 1164 successful descendant claims, a success rate of only 20%. This was due to the previously discussed difficulties with the records and because descendant claimants often lacked precise information on their relatives' interactions with the Boards.

An additional problem was that many descendants' claims were lodged in the lead-up to the closing date for the Scheme and they made the decision to make a claim for fear of missing the deadline, but without a clear understanding of what repayments the Scheme could make. It was in this context that the ongoing difficulties for the Scheme in relation the 'stolen wages' are apparent.

The decision by the NSW government to act on money that might be owed from the Boards' Trust Funds was very clear; the ambit of the Scheme was that it could only repay money found to be owed based on evidence. It was only a repayment Scheme; it had no remit to deal with any questions of compensation. Yet in the early periods of establishment around 2004 and later, when the revised Guidelines to the Scheme were being discussed in 2009, publicity campaigns by PIAC, the Legal Aid Commission and Indigenous media were mistakenly leading Indigenous communities to believe that the Scheme would fully encompass all the issues of 'stolen wages' in whichever way they defined that issue.

The research highlights that various definitions of 'stolen wages' are used nationally, but there are also important state differences. The 2006 report of the Senate Inquiry into the issue revealed the ambiguities in relation to 'stolen wages' – a term they found meant different things to different people. For the purposes of their Inquiry they used it to refer 'to all wages, savings, entitlements and other monies due to Indigenous people during the periods where governments sought to control the lives of Indigenous people' (Unfinished business: Indigenous stolen wages, 2006: p. 2). The Public Interest Advocacy Centre defined it as the withholding by governments under a 'trust' arrangement of the wages and other entitlements of Indigenous people and the exploitation of Indigenous labour (Banks, 2008: p. 55), whilst the legal academic, Thalia Anthony (2007b: p. 4), defines it as wages either stolen or wholly withheld throughout the twentieth century. Several researchers have noted that, unlike Queensland, the NSW Boards did not appear to control adult wages, and the AWB was abolished in NSW in 1969. In Queensland, Aboriginal monies were still being controlled into the 1990s (Brennan & Craven, 2006: pp. 44-45). In the archival research undertaken by the Scheme, there was little to no evidence of adult wages being placed into NSW Trust Fund accounts, the main sources being apprentices' wages and welfare endowment monies.

The difficulty for the Scheme in the face these media campaigns, as outlined earlier, was that the varying definitions of 'stolen wages' meant that many Indigenous people sought justice and repayment from the Scheme in whichever way they believed the term 'stolen wages' related to in their lives. We had requests in relation to non or underpayment of wages, compensation for removal as a child, or claimants arguing that they or their ancestor had been eligible for a welfare or returned servicemen's benefit which they never received, all of which fell outside of the ambit of the ATFRS. An example of this is contained in the New South Wales Legislative Council's report on reparations for the 'Stolen Generation' when it noted that some people missed out on

the opportunity to make a claim. It supports this claim using evidence of an Aboriginal person who advised the Committee that she was unable to make a descendant claim on behalf of her grandmother or mother as she had no knowledge of the Scheme. She stated her mother had worked on various rural properties but was paid nothing in all the years she worked there (2016: p. 890). It is highly probable that such a descendant claim would have failed as the claim appears to relate to a 'stolen wages' argument rather than evidence of monies missing from a Trust Fund account. These misunderstandings did lead to descendant claims being made which were never going to be successful.

As one Department of Premier and Cabinet bureaucrat involved in the Scheme said when interviewed,

I can remember myself having to sit down with a couple of people who came into the office and complained that they had got nowhere. And they were very testy conversations. I've still got the memory of them. So, it was just a matter of being straight forward and being clear what we were doing and what we couldn't do. And I'm not sure that message was always out there and, the other demonstration of that was, every time you spoke to someone like PIAC you'd still get the nonsense about 'stolen wages' and so that was a more fundamental confusion which was persisting ... Here we were towards the ... getting well into the Scheme and, hopefully, its end in my time, still having to bat away some of those misconceptions (Interviewee 5).

Other financial avenues pursued by the ATFRS

As my team and I undertook the variety of tasks needed to set up policies and procedures for the Scheme in 2005 there was another pressing issue to be addressed which had the potential to negatively impact the financial return to claimants who were owed money: discussions with the Queensland bureaucrats working on that State's 'stolen wages' project highlighted two potential areas of financial difficulties for successful claimants, which were the way any repayments made would be treated by the Australian Tax Office (ATO) and by Centrelink. Advice was urgently required from these two agencies prior to any repayment being made.

Whilst concerns had been raised in community consultations about how Centrelink might assess any repayments the Scheme made in relation to claimants' pensions and benefits, my experience in negotiations with the Commonwealth Department of Families, Community Services and Indigenous Affairs was that they were extremely

supportive. They enacted a regulation in 30 June 2005 to exempt one-off ATFRS repayments from being regarded as income under that Act. This meant that the Scheme's repayments were exempt from the income test for claimants who received social security payments from Centrelink.³

My initial expectations were that the taxation issue would not create any major problems as the ATO had already ruled that payments made under the Queensland scheme were tax-free. This assumption was soon overturned and the issue of tax exemptions for ATFRS repayments emerged as a far more difficult problem. In early discussions with the ATO, they indicated a tax-free ruling would only be given if the Scheme repayments were compensation payments. This was a real setback as it was totally at odds with the key principle of the Scheme which was that it was a repayment scheme not a compensation scheme. This was a non-negotiable element of the Scheme from the NSW Government's perspective. In addition, a decision had been made at the highest levels of Government that if the ATO ruled against repayments being tax free, ATFRS claimants would be personally liable for any tax imposed.

Potentially this was also a real financial disadvantage for claimants and I urgently sought further advice from the Crown Solicitor's Office. A possible compromise was suggested which asked successful claimants to sign a statement that they 'acknowledge that the payment of \$.... is an ex-gratia repayment made by the NSW Government which contains a compensatory component for the hurt caused to you, or your deceased relative, by the deprivation of the money during the time it was held by either the Aborigines Protection Board or the Aborigines Welfare Board'. Whilst I was not party to the final negotiations between the ATO and the NSW Treasury, it appeared the ATO accepted this as a reasonable compromise and in October 2005 it made a ruling that ATFRS repayments would be tax free.

Unfortunately, the wording of this compromise became problematic later in the Scheme's operations as some legal representatives advised their clients not to accept the offered repayments if it meant signing this acknowledgement in the belief that it might jeopardise any future legal action. Requiring claimants to sign away their legal rights was never a requirement of the ATFRS. All claimants and their lawyers eventually accepted the reason for this wording but, in hindsight and despite the

³ *The Social Security Exempt Lump Sum (New South Wales Aboriginal Trust Fund Repayment Scheme (FACS) Determination under the Social Security Act 1991*

confusion the wording created, it was advantageous to claimants to receive their repayments tax free.

ATFRS repayments were ex-gratia payments, which legally defined means they are payments made in the exercise of the prerogative power of Government and can be made if a person has suffered a financial loss or other detriment directly as a result of the workings of Government. This detriment must be of a nature which cannot be remedied or compensated through recourse to legal proceedings (or where it is impractical to do so). In his research into Australian redress schemes, Stephen Winter (2009) argues such 'ex gratia' repayments are a mismatch with corrective justice as they do not recognise the right of the victims to full compensation. He points out that such payments decrease direct Government expenditure and by limiting the possibility of ongoing legal action, provided greater predictability for the State.

This was not the thinking in relation 'ex gratia' repayments by the ATFRS. At the time this decision was made, the Government had indicated that it would repay in total any money owing, although admittedly this was not defined as a compensation payment; and whilst the Scheme had an initial budget allocation of \$22 million over five years it could request additional funds at any time if required. It was also understood that the very nature of the 'ex-gratia' power means that the circumstances in which it could be exercised were at the discretion of the Minister. The need for this flexibility was important as the Minister would be approving repayments in a variety of circumstances including cases under s1.8 of the Guidelines which allowed for Ministerial discretion to be applied where it was in the interests of justice and equity to do so.

The Panel and the ATFRS Unit also made many attempts to find money that might be owed to claimants from other sources. These related to attempts to access historical records held by the Churches, negotiations with the Department of Community Services to make repayments for wards transferred into their care and attempts to obtain repayments for the young men who were removed from their families and placed in Kinchela Boys Training Home.

Interest in Church records as they relate to their work in Indigenous communities was not unique to the Scheme. As Sarah Pritchard (1998: p. 263) noted in her consideration of the 'Bringing Them Home' report, there were many recommendations designed to preserve archival material including those in the possession of the churches. The first Panel's report recommended that the Government should seek to recover records held

by non-government institutions which included the Churches (Gilligan, Janke & Jeffries, 2004).

The Chair of the second ATFRS Panel, Aden Ridgeway, was keen to pursue access to any records held by the Churches for two major reasons. Firstly, the Panel was keen to identify and locate any other records relating to Aboriginal people outside of the official State Records archives. And, secondly, they felt they had to seek more information as there appeared to be substantial differences between the treatment of Aboriginal people and communities living on missions and reserves and the treatment of those under the direct control of the APB or AWB. Many of the Scheme's claimants who had lived on missions and reserves had written outlining how they had been told that their wages had been placed in a Trust Fund which they would be entitled to once they turned 21 years of age and yet this money had never been repaid.

Letters were sent to ten of the major Churches in November 2006 informing them about the Scheme, and sought their assistance as to whether they might have records relating to Aboriginal people who were either on missions run by their organisations or who were sent to Church homes in Sydney. The Panel was very keen to better understand the role of the Churches and other non-government organisations and to open a dialogue about their role in relation to Aboriginal people under their care in the period 1900 to 1969. Only six of the Churches responded and whilst they were sympathetic, they were also not very forthcoming in relation to any records they might hold. It did appear from their responses that the possibility of Church compensation relating to their historical involvement with Indigenous communities remained a vexed issue for them. Unfortunately, due to staffing constraints and the need to prioritise existing claimants, this avenue of research was not pursued any further.

Another cohort of claimants for whom we had more success were Indigenous people who were initially wards of the AWB but whose wardship transferred to the Child Welfare Department when the Board was abolished in 1969. Some 308 Indigenous wards were transferred to the Department in 1969 and that included the devolvement of responsibility for their Trust Fund accounts. Unfortunately, a consequence of this administrative demarcation meant that strictly speaking these claims fell outside of the scope of the Scheme. By early 2008 staff at State Records had identified 54 (or 15%) of claimants whose records had been transferred to the Welfare Department in the 1960s, and they recommended that I approach the Department of Community Services (DOCS) to see if they would be willing to give us access to Ward files for these claimants.

DOCS was sympathetic to this problem during negotiations and a successful protocol was developed in which State Records' staff were given access to Ward files. However, we were unable to provide claimants with a copy of their records and they had to be referred back to DOCS for information and support if they wished to access their complete Ward file. If the Panel found that money was owed, the Department was informed of this and told that, had the matter fallen within the scope of the Scheme, a repayment would have been made. DOCS reviewed this material and usually made a repayment through Departmental funds. By early 2008, the Panel had referred nine such claims and DOCS had made repayments totalling \$60,000 to six claimants at that stage.

Conclusion

Reviewing both the adequacy of the Scheme's repayments and whether they could be considered reparations, I found I was not alone in having contradictory and sometimes changing views as to whether particular elements of the ATFRS fell into a reparation framework; many interviewees had similar responses. In answer to the question of whether the Scheme ensured that reparation/compensation was made to those affected by the Boards' management regime of the Trust Funds accounts, the response was often a yes or no, followed by a number of qualifiers.

Why the conflicted responses? I suggest that it is partly because of the various meanings that people bring to concepts of reparation and compensation. This element of conflict is also noted by researchers such as Sarah Pritchard (1998), who acknowledge that monetary repayments are largely symbolic since no money can adequately compensate for many of the historic wrongdoings. She quotes the psychologist and traumatologist Dr Yael Danieli, who says it is 'not the money but what the money signifies – vindication'.

Or perhaps it is the knowledge that people who worked on the Scheme had a more nuanced approach to its policies and procedures and felt that somehow these needed to be acknowledged. As one interviewee stated 'I found this quite difficult to answer this question ... I wasn't sure whether we could say it was a reparation scheme given the way it was structured ... structurally I would probably say no to that – but operationally I would say yes' (Interviewee 1). Or in the view of one of the Panel members,

the purpose of the scheme was repayment and I don't see that really as having very much compensation or reparation ... It was simply repayment of a debt with interest as in the same way ... as any commercial or other arrangement

would be recognised. I ... agree that the setting up and funding of a fully staffed resourced team ... with the Panel included was ... an aspect of goodwill and reparation in that sense and trying to put the integrity around that system and really kinda patch up and fix up something that was difficult to fix because of the passage of time (Interviewee 2).

As outlined in this chapter the Scheme could only operate within the framework determined by the Government. That is, it could only repay money placed into the Aboriginal Trust Funds and found to be owed based on evidence from the archival records or oral submissions from claimants. It was not a reparation scheme in that it could not compensate claimants for the many injustices they experienced while were under the control of the APB or the AWB. In addition, as the statistics show, many claimants were disadvantaged by the evidential requirements of the Scheme due to the inadequacies of the archival records.

CONCLUSION

This concluding chapter explores the significance of applying elements of international human rights reparations theory to the operations and processes of the ATFRS. It reveals how the State attempted to make redress for the misuse of monies placed into the NSW Aboriginal Trust Funds and argues that there are fundamental implications for the NSW Government relating to human rights abuses of past government policies related to this issue.

The Apology

It is clear from the research that Aboriginal Trust Funds were established in the late nineteenth century as an element of the control of the NSW Indigenous population by settler colonial authorities, and remained operational until the abolition of the AWB in 1969 (Goodall, 1995; Parbury, 1986). In the NSW context, they were used to manage both welfare endowment payments and the wages of young Aboriginal people sent out to work as apprentices in domestic service or in agricultural labouring positions (Goodall, 1990; Haskins, 1998; Cole, 2005; Haskins, 2005; McGrath, 1995b; Walden, 1995). There is little evidence from the searches of the archival records undertaken by the ATFRS that they were used to control adult wages in NSW, unlike the situation in the frontier states such as Queensland or the Northern Territory (Kidd, 2006; Anthony, 2004).

Two important elements led to the State's acknowledgement and action on injustices related to the NSW Aboriginal Trust Funds. Firstly, they reflect the long-term commitment by bureaucrats within the then welfare department to ensure that the issue of money missing from the Trust Funds remained on the political agenda. Secondly, the Government's action was the culmination of three decades of activism from within the NSW Indigenous and broader community, along with growing legal and media pressure, and led the NSW Premier in March 2004 to formally and publicly apologise for the misguided paternalism associated with the Aboriginal Trust Funds. In addition to the formal government apology, the ATFRS also ensured that a personal Ministerial letter of apology was sent to all successful claimants.

This apology met most of the requirements noted by researchers as needed in an authentic apology: it was officially recorded, accepted responsibility for the actions of past governments, did not demand forgiveness and, importantly, it promised redress for any monies owed (Corntassel & Holder, 2007; MacLachlan, 2010). MacLachlan (2014: p. 246) notes Arendt's view that the political is a domain not just of the state, but

of the public sphere and common life of citizens. Any public speech, or in this case the apology, expresses the will to create a just society and reinforce civic connections. Therefore, public apologies cannot be reduced to wholly instrumental aims; they create new political relationships within the public sphere.

While it was a broad apology, its role in creating a deeper understanding of the historical wrongdoings by the Boards in their management of the Trust Funds and broadening the political relationship with Indigenous people is less clear. It only promised redress to individuals who could prove that they had money taken and not returned; it did not fully address the important collective need to actively shape a broader social discourse about historical responsibility.

The ‘right to know’ the historical truth

The next element of reparations theory considered in relation to the Scheme’s work is whether it fulfilled the right under various international human rights instruments for claimants to have full and unfettered access to any information held by the State relating to their Trust Fund account (United Nations General Assembly, 2005; Walker, 2015; Lenzerini, 2008). Access to the records was a critical issue for the Scheme as, to make repayments to any claimant, there had to be evidence of a Trust Fund being established for them by the Boards.

Two components of the Scheme’s work are important in considering this question. Firstly, the digitisation and indexation not only of pre-existing APB and AWB archives, but also of previously unknown records discovered in 2006, ensured that if there were any records held about claimants, they could be found. This project, along with the *In Living Memory* photographic exhibition which travelled extensively throughout the State, will have lasting implications in ensuring that the archival materials relating to the State’s official records of its interactions with Indigenous peoples in NSW is more accessible for Indigenous communities and future researchers; a critically important aspect of the ‘right to know’ the historical truth.

The second aspect is how the policies and procedures implemented by the Scheme to ensure claimants’ ‘right to know’ were respected. The early realisation of the difficulties faced by claimants in providing evidence for their claims led to the decision to use highly experienced Indigenous archivists to search the archives on their behalf. Copies of all the records found were provided to claimants or their most senior descendant, and, where possible, the Scheme assisted claimants in difficult cases. Critiques of reparation schemes were applied (Vermeule, 2005; Lenzerini, 2008; Torpey, 2015) but

I believe, in hindsight, that more trauma-informed services and care should have been provided to the Scheme's claimants and staff.

The right to know the truth was also applied by the Scheme to ensure that Indigenous communities were advised that the ATFRS was open to any Aboriginal person (or their descendants) who came under the jurisdiction of the Boards, who believed that they were owed money from the Trust Funds. Extensive advertising was undertaken in 2004 and 2009 and through the work of LinkUP NSW. Advertising was targeted specifically to Indigenous communities, partly to try and sidestep any adverse publicity for the Scheme due to the ongoing controversy over the 'history wars' that was being played out in the Australian mainstream media at the time. Whilst PIAC was critical of the publicity undertaken by the Scheme (Banks, 2008), most the interviewees took the view that the Scheme was sufficiently advertised. The fact that 9,019 people registered with the Scheme seems to support that view, as the early estimate of the expected number of claimants was 11,500. An important consideration raised by one interviewee is that for some Indigenous people, revisiting their experiences whilst they were under the control of the Boards was simply too painful for them to consider making a claim.

In reaching a conclusion about the work of the ATFRS and the Boards' archives, this thesis highlights the somewhat paradoxical finding that its work with the records is both its most important legacy and its greatest failure. The aim of the Scheme's work was to find any monies that had been placed into the Aboriginal Trust Funds and to repay claimants where money was owed, an individualistic focus. Yet as Margaret Walker (2015) argues in her research, 'truth telling' is a remedy for individuals, but it also has a second role as a distinct kind of reparation, a collective right for Indigenous communities. The state is obliged under modern international human rights instruments to preserve collective memory from extinction. She notes that truth telling itself is a reparation measure of independent importance although alone is insufficient as reparations for serious wrongdoings.

The ATFRS's digitisation and indexing project on the Boards' records has ensured preservation and easier access to the archival records of Indigenous people's interactions with the Boards. It is also true that neither the Labor government, which established the Scheme, nor its subsequent Liberal counterpart, released any reports on the work of the ATFRS or publicised the broader history of the Aboriginal Trust Funds. Neither of ATFRS Indigenous Panel's reports has been published. Furthermore, neither government acted on the Panel's recommendations that the history of the NSW Aboriginal Trust Funds, and the work on the ATFRS in addressing this issue, are a

significant part of the history of the treatment of Aboriginal people in NSW which should be commemorated and recorded. Thus, the State has not wholly addressed its responsibility to ensure the broader reparation remedy of the collective ‘right to know’ has been implemented.

The greatest failure of the Scheme in attempting to address the wrongdoing associated with the Trust Funds is also associated with the Boards’ archives. While the Scheme’s work with the records did ensure that records were freely available to claimants, it is also true (as many researchers have noted) that the Boards’ records are often incomplete or non-existent, despite the responsibility of successive governments to keep adequate records (Brennan & Craven, 2006; Greer, 2009; Mawuli, 2010a). Relying on these records to provide supporting evidence for all claims is almost impossible (Banks, 2008; Mawuli, 2010b; Cunneen, 2005). As the Panel advised the Government in the review of the Scheme three years into its operations, the lack of records resulted in the unjust exclusion of many claims. The final figures on how many claimants were successful have proved difficult to obtain from the Department of Premier and Cabinet, yet it appears that approximately 25% of direct claimants and 20% of descendant claims were successful. This lack of success is mostly, but not only, due to the state of the archives. Some record searches found that Trust Fund accounts had been repaid or that, despite there being records, there was no evidence of a Trust Fund account being established for that claimant. In addition, the lower rate of success in descendent claims can also be explained by the fact that many family members may have registered a claim but legally any repayment had to be made to the appropriate family member, i.e. surviving spouse or eldest child.

The NSW Government’s decision to focus the ATFRS on individual cases where the Boards had mismanaged Trust Fund accounts and the imperative for evidence from the flawed archival collections highlight further questions about how to view the Scheme as a reparations scheme which will be expanded upon later in this chapter.

Addressing historical wrongdoing including diligent, impartial investigations and the need for cultural sensitivity

The need for cultural sensitivity, along with ensuring diligence and impartiality in the implementation of reparation schemes, are highlighted in the literature as important guiding elements (Pritchard, 1998; Lenzerini, 2008; Nieves, 2008). In considering the reparations requirement for ‘satisfaction’ contained in the UN Basic Principles, Torpey (2015) notes that only a relatively small proportion of reparations have to do

with monetary compensation, and that this is consistent with the claim that is frequently made by those seeking reparations that 'it's not about the money'.

This thesis argues that many of the ATFRS principles and processes were established to meet these less tangible reparations requirements. The key criterion of any project working on Indigenous issues is the need for meaningful Indigenous input and representation. The Scheme had a high level of Indigenous staffing and, importantly, a wholly Indigenous Panel was appointed and given real administrative and review powers within the Scheme's guidelines. It made the final decision on all claims and provided an independent appeals mechanism for claimants. While it has proved difficult to find any external research on this aspect of the Scheme, the Human Rights Commission noted in comparing the NSW and Queensland schemes that NSW claimants appeared to be more satisfied, despite sometimes lower repayments, because people felt empowered through the ATFRS processes (Unfinished business: Indigenous stolen wages, 2006).

This research demonstrates the degree of respect given to Indigenous claimants by the ATFRS and its staff. Claimants' access to any archival records relating to them was facilitated by the Scheme and copies provided to them along with the initial assessment of their claim. This procedure ensured transparency and demonstrated impartiality in the treatment of the claimants. If they wished to challenge the initial assessment, they could give written or oral evidence to the Panel. Another important element of diligence was addressed in ensuring a measure of flexibility in the Scheme's guidelines in recognition that there was great uncertainty about the Boards' records. Furthermore, s1.8 of the guidelines provided an avenue for the Panel to consider any atypical situation that might be discovered and allowed them to depart from the guidelines if it was in the interests of justice and equity to do so. This provision proved invaluable in assisting disadvantaged groups of claimants such as the young men sent to Kinchela Boys Home and for whom very few records were ever found.

The acknowledgement by the NSW Government that money was owed from the Aboriginal Trust Funds three and a half decades after the closure of the AWB was not prompt action. Furthermore, the time taken for the ATFRS to commence processing claims received criticism from community groups such as the Public Interest Advocacy Centre. Yet the expectation that the Scheme would start immediately was unrealistic due to the range of administrative and legal requirements to be met before the Scheme could be operational. Cabinet approval of the ATFRS guidelines and the

Panel membership, along with negotiations with the Commonwealth government in relation to taxation and Centrelink treatment of any repayments, simply took time.

Did the ATFRS provide adequate monetary reparations?

Consideration of whether monetary repayments are ever effective in addressing historical injustices is widely considered in the literature, with the conclusion that full compensation for the harms done to Indigenous populations through colonisation can never realistically be achieved (Pritchard, 1998; Winter, 2009; Menkel-Meadow, 2014; Lenzerini, 2008). Harvard law professor, Adrian Vermeule (2005: pp. 2-3), raises a critical question in relation to reparations, and considers why monetary compensation for historical injustices continues to be made when on pragmatic and principled grounds so many philosophers and others argue it does not work. He suggests that the drive of modern governments to provide such compensation is fuelled by complex sets of intuitions he calls 'rough justice'. And he notes that while it is 'indefensible according to any first-best criterion of justice', the status quo of no justice is even less morally defensible'.

The ATFRS initially repaid any money that was found to be owed indexed to current dollar value. In 2009 the Government revised the Scheme's guideline and a standard repayment of \$11,000 was made to any successful claimant. Prior to this change, the average repayment was \$10,209. There were, however, large variations – the lowest being \$162 and the highest \$30,005. The change to a flat repayment was necessary to meet the challenges of processing descendant claims within the five-year timeframe of the Scheme.

The ATFRS also successfully pursued money owed from Trust Funds through informal arrangements with the Department of Community Services for claimants who had been wards of the Board and whose wardship had transferred to the Welfare Department along with their Trust Fund accounts in 1969. Additionally, the Scheme negotiated with the Commonwealth to ensure any claimant receiving a pension or benefit was not disadvantaged by any repayment made by the ATFRS. The Australian Tax Office similarly ruled that ATFRS repayments would be tax free.

In total, the Scheme repaid \$12.9 million from the Aboriginal Trust Funds. The Government directive was that the ATFRS was not a compensation scheme. As such, it was unable to respond to the many Indigenous people who sought justice and repayment from the Scheme in whichever way they believed the term 'stolen wages' related to their lives, be it compensation for removal as a child or underpayment or

non-payment of wages. Thornton and Luker (2009), in research into the history of the non or underpayment of Indigenous workers, considered both the Queensland and NSW governments' attempts to address the issue of 'stolen wages' and found the ATFRS was a better scheme. But they were not uncritical, arguing correctly that it did not address the issue of governmental failure to address the issue of inadequate wages.

By failing to establish a scheme that could provide reparations for all those whose money was controlled by the Boards, the NSW government did not properly address the undeniable truths about the impact of colonisation on Indigenous people in NSW (Grbich, 2005). Such actions did not occur in a vacuum; they were reinforced by a myriad of other detailed actions, such as permitting unpaid or underpaid labour and appropriation of their wages (Clarke, 2001). The failure to provide compensation has been characterised by the Australian lawyer, Regina Greycar, as a matter of political not factual judgment (Graycar, 1997).

The establishment of the ATFRS as the NSW Government's response to addressing the historical wrongdoings associated with the use of the Aboriginal Trust Funds was a first step in acknowledging and acting upon an important issue for the Indigenous population of New South Wales. This thesis concludes that within the legal and administrative framework set by the NSW Government, the ATFRS did successfully meet many of the elements of international human rights reparations. But in establishing the ATFRS with a specific requirement that only individuals who could establish that they were owed money from the Aboriginal Trust Funds, the NSW Government failed to properly address the broader need for just reparations on a collective basis. By ensuring the focus was on individual claims, the NSW Government did not recognise that, while the formal apparatus of colonialism and assimilation have been dismantled in the public's consciousness, injuries and losses suffered by Indigenous communities and the associated trauma and referred trauma that resulted from these policies and practices are ongoing and intergenerational (Vrdoljak, 2008). And, it is important to see clearly as the Australian historian Tim Rowse states, that Australia continues to be a settler colony where Indigenous assimilation is "built into the very fabric of Australian society, ... we cannot say that it came to an end: it continues in one form or another" (Rowse 2005).

Considered in this light the Scheme did not address the need to challenge the myths associated with 'settler colonialism'. The ATFRS was, as Vermeule (2005) highlights in

his work, a ‘rough justice’ reparation scheme. It tackled the issue of the NSW Aboriginal Trust Funds, but did not attempt to address the harder question of reparations for historical wrongdoing, such as the removal of Indigenous children or the loss of land and culture. It was a partial act of reparation by the NSW State, a compromise due to political and budgetary constraints.

Even if the ATFRS focus on dealing with individual claims was ineffective in addressing the collective injuries inflicted on Aboriginal people and communities by the Boards, as Lenzerini (2008) argues, keeping the components of reparation separate can be helpful. While the movement for the affirmation of Indigenous peoples’ rights as collective prerogatives remains crucial, it is likely to produce satisfactory results only in the longer term. It may not be strong enough to pursue adequately the goal of restoring justice to the many individual Indigenous people living now, who have suffered grave breaches of their rights and dignity. This was certainly the case in relation to many of the direct claimants to the ATFRS, for whom the Scheme was the only opportunity in their lifetime to ensure that they received a measure of justice in their mistreatment by the Boards.

Criticism of the ATFRS as a partial act of reparations is not necessarily counter-productive. Henderson and Wakeham (2013) suggest reconciliation should remain ‘unreconciled’ because, at a theoretical level, scholars must continue to problematise redress and the ways in which the State attempts to make amends for past transgressions. To attempt to impose historical closure, as it might be argued the ATFRS attempted to do, without addressing the root causes of injustice and discrimination endured by different wronged groups, will do little to mend rifts. Indeed, such an approach is likely to make cleavages even deeper. But importantly, by ensuring that claimants did not sign away their legal rights, the Scheme left open avenues for further action on reparations upholding the principle defined by Vermeule (2005) to ensure there is no legal bar to multiple reparations for the same historical injustice. The ATFRS has a lasting legacy in both protecting the records of the Boards and ensuring greater transparency and access to them for Aboriginal people. I would argue also that it provided hope within Aboriginal communities that further action to address the impact of the state’s assimilation policies on their communities is possible. And perhaps its greatest achievement has been to show the political classes that action for the historical injustices perpetrated on Indigenous Australians can be implemented without public backlash. In fact, I believe the Scheme has fulfilled a hope I secretly held whilst working on it, that it would prove to be a stepping stone for more action on Aboriginal reparations. The new Stolen Generations Reparations Scheme announced

by the NSW Government in December 2016 has used the Scheme's guidelines as its basis but has learnt from the challenges faced by the ATFRS to establish a superior reparations response.

This belief has been verified by the unusual circumstances I now find myself in, having been approached in early 2017 to manage the implementation of the NSW Stolen Generations Reparations Scheme – an offer I accepted. As discussed earlier, the new Scheme uses as its fundamental structure many elements from the ATFRS. It has appointed three well-known and respected Aboriginal leaders, Aden Ridgeway, Terri Janke and Anita Heiss to provide advice on claims to the Scheme through their appointment as Independent Assessors by the NSW Governor. Its guidelines have the same flexibility to allow claims on the basis of justice and equity as the ATFRS' S1.8. It is, however, a much-improved reparation scheme, there are standard ex-gratia payments of \$75,000 to all eligible claimants along with a \$7,000 funeral assistance payment; it has extensive funding for healing and memorial projects and a historian will be appointed to the staff of the Scheme; and its work will be shaped and advised by four Stolen Generation organisations along with a Stolen Generations Advisory Council. It reflects the public policy learning that is possible when the mistakes and challenges of earlier Government policy initiatives are recorded and available as building blocks on future policy development.

In using memoir writing as an element of this thesis I have reflected on the journey I have taken. First, I acknowledge that I am archetypal 'settler' in Australian terms, having emigrated to Australia in 1956 after spending the first decade of my life growing up in Wales. Hence my views and understanding of Australian Indigenous people and culture came to me as a young person reaching adulthood in Australia during the 1960s and 1970s. As a politically active person during those decades it was impossible to ignore the growing calls for justice from the Indigenous community. It was the time of the Freedom Rides and the Tent Embassy in Canberra and working for a Queensland Minister in the Whitlam Government brought me growing awareness of the continuing exploitation and suppression experience by Aboriginal people. It was impossible to work in the areas of social justice, which I did, and not to be angry at the ongoing barriers and injustices suffered by Aboriginal people. This was the understanding that I brought to the project of setting up a scheme to dealing with the issue of ensuring money held in the NSW Aboriginal Trust Funds was found and repaid.

My research has brought together diverse theoretical threads in various disciplines, oral and institutional history, settler-colonial theories, Indigenous studies and the legal

aspects of reparations through international human rights law. As well it forced me to understand the need for reflectivity in both memoir writing and the use of oral history, I have a far clearer understanding of the records of the Aborigines Protection and Welfare Boards, that they are the records of the colonisers and they do not record the 'historical truth'. They were bureaucratic documents of the Boards that were never intended to be viewed by the Indigenous people they wrote about and they often had a profound impact on our Indigenous claimants and staff. My views were also challenged and expanded by talking and listening to the Indigenous people involved in the Scheme as I heard their views about the records and their histories, about the realities of their lives under the control of the Boards. In analysing the responses to my interviews, I also sought to consider and be respectful of what interviewees did not say, the 'silences' in their answers; reflecting what psychologist Thomas Cottle explains as understanding 'as best we can, as we play out political roles, the politics, that is, of our own experiences together, hoping to combat the (many) asymmetries' between ourselves and our interviewees (Yow, 1997: p.62). On reflection and with my greater understanding today of the need for trauma-informed policies and procedures the Scheme should have provided more avenues of professional support to claimants and staff.

It would be naive to believe that all the areas I have canvassed cohere neatly, but I do not consider these tensions as necessarily negative. Rather, my research highlights the challenges faced by people working on social justice initiatives within the public sector and the subjective pragmatism that is usually necessary to implement such initiatives, as well as how the establishment and operations of such projects are viewed through objective historical critiques.

This thesis has laid bare the work of the ATFRS – its failures but also its successes – to ensure that the history of the Scheme is recorded. I am still of the opinion that the history of the work of the ATFRS has an important role to play in building a framework to properly address historical human rights injustices experience by Indigenous communities in NSW and, indeed, Australia-wide. The pragmatics of this institutional history continue to be worthwhile, despite that complexity and complicity. And although I delight in the achievements of the Scheme, it is the story of its mistakes that are just as important. If the work of the ATFRS has helped develop a *better* political response to the need for improved reparations for the historical wrongdoings suffered by Indigenous people in New South Wales, as I believe it has in relation to the NSW Stolen Generations Reparations Scheme, it has achieved an important role in the history of reconciliation in Australia.

Appendix One

Interview Questions

The semi-structured interviews I undertook with others involved in the ATFRS in various roles and claimants to the Scheme were an important point of triangulation for my research. For these interviews, I used a set of questions focused on actions that constitute reparations for victims contained in the UN Basic Principles. Using these principles to review the work of the ATFRS strengthened the somewhat evaluative narrative of the thesis and provided a solid framework in which to consider multiple aspects of the Scheme and its impacts. I decided to undertake semi-structured interviews instead of surveys as the participants have important unique, as well as, common experiences regarding the formal and informal aspects of the Scheme which would not have been reflected in a standardised survey.

On the advice of the Ethics Committee, slightly different sets of questions were developed for those that had worked on the Scheme and claimants. The two sets of questions are as follows.

Questions for interviewees involved in work of the ATFRS.

QUESTION 1.

Do you think the ATFRS ensured that “reparation/compensation” was made to individuals (or their descendants) who were directly affected by the management of their Trust Fund accounts by the Aborigines Protection or Welfare Boards?

QUESTION 2.

Did the Government publicise broadly the establishment of the ATFRS, its guidelines and procedures and how to make applications to the Scheme?

QUESTION 3.

The statutes of limitations are often a barrier for people seeking justice within the legal system. Do you think the NSW Government sought to address this issue in relation to claims made to the ATFRS?

QUESTION 4.

Did the NSW Government ensure that all available information in its possession relevant to the determination of claims was made available to people wishing to make a claim to the ATFRS?

QUESTION 5.

Do you think decision making on claims to the Scheme took place in a diligent and prompt manner?

QUESTION 6.

International human rights law states that governments should try to make restitution to re-establish the situation that existed prior to the violation of human rights. This can include policies to ensure restoration of liberty, family life, citizenship, return to one's place of residence, use of property. Did the ATFRS fulfil any of these aims?

QUESTION 7

Was compensation provided for ATFRS claimants costs related to legal or expert assistance?

QUESTION 8

Did the government ensure that claimants were offered rehabilitation? This might include medical and care as well as legal and social services.

QUESTION 9

Did the Government make an apology for the operations of Trust Funds under the Boards, including a public acknowledgement of the facts and acceptance of responsibility?

QUESTION 10

Did the Government introduce policies to ensure that:

- commemoration and tribute was paid to the victims?
- any human rights violations committed were publicised via human rights training and/or in history textbooks?

FOLLOW-UP QUESTIONS

Overall what are your views about the establishment and operation of the ATFRS? Did it provide a remedy to Aboriginal people in NSW in relation to the operation of Trust Fund accounts by the Aborigines Protection and Welfare Boards? What do you think were its strengths and weaknesses?

Are there any other issues related to the ATFRS and/or your experiences working with the Scheme that you would like to talk about?

Questions for claimants to the ATFRS.**QUESTION 1.**

Can you tell me how you first heard about the Aboriginal Trust Fund Repayment Scheme and your experiences when making a claim to the Scheme?

QUESTION 2.

Did you receive copies of the records held by the Board about you? Were they helpful to you in relation to your claim?

QUESTION 3.

Did you seek help from anyone whilst making your claim, for example, family members, people working in Indigenous organisations or lawyers. Were they helpful?

QUESTION 4.

Was your claim to the ATFRS successful or not?

QUESTION 5.

Are you aware of whether or not the Government accepted responsibility for the actions of the Aborigines Welfare Board and apologised to you and/or the broader Aboriginal community for the Trust Fund issue?

QUESTION 6.

Overall what are your views about the establishment and operation of the ATFRS? Did it provide a remedy to Aboriginal people in NSW in relation to the operation of Trust Fund accounts by the Aborigines Protection and Welfare Boards? What do you think were its strengths and weaknesses?

QUESTION 7

Is there anything else you would like to talk in relation to the Scheme or your experiences as a claimant to the Scheme?

BIBLIOGRAPHY

‘\$14,000 Unclaimed in Trust Accounts’ 1967, *DAWN*.

Aborigines Protection Board Annual Report 1904, Sydney.

Aborigines Protection Report and Recommendations of the Public Service Board of New South Wales 1940, Parliament of New South Wales, Sydney.

Alcoff, L. 1991-1992, ‘The Problem of Speaking for Others’, *Cultural Critique*, vol. 20, pp. 5-32.

Anthony, T. 2004, ‘Labour relations on northern cattle stations: feudal exploitation and accommodation’, *The Drawing Board: An Australian Review of Public Affairs*, vol. 4, no. 3, pp. 117-20.

Anthony, T. 2007a, ‘The Northern Territory Intervention: The ongoing story of withheld indigenous money’, *Ngiya: talk the law*, vol. 1, no. 1.

Anthony, T. 2007b, ‘Unmapped Territory: Wage Compensation for Indigenous Cattle Station Workers’, *Australian Indigenous Law Review*, vol. 11, no. 1, pp. 4-29.

Aolain, F.N. 2013, ‘Justice in Times of Transition: A Reflection on Transitional Justice’, *Constitutional Commentary*, vol. 29, no. 1, pp. 81-91.

Aborigines Protection Board 1890, *Annual Report*, NSW State Records Indigenous Collection, Sydney.

Aborigines Protection Board 1898, *Annual Report*, NSW State Records Indigenous Collection, Sydney.

Aborigines Protection Board 1899, *Annual Report*, NSW State Records Indigenous Collection, Sydney.

Aborigines Protection Board 1905, *Annual Report*, NSW State Records Indigenous Collection, Sydney.

Aborigines Protection Board 1912, *Annual Report*, NSW State Records Indigenous Collection, Sydney.

Aborigines Protection Board 1920, *Annual Report*, NSW State Records Indigenous Collection, Sydney.

Aborigines Protection Board 1935, *Annual Report*, NSW State Records Indigenous Collection, Sydney.

Aborigines Welfare Board 1941, *Manual of Instructions to Managers and Matrons of Aboriginal Stations and Other Field Officers*, NSW State Records Indigenous Collection, Sydney.

Aborigines Welfare Board 1940, *Minutes of the Board*, NSW State Records Indigenous Collection, Sydney.

Aborigines Welfare Board 1941, *Apprenticeship of Aborigines: Recommendations in relation to proposal to revise the system*, NSW State Records Indigenous Collection, Sydney.

- Atkinson, J. 2013, 'Trauma-informed services and trauma-specific care for Indigenous Australian children', *Closing the Gap Clearing House Resource Sheet No. 21*, Australian Institute of Health and Welfare & Australian Institute of Family Studies, Canberra.
- Banks, R. 2004, 'PIAC proposes Aboriginal trust fund repayment model', *PIAC Bulletin*, vol. 20, November, pp. 1-3.
- Banks, R. 2008, 'Stolen wages: settling the debt', *Australian Indigenous Law Review*, vol. 12 (Special Edition), pp. 55-67.
- Barker, J. 1988, *The two worlds of Jimmie Barker: the life of an Australian Aboriginal 1900-1972 / as told to Janet Mathews*, Aboriginal Studies Press, Canberra.
- Barrington, J. 2007, 'Writing the Memoir', in S. Earnshaw (ed.), *The Handbook of Creative Writing*, Edinburgh University Press, Edinburgh.
- Biber, K. & Luker, T. 2015, "Evidence and the Archive: Ethics, Aesthetics, and Emotion", *Legal Studies Research Paper Series*, vol. 2015/7, no. 7, pp. 1-13.
- Bird, C. (ed.) 1998, *The Stolen Children: Their Stories: including extracts from the Report of the National Inquiry into the separation of Aboriginal and Torres Strait Islander Children from their families*, Random House Australia, Milsons Point, N.S.W.
- Bottoms, T. 2013, *Conspiracy of Silence: Queensland Frontier Killing Times*, Allen & Unwin, Sydney.
- Brennan, S. & Craven, Z. 2006, "Eventually they get it all" - government management of Aboriginal trust money in New South Wales', Indigenous Law Centre, Australia.
- Broome, R. 2010, *Aboriginal Australians: A history since 1788*, 4th edn, Allen & Unwin, Australia.
- Burton, A. (ed.) 2005, *Archive Stories: Fact, Fictions and the Writing of History*, Duke University Press, Durham & London.
- Button, J. 2012, *A Year in my Father's Business*, Melbourne University Publishing, Carlton, Australia.
- Chief Secretary's Department 1929, *Correspondence AWB and Chief Secretary's Department*, File Number A2287, NSW State Records Indigenous Collection, Sydney.
- Clark, A. 2013, 'The History Wars', in A. Clark & P. Ashton (eds), *Australian History Now*, New South Publishing, Sydney.
- Clarke, J. 2001, 'Cubillo v Commonwealth', *Melbourne University Law Review*, no. 25.
- Clendinnen, I. 2006, *Agamemnon's Kiss*, The Text Publishing Company, Melbourne.
- Cline, S. & Anger, C. 2010, *The Arvon Book of Life Writing*, Methuen Drama, London.
- Cole, A. 2005, 'Would have known it by the smell of it', in A. Cole, V. Haskins & F. Paisley (eds), *Uncommon Ground: White women in Aboriginal history*, Aboriginal Studies Press, AIATSIS.
- Corntassel, J. & Holder, C. 2007, 'Rethinking Reconciliation: Apologies, Truth Commissions Indigenous Self-Determination in Australia, Canada, Guatemala and Peru', *Conference Papers - International Studies Association*, Connecticut, pp. 1-40.

- Cornwell, A. 2009, *Restoring Identity - Final Report of the Moving Forward consultation project*, Public Interest Advocacy Centre, Sydney.
- Crane, S.A. 2006, 'Historical Subjectivity: A Review Essay', *The Journal of Modern History*, vol. 78, no. 2, pp. 434-56.
- Cruikshank, J. 1994, 'Oral tradition and oral history – Reviewing some issues', *The Canadian Historical Review*, vol. 75, issue 3, pp. 403-418.
- Cunneen, C. 2005, 'Colonialism and Historical Injustice: Reparations for Indigenous Peoples', *Social Semiotics*, vol. 15, no. 1, pp. 59-80.
- Cunneen, C. & Grix, J. 2004, *The Limitations of Litigation in Stolen Generation Cases*, Australian Institute of Aboriginal and Torres Strait Islanders, Canberra.
- Curthoys, A. & Docker, J. 2006, *Is History Fiction?* University of New South Wales Press, Sydney.
- Cuthbert, D. 2008, 'Forbidden Knowledge? The Politics of Voice, White Privilege and the Ethics of Research', *ACRAWSA e-journal*, vol. 4, no. 2, pp. 1-3.
- d'Argent, P. 2006, 'Wrongs of the Past, History of the Future', *The European Journal of International Law*, vol. 17, no. 1, pp. 279-88.
- Daly, K. & Proietti-Scifoni, G. 2011, 'Reparation and Restoration', in M. Tonry (ed) *Oxford Handbook of Crime and Criminal Justice*, Oxford University Press, New York, pp. 1-67.
- Denzin, N.K. 1978, *The Research Act: A theoretical introduction to sociological methods*, 2nd edn, McGraw-Hill, New York.
- Dodds, G. 2016, *Political Apologies Archive*, Alliance for Historical Dialogue and Accountability, Quebec.
- Durbach, A. 2008, 'The cost of a wounded society: reparations and the illusion of reconciliation', *UNSW Law Research Services*, vol. 4.
- Edwards, C. 1982, *Is the ward clean?*, Australian National University Research School of Social Sciences, History Project, Canberra.
- Edwards, C. & Read, P. (eds) 1989, *The Lost Children*, Doubleday, Sydney.
- Eliot, G. 1873, *Middlemarch*, Penguin Classics.
- Evans, R. 1984, 'Kings in Brass Crescents: Defining Aboriginal Labour Patterns in Colonial Queensland', in K. Saunders (ed.), *Indentured Labour in the British Empire 1834-1920*, p. 183.
- Felton, P. 1950, 'Observations on Kinchela Training Home', NSW State Records Indigenous Collection, Sydney.
- Gair, G. 2011, 'Approaching autobiography in thesis research', in M. Waring & K. Kearins (eds), *Thesis Survivor Stories - practical advice on getting through your PhD or Master's thesis*, AUT MEDIA, Auckland, pp. 59-68.
- Gair, G.F. 2010, *Managing Change as a Minister of the Crown*, Auckland University of Technology, Auckland.

- Gilligan, B, Janke, T. & Jeffries, S. 2004, *Report of the Aboriginal Trust Fund Repayment Scheme Panel*, Department of Community Services, Sydney.
- Godfrey, K. 1995, 'The lost Kooris: a history of Aboriginal child welfare policies in New South Wales', *Aboriginal Law Bulletin*, vol. 3, no. 72, pp. 26-9.
- Goodall, H. 1990, 'Saving the children: gender and the colonization of Aboriginal children in NSW 1788 to 1990', *Aboriginal Law Bulletin*, vol. 2, no. 44, pp. 6-9.
- Goodall, H. 1995, 'New South Wales', in Ann McGrath (ed.), *Contested Ground, Australian Aborigines under the British Crown*, Allen & Unwin, St Leonards, Australia, pp. 55-120.
- Graham, C. 2004, 'They're still misleading us today', *National Indigenous Times*, 4 February 2004, p. 7.
- Graham, C. 2007, 'Stolen Wages and our slave past', *National Indigenous Times*, 8 February 2007, pp. 15-20.
- Graycar, R. 1997, 'Compensation for the stolen children: Political judgments and community values', *University of New South Wales Law Journal*, vol. 21, pp. 253-8.
- Grbich, J. 2005, 'Tracing the Figure of the Native in Postcolonial Theory and Native Title Law: Enlightenment Aesthetics', *The Australian Feminist Law Journal*, no. 22, pp. 127-44.
- Greer, S. 2009, 'In the interests of the children: accounting in the control of Aboriginal family endowment payments', *Accounting History*, vol. 14, no. 1/2, pp. 166-91.
- Grey, S. 2007, 'The Elephant in the Drawing Room: Slavery and the 'Stolen Wages' debate', *Australian Indigenous Law Review*, vol. 4.
- Guidelines for the Administration of the NSW ATFRS* 2006, NSW Department of Premier and Cabinet, Sydney, pp. 1-24.
- Haebich, A. 2015, 'Neoliberalism, Settler Colonialism and the History of Indigenous Child Removal in Australia', *Australian Indigenous Law Review*, vol. 19, no. 2, pp. 20-29.
- Hallsworth, M., Parker, S. & Rutter, J. 2011, *Policy Making in the Real World - Evidence and Analysis*, Institute for Government, United Kingdom.
- Hammersley, M. 1998, *Reading Ethnographic Research: A Critical Guide*, 2nd edn, Longman, London.
- Haskins, V. 1998, 'The women's movement and Aboriginal citizenship, Sydney, 1937-1940', paper presented to the *International Federation for Research in Women's History*, Melbourne.
- Haskins, V. 2005, 'and so we are 'Slave owners': employers and the NSW Aborigines Protection Board Trust Funds', *Labour history: Bulletin of the Australian Society for the Study of Labour History*, no. 88, pp. 147-64.
- Henderson, J. & Wakeham, P. 2013, 'Reconciling Canada. Critical perspectives on the Culture of Redress', in J. Henderson & P. Wakeham (eds), *Reconciling Canada. Critical perspectives on the Culture of Redress*, University of Toronto Press, Canada.
- Houston, J. 2004, 'Marjorie Woodrow: Community Profile', *Indigenous Law Bulletin*, vol. 6, no. 5, pp. 19-22.

Howard, J. 1997, 'Opening Address', *Australian Reconciliation Convention*, Department of the Prime Minister and Cabinet, Melbourne.

Howes, C. 2005, 'Stolen wages: pushing the issue onto the national agenda', *Indigenous Law Bulletin*, vol. 6, no. 12, pp. 6-8.

Human Rights and Equal Opportunity Commission 1997, 'National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from Their Families', Sydney, N.S.W.

In living memory: exhibition catalogue, State Records Gallery 2007, NSW Dept. of Commerce, State Records, Sydney, N.S.W.

Kidd, R. 2006, *Trustees on Trial: recovering the stolen wages*, Aboriginal Studies Press, Canberra ACT.

Langton, M. 1993, *Well I heard it on the Radio and I saw it on the Television*, Australian Film Commission, Woolloomooloo.

Larson, T. 2007, *Memoir and the Memoirist: Reading and Writing Personal Narrative*, Swallow Press, Athens.

Legal Aid NSW 2009, *Verbals*, no. 54.

Lenzerini, F. (ed.) 2008, *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Oxford University Press, Oxford.

Lutz, E. 1988, 'After the Elections: Compensating Victims of Human Rights Abuses', in E. Lutz, H. Hannum & K. Burke (eds), *New Directions in Human Rights*, Pennsylvania Press, Pennsylvania.

MacLachlan, A. 2010, 'The State of "Sorry": Official Apologies and their Absence', *Journal of Human Rights*, no. 9, pp. 373-85.

MacLachlan, A. 2014, 'Beyond the Ideal Political Apology', in M. Mihai & M. Thaler (eds), *On the Uses and Abuses of Public Apologies*, Palsgrave MacMillan, Houndmills, Basingstoke.

Manager Burra Bee Dee 1943, *Letter to AWB*, NSW State Records Indigenous Collection, Sydney.

Manager Taree Aboriginal Mission 1940, *Letter to AWB*, NSW State Records Indigenous Collection, Sydney.

Mawuli, V. 2010a, 'Procedural challenges in the Stolen Wages scheme', *PIAC Bulletin*, vol. 31, pp. 1-13.

Mawuli, V. 2010b, 'Stolen wages: evidentiary challenges for claimants', *Indigenous law bulletin*, vol. 7, no. 17, pp. 8-11.

McGrath, A. (ed.) 1995a, *Contested Ground: Australian Aborigines under the British Crown*, Allen & Unwin, St Leonards, Australia.

McGrath, A. 1995b, 'Modern Stone-Age Slavery: Images of Aboriginal Labour and Sexuality', in A. McGrath & K. Saunders (eds), *Aboriginal Workers*, Australian Society for the Study of Labour History, Sydney.

McKenna, M. 1997, 'Different Perspectives on Black Armband History', *Research Paper*, 1997-98, <<http://www.aph.gov.au/library/>>.

Menkel-Meadow, C. 2014, 'Unsettling the Lawyers: Other Forms of Justice in Indigenous Claims of Expropriation, Abuse, and Injustice', *Legal Studies Research Paper Series*, no. 27, pp. 620-39.

Miley, L. 2006, *White Writing Black: Issues of Authorship and Authenticity in Non-Indigenous representations of Australian Aboriginal Fictional Characters*, Queensland University of Technology, Brisbane.

Moreton-Robinson, A. 2014, 'Imagining the Good Indigenous Citizen: Race War and the Pathology of Patriarchal White Sovereignty', in Neale, T. McKinnon, C. Vincent, E. (eds), *History, Power, Text: Cultural Studies and Indigenous Studies*, UTS ePress, Sydney, pp. 310-330.

Morgensen, S.L. 2011, 'The Biopolitics of Settler Colonialism: Right Here, Right Now', *Settler Colonial Studies*, vol. 1, pp. 52-76.

Murray, A. 2008, 'The Forgotten Australians: Identity, records and their search for the past', *The New Critic*, no. 8, September 2008, www.web.uwa.edu.au.

New South Wales, Legislative Council 2004, Debates, 11 March, Sydney, pp. 6670-7163, 8277-8.

New South Wales, Legislative Council General Purpose Standing Committee No 3 (2016), *Reparations for the Stolen Generations in NSW*, Sydney.

Newmann, K. & Thompson, J. (eds) 2015, *Historical Justice and Memory*, The University of Wisconsin Press, Wisconsin.

Ni Aolain, F. 2013, 'Justice in Times of Transition: A Reflection on Transitional Justice', *Constitutional Commentary*, vol. 29, no. 1, pp. 81-91.

Nieves, G. 2008, 'Indigenous Peoples and Psychosocial Reparation: The Experience with Latin American Indigenous Communities', in F. Lenzerini (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Oxford University Press, Oxford.

Nobles, M. 2008, *The Politics of Official Apologies*, Cambridge University Press, New York.

Okihiro, G.Y. 2009, 'Self and history', *Rethinking History*, vol. 13, no. 1, pp. 5-15.

Parbury, N. 1986, *Survival A History of Aboriginal Life in New South Wales*, NSW Department of Aboriginal Affairs, Surry Hills NSW.

Passerini, L. 1998, 'Work ideology and consensus under Italian fascism', in Perks, R. & Tomson, A. (eds), *The Oral History Reader*, Routledge, New York.

Popic, L. 2008, 'Compensating Canada's "Stolen Generations"', *Indigenous Law Bulletin*, vol. 7, no. 2, pp. 14-7.

Pritchard, S. 1998, 'The Stolen Generations and Reparations', *UNSW Law Journal*, vol. 21, pp. 259-67.

Read, P. 1995, 'Review - Don't Turn Your Back on Me: A Bibliographical Review of the Literature of the Stolen Generations', *Aboriginal Law Bulletin*, no. 33.

ReconciliationAustralia, *RECONCILIATION*, Reconciliation Australia, Kingston ACT.

REDRESS 2006, *Implementing Victims' Rights: A Handbook on the Basic Principles and Guidelines on the Right to a Remedy and Reparation*, The Redress Trust, London.

Reynolds, H. 1981, *The Other Side of the Frontier*, Penguin, Ringwood.

Rowse, T. 2005, 'Introduction' in Rowse, T. & Nile, R. (eds), *Contesting assimilation*. 1st edn, Network Books, Perth WA, pp. 19-25.

Rowse, T. 2012, *Rethinking Social Justice: From 'peoples' to 'populations'*, Aboriginal Studies Press, Canberra, ACT.

Senate Standing Committee on Legal and Constitutional Affairs 2006, *Unfinished business: Indigenous stolen wages*, Australian Parliament, Canberra.

Steinmo, S. 2008, 'Historical institutionalism', in D. Della Porta & M. Keating (eds), *Approaches and Methodologies in the Social Sciences: A Plurali*, Cambridge University Press, Cambridge.

Thornton, M. & Luker, T. 2009, 'The wages of sin: compensation for Indigenous workers', *University of New South Wales Law Journal*, vol. 32, no. 3, pp. 647-73.

Tingle, L. 2015, 'Political Amnesia - How We Forgot How to Govern', *Quarterly Essay*, no. 60, pp. 1-86.

Torpey, J. 2001, 'Making Whole What Has Been Smashed': Reflections on Reparations', *The Journal of Modern History*, vol. 73, June, pp. 334-58.

Torpey, J. 2015, 'The Political Field of Reparations', in K. Neumann & J. Thompson (eds), *Historical Justice and Memory*, vol. 2015, The University of Wisconsin Press, Madison, Wisconsin.

Tucker, M. 1983, *If Everyone Cared: Autobiography of Margaret Tucker*, 2 edn, Grosvenor Books, South Melbourne.

United Nations General Assembly 2005, 'Basic Principles and Guidelines on the Right to Remedy and Reparation for Victims of Gross Violations of International Human Rights Law and Serious Violations of International Humanitarian Law', *Yearbook of the United Nations*, New York, p. 793.

Veracini, L. 2013, 'Career of a Concept', *The Journal of Imperial and Commonwealth History*, vol. 41, issue 2, pp. 313-333.

Vermeule, A. 2005, 'Reparations as Rough Justice', *Public Law and Legal Theory Working Paper*, no. 105, pp. 1-23.

Vrdoljak, A.F. 2008, 'Reparations for Cultural Loss', in F. Lenzerini (ed.), *Reparations for Indigenous Peoples: International and Comparative Perspectives*, Oxford University Press, Oxford.

Walden, I. 1995, 'To send her to service: Aboriginal domestic servants', *Aboriginal Law Bulletin*, vol. 3, no. 76, pp. 12-4.

Walker, M.U. 2015, 'How Can Truth Telling Count as Reparations?', in K. Neumann & J. Thompson (eds), *Historical Justice and Memory*, The University of Wisconsin Press, Madison, Wisconsin.

Williams, E.P. 1939, 'Memorandum on organisation of Boys Home Kinchela', NSW State Records Indigenous Collection, Sydney.

Williams, L., Thorpe, K. & Wilson, A. 2005, 'Identify and Access to Government Records: Empowering the Community', *Archives and Manuscripts*, vol. 34, no. 1, pp. 8-30.

Winter, S. 2009, 'Australia's Ex Gratia Redress', *Australian Indigenous Law Review*, vol. 13, no. 1, pp. 49-61.

Winter, S. 2014, *Transitional Justice in Established Democracies. A Political Theory*, Palgrave Macmillan, Hampshire, UK.

Wolfe, P. 2006, 'Settler colonialism and the elimination of the native', *Journal of Genocide Research*, vol. 8, no.4, pp. 387-409.

Yow, V. 1997, "Do I like them too much?", effects of the oral history interview on the interviewer and vice-versa', *The Oral History Review*, vol. 24, no. 1, pp. 403-418.