# PAYING IT BACK: ON LITIGATING FIRST PEOPLES' STOLEN WAGES IN VICTORIA

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*The Stolen Wages practices refer to the policies and actions of Australian states and territories under so-called 'protection legislation' throughout the 19th and 20th centuries which withheld, mismanaged and underpaid First Peoples' wages and entitlements. In Victoria, despite decades of advocacy and a considerable body of evidence of such practices, there have been no government attempts to provide redress for the Stolen Wages. This article analyses the potential liabilities of the Victorian Government for these historical wrongs, in light of recent legal developments and parallel claims in other jurisdictions, focusing in particular on claims under trust and fiduciary duties. We argue that despite significant hurdles and constraints facing claimants, Victoria is potentially liable for substantial sums for breaches of its duties to First Peoples. Our analysis of such liabilities, and the limitations of courts as an avenue for reparations, speaks directly to the current truth-telling and Treaty processes in Victoria.*

## I INTRODUCTION

> After all, this money used to build Victoria came from the sweat and tears of our ancestors, this cannot be ignored. Justice must be given to all families from whom wages were stolen – now is the time.[1]

For nearly two centuries in the colonies now known as Australia, colonial exploitation of First Peoples[2] involved the control, withholding and mismanagement

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1 Andrew Gunstone and Sadie Heckenberg, *The Government Owes a Lot of Money to Our People* (Australian Scholarly Publishing, 2009) xi.

2 The term 'First Peoples' is used in this article to refer to those who make up the First Nations of the lands now known as Australia. Although most scholarly literature in this field uses the term 'Indigenous', when not quoting other sources, we follow the terminology adopted by the First Peoples' Assembly of Victoria and the Yoorrook Justice Commission – which are led by First Peoples and whose work provides the current socio-political context for this article. As non-First Peoples researchers, we do not purport to speak on behalf of First Peoples. We acknowledge the significant and difficult work already engaged in by so many First Peoples, as well as various public inquiries and commissions, in hearing and sharing

of their wages and entitlements under successive legislative schemes and agencies of both State and Federal Government.[3] Systematic exploitation of First Peoples' labour both assisted the prospering fortunes of the Australian colonies, and reinforced the poverty and wealth disparity experienced by First Peoples.[4] While practices varied from jurisdiction to jurisdiction, these 'Stolen Wages' broadly involved underpayment or lack of payment for work performed,[5] control over employment contracts, withholding of social security and other entitlements, and misappropriation of wages and profits in trust funds.[6]

Of course, resistance to such exploitation – including attempts to hold colonial governments responsible – has been just as longstanding. In Victoria, First Peoples' protests and calls for self-determination successfully prompted a parliamentary inquiry into management of Coranderrk in 1881, which considered wages among a range of other issues.[7] In Australia more broadly, growing public awareness due to legal and political pressure by First Peoples in the 1980s and 1990s gained traction in attempts at redress in some jurisdictions.[8]

Given merely six months to report on 'Indigenous workers whose paid labour was controlled by government', a 2006 federal parliamentary inquiry received submissions from a broad range of individuals and groups, and held public hearings in four capital cities.[9] Its final report – *Unfinished Business: Indigenous Stolen Wages* ('*Unfinished Business*') – outlines the historical control of security payments and wages due to First Peoples, including misappropriation and mishandling of First Peoples' money, the impacts of such control, and both investigatory and

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First Peoples' experiences of Stolen Wages and other systemic injustices. Our own analysis is primarily doctrinal in nature, based on desk research, and building on the scholarly and archival work of other researchers. We have consulted only minimally with Aboriginal Community-Controlled Organisations while writing this article, and are grateful for their input.

3 See Senate Standing Committee on Legal and Constitutional Affairs, Parliament of Australia, *Unfinished Business: Indigenous Stolen Wages* (Report, December 2006) 7–8, 68 ('*Unfinished Business*').

4 Ibid 130; Elise Klein, 'Beyond Compensation: Reparations and the Ongoing Colonization of Australia' (2024) 55(4) *Development and Change* 830, 845 <https://doi.org/10.1111/dech.12853>.

5 Underpayment refers to instances where First Peoples were paid less than what they were legally entitled to at the time, such as where they were paid below an award rate.

6 Rosalind Kidd, *Trustees on Trial: Recovering the Stolen Wages* (Aboriginal Studies Press, 2006) 19 ('*Trustees on Trial*').

7 Parliament of Victoria, *Coranderrk Aboriginal Station: Report of the Board Appointed to Enquire into, and Report upon, the Present Condition and Management of the Coranderrk Aboriginal Station, Together with the Minutes of Evidence* (Report, 1882) <https://vgls.sdp.sirsidynix.net.au/client/search/asset/1292474>. See also Minutes of Evidence, 'The Coranderrk Inquiry: A Window onto the History of Colonial Dispossession in Settler States' (Web Page, 2013) <http://www.minutesofevidence.com.au/the-coranderrk-story/>.

8 Rosalind Kidd, *Hard Labour, Stolen Wages: National Report on Stolen Wages* (Report, 2007) ('*Hard Labour, Stolen Wages*'). See also *Unfinished Business* (n 3) ch 6. In particular, '[i]n some jurisdictions, there have been long-standing concerns about the administration of the finances of Indigenous people under protection Acts': at 71. One example of litigation from the 1990s regarding underpayment of wages (albeit under discrimination law) is *Bligh v Queensland* [1996] HREOCA 28. See also 'Aboriginal activists had for years complained that money controlled by the government had been lost or stolen': Kidd, *Trustees on Trial* (n 6) 1.

9 *Unfinished Business* (n 3) 2–3.

reparations measures undertaken by governments.[10] Contextualised amongst other forms of violence and dispossession enacted against First Peoples by colonial governments, it is fair to say that the Stolen Wages have sometimes been relegated to a background issue, possibly also due to its complexity and its suppression in the historical record.[11]

Research confirms that, like its counterparts, the Victorian Government engaged in many Stolen Wages practices throughout the 19th and 20th centuries.[12] Victoria has also seen significant campaigns, advocacy and research led by First Peoples and groups aimed at raising awareness and lobbying the state government to provide meaningful action. Wampan Wages has been the peak body on Stolen Wages practices in Victoria,[13] bringing together representatives from various First Peoples organisations and individuals, as well as non-First Peoples groups such as trade unions.[14] This group conducted significant research and advocacy with regards to the Stolen Wages in Victoria, and published the most comprehensive Victorian-focused submission to the Senate Inquiry in 2006.[15]

The Victorian Government's failure to meaningfully engage with this part of its own history has hindered a thorough accounting of the true nature and extent of the Stolen Wages in this state.[16] In *Unfinished Business*, the Senate Inquiry expressed disappointment that it had not received any submissions from the Victorian Government, and recommended that it urgently consult with First Peoples in relation to the issue and conduct archival research of available records.[17] The Victorian Government responded by commissioning private firm History Matters[18] for a 'preliminary investigation', which culminated in a two-part report released in

10 *Unfinished Business* (n 3).

11 Kidd, *Trustees on Trial* (n 6); Chris Cunneen, 'The Race to Defraud: State Crime and the Immiseration of Indigenous People' in Elizabeth Stanley and Jude McCulloch (eds), *State Crime and Resistance* (Routledge, 2013) 99, 101 ('The Race to Defraud').

12 See below Part II.

13 *Wampan* meaning 'pay back' in the Kirrae Whurrong language of Southwestern Victoria.

14 Wampan Wages (Victorian Stolen Wages Working Group), Submission No 84 to Senate Legal and Constitutional References Committee, *Inquiry into Stolen Wages* (2 October 2006) ('Wampan Wages').

15 Ibid.

16 The only research commissioned by the Victorian Government is a History Matters study conducted by consulting historians in 2007, culminating in a two-part report in 2009: History Matters, *Indigenous Stolen Wages Preliminary Investigation Stage One: Establishing the Legal Framework* (Final Report, September 2009) ('*History Matters Report Stage One*'); History Matters, *Indigenous Stolen Wages Preliminary Investigation Stage Two: Determining Implementation* (Final Report, September 2009) ('*History Matters Report Stage Two*'). The study has been criticised for its limited scope: Andrew Gunstone, 'Indigenous Stolen Wages and Campaigns for Reparations in Victoria' (2014) 8(12) *Indigenous Law Bulletin* 3, 3 ('Indigenous Stolen Wages').

17 *Unfinished Business* (n 3) 2, 127.

18 When operational in 2022, the History Matters website explained that its purpose 'is to provide Australian Teachers and Students with a point of contact for assistance with resources, assessment or units of work for teaching History based on the Australian National Curriculums': 'Our Mission', *History Matters* (Web Page, 2022) <https://web.archive.org/web/20220313075111/https://historymatters.com.au/our-mission/#>.

2009 ('*History Matters Report*').[19] No consultation with First Peoples was carried out for this study[20] and it has also been criticised for its limited scope.[21]

The failure of government action means the issue has largely lost political traction in the state.[22] However, the truth-telling[23] and Treaty processes[24] currently underway in Victoria could signal an opportunity for the Stolen Wages issue to finally be addressed. The Yoorrook Justice Commission's Terms of Reference regarding historical systemic injustice specifically list 'unfair labour practices'[25] and, more broadly, 'practices of structural and systemic exclusion of First Peoples from Victorian economic, social and political life'.[26] Its first Interim Report confirms that '[s]tolen wages and economic marginalisation' are being considered.[27] First Peoples in Victoria thus await reparations – or indeed any form of government accountability – to address this particular injustice. Meanwhile, each year more and more individual First Peoples who are owed reparations grow older and pass away.

In terms of the various avenues or forms of justice for Stolen Wages, *Unfinished Business* recommended a comprehensive government reparations scheme as a preferable option to litigation because of the cost, emotional burden to claimants, time and potential evidentiary limitations.[28] The shortfalls of engaging with courts in First Peoples' struggles for redress are well demonstrated by other areas of litigation, such as for the Stolen Generations.[29] However, strategic litigation for Stolen Wages has been important in other jurisdictions and can potentially operate alongside, and even inform, the content and outcome of parallel forums for justice. For instance, in Queensland, where the most substantial Stolen Wages research has been conducted, the government introduced a compensation scheme for affected workers in 2002. The scheme was widely criticised[30] and was eventually superseded by a class action which settled with the Queensland Government for $190 million

19 See above n 16.

20 '[I]nformation held within the Victorian Aboriginal community' is listed as not being included in the scope of the research: *History Matters Report Stage Two* (n 16) 2.

21 Gunstone, 'Indigenous Stolen Wages' (n 16) 3.

22 The only political party in Victoria which has a current policy for addressing the Stolen Wages is the Greens Victoria: 'First Nations Peoples', *The Greens Victoria* (Web Page) <https://greens.org.au/vic/policies/aboriginal-and-torres-strait-islander-peoples>.

23 'About Yoorrook', *Yoorrook Justice Commission* (Web Page) <https://yoorrookjusticecommission.org.au/about/>.

24 'Pathway to Treaty', *First Peoples – State Relations Victoria* (Web Page, 18 July 2024) <https://www.firstpeoplesrelations.vic.gov.au/treaty-process>.

25 Victoria, *Victoria Government Gazette*, No S 217, 14 May 2021, s 3(a)(vi).

26 Ibid s 3(a)(xi).

27 Yoorrook Justice Commission, *Yoorrook with Purpose* (Interim Report, 30 June 2022) 40–2.

28 *Unfinished Business* (n 3) 124–5.

29 See *Trevorrow v South Australia [No 5]* (2007) 98 SASR 136 ('*Trevorrow*'); Larissa Behrendt, 'Genocide: The Distance Between Law and Life' (2001) 25 *Aboriginal History* 132 <https://doi.org/10.22459/AH.25.2011.08>; Chris Cunneen and Julia Grix, 'The Limitations of Litigation in Stolen Generations Cases' (Research Discussion Paper No 15, Institute of Criminology, University of Sydney Law School, 2004).

30 Kidd, *Trustees on Trial* (n 6) 7–21.

in 2019.[31] Although this settlement was only a fraction of the estimated $500 million owed to First Peoples workers in Queensland,[32] litigation was strategically useful in this case. Similar class actions have followed in Western Australia and the Northern Territory.[33]

An analysis of the potential for Stolen Wages litigation may therefore be relevant to ongoing treaty negotiations and other efforts of First Peoples in Victoria to obtain justice on this issue. It is this question that we take up in this article. While no scholarly literature has yet focused on litigating the Stolen Wages in Victoria, there has been some archival research (as summarised in Part II), and scholarly analysis of litigation in other jurisdictions (eg, Queensland)[34] or that does not focus on any particular jurisdiction.[35] Building on earlier doctrinal analyses, such as that by Stephen Gray,[36] we also draw on domestic and international commentary on the use of litigation to provide redress and reparation for wrongs perpetrated by colonial governments against First Peoples. We also consider existing research into the history of Stolen Wages in Victoria, identifying areas where this research is insufficient or incomplete,[37] and draw lessons from comparable litigation in other jurisdictions.

Our scope is limited to an analysis of litigation against the Victorian Government on the issue of Stolen Wages. We consider similar litigation in other jurisdictions solely for comparison where relevant to the Victorian context. We also limit our analysis to the liabilities of the Victorian Government (that is, not covering Stolen Wages liability of private enterprise) and to a consideration of policies enacted under protection legislation between 1869–1975. Finally, we focus on potential equitable claims for breach of fiduciary duty and breach of trust, leaving aside other arguably potential claims, such as for breach of statutory or common law duties, in criminal law or under human rights laws. This narrowed scope allows us to cover the strongest legal arguments for the liability of the Victorian Government. We find that despite complex doctrinal requirements, it is arguable that trust obligations were created under the relevant legislative schemes and/or that the Victorian Government owed fiduciary duties to First Peoples workers – and that many of

31 'Queensland Government to Pay $190 Million Settlement over Unpaid Wages', *Australian Broadcasting Corporation* (online, 9 July 2019) <https://www.abc.net.au/news/2019-07-09/hans-pearson-class-action-settled-qld-government/11292886>.

32 Sanushka Mudaliar, 'Stolen Wages and Fiduciary Duties: A Legal Analysis of Government Accountability to Indigenous Workers in Queensland' (2003) 8(3) *Australian Indigenous Law Reporter* 1, 1.

33 *Street v Western Australia* [2024] FCA 1368 ('*Street*'); Order of Mortimer CJ in *McDonald v Commonwealth* (Federal Court of Australia, VID312/2021, 16 September 2024) ('*McDonald Orders*').

34 See Kidd, *Trustees on Trial* (n 6); Mudaliar (n 32); Robert James Walker, 'Resolving the Stolen Wages Claim in Queensland: The Trustee's Non-Fiduciary Duties' (2008) 2(2) *Journal of Equity* 77.

35 See Stephen Gray, 'Holding the Government to Account: The "Stolen Wages" Issue, Fiduciary Duty and Trust Law' (2008) 32(1) *Melbourne University Law Review* 115 ('Holding the Government to Account').

36 Ibid. Like Gray's analysis in 2008, we focus on potential arguments on the basis of trusts and fiduciary duties. However, we also consider the potential application in the specific circumstances of Victoria and our doctrinal analysis incorporates more recent legal developments, such as those on political trusts. See Part III below.

37 See, eg, Gunstone and Heckenberg (n 1) xix; see above n 16; Wampan Wages (n 14).

these obligations and duties were breached as a matter of course, giving rise to substantial liability.

When considering potential litigation, barriers beyond doctrine and beyond the courtroom are also significant – such as the onerous evidentiary burden placed on claimants, particularly given the Victorian Government's historical maladministration and the consequential deficit in reliable records from the relevant time period. The potential for harm, such as re-traumatisation of victims and their descendants, is also worth considering, as is the limited transformative potential of compensation as reparations. Nonetheless, litigation remains a viable option and could catalyse government accountability for harms inflicted by previous administrations, providing victims with compensation and confirming the political importance of Stolen Wages justice. It is our hope that a full understanding of the government's liabilities may also inform truth-telling and treaty negotiations.

This article proceeds as follows. Part II outlines the history of the Stolen Wages in Victoria, demonstrating how the legislative framework enacted by the Victorian Government between 1869 and 1975 empowered its agencies and officers to withhold wages and entitlements of First Peoples workers. We detail how these policies operated in practice and identify areas where further research is required. Part III sets out the potential liabilities of the Victorian Government in equity, for breach of trust and fiduciary duties, based on the Stolen Wages practices outlined in Part II, and canvasses some of the doctrinal issues relevant to these claims, as well as summarising potential remedies available to claimants should they be successful. Part IV discusses key barriers to litigation as well as its limitations as a means to accountability and reparations, before Part V provides a brief conclusion.

## II A HISTORY OF THE STOLEN WAGES IN VICTORIA

### A Background

First Peoples' labour was exploited from the earliest days of the Victorian colony, significantly contributing to the modern wealth and prosperity the state enjoys today. During the colony's expansion from Port Phillip from the 1830s, First Peoples in Victoria worked across almost all areas of the economy, including agricultural, pastoral, domestic, service and fishing industries, among others.[38]

By the 1850s, many First Peoples in Victoria had been decimated by disease, dispossession and the violence of colonisation. During the 1860s, under the prevailing colonial ideology of 'protection', the Victorian Government sought to centralise control over First Peoples' lives. It established reserves and Christian missions across Victoria and sought to move First Peoples onto these settlements[39] – at Lake Hindmarsh (1859), Framlingham (1861), Lake Tyers (1861), Lake

38 Richard Broome, 'Aboriginal Workers on South-Eastern Frontiers' (1994) 26(103) *Australian Historical Studies* 202, 210–12 <https://doi.org/10.1080/10314619408595960>.

39 These reserves and missions were a mix of government owned and operated reserves and government-funded Christian missions. They have also been called 'stations' in some texts. We refer to all such settlements as 'reserves'.

Wellington (1863), Coranderrk (1863) and Lake Condah (1867).[40] The enactment of the *Aborigines Protection Act 1869* (Vic) – the first of its kind in Australia – heralded a new era of government policy and control over First Peoples' lives.[41]

From this time until 1975, under the guise of 'protection', the administration of extraordinarily invasive intervention in the lives of First Peoples in Victoria was overseen by successive government agencies,[42] namely the Board for the Protection of the Aborigines ('BPA') (1869–1957), the Aborigines Welfare Board ('AWB') (1957–67) and the Ministry for Aboriginal Affairs ('MAA') (1968–75). Relevantly for our purposes, this included the power to regulate First Peoples' working lives, including their conditions of employment, wages, savings and social security benefits. This system of government control remained until the passing of the *Racial Discrimination Act 1975* (Cth) and the transfer of government administration of First Peoples' affairs to the Commonwealth Government.

We therefore focus on the period of administration under the legislation enacted between 1869 and 1975 ('Protection Acts'). Our analysis covers three different kinds of First Peoples workers or employment relationships:

1. Workers on reserves performing work including building and maintaining infrastructure, such as fencing, housing, schools and churches etc; clearing and cultivating land and livestock; growing vegetables and cash crops including arrowroot and hops; woodcutting; domestic labour, such as cleaning, cooking and childcare; and the production of goods to be sold, such as baskets and boomerangs. These workers were in a direct employment relationship with the government agencies via the managers/administrators of the reserves.
2. Persons living on reserves and working outside of reserves under a licence in private employment. First Peoples living on reserves were often subject to the issue of work certificates by Aboriginal affairs agencies before they could perform any work away from the reserves. These workers participated in a range of employment activities across society, including as rural labourers, harvesters, shearers, stockmen, seasonal farm workers, private domestic servants, and in the police and defence forces.
3. First Peoples children who were apprenticed out to work for private employers, whose wages were paid into funds established by Aboriginal affairs agencies. In practice, boys were usually sent to work as labourers on farms, while girls were sent to work as domestic servants in private homes.[43]

In the latter two categories, although the employment relationships were of a private nature with third parties, the terms of such relationships were mediated by the State. Government agencies had extensive control over the terms and

40 Richard Broome, *Aboriginal Victorians: A History Since 1800* (Allen & Unwin, 2005) ('*Aboriginal Victorians*') 126.

41 *Aborigines Protection Act 1869* (Vic) ('*Protection Act 1869*').

42 'To Remove and Protect', *AIATSIS* (Web Page) <https://aiatsis.gov.au/collection/featured-collections/remove-and-protect>.

43 Kidd, *Hard Labour, Stolen Wages* (n 8) 120.

conditions of work contracts, including the nature and duration of employment and the payment of wages and rations, and often had broad powers to direct that some or all of a worker's wages be paid to a local guardian or into a trust fund for the benefit of the worker and/or their family. It has been argued that the reserves thus acted as 'employment agents', sometimes refusing to grant work certificates for residents to secure employment off the reserve.[44]

### B Research and Archival Gaps

In this Part, we draw substantially on the 2009 research of Andrew Gunstone and Sadie Heckenberg, as well as the *History Matters Report*, to identify several key aspects of the Stolen Wages practices in Victoria. Unfortunately, a comprehensive account is not possible, due to both a lack of existing research and deficiencies in archival records. Unique to this jurisdiction is the further issue that relevant records are dispersed across the National Archives of Australia ('NAA') and the Public Record Office Victoria ('PROV'), requiring researchers to navigate two archival systems.[45] In addition, the record-keeping and administrative practices of relevant government agencies under the Protection Acts were incredibly poor. A recurring theme in the *History Matters Report* is reference to the inconsistent, incomplete, confusing and often non-existent record-keeping of these agencies, despite legislation mandating that thorough records be kept.[46] These issues all make it difficult to ascertain the precise extent to which Stolen Wages practices were carried out under relevant legislation.

### C Controlling Employment Conditions

Beginning with the *Aborigines Protection Act 1869* (Vic), the BPA was granted extensive power to control the conditions of First Peoples' employment.[47] Both an employer and First Peoples worker could be fined for work done without a work certificate issued by the BPA.[48] Additionally, the BPA could enter into and negotiate the terms of employment contracts on behalf of First Peoples workers including the nature, duration and remuneration of employment.[49] Evidence confirms that these powers were used to restrict access to private employment and competitive wages.[50]

The *Aborigines Protection Act 1886* (Vic) redefined the meaning of an Aboriginal person under the Act, excluding all half-castes under the age of 34 years.[51] It resulted in approximately half the First Peoples population living on reserves at the time being forcibly removed and assimilated into wider society

44 Ibid 121–2.
45 *History Matters Report Stage Two* (n 16) 16.
46 Ibid 3, 16, 21.
47 *Aborigines Protection Regulations 1871* (Vic) regs 2–8 ('*Protection Regulations 1871*').
48 Ibid reg 6.
49 Ibid regs 2–7; Gunstone and Heckenberg (n 1) 75.
50 See Gunstone and Heckenberg (n 1) 81; Kidd, *Hard Labour, Stolen Wages* (n 8) 121.
51 *Aborigines Protection Act 1886* (Vic) s 4(2).

without government support.[52] This had catastrophic effects for First Peoples' families and livelihoods.[53] As a cost-saving measure, the government in 1917 began closing all reserves except Lake Tyers, and concentrating the remaining First Peoples there.[54] At Lake Tyers, the situation continued along a similar pattern. The *Aborigines Act 1915* (Vic) and the *Aborigines Regulations 1916* (Vic) strictly regulated work for residents,[55] and those who attempted to leave the reserve to work without a pass could be fined or have their rations withheld.[56] Again, evidence confirms these powers were used to prevent people from working off the reserve.[57]

The *Aborigines Act 1957* (Vic) replaced the BPA with the AWB and broadened the definition of an Aboriginal person to include 'any person of [A]boriginal descent'.[58] The Act allowed for regulations relating to the 'conditions of employment' of any First Peoples 'in any area'.[59] In practice, this power was used to place harsh employment controls on the First Peoples living at Lake Tyers.[60]

### D Withholding and Underpayment of Wages

A key feature of the strict control that these legislative powers granted administrative agencies was control over First Peoples' wages. From 1869, the legislation and regulations allowed for the underpayment of wages, no wages, rations and food in exchange for work, and for wages to be paid in part or in whole to a guardian or manager of a reserve.[61] On reserves, people were required to perform work remunerated at the reserve's discretion.[62] In 1909, the BPA wrote to the manager at Coranderrk, remarking 'it is not desirable that [First Peoples] be kept in idleness, nor should the Board be required to pay [them] for every hour worked by them'.[63] Between the years 1869–77, the First Peoples residents of Framlingham were paid no wages at all.[64] Many sought paid work elsewhere,

52 Andrew Gunstone, 'Indigenous Peoples and Stolen Wages in Victoria, 1869–1957' in Natasha Fijn et al (eds), *Indigenous Participation in Australian Economies II: Historical Engagements and Current Enterprises* (ANU Press, 2012) 181, 184–5 ('Indigenous Peoples and Stolen Wages').

53 Ibid; Gunstone and Heckenberg (n 1) 82–8.

54 Gunstone, 'Indigenous Peoples and Stolen Wages' (n 52) 188; *History Matters Report Stage Two* (n 16) 9, 24.

55 Gunstone, 'Indigenous Peoples and Stolen Wages' (n 52) 188; *Aborigines Regulations 1916* (Vic) ('*Aborigines Regulations 1916*').

56 Gunstone and Heckenberg (n 1) 90.

57 Broome, *Aboriginal Victorians* (n 40) 203–4.

58 *Aborigines Act 1957* (Vic) ss 3, 6(1) ('*Aborigines Act 1957*').

59 Ibid s 10(1)(c).

60 Gunstone and Heckenberg (n 1) 100–12.

61 *Protection Act 1869* (n 41) s 2(III); *Protection Regulations 1871* (n 47) regs 6–7, 9; *Aborigines Act 1910* (Vic) ('*Aborigines Act 1910*'); *Aborigines Regulations 1916* (n 55) regs 6–7, 9–10; *Aborigines Act 1928* (Vic) ss 6(II)–(III) ('*Aborigines Act 1928*'); *Aborigines Regulations 1931* (Vic) regs 6–7, 9–10, 21(a) ('*Aborigines Regulations 1931*'); *Aborigines Act 1957* (n 58) ss 6(2)(a), 7, 10(1)(b)–(c); *Aborigines Regulations 1958* (Vic) regs 9, 26 ('*Aborigines Regulations 1958*').

62 '[A]pportioning amongst [A]boriginals the earnings of [A]boriginals under any contract, or where [A]boriginals are located on a reserve, the net produce of the labor': *Protection Act 1869* (n 41) s 2(III).

63 Gunstone, 'Indigenous Peoples and Stolen Wages' (n 52) 182.

64 Kidd, *Hard Labour, Stolen Wages* (n 8) 121; Broome, *Aboriginal Victorians* (n 40) 142.

often facing discrimination in the wider community and difficulty returning to visit family on the reserves.[65]

After the closure of the reserves and concentration of the population at Lake Tyers, residents were subject to appalling working and living conditions,[66] and were required to perform work in exchange for rations or nominal wages.[67] In order to minimise the board's expenditure, rates of pay were regularly cut. A 1955 government inquiry into the conditions at Lake Tyers found that wages were paid at the rate of approximately £1.10s – £3 per fortnight, while First Peoples working off the reserve could earn around £5 to £6 per day.[68] In 2008, Andrew Gunstone and Sadie Heckenberg conducted community consultations with Elders who had lived at the Lake Tyers reserve. One Elder remembers, '[m]y father used [to get paid] about … three to five pounds … I would say maybe even less … The women of the household they used to work I think it was just for maybe rations you know'.[69] Although the *Aborigines Regulations 1958* (Vic) prescribed that any applicable industry award rate must be paid to First Peoples workers at Lake Tyers, a work-for-rations system persisted and award wages were never paid.[70]

Evidence also reveals a number of other disturbing practices in relation to the payment and withholding of wages at Lake Tyers. The administrative records are plagued with inconsistencies, such as discrepancies between the reserve's time books and board correspondence.[71] Despite the BPA's own financial records indicating that wages were paid to workers at the reserve, no wage sheets identifying individual workers, or receipts of payment, have been found in the archives.[72] Despite the introduction of formal hourly rates of pay for some workers on the reserve, many were still paid in rations or on a task by task basis.[73] An audit of Lake Tyers in 1962 revealed several 'time saving "short-cuts"' in relation to the payment of wages.[74] The ration system was also abused, such as by charging residents for rations and not providing rations to children under four years of age.[75] Finally, First Peoples' wages were routinely paid into the treasury trust fund as 'unclaimed' or 'refund' wages, as a suspected form of punishment by reserve managers, acting outside the scope of their authority.[76]

Many First Peoples and other groups protested the working conditions and lack of wages at Lake Tyers during this time. The Australian Aborigines League,

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65 Broome, *Aboriginal Victorians* (n 40) 295, 313.
66 Gunstone and Heckenberg (n 1) 90.
67 Ibid; *Aborigines Regulations 1931* (n 61) reg 10.
68 Gunstone and Heckenberg (n 1) 101.
69 Ibid 6.
70 *History Matters Report Stage Two* (n 16) 4; *Aborigines Regulations 1958* (n 61) reg 29. The Centre for Aboriginal Rights argued in 1962 'the Manager and the Welfare Board are illegally frustrating the intention of the legislature' as the *Aborigines Regulations 1958* (n 61) reg 29 states that award rates should be paid in these cases: Gunstone and Heckenberg (n 1) 108.
71 *History Matters Report Stage Two* (n 16) 28.
72 Ibid 4.
73 Ibid 24, 29.
74 Ibid 22.
75 Ibid 31.
76 Ibid 35–7.

formed in 1934 by Yorta Yorta man William Cooper, argued for the abolition of the ration system at Lake Tyers and for wages on the same terms as whites.[77] Protests throughout the 1950s and 1960s demanded that First Peoples, particularly those living at Lake Tyers, be paid fair wages.[78] In 1963, Lake Tyers residents petitioned the government to be paid full award wages and social security benefits.[79] In 1965, the Centre for Aboriginal Rights argued:

> The lowest wages of all are those paid on Church Missions and Government settlements in some states. A striking example of this is the standard of wages paid on the Lake Tyers reserve in Victoria despite the fact that Aborigines outside the reserve are entitled to full wages.[80]

Government control over First Peoples' wages finally ended with the passing of the *Aboriginal Affairs Act 1967* (Vic) which dissolved the AWB.[81] In 1970, the Victorian Government handed the Lake Tyers freehold over to two First Peoples-owned trust funds.[82]

### E Misuse of Money Held in Trust Funds

Legislation granted the Victorian Government and its agencies the power to direct First Peoples' wages to be paid into a trust fund or to another person tasked with disposal of funds on workers' behalf.[83] Although there are records of some individual trust accounts for workers, maladministration of the reserves and government agencies make it difficult to ascertain from archival records the extent to which this took place.[84]

Agencies were also empowered to appropriate proceeds from various sources, including leasing reserve land, maintenance payments, social security payments and the sale of goods produced on reserves, into a treasury-controlled trust fund.[85] Lake Tyers was a popular tourist destination and traditional goods – such as boomerangs made by First Peoples residents – were often sold to visitors.[86] First Peoples men working off the reserve were also required to pay family 'maintenance' payments into the fund.[87] The Aborigines Board Produce Fund ('ABPF') was £3485.11 in credit when all monies in the fund were transferred into the Aborigines Welfare Fund ('AWF') in 1957.[88] In the same year, the AWF was expanded in scope to include control over all monies in connection with the reserves and associated with the administration of the Act.[89]

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77 Gunstone and Heckenberg (n 1) 96.
78 Ibid 106.
79 *History Matters Report Stage Two* (n 16) 33.
80 Gunstone and Heckenberg (n 1) 111, quoting Centre for Aboriginal Rights, *The Aborigines: Wages and Work* (Report, 1965) 11.
81 *Aboriginal Affairs Act 1967* (Vic) s 18.
82 Broome, *Aboriginal Victorians* (n 40) 346.
83 See, eg, *Protection Regulations 1871* (n 47) regs 6–7; *Aborigines Regulations 1931* (n 61) regs 6–7.
84 *History Matters Report Stage Two* (n 16) 3.
85 *Aborigines Regulations 1931* (n 61) reg 9.
86 Gunstone and Heckenberg (n 1) 91.
87 *History Matters Report Stage Two* (n 16) 4.
88 Gunstone and Heckenberg (n 1) 94.
89 *Aborigines Act 1957* (n 58) s 7(2).

Both the ABPF and the AWF had a history of defective and opaque administration. The financial administration of reserves was routinely criticised by the Auditor-General, and the BPA had little to no accountability to Parliament during the 20th century.[90] In 1962, an audit of the AWB found that 'unsatisfactory features were found to exist in the accounting methods which had been used at the [Lake Tyers] Station'.[91] The money in the AWF was transferred into the Aboriginal Affairs Fund ('AAF') in 1967 and, finally, a balance of $174,358 into the Consolidated Fund in 1975.[92] There is no record of the dispersal of these funds to First Peoples.[93]

Evidence from other jurisdictions indicates that money held in trust funds was often mismanaged or misappropriated by government agencies or local guardians for personal use.[94] It can be inferred that similar practices also occurred in Victoria, but again due to poor government record keeping it is difficult to ascertain the degree to which this took place.

## F Exploitation of Children

Government intervention in the lives of First Peoples children is a well-documented element of Australian colonialism. In addition to empowering government to remove children from their families, Victorian legislation granted the government extensive powers to apprentice First Peoples children into work and to control their wages. Broadly, children could be removed from their families and placed on reserves, apprenticed out or trained in work, and their wages could be paid to another person on their behalf, or into trust funds and consolidated revenue.

Initially, First Peoples children were controlled through general provisions in neglected children legislation. *The Neglected and Criminal Children's Act 1864* (Vic) empowered government to remove any child deemed a 'neglected child' and commit them to an industrial school, the superintendent of which then controlled all money earned by these children.[95] In 1874, these powers were broadened to include the power to detain children and apprentice them out.[96] These children's wages could be recovered by anyone appointed by the Chief Secretary.[97] Powers were expanded again in 1887,[98] such that children's wages controlled by the Secretary could be paid into a State Wards' Fund, and credit on this paid into consolidated revenue.[99] Deductions could be made from the fund for children's expenses and for the child's 'misbehaviour'.[100]

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90 Gunstone, 'Indigenous Peoples and Stolen Wages' (n 52) 187.
91 Gunstone and Heckenberg (n 1) 103.
92 *History Matters Report Stage Two* (n 16) 19–20.
93 Gunstone and Heckenberg (n 1) 115.
94 See, eg, Kidd, *Hard Labour, Stolen Wages* (n 8).
95 *Neglected and Criminal Children's Act 1864* (Vic) ss 15, 30.
96 *Neglected and Criminal Children's Amendment Act 1874* (Vic) ss 3, 17–18, 20.
97 Ibid s 18.
98 *The Neglected Children's Act 1887* (Vic) ('*Neglected Children's Act*').
99 Ibid ss 37–8.
100 Ibid ss 40, 85(1).

Subsequent legislation applied explicitly to First Peoples children. In 1899, the power to remove children from their families was expanded from deemed 'neglected' children to 'any [A]boriginal child'.[101] These powers remained until 1967.[102] Regulations under the *Aboriginal Protection Act 1886* (Vic) provided for employers to send half of every 'half-caste' child's wage to the BPA's General Inspector.[103] Although this money was supposed to be paid to children at the end of their apprenticeship, there is little evidence that this occurred.[104] Child welfare legislation throughout the first half of the 20th century continued to provide for First Peoples children's wages to be paid to third parties.[105]

Once again records are unclear on the extent to which the wages of children were held in individual trust accounts or paid to the inspector. Young girls in particular were frequently removed from their families and apprenticed into domestic work under the legislation. Concerningly, despite evidence of their wages being paid to the board, no accounts in their names can be found in available financial statements and audit reports.[106]

### G Non-Payment and Misapplication of Social Security Benefits

The final aspect of the Stolen Wages history in Victoria that we consider is the deliberate exclusion or withholding of social security benefits from First Peoples.[107] Most of the benefits that were withheld from First Peoples in Victoria were governed by Commonwealth legislation, including the 'invalid' and old-age pensions, maternity allowance, child endowment, widows' pension, unemployment and sickness benefits, and war and service pensions. Pensions withheld by the Commonwealth Government from First Peoples in Victoria are beyond the scope of this article. There were, however, many instances where federal legislation allowed for the payment of benefits owed to First Peoples to a third party to control on their behalf. For instance, the *Invalid and Old-age Pensions Act 1908–1942* (Cth) provided:

> Where, in the opinion of the Commissioner, it is desirable to do so, he may direct that payment of the pension of an [A]boriginal native of Australia shall be made to an authority of a State or Territory of the Commonwealth controlling the affairs of [A]boriginal natives …[108]

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101 *Aborigines Act 1890 Alteration of Regulations 1899* (Vic) s 13.

102 Broome, *Aboriginal Victorians* (n 40) 193.

103 *The Aborigines Protection Act 1886 Regulations Relating to Half-Castes 1890* (Vic) reg 17.

104 Gunstone and Heckenberg (n 1) 85.

105 The *Children's Welfare Act 1928* (Vic) s 88(7) allowed '[t]he collection and investment and deposit of any earnings of any ward of the Children's Welfare Department'; The *Children's Welfare Act 1954* (Vic) ss 26(2)–(3) ('*Welfare Act 1954*') similarly provided for 'the employer of any young person … to remit to [the BPA's Director] at regular intervals a specified portion of the weekly earnings of such young person' and for the Director to apply this money for the benefit of that person 'as the Director thinks fit'. These powers continued into the 1960s under the *Children's Welfare Act 1958* (Vic) ss 26(2)–(3) and the *Social Welfare Act 1960* (Vic) s 56(s).

106 *History Matters Report Stage Two* (n 16) 5.

107 So significant was this practice that Andrew Gunstone and Sadie Heckenberg, in the most substantial Stolen Wages research project conducted thus far in Victoria, devote a third of their publication to social security benefits alone: Gunstone and Heckenberg (n 1).

108 *Invalid and Old-age Pensions Act 1908–1942* (Cth) s 44A(2), as inserted by *Invalid and Old-age Pensions Act 1942* (Cth) s 13.

Similar provisions can be found across social security legislation throughout the 20th century.[109]

Evidence indicates that these provisions were used to withhold payments from First Peoples living at Lake Tyers. As residents became eligible for the old-age and invalid pension in 1959, their pensions were paid directly to the AWB and then forwarded to the Manager of the reserve.[110] Similarly, child endowment payments, maternity allowances and social security payments were paid to the AWB and administered by the manager of Lake Tyers between 1959 and 1965.[111] Although never officially government policy, anecdotal evidence also indicates that war and services pensions were paid into government-controlled trust funds rather than directly to beneficiaries.[112] Given the state of available evidence, it remains unclear the full extent to which First Peoples' social security benefits were paid into trust funds or misappropriated by local authorities in their positions as trustees.

## III LIABILITY OF THE VICTORIAN GOVERNMENT

In this Part, we present the key potential legal bases upon which litigation could be brought in Victoria on behalf of victims of the Stolen Wages. Litigating historic injustices against First Peoples has been a difficult and often frustrating process for plaintiffs; the legal issues are complex and the jurisprudence surrounding them still in its infancy. Claimants in genocide and Stolen Generations cases, for example, have faced a judiciary reluctant to find the existence of a fiduciary relationship between colonial governments and First Peoples.[113] Nonetheless, scholarly works, along with recent class actions in Queensland, Western Australia and the Northern Territory,[114] provide an emerging blueprint for Stolen Wages claims. Synthesising these sources, we apply this blueprint to the Victorian situation. Broadly, the strongest legal arguments in this approach are based in equitable principles of fiduciary and trust law.

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109 *Social Services Consolidation Act 1947* (Cth) s 47; *Social Services Act 1947–1959* (Cth) s 43, as inserted by *Social Services Act 1959* (Cth) s 8; *Maternity Allowance Act 1912–1942* (Cth) s 9A, as inserted by *Maternity Allowance Act 1942* (Cth) s 4; *Child Endowment Act 1941* (Cth) s 22(1*)*; *Widows' Pensions Act 1942* (Cth) s 43(2); *Unemployment and Sickness Benefits Act 1944* (Cth) s 30.

110 Gunstone and Heckenberg (n 1) 35; *History Matters Report Stage Two* (n 16) 5.

111 The Centre for Aboriginal Rights observed in 1962 that 'several Aboriginal people have written to the Council over the last year complaining that, contrary to Victorian practice, their Social Service benefits have not been paid direct, but have been paid to trustees': Gunstone and Heckenberg (n 1) 61.

112 Ibid 65.

113 *Williams v Minister, Aboriginal Land Rights Act 1983* (1994) 35 NSWLR 497 ('*Williams*'); *Cubillo v Commonwealth* (2001) 112 FCR 455, 575 [461] ('*Cubillo Appeal*'); *Thorpe v Commonwealth [No 3]* (1997) 144 ALR 677.

114 Kidd, *Trustees on Trial* (n 6); Mudaliar (n 32); Walker (n 34); Gray, 'Holding the Government to Account' (n 35); *Pearson v Queensland [No 2]* [2020] FCA 619 ('*Pearson*'); *Street v Western Australia* (n 33); *McDonald Orders* (n 33).

## A The Stolen Wages and Equity's Just Intervention

Despite the traditional associations of equity with notions of justice, fairness and remedying unjust exercises of power, First Peoples claimants in Australian courts have struggled to access its intervention. The two equitable doctrines central to potential Stolen Wages claims are breach of fiduciary duties and/or breach of trust. Despite a strong overlap in the law of trusts and fiduciary principles, and the fact that trustee/beneficiary is the classic fiduciary relationship, the characteristics of a trust and a fiduciary relationship are unique. A trust is a legal obligation to hold and use property for the benefit of another person/people (or in the case of charitable trusts, for a specific purpose). A fiduciary relationship is a special relationship arising under equitable principles to protect relationships of trust and confidence. Alongside general fiduciary obligations, a trustee owes additional duties to their beneficiaries. We therefore consider each relationship separately.

## B Fiduciary and Trustee: Either or Both?

Where a trust can be established, the relationship will automatically fall within the archetypal fiduciary relationship. Because of the significant overlap in the two equitable relationships, where Stolen Wages claimants cannot establish a factual fiduciary, they may be able to establish a trust, or vice versa. Strategically, then, both arguments should be considered. Trustee duties are far more expansive and prescriptive, such that where a trust can be established, the complaint can capture broader conduct and a wider range of remedies may be available. However, where the various actions of government agencies fall short of creating duties as trustees, fiduciary law may still usefully supplement the claims.

### *1 The Trust Claim*

#### *(a) Establishing a Trust: Possible but Difficult*

There is no one universal definition of a trust, and there are a great variety of kinds of trust. But essentially, a trust is an obligation enforceable in equity where property is legally held by a trustee/s but must be used or applied for the benefit of the beneficiary/ies.[115] The two kinds of trusts potentially relevant for Stolen Wages claimants are express trusts for persons and express trusts for charitable purposes.[116] The creation of an express trust requires 'three certainties' – certainty of intention, certainty of subject matter and certainty of object.[117]

#### *(i) Certainty of Intention*

Certainty of intention requires an objective intention to create an express trust with legally enforceable obligations.[118] Finding a certainty of intention requires

115 MW Bryan, VJ Vann and S Barkehall Thomas, *Equity and Trusts in Australia* (Cambridge University Press, 3rd ed, 2023) 211–2 [13.2].
116 Walker (n 34) 102.
117 *Knight v Knight* (1840) 3 Beav 148; 49 ER 58, 68 (Lord Langdale MR).
118 *Byrnes v Kendle* (2011) 243 CLR 253.

close inspection of the wording of the legislation argued to have created the trust, as well as other documents and surrounding circumstances at the time the trust was created.[119]

A central uncertainty a potential Stolen Wages trust claim faces is the influence of the 'political trust' doctrine in Australian law. Historically, courts have been reluctant to interfere with the executive function of governments, under separation of powers principles.[120] Because of this, the 'political trust' doctrine emerged in British cases, including *Tito v Waddell [No 2]* ('*Tito v Waddell*')[121] and *Kinloch v Secretary of State for India* ('*Kinloch*'),[122] as effectively a 'legal presumption against the Crown being a trustee'.[123] Accordingly, where the government or a government agent is the purported trustee, the trust instrument must evidence a clear intention to create a legally enforceable obligation. The absence of such an intention will create a mere political obligation rather than a true trust.

Helpfully for claimants, *Registrar of the Accident Compensation Tribunal v Federal Commissioner of Taxation* ('*Registrar of the Accident Compensation Tribunal*') provides strong authority that the political trust doctrine is no longer significant in Australia, or is at least very qualified in its application.[124] In this decision, the High Court clarified that *Kinloch* (and *Tito v Waddell*) offers no more than a 'rule of construction' to be applied in ascertaining the intention of a purported trust instrument in its language. Importantly for Stolen Wages claimants, the High Court clarified that 'there is no rule of law or equity to prevent the imposition of ordinary trust obligations on a person who is, in other respects, a servant or agent of the Crown.'[125] It could therefore be argued that the relevant sections of the Protection Acts created legally enforceable obligations independent of agency functions as agents of the Crown.

This argument finds strong support in international jurisprudence on the role of the Crown as a trustee vis-a-vis First Nations peoples. The landmark decision of the Canadian Supreme Court in *Guerin v The Queen* ('*Guerin*') disposed of the proposition that the political trust doctrine prevents the imposition of equitable obligations on the Crown.[126] In *Guerin*, the Court held that the Canadian government, in dealing with land of the Musqueam Band, was not only acting in the exercise of its administrative functions, but was protecting an 'independent legal interest'.[127] In the more recent New Zealand case of *Proprietors of Wakatu v Attorney-General* ('*Proprietors of Wakatu*'), Elias CJ applied *Guerin* in accepting

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119 JD Heydon and MJ Leeming, *Jacob's Law of Trusts in Australia* (LexisNexis Butterworths, 8th ed, 2016) 58–9 [5.20]–[5.21].

120 Gray, 'Holding the Government to Account' (n 35) 119; *Authorson v Canada (Attorney-General)* (2002) 58 OR (3d) 417, 433 [62]–[64] (Austin and Goudge JJA).

121 [1977] Ch 106 ('*Tito*').

122 (1882) 7 App Cas 619 ('*Kinloch*').

123 Gray, 'Holding the Government to Account' (n 35) 119; *Skinners' Co v Irish Society* (1845) 12 Cl & Fin 425; 8 ER 1474. See also ibid.

124 (1993) 178 CLR 145 ('*Registrar of the Accident Compensation Tribunal*').

125 Ibid 163 (Mason CJ, Deane, Toohey and Gaudron JJ).

126 [1984] 2 SCR 335 ('*Guerin*').

127 Ibid 385 (Dickson J).

the existence of a trust with regards to Crown disposal of *Wakatu* Māori land.[128] There is a forceful logic in the application of *Guerin* and *Proprietors of Wakatu* to Stolen Wages claims. A clear independent legal interest exists in First Peoples' wages: as Stephen Gray argues, to say otherwise would effectively 'regard Aboriginal workers as having been legally enslaved.'[129]

Accepting that the political trust doctrine would be unlikely to block a Stolen Wages claim, then, there are broadly two kinds of possible trusts that can be identified in the relevant legislation: money paid to a person to manage on behalf of a worker, and money paid into a central fund.

### *(1) Money Paid to an Individual Third Party*

The Protection Acts contain many provisions for the payment of First Peoples' wages and entitlements to a third party. Some of the legislation uses the language of a 'trust fund'.[130] Although the word 'trust' is not by itself sufficient to infer an intention to create an express trust, other indicia within the legislation also suggest such an intention. The wording of the relevant legislation often refers to wages or entitlements being paid to someone who will apply the money for the benefit of the individual.[131] In *Registrar of the Accident Compensation Tribunal*, the words 'for the benefit of the person entitled to that money' were held to indicate an intention to create a 'true trust'.[132] Similarly, the language of protection which can be found in several of the relevant Acts or regulations, and in the reports to Parliament which led to their creation, also suggests that wages and entitlements were withheld with the intention of protection.[133] In many cases, the legislation and/or regulations specify that the money be held in individual accounts in the names of First Peoples workers or be used on behalf of 'the [A]boriginal or of any member of his family'.[134] The requirement to separate the money and use it on behalf of a named person is a classic characteristic of a trust relationship.[135]

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128 [2017] 1 NZLR 423.

129 Gray, 'Holding the Government to Account' (n 35) 124. See also Stephen Gray, 'The Elephant in the Drawing Room: Slavery and the "Stolen Wages" Debate' (2007) 11(1) *Australian Indigenous Law Review* 30 ('Elephant in the Drawing Room').

130 See, eg, *Aborigines Regulations 1931* (n 61) reg 7.

131 *Protection Regulations 1871* (n 47) reg 7; *Welfare Act 1954* (n 105) s 26(2).

132 *Registrar of the Accident Compensation Tribunal* (n 124) 162, 165–6 (Mason CJ, Deane, Toohey and Gaudron JJ).

133 See, eg, *Protection Regulations 1871* (n 47); *Aborigines Act 1890* (Vic); *Aborigines Act 1957* (n 58) s 6; EH Cameron et al, *Coranderrk Aboriginal Station: Report of the Board Appointed to Enquire into, and Report upon, the Present Condition and Management of the Coranderrk Aboriginal Station, Together with the Minutes of Evidence* (Report, 1882) <http://www.minutesofevidence.com.au/static/media/uploads/coranderrk_moe_digitized.pdf>; *Royal Commission on the Aborigines: Report of the Commissioners Appointed to Enquire into the Present Condition of the Aborigines of this Colony, and to Advise as to the Best Means of Caring for, and Dealing with Them, in the Future* (Report, 1877) <https://aiatsis.gov.au/sites/default/files/catalogue_resources/92914.pdf>.

134 See, eg, *Protection Regulations 1871* (n 47) reg 7.

135 Similarly, provision for '[t]he collection and investment' of wages earned by wards of the state as in the *Children's Welfare Act 1928* (Vic) s 88(7) suggests an intention to create a trust. See also Mudaliar (n 32) 5; *Henry v Hammond* [1913] 2 KB 515.

Conversely, the way some monies were handled in practice may demonstrate that the true intention was *not* to create a legally enforceable trust.[136] As the audit records demonstrate, individual funds were often mixed and were applied for purposes other than the care and maintenance of the workers in whose names they were held. Rather than indicating a lack of intention to create a trust, however, claimants would argue that this was instead evidence of fraud and mismanagement.

### *(2) Money Paid into a Central Fund*

The other kind of trust account arguably created in the Stolen Wages context involved money pooled in a central fund, such as the ABPF and the State Wards' Fund. The establishment of these funds again specifically refers to a 'trust fund'. However, as in *Tito v Waddell*,[137] where a fund is to be used generally for a part of the community rather than for a specific beneficiary, it may be harder to argue intention to create a 'true trust' rather than a political trust. Robert James Walker thoroughly analyses how *Tito v Waddell* may be distinguished in the case of pooled trust funds of wages or profits.[138] Such arguments include the involvement of government in passing the relevant legislation, the broader context of the policy of protection and intrusion into individual financial affairs, and the fact that an express trust for a charitable purpose, rather than for specific people, has been created.

The legislation creating the ABPF is less explicit that the money earned by residents of reserves was to be used *for their benefit*.[139] It is arguable that the intention was for money paid into the fund to be used in the furtherance of a government function, rather than a private trust fund.[140] For instance, the *Aborigines Act 1928 Regulations 1931* (Vic) provides that '[t]he Board may from time to time from this fund pay to the [A]borigines who have laboured on reserves such sums as it may determine, having regard to the kind and amount of labour performed by each.'[141] The profits of sale of goods were mixed in the fund together with '[a]ny moneys received from the leasing of reserves, sale of timber, wattle bark'.[142] Further, under the *Aborigines Act 1957* (Vic), money from the ABPF was paid into the AWF, which provided that '[m]oneys to the credit of the Fund shall be applied to the payment of expenses of the Board and the members thereof and the administration of this Act.'[143]

### *(ii) Certainty of Subject*

Certainty of subject refers to ascertainable property held by the trustee. In the Stolen Wages claims, certainty of subject can be readily identified as the wages,

136 Mudaliar (n 32) 5; *Kauter v Hilton* (1953) 90 CLR 86, 100 (Dixon CJ, Williams and Fulagar JJ); *Paul v Constance* [1977] 1 All ER 195.
137 *Tito* (n 121).
138 Walker (n 34) 106–8; ibid.
139 *Aborigines Regulations 1931* (n 61) reg 9.
140 See *Registrar of the Accident Compensation Tribunal* (n 124).
141 *Aborigines Regulations 1931* (n 61) s 9.
142 Ibid.
143 *Aborigines Act 1957* (n 58) s 7(3).

social security entitlements and profits from the sale of goods produced by First Peoples residents of reserves.

### *(iii) Certainty of Object*

The final certainty – certainty of object – refers to the requirement of certainty of the person, group of people, or purpose for whom the trust property must be applied. Where the trust is for a specific person or persons, there are several considerations to determine whether the objects of the trust are sufficiently certain. In order for the trust to be regarded as one for a charitable purpose, the trust must be 'of a public nature', within the '"spirit and intendment" of [the Preamble to] the Statute of Elizabeth' and 'for the benefit of the public'.[144]

#### *(1) Express Trusts for Persons*

Determining certainty of object for trusts for persons involves either the list certainty test or criterion certainty test, depending on whether the trust is characterised as fixed or discretionary. A fixed trust predetermines the beneficial share of the trust property to which each beneficiary is entitled in the trust instrument. In contrast, under a discretionary trust the trustee has a discretion as to how the trust property is distributed between beneficiaries.[145] In many of the Stolen Wages examples outlined in Part II, the beneficiary of each specific 'trust' is the individual worker. In these examples, a 'fixed trust' would be created, as the beneficiaries are a closed list. The 'list certainty' test requires that the identity of all the beneficiaries of the trust is known at the time of distribution of the trust property.[146]

Where there is discretion in the protection legislation for the money to be used for a worker or 'any member of his family',[147] the fund could be characterised as a discretionary trust, in which case the 'criterion certainty' test applies. This test requires a trustee to say 'with certainty that a given individual is or is not a member of the class'.[148] As Australian courts have interpreted 'dependants' and 'relatives' to be a sufficiently certain class of people,[149] the criterion certainty test would likely be satisfied in the example given.

One issue that may arise in the context of the Stolen Wages is whether the legislation intended for a trust to be imposed, or if the trustee has a mere power, rather than a duty, to distribute the trust property. Courts have demonstrated a low threshold exists for the imposition of a trust. In *Registrar of the Accident Compensation Tribunal*, where the legislation provided that 'any amount of money

144 Walker (n 34) 110, quoting JD Heydon and MJ Leeming, *Jacobs' Law of Trusts in Australia* (LexisNexis Butterworths, 7th ed, 2006) 140–1 [1003]–[1004].

145 Bryan, Vann and Thomas (n 115) 235–6 [14.38].

146 Ibid 237 [14.44].

147 See, eg, *Protection Regulations 1871* (n 47) reg 7; See also 'for his benefit and/or the benefit of his dependants': *Aborigines Regulations 1931* (n 61) reg 7.

148 Bryan, Vann and Thomas (n 115) 237 [14.45].

149 MW Bryan et al, *A Sourcebook on Equity and Trusts in Australia* (Cambridge University Press, 2nd ed, 2020) 374, citing *Re Baden's Deed Trusts [No 2]* [1973] Ch 9.

… may be invested, applied or otherwise dealt with in any manner',[150] this was held to impose a trust rather than a mere power. By analogy, the powers contained in the Protection Acts arguably impose trust obligations on the trustees. Indeed, the language in much of the legislation is less ambiguous than in *Registrar of the Accident Compensation Tribunal,* for example directing that '[a]ny money to be received in pursuance of any such direction *shall* be applied at the discretion of the receiver'.[151] The legislation establishing the State Wards' Fund also likely satisfies the criterion certainty test, as according to *The Neglected Children's Act 1887* (Vic) the fund is for all wards for whom the state is guardian.[152]

*(2) Express Trusts for Charitable Purposes*

It could also be argued that the ABPF, the AWF and the AAF were express trusts for charitable purposes. Drawing on Walker's arguments in the context of the Queensland Stolen Wages, the trusts were of a public nature as the First Peoples community was 'an appreciably large part of the community';[153] the funds were for the benefit of this community (which an Australian court has found to be a purpose within the spirit of the Preamble of the Statute of Elizabeth);[154] and the trusts were for the benefit of the public.[155] Arguing a charitable purpose trust for these funds may also avoid the certainty of object arguments relied upon in *Tito v Waddell*.[156]

*(iv) Trustee Duties*

Assuming that the three certainties are satisfied, a trust relationship gives rise to extensive and prescriptive duties imposed upon the Victorian Government in the management of the funds. Some of these duties include:

- The duty to keep accurate records and accounts;[157]
- The duty to provide information on dealings with the trust to beneficiaries;[158]
- The duty not to take unauthorised profits from the trusteeship;
- The duty not to borrow from the trust fund;[159]
- The duty to abide by the terms of the trust;[160]
- The duty to exercise reasonable care;[161]
- The duty to account;[162]

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150 *Registrar of the Accident Compensation Tribunal* (n 124) 159 (Mason CJ, Deane, Toohey and Gaudron JJ).
151 *Protection Regulations 1871* (n 47) reg 7 (emphasis added).
152 *Neglected Children's Act* (n 98) s 37.
153 *Re Mathew* [1951] VLR 226, 231 (O'Bryan J).
154 Ibid 231–2.
155 Walker (n 34) 110–1.
156 [1977] Ch 106.
157 *Kemp v Burn* (1863) 4 Giff 348; 66 ER 740, 740 (Sir Stuart V-C).
158 *Hawkesley v May* [1956] 1 QB 304, 305 (Havers J).
159 See fiduciary duties of no conflict/no profit: *Breen v Williams* (1996) 186 CLR 71, 113 (Gaudron and McHugh JJ) ('*Breen*').
160 *Re Diplock* [1948] Ch 465.
161 *Speight v Gaunt* (1883) 22 Ch D 727.
162 *Schmidt v Rosewood Trust Ltd* [2003] 2 AC 709.

- The duty to keep monies separate;[163] and
- The duty of prudent investment.[164]

*(v) Did the Government Breach its Duties as Trustee?*

The duty to keep accurate records and accounts was almost certainly breached by government administrators. There are numerous examples of poor and at times non-existent record keeping with regards to trusts managed by agencies responsible for First Peoples affairs. Contemporaneous reports make specific reference to this incompetence, particularly of the BPA.[165]

Where trust money was paid back into treasury or not paid to a worker, it is likely that several duties were breached, including the duty to abide by the terms of the trust, the duty to exercise reasonable care and the duty to keep monies separate. This occurred where wages were paid back into treasury as 'unclaimed' wages, and when child apprentices did not receive their wages upon completion of their apprenticeships. This may have also occurred in the context of social security entitlements managed 'on behalf' of the beneficiary by the manager at Lake Tyers.

Using individual trust money for personal expenditure, or expenditure on general maintenance of reserves, is also likely a breach of the duties not to take unauthorised profits from the trust, not to borrow from the trust and to abide by the terms of the trust. It is unclear the extent to which managers at reserves misappropriated wages held on trust for individual workers, but evidence from other jurisdictions and evidence of poor management at reserves in Victoria indicates it is likely.

Finally, the government likely failed to exercise reasonable care in the management of the centralised trust funds such as the ABPF. Audits revealing the poor accounting methods used by the relevant agencies managing the fund demonstrate this breach. The proceeds of the funds were transferred into consolidated revenue when Lake Tyers was sold, which may also have resulted in a failure to provide beneficiaries information on dealings with regards to the trust.

## *2 The Fiduciary Claim*

*(a) Fiduciary Relationships: First Peoples and the Crown*

The advantage for Stolen Wages claimants in pursuing a claim for breach of fiduciary duties is that the fiduciary relationship has the potential to regulate a broader cross-section of the conduct of the Victorian Government under the Protection Acts. A fiduciary's obligations are sourced in the relationship itself, potentially capturing powers where no property is involved, or where the relationship is 'trust like' but a complete trust cannot be established. Therefore, various situations discussed in Part II which may not constitute a trust relationship, could instead be

163 *Associated Alloys Pty Ltd v ACN 001 452 106 Pty Ltd (in liq)* (2000) 202 CLR 588, 605 [34] (Gaudron, McHugh, Gummow, Hayne JJ).

164 *Speight v Gaunt* (1883) 22 Ch D 727.

165 *History Matters Report Stage Two* (n 16) 23, citing Charles McLean, *Report upon the Operation of the Aborigines Act 1928 and the Regulations and Orders Made Thereunder* (Report, 1957) 13.

pursued on the basis of a fiduciary relationship. This may cover instances where workers were directed to work on or off the reserve under the work certificate system, were paid in only rations or nominal wages, or where wages and profits generated on the reserve were used to cover shortfalls in government expenditure on First Peoples affairs, and other areas of administration. Although Australian courts have equivocated in recognising the existence of a fiduciary relationship between First Peoples and the Crown, a Stolen Wages claim is arguably strongly placed to overcome the relevant doctrinal barriers.[166]

Generally, a fiduciary relationship arises where one party undertakes to act in the best interests of another in the exercise of a power or discretion which affects the legal interests of that party.[167] There are several categories of presumed fiduciary relationships recognised at law, such as trustee and beneficiary, guardian and ward, and solicitor and client. The list of fiduciary relationships is not closed; the courts may also recognise relationships as fiduciary in nature on an ad hoc basis.[168] The characteristics which courts look to in order to determine whether a fiduciary relationship exists in any given factual scenario include, inter alia, the presence of a relationship of trust, an inequality of bargaining power, an undertaking to act in another's interests, the discretion to affect the legal interests of another, and dependency or vulnerability causing reliance.[169]

### *(b) Arguing a Fiduciary Relationship*

The starting point for establishing a factual fiduciary relationship in Australia is the judgment of Mason J in *Hospital Products Ltd v United States Surgical Co*,[170] where he outlined the following essential characteristics:

1. The fiduciary undertakes or agrees to act for or on behalf of or in the interests of another person in the exercise of a power or discretion;
2. The exercise of this power or discretion will affect the interests of that other person in a legal or practical sense;
3. The fiduciary has a special opportunity to exercise this power or discretion to the detriment of the other person and the other person is vulnerable to the abuse by the fiduciary because of their position.[171]

The source of these obligations may be found in an agreement between parties, in statute or in a trust instrument.[172] The undertaking need not be agreed to by the beneficiary; it may be 'officiously assumed without request'.[173] Where the undertaking creates an expectation, or an entitlement to an expectation of a

166 Kidd, *Trustees on Trial* (n 6) 43; Mudaliar (n 32) 4; Gray, 'Holding the Government to Account' (n 35) 130.
167 *Hospital Products Ltd v United States Surgical Co* (1984) 156 CLR 41, 96–7 (Mason J) ('*Hospital Products*').
168 Walker (n 34) 94.
169 *Breen* (n 159); Bryan et al (n 149) 243; *Mabo v Queensland [No 2]* (1992) 175 CLR 1, 200 (Toohey J) ('*Mabo*').
170 (1984) 156 CLR 41.
171 Ibid 96–7 (Mason J).
172 PD Finn, *Fiduciary Obligations* (Lawbook, 1977) 12–1 [22]–[23].
173 Ibid 201 [467].

particular standard of conduct within the beneficiary, a fiduciary relationship can be established.[174]

There is a strong argument to be made that an ad hoc, or even sui generis, fiduciary relationship exists between First Peoples and the Victorian Government in the context of the Stolen Wages. The first aspect of this, as argued by both commentators and in legal claims in other jurisdictions, is that various protection legislation and other historical documents evidence the requisite undertaking by colonial governments to act on behalf or in the interests of First Peoples.[175] The long title of the *Aborigines Protection Act 1869* (Vic) states that the Act is 'to provide for the Protection and Management of the Aboriginal Natives of Victoria.' This legislation was enacted in the context of rapid decline of the First Peoples population in Victoria and the prevailing sentiment behind its enactment was the paternalistic colonial idea of 'protective' government control.[176]

In subsequent protection legislation, we see further evidence of this 'undertaking' in the language of 'protection' and the creation of incredible powers over the lives of First Peoples. For example, such legislation provides for 'the distribution and expenditure of moneys granted by Parliament *for the benefit* of Aboriginals'.[177] Likewise, the *Aborigines Act 1957* (Vic) stated that the function of the AWB was 'to promote the moral intellectual and physical welfare' of First Peoples 'with a view to their assimilation into the general community.'[178] At a broader level, the powers granted to administrators of the Acts were extremely invasive in the legal interests of First Peoples workers' employment contracts and wages.[179]

The other aspect of the relationship which arguably gives rise to the relevant fiduciary obligations is the special vulnerability and power differential, as these assist in determining whether a vulnerable party is entitled to expect a particular standard of conduct.[180] In the Stolen Wages class action against the Queensland Government, as evidence of the vulnerability and power inequity in the relationship, the plaintiff's pleadings pointed to claimants' reliance on various administrators to obtain and negotiate employment; the power of these agents to unilaterally exercise the members' employment rights and manage their finances and property; the 'lack of education and unsophistication' of group members; and the broader social context of discrimination against First Peoples in society.[181] These factors apply equally to the Victorian context.

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174 *Brunninghausen v Glavanics* (1999) 46 NSWLR 538, 558 [100]–[102] (Handley JA).

175 Kidd, *Trustees on Trial* (n 6) 53–4; Walker (n 34) 97; Mudaliar (n 32) 6; Hans Pearson, 'Fourth Further Amended Statement of Claim', Submission in *Hans Pearson v State of Queensland,* QUD714/2016, 27 May 2019, 56 [258(aa)].

176 Journalist, historian, colonist and chairman of the Select Committee of the Victorian Government in 1858 on the State of First Peoples argued that '[t]he "higher race" had a "right to take possession of this land", but also a duty to ensure the "protection and support" of the "inferior" race': Broome, *Aboriginal Victorians* (n 40) 122.

177 *Aborigines Act 1915* (Vic) s 6(iv) (emphasis added).

178 *Aborigines Act 1957* (n 58) s 6(1).

179 Mudaliar (n 32) 6.

180 Finn (n 173); *News Ltd v Australian Rugby Football League Ltd* (1996) 64 FCR 410, 541–4.

181 Pearson (n 175) 57–8 [258(a)]–[258(h)].

Despite the force of the conceptual and moral logic behind this argument, claimants seeking to establish the existence of a fiduciary relationship between the government and First Peoples in Australia face key doctrinal barriers. These include: courts' reluctance to impose fiduciary obligations on the Crown; the limitation to proscriptive duties in Australia; and the principle that fiduciary obligations cannot override legislation. Unlike a trustee and beneficiary, this is not an established category of fiduciary relationship, and it is difficult to draw any clear principles from the existing authorities.[182] In this section, we briefly map these barriers and how Stolen Wages claimants in Victoria might overcome them.

*(c) Courts' Reluctance to Impose Fiduciary Obligations on the Crown*

There is no principle of law that fiduciary obligations cannot be imposed upon the Crown; the current jurisprudence leaves open the possibility. However, the influence of the political trust doctrine can be observed in courts' clear reluctance to impose duties which effectively require the Crown to act exclusively in the interests of a group of people.[183] In Australia, this can be seen particularly in response to broad formulations of government's fiduciary obligations. In *Wik Peoples v Queensland*, Brennan CJ acknowledged that a fiduciary relationship *could* arise between the government and First Peoples, but held that Crown power to extinguish Native Title was not sufficient to attract fiduciary principles.[184] An extra element of discretionary power to be exercised 'on behalf of, or for the benefit of, another or others' was needed.[185] In *Jones v Queensland*, the Queensland Supreme Court similarly found that the extraordinary power of the government to impair First Peoples' rights was not sufficient to give rise to a fiduciary relationship.[186] In *Coe v Commonwealth*, the High Court rejected a claim that the New South Wales Government had breached fiduciary obligations to the Wiradjuri people.[187] While identifying a number of deficiencies in the claim, Brennan CJ denied that fiduciary obligations could be sourced in conduct of the New South Wales Government amounting to representations recognising Wiradjuri Native Title and laws.[188]

Stolen Generations claims have faced similar obstacles in establishing the existence of a fiduciary relationship. *Williams v Minister, Aboriginal Land Rights Act 1983* ('*Williams*')[189] and *Cubillo v Commonwealth*[190] reflect Australian courts' conservative approach to fiduciary law and a reluctance to apply it to supplement duties sourced in other areas of law. In *Williams*, the New South Wales Supreme Court did not accept that the AWB was in a fiduciary relationship with the plaintiffs

182 See Gray, 'Holding the Government to Account' (n 35) 130–9. '[W]hether a fiduciary duty is owed by the Crown to the [I]ndigenous peoples of Australia remains an open question': *Thorpe v Commonwealth [No 3]* (1997) 144 ALR 677, 688 (Kirby J).
183 See, eg, *Tito* (n 121).
184 (1996) 187 CLR 1, 96 (Brennan CJ).
185 Ibid.
186 [2000] QSC 267.
187 (1993) 118 ALR 193.
188 Ibid 203–4 (Mason CJ).
189 *Williams* (n 113).
190 *Cubillo Appeal* (n 113).

simply because they were state wards subject to the Board's control.[191] In so doing, it distinguished the Australian line of authority from international examples, where fiduciary obligations between First Peoples and the government have been sourced in the characteristics of the classic guardian/ward relationship.[192]

The relationship between First Peoples and colonial governments creates an inherent tension in the application of fiduciary law. In *Mabo,* Toohey J found that fiduciary obligations arose from the power of the Queensland Government to alienate First Peoples' land and, more broadly, its extraordinary power to impair First Peoples' rights.[193] In many senses the special vulnerability of First Peoples, and enormous power and discretion of the government to affect their legal interests, has all the characteristics of the classic fiduciary relationship – as contemplated by Toohey J in *Mabo*.[194] However, so uniquely one-sided is this relationship, that it stretches the characteristics of recognisable fiduciary relationships where there is a clearly delineated scope. This tension can be seen in the different judgments of appellate courts in *Guerin*. In *Guerin,* the Canadian Court of Appeal considered that the broad discretion and enormous power granted by the surrender of land by the Musqueam Band of British Columbia to the Canadian Government pointed to a mere political obligation, whereas the Supreme Court found the opposite.[195]

In order to overcome this legal tension, the scope of the claimed fiduciary relationship could be narrowed to cover only the powers of the government to alter independent legal interests of First Peoples workers, such as wages or profits from sale of goods.[196] Again, international jurisprudence provides support for such a formulation of the duty. Building on the Canadian Supreme Court's decision in *Guerin,* in *Wewaykum Indian Band v Canada*, Binnie J rejected the notion of fiduciary obligations as a 'plenary Crown liability', instead contemplating such obligations vis-a-vis specific and identifiable legal interests of First Nations people.[197]

The unique nature of the relationship has led to advocacy for recognition of a sui generis fiduciary category between governments and First Peoples.[198] Internationally, such a relationship has been sourced in treaties between First Peoples and States.[199] Without comparative instruments in Australia, it is less clear from where these obligations may be said to arise. Some suggest that this relationship could be sourced in the *Constitution*, or may arise from a 'forgotten'

191 *Williams* (n 113) 511 (Kirby P).

192 For example, the relationship 'resembles that of a ward to his guardian. They look to our government for protection; rely upon its kindness and its power; appeal to it for relief to their wants; and address the president as their great father': *Cherokee Nation v Georgia* (1831) 30 US (5 Pet) 1, 30 (Marshall CJ).

193 *Mabo* (n 169) 203 (Toohey J).

194 Ibid 200, 203 (Toohey J).

195 *Guerin* (n 126).

196 Ibid 387–8 (Dickson J).

197 [2002] 4 SCR 245, 286–7.

198 Gray, 'Holding the Government to Account' (n 35) 135; Brad Morse, 'Is the Common Law Still Relevant for Indigenous Australians? A Canadian Perspective' (Speech, Castan Centre for Human Rights Law Public Lecture, Monash University Law Chambers, 16 October 2007).

199 *Guerin* (n 126); *R v Sparrow* [1990] 1 SCR 1075; *United States v Creek Nation* (1935) 295 US 103; *Delgamuukw v The Queen* (1991) 79 DLR (4th) 185; *New Zealand Maori Council v A-G* [1987] 1 NZLR 641.

general fiduciary relationship between citizen and State.[200] Alternatively, and helpfully for Stolen Wages claimants, the undertaking could be found in general protective legislation, or the special vulnerability of First Peoples combined with public policy considerations.[201] One approach, informed by the obiter of Elias CJ and McGrath J in *Paki v Attorney-General [No 2]*,[202] is that a sui generis fiduciary relationship could be confined to the duty to act in good faith only, dispensing of the requirement of exclusive loyalty. Such a formulation of the duty balances the preservation of the Crown's constitutional role with the interests of individuals whose legal interests are vulnerable to the Crown's discretion. Although such a category has not (yet) been recognised by Australian courts, the Stolen Generations decision of *Trevorrow v South Australia* ('*Trevorrow*') and the judgment of Toohey J in *Mabo* both provide some judicial support for this argument.

*(d) Limitation of Duties: Proscriptive v Prescriptive*

Another doctrinal barrier to the establishment of a fiduciary relationship is the strictly limited proscriptive duties imposed on fiduciaries in the Australian context. Fiduciary duties which attract liability are limited to the proscriptive obligations of 'no profit' and 'no conflict'.[203] These duties apply to the fiduciary's obligation not to make a financial profit, and not to put themselves in a position where their own interests and their interests as a fiduciary may conflict in the 'pursuit or possible receipt' of a benefit or gain.[204] In *Cubillo*, the full court of the Federal Court rejected the submission that the Commonwealth had breached fiduciary obligations owed to children removed from their parents.[205] Although it was conceded that the Director of Native Affairs may owe fiduciary obligations to the children in their care, these obligations were not expansive. Rather, they were limited to proscriptive duties to protect economic interests. Stolen Wages claims have a legal advantage over Stolen Generations claims in this respect, given the quantifiable economic interests that are the subject of the claim.

To overcome the narrow approach to fiduciary duties in Australia, it has been creatively argued that the negative or proscriptive duties could actually give rise to positive obligations. For example, in using wages controlled in central funds for the maintenance of First Peoples' reserves and provision of supplies to First Peoples residents, the government pursued its own interests above those of residents in its care. As Thalia Anthony points out, the government profited by saving money which would be spent on First Peoples affairs and welfare responsibilities, and using these savings in other areas of government spending.[206] The counter is that

200 Gray, 'Holding the Government to Account' (n 35) 135–6.
201 Ibid 137.
202 [2015] 1 NZLR 67.
203 *Breen* (n 152) 93 (Dawson and Toohey JJ), 108 (Gaudron and McHugh JJ), 137 (Gummow J).
204 *Chan v Zacharia* (1984) 154 CLR 178, 199 (Deane J).
205 *Cubillo Appeal* (n 113).
206 Thalia Anthony, 'Unmapped Territory: Wage Compensation for Indigenous Cattle Station Workers' (2007) 11(1) *Australian Indigenous Law Review* 4, 17–18 ('Unmapped Territory').

courts may be reluctant to interfere with executive decision making, especially when it comes to balancing expenditure and allocation of resources.

In *Trevorrow*, the South Australian Supreme Court accepted the existence of a fiduciary relationship between the plaintiff, a Ngarrindjeri man removed from his parents, and the Aborigines Protection Board as his statutory legal guardian. The Court purported to recognise the existence of positive fiduciary obligations which attract liability for breach and accepted that the plaintiff was 'in a situation of vulnerability and dependence which required special protection of his interests'.[207] The State of South Australia had breached its fiduciary duty to disclose to the plaintiff that he was removed from his parents without legislative authorisation and to provide access to independent legal advice with regards to the removal.

Building on the comments in *Paki v Attorney-General [No 2]*,[208] another (and potentially stronger) argument is that the government's fiduciary obligations to First Peoples workers included positive duties to use its legislative powers in good faith and for a proper purpose, analogous to the application of directors' duties.[209] Anthony has argued that the government's fiduciary obligations to First Peoples workers extended to a positive duty to '[ensure] the general welfare of Indigenous workers'.[210] Even if a court considered such an obligation as applied to the entire relationship to be too broad,[211] a more limited scope could be argued – to the control of employment and wages by government on behalf of First Peoples workers. Importantly for claimants in Victoria, this duty could arguably extend to a 'duty to keep proper records'.[212]

### *(e) Courts Cannot Override Legislation*

In *Cubillo*, the Federal Court recognised that fiduciary obligations must be imposed upon statutory duties with a clear intention and cannot 'forbid what the legislation [permits]'.[213] Where legislation expressly authorises an action – such as paying a First Peoples worker a nominal wage[214] – a fiduciary is not liable for doing so.[215] This presents issues for Stolen Wages claimants, as many of the exploitative practices were expressly authorised by legislation. In contrast, in *Trevorrow* the existence of a fiduciary relationship arose in the context of the South Australian Government clearly acting *beyond* the scope of its legislative authority.

Applying the argument that the government's fiduciary obligations extended to positive duties to exercise their powers in good faith and for a proper purpose, Stolen Wages claimants could argue that the fiduciary relationship acted as a constraint on the way legislative power was exercised. For example, where

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207 *Trevorrow* (n 29) 344 [999] (Gray J).
208 [2015] 1 NZLR 67.
209 *Grimaldi v Chameleon Mining NL [No 2]* (2012) 200 FCR 296.
210 Anthony, 'Unmapped Territory' (n 206) 17.
211 See, eg, *Cubillo Appeal* (n 113).
212 Mudaliar (n 32) 6.
213 *Cubillo Appeal* (n 113) 577 [465] (Sackville, Weinberg and Hely JJ).
214 See, eg, *Aborigines Regulations 1931* (n 61) s 10, which provides for remuneration 'at a rate to be arranged by the manager and approved by the Board.'
215 *Cubillo Appeal* (n 113) 577 [465] (Sackville, Weinberg and Hely JJ); *Chan v Zacharia* (1984) 154 CLR 178.

protectors refused to grant work certificates for First Peoples residents living on reserves, local protectors and reserve managers retained and profited off the labour of those workers. Thus, where decisions were made to exclusively profit government or its agencies, it can be argued that the legislative powers were not exercised in good faith or for a proper purpose.

*(f) Breach of Fiduciary Duties*

Proceeding on the assumption that these doctrinal barriers may be overcome and that Stolen Wages claimants can establish the requisite fiduciary relationship, there are numerous examples of where this relationship may have been breached. These include, for example:

- Proceeds of payment for goods made into the ABPF and subsequent funds;
- Regulations allowing for wages to be paid to a nominated person to manage on behalf of the worker;
- Regulations that deductions be paid into accounts in the names of First Peoples workers;
- Provision for children's wages to be paid to the Director of the BPA, or superintendent of their school;
- Deduction of rations and other living expenses from the wages of First Peoples living and working on reserves, such as occurred at Lake Tyers; and
- Payment of social security entitlements into funds.

Where funds in these trusts were never paid to First Peoples workers, or where fraudulent transactions were made by the local protectors using these funds, breach is relatively straightforward to establish. Evidence from other jurisdictions shows that fraudulent transactions would occur where money was withdrawn for the protectors' own purposes, or accounts were not safeguarded to ensure withdrawals were made by only the account holder.[216] The available audit evidence indicates that these kinds of fraudulent transactions likely occurred in Victoria. An audit of reserves in 1906 described an inability to 'reconcile the books with the cash on hand' and expressed concern over the:

> Intertwining of financial affairs between the reserve managers and the BPA, the use of Indigenous labour for the benefit of the reserve managers and the reserves … and the practice of reserves forwarding cash into a bank account in the name of the reserve manager rather than into revenue.[217]

Where these practices cannot be captured in a classic 'trust' relationship – such as where money is fraudulently paid to a reserve manager instead of into revenue – establishing a breach of fiduciary duty can assist Stolen Wages claimants. More evidence is needed to understand the extent to which this kind of misappropriation occurred in Victoria. There is also evidence of government misuse of funds. In the example above, where rations and living expenses were deducted from First Peoples' wages, the reserve managers and government profited by reducing their

216 *Street* (n 33) 53–5.
217 Gunstone and Heckenberg (n 1) 87–8.

own maintenance and welfare costs. Although some of the legislative schemes permitted 'the money earned by Aboriginal people [to be used] for official purposes', it also refers to such funds being used 'at the discretion of the receiver *for the benefit* of the [A]boriginal or of any member of his family'.[218] Breach of fiduciary duty is thus arguable where funds were used to cover costs of maintenance of the reserves, or for personal expenses of local protectors. In other jurisdictions, funds were also used to cover shortfalls in government revenue.[219] Investigation is needed to determine whether similar practices occurred in Victoria. If so, this is likely a breach of the duty not to profit from the government's position as fiduciary.

### C Equitable Remedies for Stolen Wages Claimants

The financial remedy which successful Stolen Wages claimants would most likely receive is an order for equitable compensation. The court has discretion regarding which remedy best suits the breach, and broad discretion over factors which can be taken into account in determining this.[220] An account of profits, which seeks to strip profits accrued in the breach of equitable obligations,[221] would likely be impractical due to the difficulties of determining precise accounts for the various funds involved.[222] Equitable compensation, comparable to common law damages, is more flexible and seeks to compensate loss brought about by a breach. This is not limited to economic losses; the Victorian Court of Appeal has awarded equitable compensation for distress.[223] While individual amounts of compensation awarded would vary between claimants depending on the available evidence, again the evidentiary issue is a significant one in Victoria.

The historical and social context of compensation is also worth noting. *Unfinished Business* acknowledged the link between the poverty and entrenched inequality between First Peoples and the wider Australian community, and the loss of income under the Stolen Wages practices.[224] Robert Haebich described this using the term 'consequential poverty', while Chris Cunneen has described it as a process of 'immiseration'.[225] In this context, compensation is not only about justice and accountability; paying back money owed to First Peoples can also materially alleviate the generational burden of poverty brought about by these practices.

Of particular use in the Victorian context could be an order for the government to produce a full account of the various trust funds. Such an order was made in the US decision of *Cobell v Norton*.[226] In this case, the court found that the US Government failed to maintain adequate records and accounting of trust funds from

218 *Protection Regulations 1871* (n 47) reg 7 (emphasis added); Gunstone and Heckenberg (n 1) 76.
219 Kidd, *Trustees on Trial* (n 6) 60–1, 96–102.
220 Mudaliar (n 32) 7.
221 Bryan, Vann and Thomas (n 115) 52 [4.2].
222 See generally *Regal (Hastings) Ltd v Gulliver* [1967] 2 AC 134; *Hospital Products* (n 167); *Warman International Ltd v Dwyer* (1995) 182 CLR 544.
223 *Giller v Procopets* (2008) 24 VR 1, 34 [159] (Ashley JA).
224 *Unfinished Business* (n 3) 68.
225 Robert Haebich, Submission No 77 to Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into Stolen Wages* (29 September 2006) 1; Cunneen, 'The Race to Defraud' (n 13) 110.
226 *Cobell v Norton*, 240 F 3d 1081 (DC Cir, 2001) ('*Cobell*').

the 1900s held by the US Government for the benefit of First Peoples.[227] Though there are no comparable decisions from Australian courts, beneficiaries can apply for court orders that accounts be rendered to them.[228] If the decision in *Cobell* was followed, the government could finally be forced to provide a comprehensive history of the Stolen Wages in Victoria.

## IV BARRIERS AND LIMITATIONS OF LITIGATION

The possibilities for litigation, and its potential value as an avenue for redress, are shaped by several factors beyond the doctrinal analysis offered above. To begin, the significant passage of time since the government policies and practices discussed in Part II raises various practical issues for litigants. While equitable causes of action are not statute barred in the same way as common law, whether a time restriction may apply is largely up to the court's discretion in applying a limitation by analogy or invoking equitable bars to relief such as laches or acquiescence.[229] The *Limitation of Actions Act 1958* (Vic) provides a six year limitation period for bringing a claim to recover trust property, but this does not apply in cases of fraud or where the property remains in the possession of the trustee.[230] Arguing that Stolen Wages claimants have waived their rights will likely be unsuccessful, as the facts of the Stolen Wages practices have not been widely available or known. The government archives are incomplete, and there has only been limited research on the issue.[231] The Victorian Government may, however, successfully argue that the significant delay has resulted in a loss of key evidence, which unfairly prejudices their ability to defend the claims. This argument has been successful in Stolen Generation cases,[232] barring claimants from accessing remedy through the courts. In addition, given the delay in proceedings, most of the individuals subject to these practices are already of an advanced age or no longer alive. This raises several issues, such as the possibility of bringing proceedings on behalf of a deceased's estate (potentially even several generations later) and the loss of potential plaintiffs' own testimony as key evidence in the absence of archival records.

One of the most significant barriers to litigation is the vast evidentiary deficit that potential claimants face. The limited archival research conducted, the government mismanagement and record keeping failures, and the onus on plaintiffs to establish a cause of action, would hinder many from making out a claim to the requisite legal standard. As Murphy J remarked in the settlement approval for the Queensland Stolen Wages class action:

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227 Mudaliar (n 32) 8.
228 Bryan, Vann and Thomas (n 115) 280–1 [17.13]–[17.16].
229 Ibid 84–7 [6.3]–[6.15]. See *Gerace v Auzhair Supplies Pty Ltd (in liq)* (2014) 87 NSWLR 435, 456 [70] (Meagher JA).
230 *Limitation of Actions Act 1958* (Vic) s 21.
231 Mudaliar (n 32) 8.
232 *Cubillo Appeal* (n 113); See Cunneen and Grix (n 29) 32–4.

> [M]any class members would have likely faced real difficulties in [establishing claims to the requisite legal standard], or alternatively in proving an entitlement to compensation anywhere near the substantial amount that has been achieved through the proposed settlement. For claims brought on behalf of deceased estates, which comprise the majority of claims, those difficulties would likely have been extreme.[233]

As recognised in relation to Stolen Generations and Native Title cases, the Australian legal system's approach to evidence privileges written and recorded evidence over oral traditions, inherently prioritising colonial narratives of history, especially with regards to First Peoples.[234]

For many Stolen Wages claimants, their own oral testimony may be the only available evidence in support of their claims. Where records are available, claimants must rely on the Victorian Government's records of its own misconduct, which are unlikely to demonstrate the full extent of wrongdoing, and inevitably present the historical record from the perspective of the coloniser. As Gray notes regarding Stolen Wages claims generally, '[g]iven the loss of records and the death of key witnesses, the accounting difficulties of tracing "what happened" to individual moneys placed in trust are likely to be almost insuperable'.[235] As *Unfinished Business* observed, the evidentiary burden placed on litigants allows government effectively to profit from hiding its own misconduct: '[i]t would be iniquitous if the failure to keep adequate records or the destruction of records allowed governments to avoid repaying money which is owed to Indigenous people.'[236]

Another practical barrier to litigation is the nature of the court system as a particularly hostile and difficult environment for First Peoples claimants,[237] carrying high risk for re-traumatisation,[238] as has been the experience of many Stolen Generations claimants.[239] This is heightened by many First Peoples' only personal experiences with the legal system being those of policing and criminal charges, the limited awareness of civil rights and remedies among most First Peoples[240] and their 'fundamental distrust of the colonising state'.[241] Whilst in essence monetary claims, the Stolen Wages occurred in the context of broader racist and colonial

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233 *Pearson* (n 114) [11] (Murphy J).

234 See, eg, Cunneen and Grix (n 29); Richard Bartlett, 'An Obsession with Traditional Laws and Customs Creates Difficulty Establishing Native Title Claims in the South: *Yorta Yorta*' (2003) 31(1) *Western Australian Law Review* 35; John Borrows, 'Listening for a Change: The Courts and Oral Tradition' (2001) 39(1) *Osgoode Hall Law Journal* 1 <https://doi.org/10.60082/2817-5069.1480>.

235 Gray, 'Holding the Government to Account' (n 35) 129.

236 *Unfinished Business* (n 3) 125.

237 See, eg, Cunneen and Grix (n 29) 28; Legal and Social Issues Committee, Parliament of Victoria, *Inquiry into Victoria's Criminal Justice System* (Report, March 2022) 151–71.

238 Cunneen and Grix (n 29) 28–32.

239 For instance, in *Williams v The Minister, Aboriginal Land Rights Act 1983* (1999) 25 Fam LR 86, Abadee J found that the 'objectively untrue' and 'exaggerated allegations' in the plaintiff's affidavits reflected 'deleteriously on the reliability and credibility of [the plaintiff's] evidence generally': at 136 [243]. In *Cubillo v Commonwealth [No 2]* (2000) 103 FCR 1, 457–8 [1473], O'Loughlin J agreed with psychiatrist Dr Waters' assessment of the plaintiff, who remarked that 'he could not remember seeing a man who seemed "so beaten as Peter Gunner".'

240 Norman Laing and Larissa Behrendt, 'Aboriginal Access to Civil Law Remedies' (2007) 82 *Precedent* 16.

241 Bethany Butchers, Dani Linder and Amy Maguire, 'Reparations and First Nations' Legal Rights in Australia' (2023) 46(3) *University of New South Wales Law Journal* 791, 808 <https://doi.org/10.53637/PXSA5866>.

government policies which inflicted physical, psychological and emotional abuse against First Peoples. Reliving these experiences whilst navigating the same colonial legal system would place an extreme burden on claimants seeking redress.

Finally, the huge monetary cost of litigation and financial risks involved is a substantial limiting factor for claimants and advocates. The litigation funder in the Queensland class action incurred disbursements and legal costs of approximately $12.6 million, which could have grown to approximately $17 million if the proceedings had been run to the end of trial.[242] In addition, should an adverse cost order have been made against the claimants, the funder could have been liable in excess of approximately $15 million.[243]

There are also important limitations of courts as an avenue for accountability and reparations. Strategic litigation utilises Western legal doctrines to address historical injustices in a manner they were not formulated to do,[244] stretching legal doctrine into previously uncharted territory and can produce inconsistent results. The Stolen Wages is more suited to litigation than some other forms of colonial violence faced by First Peoples, because the liability of the government fits relatively neatly into existing equitable causes of action, and because the particular harm addressed is legally recognised and economically assessable.[245] However, as litigation in this context is part of a broader collective political movement to address systemic harms, its possibilities and utility cannot only be measured in terms of its ability to see a trial to conclusion.

Even where successful, as creatures of the colonial legal system civil actions are constrained in significant ways. The colonial nature of state wrongs – as part of an ongoing campaign to dispossess First Peoples of their land and deprive them of collective self-determination – cannot be captured or addressed in technical arguments about trustee duties and mismanagement of funds. In addition, by engaging with the colonial legal system on its own terms, Stolen Wages litigation risks reinscribing the authority of the colonial state as arbiter of justice – even regarding its own injustices. Courts' judicial and adversarial nature is also inherently limiting:

> The adversarial justice system in Australia … is inherently limiting as it creates an 'us' versus 'them' narrative, which prevents a conciliation approach whereby both parties are looking to resolve injustice. … Knowledges and beliefs that are dissimilar to those of the dominant group are delegitimised and devalued. … colonisers' documentary evidence [is] favoured over the oral histories presented by First Nations knowledge holders.[246]

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242 *Pearson* (n 114) [22] (Murphy J).

243 Ibid.

244 Marc Loth, 'How Does Tort Law Deal with Historical Injustice? On Slavery Reparations, Post-Colonial Redress, and the Legitimations of Tort Law' (2020) 11(3) *Journal of European Tort Law* 181 <https://doi.org/10.1515/jetl-2020-0141>.

245 On the ways in which the Australian 'legal system is currently ill-equipped to recognise, understand, address, and prevent certain kinds of loss, such as the cultural losses that follow removal from family and the environmental losses that impact First Nations Peoples in a unique way', see Butchers, Linder and Maguire (n 241) 793.

246 Ibid 806–7.

Claimants' voices and experiences are considered only in very constrained ways, with the risk that the court's treatment of evidence and of claimants will itself produce further harm.[247]

As a form of reparations, compensation is also limited. Pointing to the poor transformative potential of financial compensation alone, Elise Klein argues:

> With respect to reparations for colonization, slavery and genocide, just compensation should be paid, but without transforming the structures that enable continued coloniality and gendered and racialized dispossession, the accumulation of disadvantages continues. … Colonial logics … endure alongside compensation, even when compensation is awarded for colonial acts, that is, without any attempt to transform settler colonial relations.[248]

Thus, while compensation may form a necessary component of reparations it is insufficient to address the structures and causes of the systemic harms being compensated. In some respects, compensation may even prove to be counter-productive, by not only failing to 'undo colonial practices' but even reinforcing them.[249] As Klein discusses, the use of compensation in '[allowing] the business of colonization to continue as usual' is well demonstrated in the Australian experience.[250] The potential of a legal claim for achieving justice is best appreciated with a view beyond the courtroom and beyond financial recompense, cognisant that litigation is not the only mechanism for seeking accountability or reparations.

Other responses which have been proposed in the context of the Stolen Wages, and other wrongs perpetrated by colonial governments against First Peoples, include apologies,[251] truth-telling,[252] compensation schemes and treaties. Of course, these are not mutually exclusive; beyond the immediate goal of an award of damages, litigation can be used strategically to exert political pressure, create risks and force government to account for its own historical record.[253] Victims of Stolen Wages in Queensland did not receive anything other than token compensation for the money taken from them, until the 2019 class action. This was despite an existing compensation scheme and decades of research and advocacy work.[254] Anthony has argued for 'a federal statutory framework to provide reparations in a more holistic way', rather than First Peoples workers and their descendants being

247 Reflecting on such harms in Native Title claims, Gray has suggested that 'litigation is unlikely to meet the expectations of litigants in the stolen wages cases.': Gray, 'Elephant in the Drawing Room' (n 129) 47.

248 Klein (n 4) 831, 847. See also Butchers, Linder and Maguire (n 241).

249 Klein (n 4) 831–2.

250 Ibid 837–41.

251 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 167–73 (Kevin Rudd, Prime Minister).

252 See, eg, 'About Yoorrook', *Yoorrook Justice Commission* (Web Page) <https://yoorrookjusticecommission.org.au/about/>; Referendum Council, 'Uluru Statement from the Heart' (Statement, First Nations National Constitution Convention, 26 May 2017).

253 *Unfinished Business* remarked that '[e]vidence to the committee indicated that litigation would be more expensive, more time consuming and less just than the establishment of compensation schemes': *Unfinished Business* (n 3) 124.

254 Kidd, *Trustees on Trial* (n 6).

compensated differentially according to their jurisdiction instead of the substance of their claims.[255]

Although no such federal scheme appears likely at this time, Victoria has been engaged in a truth-telling process in the work of the Yoorrook Justice Commission, and at the time of writing is about to commence Treaty negotiations.[256] The potential for litigation to prompt full disclosure about state practices is relevant here, particularly as the State of Victoria has demonstrated its hesitancy to provide full documentation and evidence as requested by Yoorrook.[257] As we have argued, whether through the process of legal discovery or a court order, litigation could explicitly require government to undertake detailed review of records, and provide access to records not currently publicly accessible.

While we await the Commission's report on economic prosperity, the potential demands of First Peoples in this area are eloquently captured by submissions from Aboriginal Community-Controlled Organisations such as the Victorian Aboriginal Legal Service ('VALS'). In stressing the importance of outstanding reparations for slavery or Stolen Wages, VALS' submission to Yoorrook applies a longer-term and collective lens to the harms caused by these wrongs:

> Reparations through Treaty should include payments for the descendants or relevant Traditional Owner groups, that provide restitution for slavery and stolen wages. Slavery and stolen wages did not only impact the individuals that were subjected to these practices, but it also impacted their kin and community, for generations. The economic disadvantage that large numbers of our people continue to live with is, in part, a direct result of slavery and stolen wages. … When calculating reparations, it is important to factor in inflation and opportunity costs.[258]

An appreciation of this broader historical context, and First Peoples' broader ongoing struggle for transformative change and self-determination in Victoria, is essential to understanding the potentials and limitations of any Stolen Wages litigation.

## V CONCLUSION

In this article, we have mapped the contours of potential litigation by First Peoples against the State of Victoria, for historical Stolen Wages. Part II outlined the history of the Stolen Wages in Victoria, demonstrating how laws enacted by the Victorian Government between 1869 and 1975 empowered its agencies and officers to withhold wages and entitlements of First Peoples workers, and what

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255 Thalia Anthony, 'Indigenous Stolen Wages: Historical Exploitation and Contemporary Injustice' (2013) 118 *Precedent* 42, 45.

256 'Pathway to Treaty: Find out about Victoria's Nation-Leading Treaty Process', *First Peoples – State Relations Victoria* (Web Page, 18 July 2024) <https://www.firstpeoplesrelations.vic.gov.au/treaty-process>.

257 Leading to a Memorandum of Understanding between the Commission and the State: see *Protocol Between the Yoorrook Justice Commission and the Crown in Right of the State of Victoria in Relation to Data and Documents to be Provided by the Crown in Right of the State of Victoria*, signed 29 March 2023 (Memorandum of Understanding).

258 Victorian Aboriginal Legal Service, Submission to Yoorrook Justice Commission, *Economic Prosperity* (30 April 2024) 10.

is known about how these policies operated in practice. Part III analysed the potential liabilities of the Victorian Government in equity, for breach of trust and fiduciary duties, while canvassing various doctrinal issues relevant to these claims. Overall, we see that despite complex doctrinal requirements, it is arguable that trust obligations were created under the relevant legislative schemes and/or that the Victorian Government owed fiduciary duties to First Peoples workers. As many of these obligations and duties were breached as a matter of course, over many decades, the Victorian Government is arguably liable in equity, for substantial sums. In Part III, we also briefly detailed potential remedies available to claimants, before considering barriers and limitations of litigation in Part IV.

Despite the longstanding efforts of First Peoples for accountability and justice, like many other aspects of Australia's colonial governance and dispossession the Stolen Wages is a systemic injustice which is yet to be properly addressed. This is especially true in Victoria. Recommendations from *Unfinished Business*, nearly two decades past, have been largely ignored, and First Peoples remain uncompensated for wages and entitlements withheld from them. Despite the poor state of surviving historical records from the years of government bureaucracy under the Protection Acts, the available evidence indicates that wages and entitlements were indeed withheld and mismanaged in Victoria, as in other states. Stolen Wages claims in other jurisdictions have identified how these practices expose governments to liability for breaches of equitable obligations as trustees or fiduciaries. As we have outlined, the Victorian Government is arguably liable for both, meaning claimants may seek compensation via the courts.

Of particular concern with regards to governmental responses to the Stolen Wages has been the lack of government accountability for the long-term harm and suffering brought about by its own policies. Outside of states where compensation schemes have been established under extreme political pressure and threat of litigation, Australian governments have failed to act on the Stolen Wages. Even where compensation schemes have been established, First Peoples have had little agency in their establishment or operation, and they have been widely criticised as inadequate.

After a longstanding struggle for accountability and redress in this area, the work of Yoorrook Justice Commission and the Treaty process currently underway in Victoria signal an opportunity for the Stolen Wages finally to be addressed. While they inevitably have complexities and limitations of their own, these processes are not subject to the same constraints and barriers faced by First Peoples claimants seeking redress through the courts. As we have outlined, civil claims for colonial harms risk re-traumatising First Peoples, reinscribing colonial state authority and even legitimising ongoing colonial violence. And while compensation is essential for reparations, its transformative potential is limited. Nonetheless, civil claims can operate in tandem with other avenues of accountability and reparations, including by pressuring states to reveal historical evidence and face the scale of their unpaid debts to First Peoples. It is in this context that we hope the detailed analysis in this article may be useful for First Peoples in Victoria in their ongoing struggle for reparations.