



Northern Territory national emergency response Bills 2007—interim Bills Digest

Law and Bills Digest Section
Social Policy Section

Note

For the final Bills Digests on the package of Bills covered by this *interim* Bills Digest, please see the following:

[Northern Territory National Emergency Response Bill 2007](#),

Bills Digest, no. 28, 2007–08

[Families, Community Services and Indigenous Affairs and Other Legislation Amendment \(Northern Territory National Emergency Response and Other Measures\) Bill 2007](#),

Bills Digest, no. 21, 2007–08

[Social Security and Other Legislation Amendment \(Welfare Payment Reform\) Bill 2007](#),

Bills Digest, no. 27, 2007–08

[Appropriation \(Northern Territory National Emergency Response\) Bill \(No. 1\) 2007-2008](#),

Bills Digest, no. 24, 2007–08

[Appropriation \(Northern Territory National Emergency Response\) Bill \(No. 2\) 2007-2008](#),

Bills Digest, no. 25, 2007–08

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Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007

Northern Territory National Emergency Response Bill 2007

Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007

Date introduced: 7 August 2007

House: House of Representatives

Portfolio: Families, Community Services and Indigenous Affairs

Links: The relevant links to the Bill, Explanatory Memorandum and second reading speech can be accessed via BillsNet, which is at <http://www.aph.gov.au/bills/>. When Bills have been passed they can be found at ComLaw, which is at <http://www.comlaw.gov.au/>.

Note

Given the unusually short time-frames which have been allowed for parliamentary consideration of this suite of Bills, the decision has been made to issue this interim Bills Digest with a view to issuing more detailed individual Digests in due course. This document necessarily reflects the short time-frames allocated to perusing the materials.

Purpose

The purpose of each individual Bill will be discussed along with the main provisions.

Overview

The provisions in the present legislative package flow from measures announced by the Prime Minister and the Minister for Families, Community Services and Indigenous Affairs on 21 June, in response to the *Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, 2007, Ampe Akelyernemane Meke Mekarle "Little Children are Sacred"*- authored by Pat Anderson and Rex Wild (Anderson/Wild report).¹ Many commentators have noted, however, that there appears to be very little overlap between the 97 recommendations of the NT report and the measures

¹ http://www.nt.gov.au/dcm/inquirysaac/pdf/bipacsa_final_report.pdf

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which the Federal Government announced and to which it now seeks to give effect. Most of the recommendations in the NT report were addressed to the NT Government. The Federal Government has said that it is responding to the issue raised in the NT report, not to its recommendations. The Federal measures may not be called for in the NT report, but that need not mean that these measures are inconsistent with those being recommended in the report. It is noted that the authors of the report have indicated their discontent with the federal Government's response.

The Anderson/Wild report and the response

Anderson and Wild have repeatedly stressed the 'critical importance of governments committing to genuine consultation with Aboriginal people in design initiatives for Aboriginal community, whether these are in remote, regional or urban settings' (see Recommendation 1). Such consultation has not featured prominently in the Federal intervention.

An authoritative summary of the Anderson/Wild report recommendations said:

The Anderson/Wild report found that Aboriginal people wanted to engage with this process and were "committed to solving problems and helping their children" in the face of a serious, widespread and often unreported problem of sexual abuse. They found the situation to be a "reflection of past, current and continuing social problems which have developed over many decades," and that the "combined effects of poor health, alcohol and drug abuse, unemployment, gambling, pornography, poor education and housing, and a general loss of identity and control have contributed to violence and to sexual abuse in many forms". They highlighted the need for existing programs to work more efficiently to "break the cycle of poverty and violence," and to improve "coordination and communication between government departments and agencies" to end the current "breakdown in services and poor crisis intervention." Further, they declared that these programs must have adequate resources and a long-term commitment from all governments if they are to succeed.

A number of recommendations were specific to Northern Territory institutions. For example, recommendations were made with respect to the structural reorganisation of the DHCS Family and Community Services Program, and the creation of a Commissioner for Children and Young People. The report also focused considerable attention on problems concerning the connection between disclosure and the legal processes. Attention was also given to dealing with some of the social determinants of health such as the lack of employment opportunities and inadequate housing as well as strategies to produce more resilient communities with a particular focus on the role of education.²:

² Ian Anderson, Professor of Indigenous health and director of the Centre for Health & Society and Onemda VicHealth Koori Health Unit at the University of Melbourne. Australian Policy Online (www.apo.org.au), 26/6/2007 -

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He went on to argue that ‘None of the ... measures announced by Prime Minister Howard are... to be found in the strategies recommended by the Anderson/Wild report’:

The Australian government response is framed as a top-down crisis intervention ... It is characterised as a short-term response to be followed by medium- and long-term strategies – none of which are clear at this stage. So, for example, whilst the Anderson/Wild report recommended strategies to increase policing in remote communities in the long term the Howard plan only extends for six months. ... Many of the government’s proposals – for instance, scrapping the permit system, assuming control of Aboriginal land and instituting welfare reform – are simply not raised in the Anderson/Wild report. No reason is given as to how measures such as scrapping the permit system will address the problem of child sexual abuse. Conversely, a number of the issues that are raised in the report – in relation to community justice process, education/awareness campaigns in relation to sexual abuse, employment, reform of the legal processes, offender rehabilitation, family support services or the role of communities, for example – have not, as yet, been addressed by the Australian government response.

There are significant differences in the recommendations that relate to those issues that are canvassed both in the Australian government approach and the Anderson/Wild report. For example, there are nine recommendations in the Anderson/Wild report – with numerous sub-components in relation to alcohol – none of which include an immediate introduction of widespread alcohol restrictions. Many remote communities are already dry and this strategy could be incorporated into the recommended development of community alcohol plans. Current evidence suggests that enforced alcohol restrictions, in the absence of broader strategies to deal with addictions, simply reduce supply and tend to shift problem drinking into unregulated areas, such as Alice Springs town camps. As a result, a single measure such as enforced alcohol restriction may, in fact, result in increased harm from violence and abuse in these communities.

The Secretary of the Department of Treasury, Ken Henry, has also commented on the degree to which consultation and engagement have been missing from the setting of the policy direction:

To achieve progress in Indigenous development, there is a need for increased ownership, by Indigenous people, of both the problems and the policy solutions...

People who are affected by policy have a *right* to be involved in its development – that is no more than a statement of the primary rationale for democracy. And... people who are affected by policy also have a *responsibility* to be involved in its development.

http://www.apo.org.au/webboard/comment_results.shtml?filename_num=161613. For a different comparison between the NT report’s recommendation and the Federal intervention measures see <http://www.crikey.com.au/Politics/20070622-gov-vs-report.html>

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The Aboriginal and Torres Strait Islander Social Justice Commissioner 2007 *Social Justice Report* has made similar observations:

The greatest irony of this is that it fosters a passive system of policy development and service delivery while at the same time criticising Indigenous peoples for being passive recipients of government services!³

He also suggested that the Federal Government's response had left many questions unanswered. For example:

First, on what basis will the government intervene in one community as opposed to another? As Rex Wild and Pat Anderson's report reveals, there is a lack of statistics that reveal the true extent of the problem. So, in the absence of any situational and needs analysis, how does the government decide?

Second, and related to this question, is how will the government decide the appropriate approach for the specific needs of individual communities? I am concerned about a mismatch that has already revealed itself between the public debate on these issues and the findings of the *Little Children are sacred* report.

Third, and of critical importance, is what role does the community have in this process? I think it is intentional that the government has described its announcements as an 'intervention' as opposed to a 'partnership' with Indigenous communities. We are now coming on three years since the introduction of the new arrangements – so why has the government not built relationships with communities sufficiently that they can approach the announcements as a partnership?

Fourth, if the government intends to make lasting change – how will it know when such change has occurred? In the absence of regional and local level planning how will the specific issues facing communities, and the connections between communities on a regional basis, be addressed? This is something that incidentally was intended to be a key feature of the new arrangements but which has by and large failed to materialise as yet.

And fifth, how does the NT announcement fit with the processes that are continuing to be introduced as part of the 'new arrangements' to date? Will it require another re-engineering of processes that are yet to be bedded down? For example, the government has released an evaluation plan for whole-of-government activities to address the critical problem of lack of baseline data. The evaluation plan identifies that in the coming year there will be reviews of some of the communities who have previously been designated as communities in crisis, and baseline data will be established for some new priority communities. What is the impact of the NT announcement on this plan? Does it re-direct these evaluation activities for new

³ In his speech 'Continuity and change through the new arrangements – Lessons for addressing the crisis of child sexual abuse in the Northern Territory', launch of the Social Justice Report and Native Title Report 2006, Tuesday, 3 July 2007, Turner Hall, Sydney Institute of TAFE, Ultimo.

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communities to the NT rather than to communities in other states, or will there be an expansion of the scope of the evaluative framework? This would appear necessary to be able to effectively understand the success or otherwise of the measures to be taken.

Similarly, will the government seek to utilise and expand its program of Shared Responsibility Agreements and Regional Partnership Agreements as tools to implement its NT announcements? It has previously foreshadowed the importance of these as primary mechanisms for engagement. As the *Social Justice Report* notes, these processes offer the potential to embed a community development approach into the new arrangements, but there is no evidence of this occurring to date.

The suite of NT emergency legislation does not appear to answer any of these questions.

Commissioner Calma also noted that ‘We are not starting from scratch in dealing with this issue – despite the rhetoric’ and suggested that the government was failing ‘to utilise the planning tools and action plans developed by the ATSIC Regional Councils and through other planning forums for health, housing, criminal justice and so on’. Many ATSIC Region Councils had, for example, produced a detailed Family Violence Policy and Action Plan.

Note

Given the time-constraints imposed on this interim Digest by the speed of the parliamentary process, we provide an initial summary of two legal issues arising from the Bills, namely racial discrimination and just-terms discrimination. We then provide an analysis of individual Bills insofar as we were able to address the major issues.

Racial Discrimination Act 1975

There is a legislative prohibition on racial discrimination contained in the *Racial Discrimination Act 1975* (the RDA). However this package of legislation suspends part of the operation of the RDA. It treats people differently on the grounds of race (the reliance on geographic location as the feature differentiating among Australian residents would fall within the definition of prohibited ‘indirect discrimination’ – i.e. the geographic feature will predominantly affect members of a particular race. It may still, arguably, qualify as direct discrimination). The general prohibition has always contained a recognition that ‘special measures’ are legitimate to promote the position of members of a particular race when that race is disadvantaged. Special measures are also referred to as ‘affirmative action’ or ‘positive discrimination.’

Accepted special measures have been policies or actions by organisations or governments which recognise that the past or present disadvantage suffered by certain groups based on their race has affected their access to equality of opportunity and basic human rights.

The Human Rights Commission has used the restriction of sales of alcohol to some Aboriginal people in the Northern Territory as a classic example of a special measure. The

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agreement they have recognised was established between the local Pitjantjajara people, the relevant roadhouse proprietor and the federal Race Discrimination Commissioner and was in response to a request from the Pitjantjajara Council to the Commission to seek assistance in dealing with the escalating problem of alcohol abuse within its community. It is important to note that this special measure was made with the acceptance, and at the request of, the community involved.⁴

Special measures are generally kept in place until the group affected has been able to reach 'substantive' equality with other members of the community.

The measures in the Social Security and other Legislation Amendment (Welfare Payment Reform) Bill 2007 (the Welfare Bill) are defined in the Bill as special measures.

The Bill is not proposing to allow judicial scrutiny of the question as to whether the measures qualify as a special measure, pre-empting the matter with the declaration that they are a special measure. To the extent that a subsequent Bill has the legislative capacity to over-ride the original RDA this may be within the legislative power of the Commonwealth, however the RDA's constitutional basis depends on the relevant UN treaty which is the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD).⁵

Article 1(4) of CERD, from which the RDA's special measures are concerned, provides as follows:

Special measures taken for the sole purpose of securing adequate advancement of certain racial or ethnic groups or individuals requiring such protection as may be necessary in order to ensure such groups or individuals equal enjoyment or exercise of human rights and fundamental freedoms shall not be deemed racial discrimination, provided, however, that such measures do not, as a consequence, lead to the maintenance of separate rights for different racial groups and that they shall not be continued after the objectives for which they were taken have been achieved.

The Australian courts have interpreted this definition as containing four elements:

- a special measure must confer a benefit on some or all members of a class;
- the membership of the class must be based on race, colour, descent, or national or ethnic origin;

4.

5. Adopted and opened for signature and ratification by General Assembly resolution 2106 (XX) of 21 December 1965, entry into force 4 January 1969. Australia ratified on 30 Oct 1975.

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- a special measure must be for the sole purpose of securing adequate advancement of the beneficiaries in order that they may enjoy and exercise equally with others human rights and freedoms; and
- the circumstances of the special measure must provide protection to the beneficiaries which is necessary in order that they may enjoy and exercise human rights and freedoms equally with others.⁶

Furthermore a special measure must not be continued after the objectives for which it was taken have been achieved.

Looking at these criteria we see the central question is: does the measure confer a benefit on some or all members of a class. The class to be benefited must be a racial group or individuals belonging to the group. In making this assessment, courts have looked to both the benefits of a measure and any costs or disadvantages borne by the beneficiaries of the measure.

The Welfare Bill proposes to prevent indigenous families from having unfettered access to their social security payments. The assessment of whether this will confer a benefit on an Indigenous community or on individuals in that community would traditionally be an assessment conducted by the courts, which would consider the impact of the conditions imposed by the agreement on individuals and on the community. The Government's choice to use a stipulative definition regarding 'special measures' may circumvent such a consideration.

If a Court were to conclude that there is, in fact, no benefit conferred it would be inconsistent with the character of a special measure. Difficult issues of fact would arise here, and close scrutiny of the arrangement and its impact would be required to consider such an argument.

A special measure must have the sole purpose of securing adequate advancement of the beneficiaries. There are a number of sources from which the purpose of a special measure can be discerned. The purpose of a measure is discerned from its terms and from the operation which it has in the circumstances to which it applies. Any fact which shows what the persons who took the measure intended it to achieve casts light upon the purpose for which it was taken provided the measure is not incapable of achieving what is intended.

The purpose of securing adequate advancement for a racial group is not necessarily established by showing that the person who takes the measure does so for the purpose of conferring a benefit, if the group does not seek or wish to have the benefit. In *Gerhardy v*

6. *Gerhardy v Brown* (1985) 159 CLR 70 at 126, as adapted, and quoted by the Human Rights Commission,
http://www.hreoc.gov.au/social_justice/sjreport04/Appendix2RDAandSRAs.html

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Brown, Brennan J stated that the ‘wishes of the beneficiaries for the measure are of great importance (perhaps essential) in determining whether a measure is taken for the purpose of securing their advancement’. Brennan J went on to state:

The dignity of the beneficiaries is impaired and they are not advanced by having an unwanted material benefit foisted on them. An Aboriginal community without a home is advanced by granting them title to the land they wish to have as a home. Such a grant may satisfy a demand for land rights. But an Aboriginal community would not be advanced by granting them title to land to which they would be confined against their wishes.⁷

Importantly, the terms and conditions upon which the benefit is conferred have been relevant to the court’s assessment of the purpose of the agreement. The wishes of the Indigenous community with whom the agreement was made may also be relevant. Difficult issues have arisen for a court’s consideration where the wishes or views of the Indigenous community are not uniform. There is also the distinction to be made that the Welfare Bill’s measures do not immediately constitute a ‘material benefit’, although it may be seen as giving a benefit to those children with inadequate financial resources due to parental mismanagement of their funds.⁸

The other question is whether the changes to the Act proposed in this suite of Bills could be seen as severing the necessary connection between the legislative head of power used to enact the RDA (i.e. an implementation of an international treaty under the foreign affairs power).⁹ By re-defining ‘special measures’ according to its own legislative criteria the Government may be stepping outside of the international understandings regarding what constitutes a ‘special measure.’ While it is well established that the Commonwealth is not bound to comply with international law, the RDA has depended on international law for its constitutional validity. Severing the link by introducing, effectively, a new meaning of ‘special measures’, as defined by the Government’s stipulative use of the term may lead to unintended consequences.

7. *Gerhardy v Brown* (1985) 159 CLR 70 at 135.

8. Considerable amounts of the above material have relied on the Human Rights and Equal Opportunities Commission’s material, particularly from ATSIJSC Social Justice Report 2004 at http://hreoc.gov.au/social_justice/sjreport04/Appendix2RDAandSRAs.html

9. The well established constitutional principle that the stream cannot rise above its source maybe applicable in this case, *Australian Competition and Consumer Commission v CG Berbatis Holdings Pty Ltd* [2003] HCA 18; *Residual Assco Group v Spalvins* [2000] HCA 33; 202 CLR 629; 172 ALR 366; 74 ALJR 1013 (13 June 2000).

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International Scrutiny

At the most recent Reporting session of the Australian Government the Committee overseeing the Convention commented on the lack of an entrenched protection of the principle of non-discrimination:

The Committee, while noting the explanations provided by the delegation, reiterates its concern about the absence of any entrenched guarantee against racial discrimination that would override the law of the Commonwealth. (article 2)

The Committee recommends to the State party that it work towards the inclusion of an entrenched guarantee against racial discrimination in its domestic law.¹⁰

Relations between the Government and the Committee have had some well-publicised difficulties, with the Committee challenging a number of Commonwealth policies over the last decade.¹¹ It is unlikely that the measures suspending or modifying the operation of the RDA are likely to find favour with the Committee.

Just terms

There are two provisions relating to the acquisition of property in the national Emergency Response Bill. Some of the relevant issues are discussed here. The [Northern Territory \(Self-Government\) Act 1978](#) provides for acquisition of property to be on just terms as follows:

50 Acquisition of property to be on just terms

(1) The power of the Legislative Assembly conferred by section 6 in relation to the making of laws does not extend to the making of laws with respect to the acquisition of property otherwise than on just terms.

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10. Consideration of Reports Submitted by States Parties under Article 9 of the Convention, Concluding observations of the Committee on Australia CERD/C/AUS/CO/14, March 2005. Committee on the Elimination of Racial Discrimination, Sixty-sixth session, 21 February - 11 March 2005. The source of the Concluding Observations are the advance unedited version issued by the Committee, <http://www.humanrights.gov.au/cerd/report.html>.
 11. See, for instance, the Committee's Decision 2 (54) of 18 March, pursuant to Article 9 (2) of the Convention, issued in 1999 and the Government's response at <http://www.faira.org.au/cerd/government-comments.html>; and Decision 2 (54) on Australia, 18/03/99 A/54/18,para.21(2) at <http://www.unhchr.ch/tbs/doc.nsf/MasterFrameView/a2ba4bb337ca00498025686a005553d3?Opendocument>

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(2) Subject to section 70, the acquisition of any property in the Territory which, if the property were in a State, would be an acquisition to which paragraph 51(xxxi) of the Constitution would apply, shall not be made otherwise than on just terms.

What are just terms?

In [Grace Bros Pty Ltd v Commonwealth](#) (1946) 72 CLR 269, Dixon J said that the inquiry should not be directed just to the question of whether the individual owner is placed in a situation in which in all respects he will be as well off as if the acquisition had not taken place.

The inquiry must rather be whether the law amounts to a true attempt to provide fair and just standards of compensating or rehabilitating the individual considered as an owner of property, fair and just as between him and the government of the country. I say “the individual” because what is just as between the Commonwealth and a State, two Governments, may depend on special considerations not applicable to an individual.¹²

According to Blackshield and Williams,¹³ ‘just terms’ does not necessarily require that a compensation package be presented as part of the acquisition scheme. It is sufficient that the scheme provides adequate procedures for determining fair compensation. The High Court can scrutinise such procedures. Thus in the *Tasmanian Dams Case* Deane J found the compensation provision in the *World Heritage Properties Conservation Act 1983* inadequate because of the intrinsic unfairness in the procedure which in effect ensured that unless a claimant agreed to accept the terms offered, he will be forced to wait years before he could get a court determination. He said that section 17:

is quite unacceptable and unfair according to the ordinary standards of “fair dealing between the Australian nation and an Australian State or individual in relation to the acquisition of property for a purpose within the national legislative competence”: *Nelungaloo Pty Ltd v Commonwealth*¹⁴

Quick and Garran¹⁵ have remarked that it was legitimate to take into account any offsetting benefits the owner realised as a result of the scheme involving the expropriation, but in some cases the High Court has taken a view more favourable to the property owner. For example in *Georgiadis*, Brennan J stated:

12. [Grace Bros Pty Ltd v Commonwealth](#) (1946) 72 CLR 269 at 290.

13. A.R. Blackshield and G. Williams, *Australian Constitutional Law and Theory*, 4th edition, Federation Press, Annandale, 2006, p.1289.

14. [Commonwealth v Tasmania](#) [1983] HCA 21; (1983) 158 CLR 1 at 291.

15. J. Quick and R. Garran, *The annotated constitution of the Australian Commonwealth*, Angus & Robertson, Sydney, p. 641.

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In determining the issue of just terms, the court does not attempt a balancing of interests of the dispossessed owner against the interests of the community at large. The purpose of the guarantee of just terms is to ensure that the owners of property compulsorily acquired by government presumably in the interests of the community at large are not required to sacrifice their property for less than its worth. Unless it is shown that what is gained is full compensation for what is lost, the terms cannot be found to be just.¹⁶

Section 51(xxxi) of the Constitution

The law surrounding section 51(xxxi) of the Constitution is complex in relation to its application to the territories. This is for two reasons, that section 51(xxxi) is not expressed to apply to territories, only the states, and secondly because of the plenary nature of section 122 of the Constitution, which allows the Commonwealth unlimited power to make laws for the government of any territory.

For example, it was long thought that section 51(xxxi) had no application to acquisitions of property in the Northern Territory. This flowed from the High Court's interpretation of section 122 ('the territories power') in *Teori Tau*, a unanimous 1969 decision which was upheld in a number of subsequent cases well into the 1990s.¹⁷ However, in the *Newcrest* decision in 1997, a majority of four to three held that the constitutional requirement of 'just terms' could apply in the Northern Territory. Three judges over-ruled *Teori Tau*, while Toohey J refused to do so but substantially narrowed its application.¹⁸ The upshot is that the application of section 51(xxxi) in the Northern Territory is not a foregone conclusion, but that present authority leans heavily towards its application to acquisitions under Commonwealth law where they are referable to a legislative power other than the territories power in section 122.

This issue was recently discussed in *Bennett v Commonwealth* (2007) 234 ALR 204 at paragraph 194 of the decision showing that the area is still open for debate.

Teori Tau v The Commonwealth was considered in *Newcrest Mining (WA) Ltd v The Commonwealth*, which was concerned with mining leases over land in the Northern Territory. Commonwealth legislation purported to operate on the land contained within those leases. A majority of the Court (Toohey, Gaudron, Gummow and Kirby JJ) held that s 51(xxxi) fettered the Commonwealth's legislative power generally, while three Justices of the majority (Gaudron, Gummow and Kirby JJ) would have overruled *Teori Tau v The Commonwealth* and found that s 51(xxxi) fettered s 122 as well. Toohey J, however, thought "it would be a serious step to

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16. [Georgiadis v Australian and Overseas Telecommunications Corporation](#) [1994] HCA 6; (1994) 179 CLR 297 at 310–1.
 17. [Teori Tau v Commonwealth](#) [1969] HCA 62; (1969) 119 CLR 564.
 18. [Newcrest Mining \(WA\) Limited v Commonwealth](#) [1997] HCA 38; (1997) 190 CLR 513.

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overrule a decision which has stood for nearly thirty years and which reflects an approach which may have been relied on in earlier years”. His Honour was therefore unwilling to overrule it.¹⁹

Northern Territory National Emergency Provisions

There are two provisions relating to compensation for acquisition of property in the main bill, the National Emergency Response Bill, namely **proposed section 60** and **proposed section 134**. The latter is a provision to cover the entire Bill apart from **Part 4**, which deals with the acquisition of rights, titles and interests in land and Part 4 is covered by **proposed section 60**. **Proposed section 134** is in similar terms and will not be dealt with at this stage.

Proposed section 60 disapplies subsection 50(2) of the Self Government Act. This means that the in lieu of a provision that reflects the standard Constitutional position a new formula which has not been the subject of judicial scrutiny in this context is being proposed.

Proposed subsection 60(2) states:

However, if the operation of this Part, or an act referred to in paragraph (1)(b) or (c), would result in an acquisition of property to which paragraph 51(xxxi) of the Constitution applies from a person otherwise than on just terms, the Commonwealth is liable to pay a reasonable amount of compensation to the person.

This subsection seems to have three possible distinctions:

- It does not specifically apply paragraph 51 (xxxi) to the acquisition
- It does not require just terms
- If the acquisition is otherwise than on just terms, the Commonwealth is liable to pay a ‘reasonable amount of compensation’, as distinct from ‘just terms’

Proposed subsection 60(3) provides that in the event that agreement cannot be reached on the amount of compensation, the owner of the property can commence proceedings.

Proposed section 61 requires the court to take into account certain things in determining what is a reasonable amount of compensation that is payable in relation to land including rent paid by the Commonwealth, amounts of compensation paid under the Special Purposes Leases Act or the Crown Lands Act and any improvements to the land funded by the Commonwealth, including improvements to buildings or infrastructure.

19. [Bennett v Commonwealth](#) [2007] HCA 18 at 195.

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The proposed compensation scheme could be read as providing that the Commonwealth should provide just terms but if not, then a reasonable amount of compensation is to be paid. Proposed section 61 gives some guide as to how this can be determined.

Note that when the Valuer-General is tasked to determine what is a reasonable amount of rent to be paid by the Commonwealth the Valuer-General must not take into account the value of any improvements in the land (**subsection 62(4)**).

Summary of just-terms issues

If subsection 50(2) were not suspended, acquisition of property in the NT would be on just terms pursuant to subsection 50(2) of the Self Government Act. This would be interpreted in accordance with the common law, that is, it must be fair and even if an amount is not specified, there should be a fair and just procedural framework for the determination of compensation.

Subsection 50(2) has been suspended by the Commonwealth (which can be done as the Self Government Act is a creature of the Commonwealth Parliament). There is some strong judicial comment that section 51(xxxi), the just terms provision of the Constitution, may have application in the NT, despite *Teori Tau* not being explicitly overturned.

It is open on the drafting that just terms should be paid in accordance with the common law meaning of the expression, and that the reasonable compensation must be paid. The Court must take into account the matters referred to in **proposed section 61** in deciding this question.

In explaining the operation of the similar compensation provision, **proposed section 134** the Explanatory Memorandum states:

Therefore, where an acquisition of property that occurs as a result of the operation of the terms of this bill is excluded from the requirement under subsection 50(2) of the *Northern Territory (Self Government) Act 1978*, **subclause 134(2)** nevertheless requires the payment of a reasonable amount of compensation.

This suggests that the intention is for reasonable compensation as distinct from just terms.

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Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007

Schedule 1

Welfare payments are inalienable

Generally, welfare payments are inalienable. This applies to the income support and income supplement payments provided under the *Social Security Act 1991* (SSA) and also to the family assistance payments provided under the *A New Tax System (Family Assistance) Act 1999* (FAA).

Payments under the SSA are inalienable

Payments provided under the SSA are inalienable. Section 60 of the *Social Security (Administration) Act 1999* (SSAA) refers.²⁰

Section 61 of the SSAA allows the recipient to elect to pay some part of their payment (deductions) to another party, for example to an energy or electricity provider. Section 238 allows deductions to be made to the Taxation Commissioner or the Child Support Agency for maintenance owed. Sections 1231 and 1234A of the SSA allow deductions to recover debts, section 1231 for debts arising under the SSA and section 1234A for deductions for other debts with the person's consent. Other than these specific exemptions, payments must be provided to the qualified person.

Payments under the FAA are inalienable

There are also provisions ensuring payments provided under the FAA are inalienable. Section 66 of the *A New Tax System (Family Assistance) (Administration) Act 1999* (FAAA) refers.²¹

20. Protection of social security payment

60. (1) A social security payment is absolutely inalienable, whether by way of, or in consequence of, sale, assignment, charge, execution, bankruptcy or otherwise.

60. (2) This section has effect subject to:

(a) sections 61 and 238 of this Act; and

(b) sections 1231 and 1234A of the 1991 Act.

21. Protection of payments under this Part

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Inalienability

Inalienability basically means that where a person is qualified to a payment and entitled to an amount of payment, the payment is their legal right and cannot be not provided at all or provided to someone else.

The *Social Security and Other Legislation Amendment (Welfare Payment Reform) Bill 2007* will add another circumstance where, notwithstanding the current inalienability of payment provisions in the SAA and the FAAA, there will be circumstances where an individual qualified to receive a payment will not be provided with that payment, in whole or in part. This will be where the income management regime (IMR) provisions in this Bill are to apply.

Income Management Regime provisions

Who are the IMR provisions to generally apply to

In the broad, a person may become subject to the IMR provisions in this Bill for one of the following reasons:

- for the protection of a child of the person,
- the person is subject to the jurisdiction of the Queensland Commission and the Commission request the IMR provisions to apply,
- the person is a resident of a specified area in the Northern Territory, or
- the person's child is subject to the unsatisfactory child attendance situation.

In what individual circumstances will the IMR provisions be applied to individuals

Generally, the specific individual circumstance that might arise where a person might be considered for and subject to the IMR provisions in this Bill are not set out in this Bill. The details of the circumstances where an individual might be subjected to the IMR provisions are to be set out in various different Legislative Instruments to be made by the Minister.

66.(1) Payments of the following are absolutely inalienable, whether by way of, or in consequence of, sale, assignment, charge, execution, bankruptcy or otherwise:

- (a) family tax benefit;
- (b) family tax benefit advances;
- (c) maternity payment;
- (d) maternity immunisation allowance;
- (e) child care benefit;
- (f) payments of advances under section 219R;
- (g) one-off payment to families.

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For the protection of a child of the person

A person may be subject to the IMR provisions for reasons of child protection of a child. The child protection IMR provisions will require a State or Territory child protection officer to request the IMR provisions to be applied and then applied where, amongst other things, subject to principles to be set out in a Legislative Instrument to be made by the Minister.

The person is subject to the jurisdiction of the Queensland Commission

Where the Queensland Commission requests in writing that the Secretary place the person under the IMR provisions, the IMR provisions are to generally be applied. The IMR provisions are to be applied unless the case involves circumstance where they should not be applied. These circumstances are not set out in the Bill but are to be set out in principles in a Legislative Instrument to be made by the Minister.

The person is a resident of a specified area in the Northern Territory

Where a person is a resident of a specified area in the Northern Territory (specified in this Bill), the Secretary can determine that a person is subject to the IMR provisions in this Bill. The Secretary must have regard to, amongst other things, principles to be set out in a Legislative Instrument to be made by the Minister. These principles are not set out in the Bill.

Child attendance

For the child attendance at school provisions, the IMR provisions can be applied where it is considered there is unsatisfactory school attendance situation. The Secretary will be empowered to declare the IMR should apply to a person subject to amongst other things, principles to be set out in a Legislative Instrument to be made by the Minister.

The Secretary will also be able to issue to a parent a requirement to provide documentary evidence about the child's attendance at school. Where the notice is not complied with, the Secretary can determine the child has not been attending school, subject to provisions to be set out in a Legislative Instrument to be made by the Minister.

Comment

The provisions in this Bill only really set out in the broad circumstances where the IMR provisions are to be applied. The specific details of where an individual person can be subjected to the IMR provisions is yet to be seen as they are to be described in principles to be set out in a Legislative Instrument made by the Minister.

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IMR elements and effects on payments to individuals

How long will IMR be applied

There is no set period ascribed in the Bill as to how long an IMR is to apply to an individual. The period an IMR can be applied will be set out in principles to be set out in a legislative instrument made by the Minister.

Payment deductions or withholdings

There are various different payment deduction or payment withdrawal (not paid) provisions in the Bill. The amounts to be deducted or withdrawn vary depending on whether the origins of the IMR for the individual refer to a Northern Territory resident, a request by the Queensland Commission, or a child protection case or a child non attendance at school case.

In child protection cases, 100 per cent of the payment may be withheld. In other cases, only 50% of the payment deducted or a different deduction amount to be described in a Legislative Instrument by the Minister.

Schedule 3 Northern Territory CDEP transitional payment

The Community Development Employment Projects (CDEP) commenced in 1977. Under the scheme, members of participating Aboriginal and Torres Strait Islander communities or organisations can forgo any Centrelink Income Support benefit (except Abstudy or full time student Youth Allowance) for a wages grant paid to the community. Although CDEP has been referred to as a ‘work for the dole’ scheme there are significant differences including the ability of all welfare recipients to participate and also a more generous income allowance on top of CDEP wages than available to Newstart recipients.

The CDEP scheme was funded and administered by the Aboriginal and Torres Strait Islander Commission (ATSIC). In monetary terms it was ATSIC's largest program with a total budget of \$484 million in 2002–2003. Since July 2004 the program has been funded and administered by the Department of Employment and Workplace Relations (DEWR).

In February 2007 the Minister for Employment and Workplace Relations, the Hon. Joe Hockey MP, announced changes to the Community Development Employment Projects (CDEP) programme to take effect from 1 July 2007. These changes included funding additional Structured Training Employment Projects (STEP) brokers instead of funding the CDEP programme in urban and major regional areas;²² the closure of all Indigenous

22. The urban and regional Community Development Employment Projects which will cease to be funded from 1 July 2007 are listed on the DEWR website:

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Employment Centres (IECs) because of the strengthened link between Job Network and CDEP organisations; and the introduction of a 26 week CDEP placement incentive payment for CDEP service providers who place participants into long term work.

In Senate estimates DEWR officials stated that about 5,000 CDEP participants will be affected by moving urban and regional CDEPs to STEP and Newstart. Furthermore the move is estimated to save \$30.9 million which will partly fund the 2007-08 budget measure of 'normalising employment arrangements for Australian government services' which is estimated to cost \$97.2 million over four years and provide 825 ongoing jobs currently provided by CDEPs.²³ The DEWR website states that 'in remote locations and regional locations with weaker labour markets, CDEP will continue to be funded in 2007–08 subject to the usual competitive funding process.'²⁴ However, as a result of the Northern Territory emergency response the fifty Northern Territory CDEP programs with approximately 8,000 participants, almost totally in remote locations, will be the exception.

As part of the Northern Territory emergency response all Northern Territory CDEP programs were informed that from 1 July 2007 their funding agreements would be reduced from twelve to three months and on 23 July 2007, the Hon Mal Brough MP, the Minister for Families, Community Services and Indigenous Affairs, and the Hon Joe Hockey MP, the Minister for Employment and Workplace Relations, announced that CDEP in the Northern Territory will progressively be replaced with 'real jobs, training and mainstream employment programmes'.²⁵ However a more significant outcome, at least initially, will be the move from CDEP wages to income support a requisite of the welfare payment reform provisions in the Bill. The fact sheet accompanying the media release states that 'moving CDEP participants onto income support will allow a single system of quarantining to apply to welfare payments. This initiative will stem the flow of cash going towards alcohol and substance abuse and ensure that money meant for children's welfare is used for that purpose.'²⁶

The Bill provides for a Northern Territory CDEP transition payment available to CDEP participants in the Northern Territory until 30 June 2008. The transition payment will

<http://www.workplace.gov.au/workplace/Category/SchemesInitiatives/IndigenousProgs/ListoflocationswhereCommunityDevelopmentEmploymentProjectsfundingswillcease.htm>

23. Senate Estimates hearings, DEWR, 29 May 2007

24. http://www.workplace.gov.au/NR/rdonlyres/4743A694-541F-4613-B31D-EEA86554561D/0/CDEPQA_08.pdf

25. M. Brough and J. Hockey, joint media release, 23 July 2007 'Jobs and training for Indigenous people in the NT' <http://www.workplace.gov.au/NR/rdonlyres/64A80D71-811E-4DA5-AE86-3BEE2735F73C/0/CDEPNTMediaRelease.pdf>

26. <http://www.workplace.gov.au/NR/rdonlyres/31071644-F73A-46BF-82D2-59046CF5057D/0/CDEPNTQuestionsandAnswers.pdf>

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compensate those CDEP participants who received other income above the income support payment.

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Northern Territory National Emergency Response Bill 2007

Part 2—Alcohol

This part overrides the Northern Territory's *Liquor Act 1978*, *Liquor Regulations* and *Police Administration Act 1978*, to ban the consumption, possession or supply of liquor within prescribed areas. There is an exemption for people engaged in recreational boating and commercial fishing. The maximum penalty for a first offence is a fine of \$1100, and for further offences \$2200. Where more than 1350 ml of alcohol is transported or supplied, the maximum penalties increase to \$74 800 or 18 months imprisonment, but if a person can prove that he or she did not intend to supply the alcohol, no offence is committed.

The Commonwealth Minister is empowered to vary liquor licences to prohibit the sale of liquor for consumption on or off licensed premises (**clause 13**).

The Minister may also vary permits to prohibit the sale or consumption of liquor in prescribed areas. Permit-holders and their guests are currently allowed to consume liquor within what will become prescribed areas. The Explanatory Memorandum states that these permits will be reviewed.²⁷

Part 3—Filtering of publicly-funded computers

This Part requires filters accredited by the Minister to be installed and maintained on publicly-funded computers within prescribed areas. This includes computers owned or loaned by bodies or individuals that receive government funding, or that directly or indirectly receive funding for employment programs. There is an exemption for a period if—for purposes of work, research or study—a person needs to access material that would otherwise be blocked by a filter. Presumably the regulations will specify more detail about the requirement to maintain and update filters.

Records must be kept for three years about each person who uses such a computer, and the time when it was used.

The Minister may determine matters that must be included in acceptable-use policies. These policies must state that the computers may not be used for illegal purposes, notably for criminal activity or incitement, obscenity, harassment or stalking. There is no defence for not developing an acceptable-use policy.

These computers must be audited twice a year, on specific days, and audit reports must be given to the Australian Crime Commission within two weeks. If a person knows or is

²⁷. Explanatory Memorandum, p. 15.

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reckless that illegal material has been accessed or stored on a computer, an additional audit must be performed as soon as practicable.

Fines of \$550 apply to failures to filter a computer, keep records, develop an acceptable-use policy, or perform audits. Fines of \$1100 apply when a person fails to ensure a computer audit with the result that illegal material is not identified. These offences commence 28 days after Royal Assent, giving computer administrators one month to install filters, create user logs and prepare acceptable-use policies.

Issues that Parliament may wish to consider:

- whether it is discriminatory to impose filtering and auditing on publicly-funded computers in Aboriginal areas of the Northern Territory, but not in Australia in general, and if so, whether the discrimination is legally justifiable under the *Racial Discrimination Act 1975*
- whether it is an infringement of free speech to impose filtering that may well hinder access to material that is perfectly legal
- the efficacy of filters in general: there was a recent report that the Government's \$116 million NetAlert project to provide nationwide ISP-level internet filtering would get off the ground 'within weeks', although the same report stated that technical trials were scheduled to go ahead later this year, and that the internet industry believed that the system would be unworkable.²⁸
- the burden of the requirement to keep computer-use logs for three years

Part 4 – Acquisition of rights, titles and interests in land

Background to the lease issue

Part 4 of the Northern Territory National Emergency Response Bill 2007, provides for the acquisition of right, titles and interests in land, and Division 1 for the grants of leases for 5 years. 'Acquiring townships prescribed by the Australian Government through five year leases including payment of just terms compensation' had been one of the measures announced by the Government on 21 June 2007²⁹,

Although this measure has been presented in the context of responding to child abuse in the Northern Territory, it comes in the context of a long debate over the merits of offering indigenous individuals in the Northern Territory the possibility of subleasing back as 'private land' communal land that a community has agreed to lease out long-term to a

²⁸ Andrew Colley, 'Internet predator protection "in weeks"', *The Australian*, 31 July 2007, p. 32.

²⁹ Minister Brough, *National emergency response to protect Aboriginal children in the NT*, media release, 21 June 2007.

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government body or agency. It is also in the context of the Federal Government's long-expressed interest in making this possible.

As long ago as 1998 John Reeves', in his *Review of the Aboriginal Land Rights (Northern Territory) Act 1976, Building on Land Rights for the Next Generation*,³⁰ recommended, among other things, giving the Northern Territory Government power to compulsorily acquire Aboriginal land for public purposes, and the development of leasing arrangements to enable Aboriginal people to own their homes on communal land. The Reeves report prompted several further reviews, including one by the House of Representatives Standing Committee on Aboriginal and Torres Strait Islander Affairs (HORSCATSIA); and a joint response to the Reeves Report by the NT Government and Land Councils.

The NT Government was also developing its own model for township leasing, and in July 2004 sent an options paper to the four NT Land Councils for consideration. However, the Commonwealth's amendments to the ALRA overtook this plan and in 2005 the NT Government wrote to the Australian Government suggesting a voluntary leasing plan which would recognise the right of traditional owners to make decisions over their land.

In April 2005 the Prime Minister stated:

I believe there is a case for reviewing the whole issue of Aboriginal land title, in the sense of looking towards private recognition. ... I certainly believe that all Australians should be able to aspire to owning their own home and having their own business. Having the title to something is the key to your sense of individuality; it's the key to your capacity to achieve, and to care for your family and I don't believe that indigenous Australians should be treated any differently in this respect.³¹

In June 2005 the National Indigenous Council (the NIC, the advisory body to the government on indigenous matters) presented its [Indigenous Land Tenure Principles](#) to Government. While acknowledging that communal interest in land is fundamental to Indigenous culture and should be inalienable, the Council considered that 'individuals and families [should be able] to acquire and exercise a personal interest in those lands, whether for the purposes of home ownership or business development.' Further, it said, the consent of traditional owners should not be unreasonably withheld to requests for individual

³⁰ <http://www.austlii.edu.au/au/journals/AILR/1999/6.html>

³¹ Transcript of the Prime Minister, the Honourable John Howard MP, *Doorstop interview*, Wadey, Northern Territory, 6 April 2005 at: <http://www.pm.gov.au/news/interviews/Interview1305.html>

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leasehold interests and that ‘involuntary measures should not be used except as a last resort.’³²

A number of Indigenous leaders have criticised these proposals. Noel Pearson has commented:

The concern from the indigenous community that I’m hearing is that the legitimate issue of home ownership might be used as a Trojan horse for a reallocation of land rights – a taking of rights away from Aboriginal people.³³

In his *Native Title Report 2005*, Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma pointed to existing leasing provisions in statutes like the ALRA and commented:

As a consequence, it is not necessary to put the communal tenure of Indigenous land at risk as the NIC Principles propose. ...

The NIC Principles are premised on the idea that private land ownership will lead to economic development because the land owners will have an economic interest in seeing land value improved. The NIC Principles also assume that communal land ownership will not lead to development, and the interests of the land will not be protected. ...

International experience demonstrates that individual title does not lead to improved economic outcomes.³⁴

In a 2005 Oxfam Australia report, an Australian National University team found ‘no evidence to suggest that individual land ownership is either necessary or sufficient to increase economic development or housing construction.’³⁵ They concluded:

The evidence does not support the notion that private individual ownership of low-value land in remote settings can be the driving force in addressing housing or other

³² National Indigenous Council, Indigenous Land Tenure Principles, reproduced in Aboriginal and Torres Strait Islander Social Justice Commissioner, *Native Title Report 2005*, Annexure 2. Accessible at: http://www.humanrights.gov.au/social_justice/ntreport05/

³³ ‘Pearson warns PM on home title fears’, *The Australian*, 14 April 2005.

³⁴ Aboriginal and Torres Strait Islander Social Justice Commissioner, ‘Chapter summary’, *Native Title Report 2005*, http://www.humanrights.gov.au/social_justice/ntreport05/summary.html.

³⁵ Jon Altman, Craig Linkhorn and Jennifer Clarke, assisted by Bill Fogarty and Kali Napier, *Land rights and development reform in remote Australia*, Oxfam Australia, 2005, p. 5.

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needs. The principal issues for any new policy framework continue to be contemporary Indigenous poverty, and the historic lack of services, housing and associated infrastructure. The notion that land rights reform can be the main driver for economic development should be reconsidered in light of the legacy of disadvantage, cultural difference and structural factors faced by these communities. Such debates must also recognise that there are fundamental Indigenous cultural reasons for attachment to land, irrespective of its commercial potential, as well as unique and diverse Indigenous perspectives on what development is appropriate for their communities and country.

The report concludes that very significant structural issues must be addressed to encourage economic development and address housing needs, including the remoteness of communities from mainstream markets; relatively low populations and population densities; the need for greater investment in education and vocational skills; poor infrastructure; and the generally economically marginal nature of most Aboriginal lands.

A contrary view was put by researchers at the Centre for Independent Studies. In *A New Deal for Aborigines and Torres Strait Islanders in Remote Communities*, Professor Helen Hughes and Jenness Warin argue:

Communal ownership of land, royalties and other resources is the principal cause of the lack of economic development in remote areas. Commonwealth, State and Territory legislative and regulatory frameworks have to make it possible for Aborigines and Torres Strait Islanders who choose to do so to become individual land owners and entrepreneurs. Royalties from mining, fishing, telecommunications and other sources must become transparent and flow to individuals. An end to communal ownership and asset management would cut into the power of councils, associations and their 'big men', making income distribution more equitable and greatly reducing the need for bargaining and political power plays that make life miserable and lead to incessant violence. Investment in land and other assets has to become viable. With individual property rights, land could be used for collateral to borrow for business, allowing the application of capital and technology to create productive enterprises with employment capacity. Private property rights in land are essential to attracting outside investment that is a pre-requisite to a major expansion in employment opportunities.

In the course of 2005 the Government committed itself further to reform in the area of indigenous home ownership, offering additional funding for purchasing homes, and a scheme to facilitate township leasing was included in the 2006 ALRA amendments. Under section 19A of the ALRA, a Land Trust may grant a 99 year lease of a township to an 'approved entity', which means either a Commonwealth or NT entity, if both the Minister and the Land Council agree to the granting of the lease. The Commonwealth was added at the last moment, with Federal doubts mounting as to the NT's commitment to the plan. After 69 years, the Land Trust may grant another lease to the same entity, to ensure certainty for home owners and other lessees (subsection 19A(5) of the ALRA).

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The *Aboriginal Land Rights (Northern Territory) Amendment (Township Leasing) Bill* 2007, 24 May 2007, sought to establish the office of Executive Director of Township Leasing, to enter into and administer township leases on Aboriginal land in the Northern Territory, under the [Aboriginal Land Rights \(Northern Territory\) Act 1976](#).

For more on concerns raised with respect to these recent development see Jennifer Norberry and John Gardiner-Garden's Bill Digest on the Aboriginal Land Rights (Northern Territory) Amendment Bill 2006.³⁶

Although the 5 year lease being proposed in the current bill may in the short term have a very different purposes to that of the above discussed 99 year leases, given the above context, it is not surprising that one of the main concerns raised with respect the proposed compulsory 5 year leases is that it may prove a stepping stone to 99 year leases – with failure to solve all community problems inside 5 years being used down the track for extensions of the arrangement.

Division 1 of Part 4 sets out the conditions under which the Commonwealth will assume five-year leases of Aboriginal lands.

Clause 31 grants to the Commonwealth a five-year lease over all Aboriginal land as defined by the ALRA, land granted to an association under subclause 46(1A) of the Lands Acquisition Act of the Northern Territory, and some other lands already subject to leases (surrounding Finke, Kalkarindji, Daguragu and Pine Creek).

Land which is already covered by a registered lease, for example a 99-year township lease as introduced in the 2006 ALRA amendments, is excluded from the five-year Commonwealth lease (**clause 31(3)**).

If during the Commonwealth's five-year lease, a Land Trust decides to enter into a 99-year township lease (under section 19A of the ALRA), then the Commonwealth's lease under proposed s.31 is terminated at the time the township lease takes effect (**clause 37 (6) to (9)**).

Any existing rights, title or other interests in land (excluding native title rights) are preserved by **subclause 34(3)**. **Subclause 34(4)** provides that if the land owner has granted any rights, title or interests to another party, it is taken to be in force as if the Commonwealth had granted that right, title or interest on the same terms and conditions. However, **clause 34(5)** allows the Minister to determine in writing that the existing grant of rights, title or interests in land, as allowed in s. 34(4) do not have effect during the five-year lease. The Minister's determination is not a legislative instrument (therefore cannot be disallowed by Parliament) and there is no avenue of appeal.

³⁶ <http://www.aph.gov.au/library/pubs/bd/2005-06/06bd158.pdf>.

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Land Trusts may continue to grant leases according to s. 19 of the ALRA, however the consent of the Minister will be required (**clause 52**) during the five-year Commonwealth lease period. If the Minister consents to such a lease, then the s.31 Commonwealth lease covering that area of land will be varied to exclude that part.

The Northern Territory laws regarding subdivision will not apply to the Commonwealth leased land (**clause 57**). **Clause 58** would allow the Commonwealth to make regulations modifying Northern Territory law relating to planning, infrastructure, subdivision or transfer of land, local government, or other matters, for land covered by the provisions of this Bill.

Division 2 – Acquisition of rights, titles and interests relating to town camps

Under the Northern Territory *Special Purposes Leases Act*, the NT Government has granted leases in perpetuity to entities to administer Aboriginal town camps which surround urban areas. For example, the Tangentyre Council, on behalf of 18 Indigenous Corporations, manages a Special Purpose lease for town camps surrounding Alice Springs, and the Julalikari Aboriginal Corporation administers the Tennant Creek camps.

Management of the town camps has been a contentious issue and the Commonwealth Government has attempted to negotiate with town camp leaseholders to return the leases to the Northern Territory government, in exchange for Commonwealth funding for housing and other services.

Upon the Commonwealth Government's announcement that it was considering whether it could compulsorily acquire leases for town camps, the Northern Territory Government responded that it would be 'working with town camps to see if the Australian Government's objectives can be achieved without compulsory acquisition.'³⁷

Under **clause 44**, references in the *Special Purposes Leases Act* to the Northern Territory Minister or the Administrator will also be taken to be references to the Commonwealth Minister.

Proposed subclause 44(2) states:

To avoid doubt, the Commonwealth Minister forfeits a lease of land, or resumes a land, under the Special Purposes Lease Act on behalf of the Northern Territory Minister or the Administrator of the Northern Territory.

Under section 28(a) of the *Special Purposes Leases Act*, the Administrator may, by Proclamation resume any land comprising, or included in, a lease...for any public purpose

37. <http://www.stopabuse.nt.gov.au/facts.shtml>.

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which he thinks fit. Section 29 of the Act requires six months' notice of a resumption of a lease. However, **clause 44(b)(i)** would reduce the notice time to 60 days.

Therefore, the Commonwealth Minister, empowered to act as the NT Minister or Administrator can, under the *Special Purposes Leases Act*, acquire town camp leases.

Clause 46 makes the same arrangements for the NT [Crown Lands Act](#), under which some town camp leases are granted.

Subdivision C of Part 4 vests rights, titles and interests in land in the Commonwealth. Upon giving the Northern Territory government a notice that it is acquiring a lease under the *Special Purposes Leases Act* or the *Crown Lands Act*, all rights, titles and interests are taken to be vested in the Commonwealth and freed and discharged from all other rights, titles and interests and any trusts, obligations, mortgages etc (**clause 47**). The notice given under s. 47 may recognise that some rights, titles and interests are to be preserved (**clause 48**). However the Commonwealth reserves the ability to terminate any such rights, titles or interest in land by writing (**clause 49**).

The Commonwealth has the power to interpret, modify and use Northern Territory legislation, as it has done in this section dealing with town camp leases, via the Territories power in the Constitution (s. 122).

Native Title Act

Clause 51 sets out the parts of the Bill to which Division 3 of Part 2 of the *Native Title Act 1993* (the 'future act' provisions) does not apply.

Public Works Committee

Under the *Public Works Act 1969*, Parliament's Joint Committee of Public Works must recommend that the Parliament approve expenditure on Commonwealth-funded capital works above \$15 million.

Clause 53 would stipulate that this requirement would not apply to any work carried out on land covered by a s.31 lease agreement, land in which a Commonwealth interest exists, or town camp land resumed under the *Special Purposes Leases Act*.

Part 5—Business management areas

The most significant amendments in Part 5 are contained in 'Division 4—Commonwealth management in business management areas'. Subdivision A relates to Commonwealth management of community government councils.

The proposed amendments contained in Division 4 modify Northern Territory legislation only so far as is necessary, in order to provide the Commonwealth with the same powers

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as the Northern Territory though with appropriate adaptations. These amendments are designed to bring particular types of *community services entities* under external administration. This initiative is in response to the failures relating to the provision of Commonwealth or Northern Territory funded services in *business management areas*.³⁸

Community services entities charged with providing services in *business management areas* by and large tend to be community government councils which are incorporated either under the *Local Government Act* or the *Associations Act* (NT). The changes proposed in Division 4 modify the *Local Government Act* and the *Associations Act* so as to give powers under that legislation to the Commonwealth Minister. However, the powers given to the Commonwealth Minister under that legislation are delimited.

Part 6—Bail and sentencing

The EM states that:

Part 6 amends Northern Territory law to prohibit the relevant authority, when exercising bail or sentencing discretion in relation to Northern Territory offences, from taking into consideration any form of customary law or cultural practice to lessen or aggravate the seriousness of the criminal behaviour of offenders and alleged offenders. Part 6 also strengthens Northern Territory bail provisions to better secure the safety of victims and witnesses in remote communities.

Clauses 90 and 91 are modelled closely on the *Crimes Amendment (Bail and Sentencing) Act 2006* which amended the sentencing and bail provisions in the *Crimes Act 1914* in accordance with the decisions made by the Council of Australian Governments (COAG) on 14 July 2006.

COAG agreed that ‘no customary law or cultural practice excuses, justifies, authorises, requires, or lessens the seriousness of violence or sexual abuse. All jurisdictions agree that their laws will reflect this, if necessary by future amendment’. COAG also asked the Standing Committee of Attorneys-General (SCAG) to report to the next COAG meeting on the extent to which bail provisions and enforcement take particular account of potential impacts on victims and witnesses in remote communities and to recommend any changes required.

38. The proposed definition of a business management area is an area of land:

- that is covered by a five year lease granted under proposed paragraph 31(1)(b);
- that is referred to in Parts 1 to 3 of Schedule 1 to this Bill; or
- a place in the Northern Territory that is specified in Schedule 2; or
- a place in the Northern Territory that is declared by legislative instrument to be a business management area.

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The COAG meeting followed the recommendations of the Intergovernmental Summit on Violence and Child Abuse in Indigenous Communities on 26 June 2006.

For full background on the Commonwealth measures, see the Senate Standing Committee on Legal and Constitutional Affairs [Crimes Amendment \(Bail and Sentencing\) Bill 2006](#) tabled 16 October 2006, and the [Bills Digest No 56](#), 27 November 2006.

The Bills Digest explains in detail the political impetus for the Summit and the bill originated in public debate around the sentencing decision in the *GJ v R* case involving customary law in the Northern Territory.

The Bill was clearly framed by the Government as an attempt to provide leadership and set an example to the States in the context of ongoing negotiations. But it also was linked to funding. The Minister for Families, Community Services and Indigenous affairs, the Hon Mal Brough MP, has indicated that state and territory funding for indigenous programs will be linked to states and territories amending their laws so as to remove cultural background from mandatory consideration when sentencing offenders. The funding linkage was opposed by ACT Chief Minister, Jon Stanhope and the WA Attorney-General.³⁹

The Senate report notes a series of criticisms of that bill, including that the ‘Bill’s focus is misdirected’, because of the ‘absence of any Federal laws relating to violence or sexual abuse in Indigenous communities that will be affected or changed as a result of the Bill’. The same could not be said of the current amendments, which will clearly affect NT indigenous residents. At present, the sentencing guidelines under section 5 of the NT *Sentencing Act* merely allow the judge discretion to consider the offender’s background in the context of the seriousness of the offence. Under section 104A, only the way the judge receives any information on customary law is regulated.

HREOC has previously argued that there needs to be formalised recognition inserted into the *Sentencing Act 1995 (NT)* to require the courts to always consider whether customary law is a relevant consideration and to apply it consistently with human rights principles.

The Committee also voiced concerns about ‘the haste with which the proposals in the Bill have been drafted and introduced into Parliament, without adequate, if any, consultation with Indigenous and multicultural groups’.

Finally, the Committee considered that ‘the most concerning feature of the Bill is the symbolic message that it sends to the judiciary (and the community at large), and the judicial uncertainty it may create’.

39. R. Peake, ‘Stanhope to defy Brough on law’, *Canberra Times*, 10 July 2006, p. 3. A. Buckley-Carr, ‘State stands firm as controversy rages’, *The Australian*, 16 June 2006, p. 24.

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As well as those general concerns which are relevant to the present amendments, other constitutional questions arise. The Commonwealth Parliament does not have a general power to legislate with respect to criminal law in a manner which would bind the states and territories. However, the Commonwealth Parliament does have a plenary power in respect of *territories*. The proposed policy measures would limit judicial discretion in sentencing matters. The constitutionality of this arose in the mandatory-sentencing debate as to whether limiting or completely usurping judicial discretion in sentencing constitutes an impermissible interference with the judicial power. This occurs when the legislature vests in a court capable of exercising the federal judicial power, a power which is incompatible with the judicial process.⁴⁰

Part 7—Licensing of community stores

Basis of policy commitment

The Explanatory Statement states that Part 7 aims to address:

long-standing concerns that some stores in Indigenous communities are poorly managed and have low quality goods sold at high prices. Many Indigenous communities in the Northern Territory have only one community store. In very remote communities there may be no other store within hundreds of kilometres and even these may not be accessible during the wet season. Hence, the way community stores operate and the quality of the food that they provide are critical to the Australian Government's efforts to improve the lives of Indigenous people in the Northern Territory.⁴¹

In effect, it appears that Part 7 of the Bill, which introduces a new licensing regime for community stores, aims to maximise the relative 'value' of Government welfare payments, in comparison to the cost of living in remote Indigenous communities in the Northern Territory. By closely regulating the quality, quantity and range of groceries sold by licensed stores, the Bill also seeks to achieve an ancillary effect of increasing the quality of produce available to the communities, which may have a direct impact on the health and lifestyle.

Main provisions

Part 7 of the Bill deals with licensing of community stores. It introduces a new licensing regime, empowering the Secretary of the Department to grant 'community store licences'. The licensing regime is designed to enable the Secretary to assess a community stores' practices, including:

40. See further D. Manderson and N. Sharp, [Mandatory sentences and the Constitution: discretion, responsibility and the judicial process](#), *Sydney Law Review* (vol 22 no.4), 2000.

41. Explanatory Memorandum, 'Outline'.

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- the capacity to comply with the *income management regime*⁴²
- the quality, quantity and range of groceries and consumer items, with an express inclusion of healthy food and drink
- the business practices of the store, including pricing and other financial aspects (such as wages), and
- other matters considered relevant at the Minister’s discretion, or those later specified by the Minister.

Clause 92 outlines the meaning of ‘community store’, to broadly include any business which provides grocery items and drinks as one of its main purposes. The definition expressly excludes takeaway and fast food shops, roadhouses, and other kinds of business expressly excluded by regulation. As the definition is broadly defined, it might also include businesses such as petrol stations (although if this were unintended, they could be expressly excluded later by regulation).

Under the Bill, community stores would not be licensed until they are assessed by appointed authorised officers (**proposed Division 2**). Assessment occurs in the community store, with the store operator being given at least 7 days notice that the assessment will occur (**clause 95**).

Community store licences are granted (or refused) by the Secretary, following assessment of the community store(s) (**clauses 97-98**). The Secretary may, having regard to the outcome of the store assessment (and any other relevant matters), refuse to grant a licence.

Clause 104 states that it is a condition of any community store licence that the holder of the licence must operate the store in a satisfactory manner (having regard to the assessable matters, above). Other licence conditions are dealt with in **clauses 102-105**. The Bill also provides for licence revocation, variation, surrender and transfer (**clauses 106-111**).

Clause 119 creates strict liability offences for store operators who refuse to produce documents and material that are ‘reasonably necessary’ for the store assessment (60 penalty units), or who fail to provide assistance and facilities which are necessary and reasonable for the assessment (10 penalty units).

The Bill also provides the Secretary with a power to request information (**clause 120**), within a specified time and in a specified form or manner (at the Secretary’s discretion),

42 Explanatory Memorandum, p. 56. The income management regime, a statutory scheme which Government intends to establish under what will be the Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007, may involve arrangements where a portion of a welfare recipient’s payment will be paid to an account established for this purpose by a community store so that the recipient can use the amounts credited to purchase food and other goods from the store.

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should the Secretary suspect that a person possesses information that relates to the assessment of a community store. Non-compliance with the request attracts a penalty of 10 units; provision of false or misleading information attracts a penalty of 60 units. The proposed section provides an exemption for people with a ‘reasonable excuse’ for non-compliance (however, this does not include excuses relating to the commercial sensitivity or confidentiality of the information).

Comment

Parliament may wish to consider the extent of discretionary power that the proposed new licensing regime provides to the Secretary and officers. The Bill lacks a balance that could be provided by the inclusion of appeal provisions and less discretion (for example, at **proposed subclause 120 (2)**). This is particularly important for those provisions which impose a criminal penalty.

While businesses are required to be satisfactorily assessed at the time of licensing, it is unclear how the proposed legislation will ensure that the ‘satisfactory state’ of business practices is maintained.

Overall, the licensing regime does not sit comfortably with general concepts of fair trading. Parliament may wish to consider the wider implications of imposing Government control upon the practices of small business operators.

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Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Bill 2007

Schedule 1—Prohibited material

Purpose

Schedule 1 amends the *Commonwealth Classification (Publications, Films and Computer Games) Act 1995* (the Classification Act) to prohibit the possession, control and supply of pornography in ‘prescribed areas’⁴³.

Pornography or ‘prohibited material’ as it is described in the Bill, is films (including DVDs and videos) or publications, that have been classified by the Commonwealth Classification Board according to the Classification Code as RC (Refused Classification), X18+ (sexually explicit material) and Category 1 or Category 2 Restricted material, as well as unclassified material likely to be classified in those categories.

Background

The Classification Act facilitates the operation of a national classification scheme, a cooperative arrangement between the Commonwealth, states and territories. The Classification Act provides that the Classification Board classifies films (including videos and DVDs), computer games and certain publications according to the National Classification Code. As part of the national scheme, each state and territory has enacted complementary classification enforcement legislation that prescribes penalties for classification offences and provides for enforcement of classification decisions in the particular jurisdictions.⁴⁴

In the Northern Territory, the *Classification of Publications, Films and Computer Games Act 2005* (NT) provides the framework for prohibitions on dealing with pornography of different classification categories and enforcement. Restrictions apply to the sale, exhibition, attendance at and copying of films and computer games which are unclassified, or classified RC, or films which are classified X18+. In addition there are restrictions on the sale or delivery of publications which are unclassified, classified RC or classified Category 1 Restricted or Category 2 Restricted⁴⁵. Although X18+ classified material is

43. The definition of prescribed area will be the same as that contained in the Northern Territory National Emergency Response Bill 2007.

44. *Annual Report for the Classification Board and the Classification Review Board, 2005–2006*, pp. 9–10.

45. These terms are defined in the Classification Code.

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restricted in the Northern Territory, unlike in the States, the sale and hire of X18+ material is permitted.

Provisions in Schedule 1

The Bill in **proposed section 101** makes the *possession or control* of prohibited material an offence in prohibited areas. Unlike existing offences in Northern Territory legislation, the prohibition applies to mere possession of the prohibited material without any intention of copying, selling or hiring. The penalty for this offence is 50 penalty units. The penalty for the offence of possession of RC material is set at 100 penalty units (**clause 102**)—the rationale being that the impact of this material is higher.

Proposed section 101 prohibits the supply of ‘prohibited material’ in and to prescribed areas. The provision would apply in all states and territories. Supply is defined broadly and includes distribution on a not for profit basis. The penalty is 100 penalty units. For the supply of 5 or more prohibited items the onus of proof is reversed and the penalty is 200 penalty units and/or imprisonment for two years.

Proposed sections 106–109 provides for police powers to seize and destroy ‘prohibited material’. Entry and search must be done by warrant or consent in accordance with Part 1AA of the *Crimes Act 1914*.

Proposed sections 100 and **111** clarify that the offences are to apply in addition to State and Territory legislation.

Schedule 2—Law enforcement

The Explanatory Memorandum states that the amendments in Part 6 to the powers and functions of the Australian Crime Commission (ACC) and Australian Federal Police (AFP) are designed to ‘protect Aboriginal children in the Northern Territory from harm’.⁴⁶

Background

Australian Crime Commission

Schedule 2, Part 1 amends the *Australian Crime Commission Act 2002* (ACC Act).

The [Australian Crime Commission](#) (ACC), (formerly the National Crime Authority but with enhanced intelligence functions), commenced operations on 1st January 2003. Under Section 7A of the ACC Act, the aim of the ACC is to ‘reduce the incidence and impact of serious and organised criminal activity on the Australian community’.

46. At p. 15.

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To achieve this aim, the ACC has a range of special coercive powers such as the capacity to compel the attendance at Examinations, to produce documents and to answer questions (similar to a Royal Commission). The ACC also has an intelligence-gathering capacity and a range of investigative powers common to law enforcement agencies, such as the power to tap phones, use surveillance devices and participate in controlled operations. These powers will be expanded if the Crimes Legislation Amendment (National Investigative Powers and Witness Protection) Bill 2006 currently before the Senate is passed by the Parliament.⁴⁷ Another Bill before the Parliament, the Telecommunications (Interception and Access) Bill 2007, if passed will deem all child pornography offences to be serious offences for the purpose of obtaining a warrant to intercept phone calls, emails, and other forms of telecommunications.⁴⁸

National Indigenous Violence and Child Abuse Intelligence Task Force

The [National Indigenous Violence and Child Abuse Intelligence Task Force](#) (NIITF) was announced in July 2006, and will lead national coordination in the collection and sharing of information and intelligence relating to child abuse, violence, drugs, alcohol, pornography and fraud affecting Aboriginal and Torres Strait Island communities.⁴⁹ Activities will be coordinated by the Task Force's operational head, based in Alice Springs, with support from ACC and jurisdictional staff working from Darwin and other ACC offices. Subject to ACC Board approval, the NIITF will operate until late 2008, with a final report to the ACC Board due in mid 2009. The ACC website for the NIITF states:

The fundamental drivers of Indigenous violence and child abuse are social and economic. Accordingly, the NIITF is adopting an approach which is 'non punitive' and respectful of Indigenous people and cultures. National and regional level

47. See further the [Bills Digest](#) No 110, 1 March 2007.

48. See further the [Bills Digest](#) No 10, 3 August 2007.

49. According to the ACC website, the NIITF has the following objectives:

- improving national coordination in the collection and sharing of relevant information and intelligence;
- enhancing national understanding about the nature and extent of violence and child abuse in Indigenous communities;
- providing related intelligence and other advice, including on organised criminal involvement in drugs, alcohol, pornography and fraud; and
- conducting research on intelligence and information coordination and identification of good practice in the prevention, detection and responses to violence and child abuse in Indigenous communities.

These are being addressed through:

- building an enhanced national intelligence capability in relation to violence and child abuse in Indigenous communities; and
- informing future law enforcement, and wider government, decisions on addressing violence and child abuse in Indigenous communities.

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consultative arrangements will be established, where possible utilising existing structures. In these processes, particular efforts will be made to engage with and involve Indigenous elders, leaders and women's groups.⁵⁰

The Law Society of the NT was critical of this development at the time because of the 'Star Chamber' powers of the ACC and stated in a media release that:

Threatening witnesses with gaol is unlikely to help if Indigenous people are already facing an environment of threats and intimidation.⁵¹

Amendments

Division 1

Under existing subsection 7C(c), the Board can to authorise, in writing, the ACC to undertake intelligence operations or to investigate matters relating to *federally relevant criminal activity*.⁵²

The main change made by **Division 1, items 1 to 14** is that the words 'serious and organised crime' are deleted from the definition of *federally relevant criminal activity* (and elsewhere in the definitions subsection 4(1)) and replaced with the term *relevant crime*.

Item 6 inserts a new definition of *relevant crime* into subsection 4(1) to include:

- (a) serious and organised crime; or
- (b) Indigenous violence or child abuse.

50. Online: http://www.crimecommission.gov.au/html/pg_NIITF-1.html (accessed 7 August 2008).

51. 'Safeguards needed to ensure Task force success', 19 July 2007.

52. The ACC currently has four Special Investigations on foot:

- High Risk Crime Groups
 - Established Criminal Networks - Victoria
 - Money Laundering and Tax Fraud
 - Wickenby Matters
- There are five Special Intelligence Operations:
- Illicit Firearm Markets
 - Amphetamines and Other Synthetic Drugs
 - Serious and Organised Fraud
 - Crime in the Transport Sector
 - Illegal Maritime Importation and Movement Methodologies
- and finally two Task Forces:
- National Indigenous Violence and Child Abuse Intelligence Task Force
 - Outlaw Motorcycle Gangs National Intelligence Task Force.

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Indigenous violence or child abuse is further defined widely in **item 5** as 'serious violence or child abuse committed by or against, or involving, an indigenous person'. *Serious violence* is further defined in **item 9** as limited to an offence punishable by a minimum three years imprisonment. *Child abuse* is also defined in **item 2** as limited to an offence punishable by a minimum three years imprisonment.

The Explanatory Memorandum explains that the government fully intends the full range of ACC powers to be directed at the issue, and that it is clearly envisaged by the government that these offences would not normally be caught by the term 'organised crime'.

Offences concerning Indigenous violence or child abuse (including sexual offences) are unlikely to meet the first set of elements, which require that the offence involves two or more offenders, substantial planning and organisation, and the use of sophisticated methods and techniques. Even if the first set of elements were met, not all offences relevant to Indigenous violence or child abuse would be captured by the list of the type of offences which for present purposes would be limited to 'violence offences' and certain Commonwealth child sex offences involving the use of a carriage service.

The government wishes to ensure that the existing special coercive powers of the ACC should be available for the purpose of an operation/investigation (or special operation/investigation) into Indigenous violence or child abuse, should the ACC Board decide that their use for this purpose should be authorised.⁵³

Divisions 2 and 3

The amendments in **Division 2** would allow an ACC examiner to request or compel information, documents or things held by a State or Territory agency that are relevant to an operation/investigation, provided an arrangement is in force between the Commonwealth and the State or Territory. Presumably this will allow the ACC to compel information from the NT government.

The **Division 3** amendments would extend the term of appointment for ACC Examiners from five to 10 years. The EM does not explain how this amendment is in any way connected to the Bill's purpose.

Australian Federal Police

Schedule 2, Part 2 amends the *Australian Federal Police Act 1979* (the AFP Act) to put beyond doubt that members of the Australian Federal Police (AFP) deployed to the Northern Territory Police Service (NTPOL) and appointed 'special constables' can exercise all of the powers and duties of a member of the NTPOL under Northern Territory legislation.

53. At p. 16.

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Comment

The amendments made to the ACC Act go far beyond the current situation in the Northern Territory. The Division 1 amendments are not geographically defined or time-limited, but affect the mandate of the ACC itself, dependent of the deliberations of the Board.

The amendments in Division 3 do not seem to relate to the purpose of the Bill in that they are not obviously directed to the NT plan at all, and in this sense appear opportunistic.

Definitions of key terms such as *federally relevant crime* were predicated on the need to carefully delimit the capacity to deploy the ACC's special coercive powers only against serious and organised crime.

The Parliamentary Joint Committee on the Australian Crime Commission report *Review of the Australian Crime Commission Act 2002*, tabled in 10 November 2005 summarised that:

The ACC therefore exists to provide investigations that operate across jurisdictional boundaries, equipped with the necessary specialist expertise and resources, and able to focus exclusively on organised crime rather than street crime/volume crime.⁵⁴

The second reading speech for the Bill introducing the previous National Crime Authority noted:

The National Crime Authority does not deal with simple street level crime, but with the web of complex criminal activity engaged in by highly skilled and resourceful criminal syndicates.

Whilst the allegations of child abuse and violence in the Northern Territory are extremely serious and alarming, the question remains whether the ACC is an appropriate body to deal with such abuse. Family violence within Australian society generally may be endemic and serious in both the moral and legal senses of the term, but most Australians would not categorise it as organised crime. The NIITF itself recognises that a 'non-punitive approach' is therefore appropriate. There do not appear to be any trans-boundary/organised crime elements to the allegations which would normally justify engaging the controlled operations/coercive powers of the ACC. Parliament may wish to consider, in the absence of such elements, whether good community policing is more appropriate to the task.

Even if Parliament answers that question in the negative, there is a strong argument that these amendments should not be rushed. The Attorney-General's Department is currently

54. Paragraph 2.14. Online:
http://www.aph.gov.au/Senate/committee/acc_ctte/acc_act02/report/c02.htm (accessed 7 August 2007)

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conducting a [review of specific provisions of the National Crime Authority Act 1984 and the Australian Crime Commission Act 2002](#), with the final report imminent. Mr Mark Trowell QC is conducting the review on behalf of the Australian Government. Any major amendments to the scope and nature of the ACC should arguably not be made until the outcome of the review is tabled and considered.

Finally, the amendments in Division 1 do not appear consistent with international law, in the sense that they could in operation apply punitive measures in a racially discriminatory manner.⁵⁵

Schedule 4—Access to Aboriginal land

Background to the Permit System

The Commonwealth *Aboriginal Land Rights (Northern Territory) Act 1976* (ALRA) currently enables the permit system on Aboriginal land in the Northern Territory. Section 70 makes it an offence for a person to enter or remain on Aboriginal land except (among other things) in accordance with the ALRA or with a law of the Northern Territory (penalty: \$1000). Section 73 gives the Northern Territory Legislative Assembly power to make laws regulating or authorising entry onto Aboriginal land, but any such laws must provide for the right of Aboriginals to enter such land in accordance with Aboriginal tradition.

In the *Aboriginal Land Act* (NT), authorised by section 73 of the ALRA, section 4 makes it an offence for people to enter or remain on Aboriginal land and certain roads without a permit (penalty: \$1000). Section 8 says the legislation does not authorise the entry of a person to a living area without the permission of the owner or the occupant. Section 11 empowers the Administrator on the recommendation of a Land Council to declare an area of Aboriginal land or a road to be an ‘open area’ or ‘open road’ which can be entered without a permit.

Permits can be issued by the traditional owners of the area concerned, the relevant Land Council, the Administrator of the Northern Territory (where a person has applied for a permit to use a road and been refused or the permit has not been issued in a reasonable time) and, if in respect of certain Commonwealth or Northern Territory Government employees, the relevant Northern Territory Minister.

The Land Council and the traditional owners can revoke their own or each other’s permits and delegate their authority to issue permits. Most permits are issued without charge.

55. The Committee for the Elimination of Racial Discrimination, *General recommendation XXXI on the prevention of racial discrimination in the administration and functioning of the criminal justice system*, A/60/18, pp. 98-108.

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Reform of the permit system was first recommended in *Building on Land Rights for the Next Generation* Report of the Review of the Aboriginal Land Rights (Northern Territory) Act 1976 August 1998. John Reeve Q.C. found that:

In many respects the permit system is a carry over from the native welfare system that applied to Aboriginal reserves in the Northern Territory prior to the introduction of the Act. Under that system, Aboriginal people were not allowed to travel off those reserves without permission and other Australians were not allowed to enter those reserves without permission. Whilst the former aspect has not been retained in the permit system, the latter has.

It is patently clear that the permit system is in need of reform.

If the permit system were removed and Aboriginal people were provided with similar rights in relation to their land to those held by other Territorians, Aboriginal people would not be disadvantaged in the process. Indeed, in my view, they would be considerably advantaged by being unburdened of a system they do not support and from the improvement in race relations that would probably follow as a result of the removal of a racially discriminatory measure.⁵⁶

Reeve recommended that:

- Section 70 of the Act should be repealed;
- Part II of the Aboriginal Land Act (NT) should be repealed;
- Amendments should be made to the Trespass Act (NT)...to make it applicable to Aboriginal land and to allow Aboriginal landowners to make better use of it.

In the years that followed there were few other public challenges to the wisdom of the permit system but it was questioned by a magistrate in 2002.⁵⁷ On 12 September 2006, the Minister for Families, Community Services and Indigenous Affairs, the Hon Mal Brough MP, announced a reconsideration of Commonwealth legislation allowing for the permit system that restricts entry to some remote Indigenous communities. The Minister put the view that increased external scrutiny would be in the interests of vulnerable in what are closed communities, and that liberalisation would also bring economic benefits that would help to promote the self-reliance and prosperity of Aboriginal people in remote communities.

56. <http://www.austlii.edu.au/au/journals/AILR/1999/6.html> (accessed 7 August 2007)

57. 'Court ruling challenges Aboriginal land exclusion rights', *The World Today*, ABC Radio, 20 November 2002, <http://www.abc.net.au/worldtoday/stories/s731220.htm>.

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In October 2006 Minister Brough issued a discussion paper⁵⁸ to examine and seek comment on options for an improved system of access to Aboriginal land under the ALRA and related legislation that both respects the integrity of Aboriginal land and facilitates the normal interactions necessary for social and economic development. Minister Brough presented the problem of the current arrangements as follows:

The permit system restricts entry on Aboriginal land, including into communities that are essentially townships of more than several hundred people. Originally designed to ‘protect’ Aboriginal people from the worst aspects of modern society, the permit system has contributed to denying Aboriginal people access to the normal advantages of mainstream Australian society. External scrutiny, from the media for example, while sometimes unnecessarily intrusive, acts as a check and balance on unhealthy or even criminal behaviour. But in remote Aboriginal communities, restricted media access has created what some have called a ‘monopoly of silence’.

Many Aboriginal communities on Aboriginal land in the Northern Territory are already remote geographically. The permit system has operated to maintain or even increase that remoteness – both economically and socially. It has hindered effective engagement between Aboriginal people and the Australian economy. This has prevented Aboriginal people from benefiting fully from their land rights. It has detracted from self-reliance and contributed to Aboriginal disadvantage. The ability of some members of a community to use their power to exclude other members has also led to community disharmony or worse. Individual Aboriginal people who have wanted to engage in the market economy or mainstream Australian society have, in effect, been prevented by gate keepers.

The permit system is a vestige of the former protectionist system of Aboriginal reserves under which entering or leaving Aboriginal lands was restricted. While Aboriginal people are now of course free to leave, entry restrictions for non-Aboriginal people remain. While the current system was put in place with the best of intentions, its maintenance is no longer appropriate. With modern communications having broken down many of the barriers of remoteness, the current paper system of permits is increasingly anachronistic and ineffective. It is clear that, despite its restrictions, the current permit system has not prevented the scourge of drug trafficking or violence and abuse occurring in many communities.

Of course, given the vastness of the Aboriginal land estate and the consequent difficulties in applying normal laws of trespass, the permit system has operated to respect the privacy and culture of Aboriginal people. Proper enforcement of trespass laws requires adequate policing. For trespass laws to be effective in townships, a

58. Department of Families, Community Services and Indigenous Affairs, *Access to Aboriginal Land under the Northern Territory Aboriginal Land Rights Act – Time for Change? Discussion Paper*, Canberra, 2006, http://www.oipc.gov.au/permit_system/docs/Permits_Discussion_Paper.pdf.

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proper police presence would be necessary. For the vast bulk of Aboriginal land, police involvement to remove trespassers may not occur in a timely manner.

However, the permit system is not an alternative to adequate policing. Arguably the permit system serves only to restrict those inclined to respect the law – not those who already flout the law and operate in spite of the permit system. ...

Brough argued that a new system regulating access to Aboriginal land should operate to:

- ensure the normal interactions of society can occur, including external scrutiny
- allow individual Aboriginal people to engage with and benefit from the market economy without hindrance
- distinguish between ‘communal or public space’ and ‘private space’ on Aboriginal land
- ensure open access to ‘public space’, including townships and related roads
- protect the privacy of ‘private space’, including residences and most Aboriginal land
- respect Aboriginal culture on traditional lands, particularly in the support it gives to protection of sacred sites and to ceremonies
- continue to allow for effective land management by Aboriginal groups, and
- be simple to administer, preferably by government, to ensure transparency and accountability.

Minister Brough presented 5 options.

1. Adjust the existing framework only as and when required to cater for access to leased townships. This option would allow for low cost incremental adoption across the Territory but could create ad hoc, confusing and conflicting arrangements across the Territory and would not significantly open up remote Aboriginal communities to public accountability and scrutiny.

2. Provide open access to communal or public space (such as townships and roads) and maintain the current permit-based system of restricted access to non-public spaces (such as private residences and sacred sites) This option would need legislation and work defining public and non-public spaces, but give greater potential for inhabitants to engage with the market economy and mainstream society.

3. Widen the current permit-based system by expanding the categories of people eligible to enter Aboriginal land without permission to include, for example representatives of the media, people conducting legitimate business. This legislative option would give some of the benefits of greater access but be administratively complex.

4. Reverse the current system to provide that people only need to apply for a permit to enter areas which have, on the strength of a case put by traditional owners, been

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designated as restricted. This legislative option would be low cost and might offer the benefits of openness while also allowing Aboriginal people to protect areas of their land where there are legitimate reasons.

5. Remove the permit system altogether and replace with the laws of trespass, with any necessary modification for Aboriginal land. This legislative option would ‘normalise’ access arrangements for Aboriginal land but the vastness of the Aboriginal land estate and associated coastline would present difficulties for effective trespass enforcement.

It was not clear which of the above options was being favoured by the Government when the Minister announced the ‘National emergency response to protect Aboriginal children in the NT’ *Media Release* 21/06/2007. The Minister’s release included the stated intention of ‘scrapping the permit system for common areas, road corridors and airstrips for prescribed communities on Aboriginal land’. That announcement, along with earlier and subsequent ones, however, drew many expressions of concern. Some argued that the permit system was not a major contributor to community underdevelopment and social dysfunction, that its scrapping was not one of the recommendations of the *Every Child is Sacred* report, and would only make the control of alcohol, drugs and outside predators even more problematic.

Provisions in Schedule 4

Schedule 4 of the Bill effectively scraps the existing permit system and allows entry for a wide range of people (highlighted in options 2 and 3 of the Brough discussion paper, outlined above).

Item 9 repeals existing subsection 70(2A) of the ALRA and replaces it with a **new subsection 70(2A)** which details a long list of people who may enter or remain on Aboriginal land, including:

- the Governor-General or appointees
- the Northern Territory Administrator or deputy
- a member of the Commonwealth Parliament or the Northern Territory Legislative Assembly
- a candidate for election to the Commonwealth Parliament (representing an NT electorate or as an NT Senator) or to the Northern Territory Legislative Assembly
- a person performing functions under the ALRA or another law of the Commonwealth or under a law of the Northern Territory
- a person performing functions as a Commonwealth or Northern Territory officer (ie an employee)
- a person performing functions as a NT local government officer, member or employee,
or

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- a person acting in accordance with the ALRA or a law of the Northern Territory.

In addition, under **proposed new section 70(2BB)** the Minister would be able to authorise a specified person, or any person included in a specified class of persons, to enter or remain on Aboriginal land. This provision has a sunset clause of five years from commencement (**70(2BD)**).

Under **proposed section 70F**, a person would be able to enter and remain on a ‘common area’ within community land, if the entry or remaining was not for a purpose that is unlawful. A ‘common area’ is defined as an area that is generally used by members of the community concerned, but does not include a building, a sacred site, or other areas which may be prescribed by regulation (**subsection 70F(20)**). Some temporary restrictions may apply to protect privacy for events such as cultural ceremonies.

Access to common areas would not apply in relation to areas that are covered by leases under section 19 of the ALRA (**subsection 70F(2)**). Regulations may be made providing that specified common areas are taken to be public parks for the purposes of NT law relating to public parks (**subsection 70F(5)**). The relevant Land Trust will not be obliged to maintain a common area to a level that is suitable for use by the public, and will not be liable for any loss, damage or injury to a person using a common area (**subsection 70F(8)**).

Schedule 7 details all ‘community land’ in the NT.

Proposed new sections 70B, 70C and 70D and 70E allow a person to use a road, aerodrome or boat landing place to travel to and from any community land, provided that the purpose of access to the community land is not unlawful. Some temporary restrictions may apply to protect privacy for events and to protect public health and safety (for example for road upgrades or repairs).

A person will be able to enter or remain on Aboriginal land to attend a court hearing (**proposed s. 70G**).

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