

COERCIVE GOVERNANCE AND REMOTE INDIGENOUS COMMUNITIES: THE FAILED PROMISE OF THE WHOLE OF GOVERNMENT MANTRA

Greg Marks*

I Introduction

Old assimilation policies, long thought put to bed, were re-awoken in pronouncements of the Howard Coalition Government. For example, then Prime Minister John Howard observed in May 2007:

I have always held the view that the best way to help the Indigenous people of this nation is to give them the greatest possible access to the bounty and good fortune of this nation and that cannot happen *unless they are absorbed into our mainstream*.¹

Conservative commentators continue to unashamedly promote an assimilationist, or 'integrationist', policy line and such ideas appear to have gained a considerable degree of traction.² Justice Elizabeth Evatt, former member of the UN Human Rights Committee, responding to such statements, has observed that:

Carried to its end, this essentially assimilationist approach would mean the eventual disappearance of Aboriginal tradition and culture – their knowledge and spiritual connections to this land built up over tens of thousands of years.³

The Rudd Labor Government elected in November 2007 endorsed, to some extent at least, the previous Government's Indigenous policy settings and programs. Examples include the Emergency Response to Protect Aboriginal Children in the Northern Territory ('NTER')⁴ and the Welfare Reform Project in selected Cape York communities.⁵ The expressed desire by Labor for a bi-partisan approach to Indigenous policy through a joint policy commission⁶ may also indicate that previous policy settings will not necessarily

be repudiated. The question is whether the assimilationist and paternalistic assumptions and premises underlying the Howard Government's approach still have resonance. To the extent that assimilationist assumptions may continue to have valency there is the potential for policies and programs to fail despite the best of intentions. Such failures are likely to present as failures of governance.

This article canvasses in section II the general policy context in respect of responding to Indigenous disadvantage. The particular situation of remote Indigenous communities, so much at the centre of public concern and discussion, is described in section III. Section III notes the strong theme of hostility to remote communities (including a particular animus against small decentralised communities – often referred to as 'outstations') evident in the policy pronouncements and program settings of the previous government. Reminiscent of the 1950s and 1960s view of the role of remote Indigenous communities as staging posts to urban 'civilised' living,⁷ the vulnerability of such communities to government policy whim and administrative competence leads directly to considerations of governance in section IV. Whilst noting the importance of Indigenous governance (section V), this article focuses in particular on 'government governance' (section VI) and the 'whole of government' mantra that has become the central motif of government policy and service delivery in respect of remote Indigenous communities in Australia in recent years (section VII). The efficacy of 'whole of government' is considered in section VIII, whilst an account of aspects of one practical manifestation of this approach, viz the NTER, is provided in section IX. Sections X and XI put the Australian experience into an international context, noting the need to reference 'government governance' to international standards and practice. It is concluded that only by observing the basic

human rights obligations set out in international law, and by reflecting basic canons of respect, will Indigenous policy outcomes be successful, equitable and sustainable. The tendency towards coercion, benign or not, can only work to maintain inequality.

II The Policy Context

The focus in this paper is on governance issues. However, governance should not be seen only as a technocratic concern divorced from policy. Accordingly, it is useful to briefly outline the policy context before moving more directly to issues of governance.

In contemporary settler democracies such as Australia, minority Indigenous peoples usually have formal equality in law with other citizens. However, the consequences of forcible dispossession often remain as the 'unfinished business' of these societies. The constitutional status of Indigenous peoples within the polity of the nation state may remain unresolved and contested. Recognition of Indigenous rights to land and resources is often belated and grudging.⁸ Autonomy and self-determination are circumscribed and vulnerable to unilateral action by the state and its representatives. Even non-discrimination on racial grounds in legal arrangements, although mandated by international law,⁹ is not sacrosanct. An 'emergency' situation can result in wide-ranging repeal and overriding of non-discrimination legislative safeguards, as is the case with the discriminatory provisions of the legislation underpinning the NTER.¹⁰ In these societies co-existence on the basis of equality and mutual respect remain elusive goals. Relations between Indigenous communities and governments tend to be difficult and provide major governance challenges.

Indigenous Australians, overall, suffer a significant degree of disadvantage. A recent report to the Commonwealth Government, *Overcoming Indigenous Disadvantage: Key Indicators 2007*,¹¹ found that:

Across virtually all the indicators ... wide gaps remain in outcomes between Indigenous and non-Indigenous Australians. Despite Australia's world class health system, the life expectancy of Indigenous people is estimated to be around 17 years lower than for the total Australian population. Despite compulsory education, Indigenous students at all levels experience much worse outcomes than non-Indigenous students. And Indigenous people are

significantly over-represented in the criminal justice system, as both victims and offenders.¹²

In respect of the life expectancy gap, the Chairman of the Productivity Commission, Gary Banks, has noted:

this appears to be at least double the life expectancy gaps in three comparable OECD countries with Indigenous populations (New Zealand, Canada and the United States). In those countries, the gap also appears to have narrowed significantly over time, which cannot be said for Australia.¹³

Despite some improvements, the situation of Indigenous Australians remains poor – and in some respects is getting worse, especially in terms relative to the overall Australian population.¹⁴ A 2008 joint report by the Australian Bureau of Statistics and Australian Institute of Health and Welfare shows that despite some improvements the health status of Indigenous Australians has shown little overall improvement in recent years, and remains considerably below that of non-Indigenous Australians.¹⁵

The need to make significant progress in addressing Indigenous disadvantage has emerged as a major concern of Australian governments and one which potentially reflects on Australia's international standing and human rights reputation. The Prime Minister, Kevin Rudd, has called for a new partnership with Indigenous Australians to address the gap in living standards. In his national apology address to Parliament on 13 February 2008, he said:

the core of this partnership for the future is the closing of the gap between Indigenous and non-Indigenous Australians on life expectancy, educational achievement and employment opportunities. This new partnership on closing the gap will set concrete targets for the future: within a decade to halve the widening gap in literacy, numeracy and employment outcomes and opportunities for Indigenous children, within a decade to halve the appalling gap in infant mortality rates between Indigenous and non-Indigenous children and, within a generation, to close the equally appalling 17-year life gap between Indigenous and non-Indigenous when it comes to overall life expectancy.¹⁶

The Prime Minister has reiterated this objective on a number of occasions.¹⁷ The heightened concern about what is perceived as a serious and in some respects deteriorating situation provides the policy context for this examination

of governance issues in respect the of delivery of programs and services to Indigenous communities, particularly remote Aboriginal communities.

III Remote Aboriginal Communities

Michael Dillon and Neil Westbury have noted, drawing on census data, that:

In terms of location, in comparison with the wider population, Indigenous Australians are still far more likely to reside away from cities, especially in remote areas. ... Indigenous people represent almost half (45%) of residents in remote areas. In areas located away from main service centres and mining towns, they are by far the majority.¹⁸

Thus, in remote areas, where the Indigenous population is a high proportion of the total population, Indigenous communities matter both in terms of Indigenous policy and also in respect of broader policies concerning remote areas. After all, '[t]hese areas constitute nearly half the continent'.¹⁹ Policies in respect of Indigenous communities and policies in respect of land management, environmental protection, national security and integrity of borders overlap and provide a two-way loop of interaction and effect. For example, the 'Caring for Country' program under the auspices of the Northern Land Council plays a significant role in bushfire control, feral plant and animal control and eradication, fisheries protection, and border security.²⁰ These are all matters of high national priority.

Some of these remote communities show high levels of poverty and social dysfunction with significant substance abuse, domestic and other violence and even juvenile suicide. Alongside low life expectancy there are high birth rates and a rapidly increasing and youthful population. Many remote Aboriginal communities are characterised by limited opportunities for employment, enterprise and economic development. As John Taylor has observed:

Indigenous people are relatively disengaged from mainstream labour markets in remote areas. Reasons for this are varied, but interlinked. Many employment sites are sporadically located over vast distances and Indigenous propensity to migrate in search of employment is low (in contrast to non-Indigenous labour); this is low partly because individuals lack necessary skills and work experience. People lack these skills partly due to low participation in

formal schooling, though evidence is available to suggest that the resources necessary to provide for the educational needs of remote school age populations are not forthcoming. In any event, crowded and ill-equipped living conditions perpetuate high morbidity, disability, and custody rates all of which detract from engagement capacity. At the same time, some Indigenous people simply prefer other, more customary, life styles.²¹

Subsistence hunting and gathering, traditional arts and crafts, cattle enterprises, wildlife conservation, ecological services and cultural tourism provide economic activity and income in cash or kind. However, government transfers now largely underpin the local economies of remote Aboriginal people²² and, consequently, the interaction between government and Indigenous communities is of maximum importance.

Remote communities are often – either as a direct result of their remoteness and the limited or late European contact, or as a result of Indigenous choices – amongst the more tradition-oriented Australian Indigenous communities. This 'traditionality factor' itself is a key, if often unspoken, issue. Current policy settings can be internally inconsistent in terms of the rhetoric of respect for Indigenous culture as opposed to the impact of policies and programs on cultural mores and practices. Recent moves to encourage boarding schools and hostel arrangements for Indigenous students reflect such potential internal contradictions in policy settings.²³

Under the previous Howard Government's policy aspirations, the preferred response to the perceived deleterious situation of these remote communities, especially in respect of younger Aboriginal people, was out-migration to townships, urban centres or other places of employment potential. This approach is to be clearly discerned, for example, in a speech by the former Minister, Mal Brough, entitled 'Blueprint for Action in Indigenous Affairs'.²⁴ Hostility to remote communities is also the strongly held view of a number of conservative commentators who, as noted by Dillon and Westbury, argue that 'migration to urban areas is the best means to secure Indigenous economic enhancement'²⁵ and who make 'consistent calls ... for government policies to adopt a process of social engineering which results in Indigenous people migrating from remote communities into major cities'.²⁶

Supported, indeed encouraged, by conservative commentators, the previous Government was particularly

reluctant to provide support for small decentralised Aboriginal communities. The Government was disinclined to extend educational, health and housing services to such communities – usually referred to as ‘outstations’ or ‘homelands’. As former Minister Brough declared:

if people choose to move beyond the reach of education and health services noting that they are free to do so, the government’s investment package will not follow them. Let me be specific – if a person wants to move to a homeland that precludes regular school attendance, for example, I wouldn’t support it. If a person wants to move away from health services, so be it – but don’t ask the taxpayer to pay for a house to facilitate that choice.²⁷

A moratorium imposed on funding of new housing and infrastructure on outstations is one highly significant manifestation of this approach. It appears the moratorium remains in place, at least until 30 June 2008.²⁸ This little remarked change in long-standing funding arrangements for remote communities puts existing outstations and homelands in a parlous situation and has had major ramifications given that small decentralised communities constitute the vast majority of discrete Aboriginal communities in the Northern Territory (and in other remote areas such as parts of Western Australia). The moratorium virtually prohibits the establishment of new outstations and homelands. Hence, the Community Housing and Infrastructure Program Guidelines provide that:

Submissions for funding of homelands and outstations ... will only be considered if the homeland has previously received funding under the programme and essential services are in place. Funding will only be provided to maintain and repair existing housing, infrastructure and essential services.²⁹

Indeed, a bilateral agreement on Indigenous housing between the Commonwealth and the Northern Territory Governments of September 2007 explicitly states that ‘[n]o Australian Government funding will be provided to construct housing on outstations/homelands.’³⁰

However, contrary to the view that small Indigenous communities are not viable, are out of the reach of law enforcement agencies, represent some sort of failed socialistic or utopian experiment, should not be encouraged, and are not to be supported (except under very restrictive criteria), there is very strong evidence that small decentralised

communities can provide a positive and constructive lifestyle choice for Indigenous people.³¹ Smaller, usually family or clan-based, communities can fashion a constructive engagement with the wider society and the requirements of modernity and technology in ways that are congruent with Indigenous societal values. Policy settings reflecting the strong attachment of Aboriginal people to their traditional country, and the right to live on that country,³² may enhance the health and social cohesion benefits that have been identified in respect of such smaller communities.

Under policies intended to discourage remote settlements by limiting the provision of housing and other services to communities, outstations and homelands have become increasingly unable to cope because of overcrowding and lack of adequate funding for maintenance and infrastructure. Consequently, there has been a drift of population to the major Aboriginal communities in remote areas and to the fringes of the regional service towns such as Alice Springs and cities such as Darwin. The end result in the towns, fringe camps and suburbs that draw the displaced population is marginalisation, overcrowding, conflict, continued social breakdown and personal distress. There is increasing pressure placed on resources and infrastructure and there are also increasing social tensions in the towns and regional centres that people move to.

The dream that Aboriginal people will move away from remote communities and settlements to urban areas, and in the process obtain secure employment and aspire to middle-class lifestyles – perhaps ‘orbiting’³³ back to their home communities at times – will for most Indigenous people in remote areas remain largely irrelevant to their lived reality. Under such circumstances, Indigenous people are presented with an impossible choice, as anthropologist Diane Austin-Broos has pointed out: ‘either Aboriginal people will favour culture and remain remote and impoverished, or they will need to migrate and forego that culture.’³⁴ In fact, there is an asymmetrical relationship between government and Indigenous communities resulting in a situation of continuing dependency on the part of Indigenous communities, which are generally characterised by inequality in relation to resources, funding and the expertise required to operate in the dominant culture.³⁵ The root cause of continuing dependency lies in original conquest and dispossession disruptive of traditional economies and in subjecting Aboriginal people to continuing exercises of arbitrary power.³⁶ However, there is an ongoing powerlessness which

leaves Indigenous communities vulnerable to unilateral interventions, bureaucratic caprice, and even termination of existing rights and understandings.

In these circumstances, the nature and quality of governance arrangements becomes absolutely critical. Governance issues are thrown into stark relief in relations between remote Indigenous communities and governments.

IV The Idea of Governance

Governance is a term that has been much in vogue in recent years.³⁷ Robert Archer notes the development of the concept during the 1990s:

Stimulated by the World Bank's report on poverty in 1990 and the fall during 1989–90 of the Berlin Wall and all European states east, after 1989 western industrialised governments identified a cluster of policy ideas which they claim constitutes a model for good economic and political management. By economists, these ideas are often called the 'Washington consensus'. Approached from politics they are usually referred as 'good governance' (good government).³⁸

Similarly, John Graham, Bruce Amos and Tim Plumptre writing in 2003 noted that:

Governance has become a 'hot' topic as evidence mounts on the critical role it plays in determining societal well-being. ... Not surprisingly, governance as a term has progressed from obscurity to widespread usage, particularly in the last decade.³⁹

They further observe that:

'Governance' opens new intellectual space. It provides a concept that allows us to discuss the role of government in coping with public issues and the contribution that other players may make.⁴⁰

Whilst a precise definition remains elusive, the general thrust of the term is that it takes the idea of 'government' and fleshes it out with structures, processes and power relationships. In some ways *governance* is the dynamic aspect of the more legalistic and formal notion of *government*. A dictionary definition of 'governance' as 'the action or manner of governing'⁴¹ shows the almost verb-like nature of the

term. It has been observed that the term 'governance' refers to both the formal and informal structures and processes through which a group, an organisation, a community or a society conducts and regulates its internal affairs and its relations with others.⁴² As Jeff Huther and Anwar Shah, in considering public service delivery, point out:

Governance is a multifaceted concept encompassing all aspects of the exercise of authority through formal and informal institutions in the management of the resource endowment of a state. The quality of governance is thus determined by the impact of this exercise of power on the quality of life enjoyed by its citizens.⁴³

It is the sense of governance *as a process* by which relations with others are conducted that is the focus of this paper. It is in terms of the impact of the exercise of power on the quality of life enjoyed by the affected citizens that governance is judged. This paper examines relations between remote Indigenous communities and Australian governments.

The interaction space or relationship space between governments and Indigenous communities can be viewed as the 'governance space'. This concept draws on the conceptualisation by Noel Pearson of the legal doctrine of native title as a 'recognition space' between Indigenous law and Australian law. That is, native title is not simply comprised of the rules and customs of Australia's Indigenous peoples; it is rather where the two systems of law meet and where recognition, with certain legal consequences, takes place.⁴⁴ Similarly, the 'governance space' is where the interaction of two systems of control, decision-making and authority occurs around the delivery of services by governments to Indigenous communities – like a single coin, it has two sides. A similar conceptualisation is provided by Alexander Reilly, also drawing on Pearson. He sees governance as lying in 'the *interaction* of Indigenous peoples with non-Indigenous legal and social systems', and describes this interaction as 'an exercise of governance'.⁴⁵ That is, for Reilly governance is located in what I term the 'governance space'. From the *government side* of this space, governance is concerned with policy development, legislation, program funding and service delivery. The performance of this role has been termed as 'government governance'.⁴⁶ The *Indigenous side* of the governance space is concerned with how Indigenous communities themselves are organised to deal with funding and services provided by government. This side of the governance space – reflecting both traditional modes of

authority and norms, and organisations based on Western law and practice incorporated under the Australian legal system – is termed ‘Indigenous governance’. In Australia an Indigenous sector has developed consisting of thousands of publicly funded Indigenous organisations including land councils, local governments, and legal, health, housing and media organisations.⁴⁷

V Indigenous Governance

There has been considerable focus over recent years on the Indigenous side of the governance space. Policies of self-determination and self-management and the growth of Indigenous organisations to manage services have been seen as co-extensive. In this context much has been said and written about capacity-building and appropriate models for Indigenous organisations.⁴⁸ Austin-Broos has referred to ‘a recent prominence in academic and policy debate on issues of governance’ and has noted that ‘the development of an Indigenous administrative sector has been seen as the centrepiece in struggles for Indigenous rights.’⁴⁹ David F Martin points out, in the context of Indigenous governance, that:

‘Governance’ and ‘capacity building’ or ‘capacity development’ are seen as fundamental precursors to addressing entrenched social and economic disadvantage in the developing world, and for so-called ‘fourth world’ or Indigenous peoples within developed, first-world nations.⁵⁰

He notes that:

the Harvard Project On American Indian Economic Development asserts that its research demonstrates an unequivocal link between the general wellbeing and economic development of Native American nations and the existence of mature, politically robust and competent Indigenous organisations ...⁵¹

The Harvard Project identified three overarching preconditions for strong Indigenous governance, viz:

- *de facto* sovereignty or ‘self-rule’ with genuine decision-making power by tribal governments;
- effective governing institutions; and
- ‘cultural match’, that is, for governing institutions to be effective, they must be legitimate in the eyes of the people they serve.⁵²

In this context, considerable interest has been shown as to whether lessons from the Harvard Project can be applied in Australia. However, a major Australian study on successful strategies for Indigenous organisations has concluded that the situation in Australia is so different from North America that these principles were not applicable to the Indigenous organisations involved in the study except in a modified form.⁵³

This emphasis on the Indigenous side of the governance space, although important, may be somewhat misplaced. Austin-Broos has observed:

If in fact government transfers are not enough, if life-long welfare is inherently disabling even on the margins of the nation state, improving [Indigenous] governance can only have a limited impact.⁵⁴

VI Government Governance

The focus of this article is rather on the other side of governance space – that is, ‘government governance’. This refers to arrangements for the delivery of programs and services to Indigenous communities by governments, and the policies that underlie those programs and services.

The *question* to be addressed is: how effective are governments in their dealings with their Indigenous citizens? The *answer*, this paper argues, is that, despite good intentions, governments, at least in Australia, are not very effective and have made only limited impact on Indigenous inequality and disadvantage. As the Secretary of the Treasury Department, Ken Henry, acknowledged in 2006:

Indigenous disadvantage diminishes all of Australia, not only the dysfunctional and disintegrating communities in which it is most apparent. Its persistence has not been for want of policy action. Yet it has to be admitted that decades of policy action have failed.⁵⁵

Similarly, the Prime Minister, Mr Rudd, has acknowledged this failure of government: ‘[t]he truth is, a business as usual approach towards Indigenous Australians is not working. Most old approaches are not working. We need a new beginning’.⁵⁶

The importance of reflecting on government governance, rather than just assuming governments know what they

are doing, is increasingly being realised. This realisation is apparent in the *Overcoming Indigenous Disadvantage* Report. Whilst focusing on the Indigenous side of the governance space, as is the common practice, the Report makes this important additional point:

A comprehensive picture of Indigenous governance *should also consider* governments' engagement with Indigenous organisations and communities – *government governance*.⁵⁷

Patrick Sullivan has identified the tendency to focus on Indigenous governance and ignore the problems of government governance, and has suggested why this might be so:

The problems on the Indigenous side of the development equation are immensely complex. Equally, they are well known, well-studied, and there is an increasing body of experience in dealing with them, not least among Indigenous organisations themselves. The problems on the non-Indigenous side, in contrast, are not well understood and have been little studied in Australia. Although they require urgent attention, they are subject to resistance by both politicians and civil servants because of the extreme sensitivity of Indigenous disadvantage in a country struggling to build its sense of national identity.⁵⁸

Indeed, significant problems may lie with the government side of the governance space. Gary Banks has characterised the state of government governance in respect of delivery of government services to Indigenous communities in Australia:

A complex array of institutions, policies and programs have governed Australian Indigenous affairs. ... [R]esponsibility for Indigenous affairs has been split between the Commonwealth and the States, resulting in a multilayered and fragmented mix of 'mainstream' services and Indigenous-specific services. ... Several reviews of 'government governance' have found a consistent failure to acknowledge Indigenous cultural perspectives in policy design and implementation, despite acknowledgement of its importance in achieving successful outcomes.⁵⁹

Whilst it is relatively easy to 'blame the victim', that is, to find fault with the Indigenous side of the governance equation, it may be time to examine the mote in the eye of the beholder and look more closely at failures on the government side.

The 'blame the victim' mentality encourages Indigenous problems to be forced into a prism of dysfunctionality regardless of whether these problems are the result of dysfunction (eg, abuse and neglect of children, alcohol and drug abuse, problem gambling, etc) or whether they preponderantly reflect failures of governments to deliver services. In fact, chronic and significant underfunding of essential services and infrastructure, and socially and culturally inappropriate service delivery modes may be the real culprits.⁶⁰ Dillon and Westbury argue:

it is not Indigenous people who are the *primary* cause of their own problems, but rather, a longstanding lack of coherent policy engagement by governments at all levels, underpinned by the absence of determination and political will to make a difference.⁶¹

In a similar vein they pose a basic question:

The real issues relate to implementation and the effectiveness of government initiatives and programs, and the 'elephant in the room': namely, do governments themselves have the capacity to sustain the commitment required to see through such an ambitious agenda [ie, effectively addressing Indigenous disadvantage] in what is arguably the most complex and least successful area of public policy in Australia?⁶²

They argue the need to focus on the other side of the governance space (ie, government governance) and note that a World Bank analysis of international development outcomes identified that a major missing factor in the sustained delivery of socioeconomic outcomes in respect of poverty alleviation is the governance effectiveness of governments themselves.⁶³ The question being posed is whether governments in Australia are up to the task of effectively tackling Indigenous disadvantage. The authors point to a dismal track record:

Over the past three decades there has been a fundamental failure in the governance of governments in relation to Australian Indigenous affairs. Symptomatic of this failure is that governments have failed to engage effectively at an institutional level with Indigenous citizens and communities. This has been the key contributor to the downward spiral of dysfunctionality and disadvantage which so perplexes governments and others.⁶⁴

VII Whole of Government

Over recent years, a major response to Indigenous disadvantage by Australian governments at state and federal levels has been to identify duplication, lack of coordination, and inflexibility in service delivery as significant contributing factors in the failure of government governance. This concern can be seen as part of growing wider concerns with problems of governance in the Australian federation.⁶⁵ Since 2000, Australian governments have attempted to reform service delivery to Indigenous communities, principally through the Council of Australian Governments ('COAG').⁶⁶ In 2001, COAG developed the National Framework of Principles for Delivering Services to Indigenous Australians.⁶⁷ The framework principles included improving service delivery by providing services and programs that are appropriate, coordinated and flexible and that avoid duplication. The principles sought to rationalise government interaction with Indigenous communities, and to maximise the effectiveness of action at the local and regional level through whole of government responses. In 2003, COAG decided to trial a whole of government approach to government service delivery in eight Indigenous communities. These whole of government trials were intended to improve the way governments interact with each other and with communities. The lessons learnt from these trials were then to be applied more broadly.⁶⁸

Indeed, 'whole of government' was to become the mantra of good governance.⁶⁹ The whole of government concept was elaborated by the Management Advisory Committee ('MAC' – a forum of Commonwealth secretaries and agency heads) in 2004 under the rubric of 'connecting government'.⁷⁰ Whole of government was defined as:

public service agencies working across portfolio boundaries to achieve a shared goal and an integrated government response to particular issues. Approaches can be formal and informal. They can focus on policy development, program management and service delivery.⁷¹

Indigenous affairs was to be the 'guinea pig' for the introduction of a whole of government approach across the public sector. The difficulties of attempting such an approach were acknowledged, including in the MAC Report.⁷² Dr Peter Shergold, former Secretary of the Department of the Prime Minister and Cabinet, articulated the high level of expectation resting on this new approach:

The vision is of a whole-of-government approach which can inspire innovative national approaches to the delivery of services to Indigenous Australians, but which are responsive to the distinctive needs of particular communities. It requires committed implementation. The approach will not overcome the legacy of disadvantage overnight. Indigenous issues are far too complex for that. But it does have the potential to bring about generational change.⁷³

In addition, in 2004 the Commonwealth Government also instituted what it termed 'new administrative arrangements' in Indigenous affairs which abolished the national elected Indigenous representative body – the Aboriginal and Torres Strait Islander Commission ('ATSIC') – and 'mainstreamed' Indigenous programs previously administered by ATSIC. The Government's stated objective in instituting the new arrangements was that, within a 20 to 30 year timeframe,

Indigenous Australians, wherever they live, have the same opportunities as other Australians to make informed choices about their lives, to realise their full potential in whatever they choose to do and to take responsibility for managing their own affairs.⁷⁴

The then Minister for Immigration and Multicultural and Indigenous Affairs, Senator Amanda Vanstone, said of the changes: '[w]e want more of the money to hit the ground. We are stripping away layers of bureaucracy to make sure that local families and communities have a real say in how money is spent.'⁷⁵ These were fine words. A dramatic overhaul of government governance in respect of service delivery to Indigenous communities was instituted. Indigenous affairs was overwhelmed in a virtual tsunami of change. These changes occurred at the macro level – including the transformation of Indigenous affairs to the lead area (or 'forward deployment') for what were to become sweeping whole of government changes in the public sector, the abolition of national and regional representative Indigenous bodies, and the mainstreaming of major Indigenous programs – and at the micro level – most notably, the detailed management of programs and projects through the introduction of Shared Responsibility Agreements based on principles of mutual responsibility. Aboriginal and Torres Strait Islander Social Justice Commissioner, Tom Calma, noted that '[t]he scope of this change is perhaps unprecedented in the administration of Indigenous affairs at the federal level'.⁷⁶ Senator Vanstone considered that the changes constituted a 'quiet revolution', as did Senator Chris Ellison, who told the Senate:

A quiet revolution has been underway since 1 July 2004 involving a radical new approach ... Nothing short of revolutionary reform is required if we are to turn around the appalling indicators of Indigenous disadvantage and the sense of hopelessness that many Indigenous people face every day.⁷⁷

However, some of these changes were not necessarily mutually reinforcing. As Sullivan has observed, '[t]he [whole of government] policy was also from the start linked to a parallel, but not conceptually related, commitment to mutual responsibility in the delivery of social services.'⁷⁸ It also, as Sullivan noted, came with considerable political baggage, not least its tendency

to reject all that had gone before as misguided, politically suspect, wasteful and corrupt ... This presents the bureaucracy with the danger of simply reinventing the past in new guise ...⁷⁹

Led by the former Federal Government, considerable energy and resources went into the re-engineering of government Indigenous programs and service delivery including the purported closer coordination of both mainstream and Indigenous-specific programs. The new arrangements provided for high-level stakeholder involvement through a Ministerial Taskforce on Indigenous Affairs, departmental collaboration at a senior level through the Secretaries' Group on Indigenous Affairs, and, on the ground, coordination through a network of Indigenous Coordination Centres co-locating officers from departments involved with relevant programs. The arrangements were 'elaborate and multi-layered involving collaboration between a number of governments and their departments as well as the private sector and not-for-profit organisations'.⁸⁰

There was a degree of initial, if cautious, support for the new arrangements, especially in respect of a whole of government approach. There was hope that they would in fact lead to real and significant progress in addressing Indigenous disadvantage. Sullivan, for example, although expressing a number of serious reservations, nevertheless was cautiously optimistic:

With these caveats in mind, it may still be said that introducing whole-of-government cooperation for Indigenous development is a significant opportunity for Indigenous people to break out of the quagmire of self-reproducing waste,

dysfunction and unintended negative consequences that has characterised development approaches for two decades.⁸¹

In a similar vein, Calma expressed support for at least some of the principles underlying the new arrangements:

It is difficult to argue against the objectives that the new arrangements are designed to meet. They contain a number of machinery of government changes that, in theory, are innovative in how they seek to address longstanding difficulties of government service provision to Indigenous people and communities.⁸²

VIII Where Rhetoric Meets Reality

Sufficient time has elapsed for the new arrangements in Indigenous affairs to have at least indicated their *potential* to impact positively on Indigenous disadvantage. To date, the new arrangements have largely been left in place by the Labor Government. However, Labor has signalled its intention to review the NTER during 2008⁸³ and also to establish some form of national representative Indigenous body.⁸⁴ Given the continued currency of a mainstreamed whole of government approach to the development of Indigenous policy and the delivery of programs, it continues to be appropriate to examine the experience with the new arrangements.

Generally speaking, the results to date can only be described as disappointing – the reality has not matched the rhetoric. In 2007, the Australian National Audit Office ('ANAO') identified a number of difficulties and shortcomings experienced in the implementation of the whole of government approach to Indigenous service delivery under the new administrative arrangements of 2004.⁸⁵ The ANAO listed key areas in need of improvement for the new arrangements to achieve their objective.⁸⁶ The ANAO Report clearly indicated that the whole of government approach was in serious difficulty. The failure of the reforms is to be seen particularly in the outcomes of the eight COAG whole of government trials which fell far short of expectations. The independent evaluation report of the COAG trials,⁸⁷ despite endeavouring to focus 'on what worked well',⁸⁸ indicated a number of significant difficulties on the government governance side, including, significantly, insufficient cultural awareness and sensitivity.⁸⁹ Contrary to expectations, there was an increase rather than a reduction of red tape.⁹⁰ It seems that a whole of government approach ironically can result in the decision-making process become more complex. The evaluation report notes:

The COAG Trial approach recognised the need to make changes at all levels in the system, national, state and local, but this was difficult to achieve consistently across levels and sites. Involving more partners increases the risk that decision making processes become too complex, unless it is made clear that the involvement of some players is to improve coordination, clear blockages and reduce red tape, not to add more steps to the decision making processes.⁹¹

A detailed account of the outcomes at one of the COAG trial sites, the large Aboriginal community of Wadeye in the Northern Territory, is provided in the *Social Justice Report 2006*.⁹² Statistics on the Daly Statistical Local Area, of which Wadeye is a substantial part, reflect a parlous situation, with a death rate four times higher than for the Northern Territory, an average life expectancy of 46 years, and a range of serious and endemic health problems.⁹³ An independent evaluation report of the COAG Wadeye trial indicated an almost total failure to achieve objectives.⁹⁴

In the light of the failure of this trial, Calma concluded:

The Wadeye COAG trial showed that the whole of government approach to service delivery is difficult to implement, requires a major investment of time and resources, and has yet to demonstrate that it provides a reliable and realistic platform for the administration of Indigenous affairs. Whilst coordination of service delivery is important and should be pursued, it is not a substitute for developing and implementing strong policies and effective programs to respond to the difficult circumstances facing communities like Wadeye.⁹⁵

Despite the disappointing outcomes at Wadeye and uncertain outcomes overall with most of the COAG trial sites, the Howard Government nevertheless pushed on with implementing its new administrative arrangements for Indigenous affairs. Faced with continuing failures, it increasingly turned to unilateral 'strategic interventions' in identified priority communities. These interventions, which were to be determined in agreement with State and Territory governments, were intended to stabilise the community and demonstrate the merit of coordinated investment and action. A Strategic Interventions Taskforce was established within the then Department of Families, Community Services and Indigenous Affairs ('FaCSIA', now FaHCSIA) to implement these interventions.⁹⁶ This 'strategic intervention' doctrine appears to have reached its apotheosis in the NTER.

The COAG trials showed that the whole of government approach to service delivery was difficult to implement and did not demonstrate that it could provide a sound basis for the administration of Indigenous affairs. The whole of government approach, plus the other fundamental changes in Indigenous affairs arrangements, were just too difficult, government officials at times lacked the cross-cultural skills to operate effectively in this environment, and government did not always follow through on commitments or respond to the priorities of communities. The danger in the governance discourse is that an undue emphasis on *process* issues becomes a substitute for effective and ongoing programs and service delivery. It is not only a question of *inappropriate* process (although this is clearly of great importance), it is also a question of a fixation with process itself. Bureaucratic priorities can displace those of the communities.

In respect of the ANAO Report, Dillon has pointed out:

The report's authors have ... managed to demonstrate the extraordinary complexity of the arrangements put in place to administer public policies and programs in Indigenous affairs, particularly over the last five years; the extraordinary state of flux in this area; and the murk and opacity which exists between policy objectives and policy and program outcomes.⁹⁷

Further, Dillon notes that:

Whole of government arrangements are primarily designed to maintain focus and co-ordination in the face of deep-seated and intractable problems which span the responsibilities of multiple agencies. But there reaches a point where the proliferation of purported solutions and responses by governments become part of the problem, not least because they create an environment where the efforts of the public sector become so diffuse that it is impossible to hold any one actor, institution or agency accountable for outcomes.⁹⁸

As Sue Hunt has observed:

whole-of-government is a relatively nebulous concept and whether or not the use of any of these practices, in their many shapes and forms, will guarantee more integrated and collaborative government has not been universally demonstrated.⁹⁹

However, the problem goes deeper than the difficulty in successfully bringing off whole of government reforms. Whilst coordination of service delivery itself is a useful objective, it can never be a substitute for sound policies and programs based on proper consultation. Essentially what has been lacking in the new arrangements in Indigenous affairs is effective engagement with the communities and the opportunity for their meaningful participation. Meredith Edwards, in discussing the need for participatory governance in respect of the Rudd Government's Indigenous agenda, notes that:

Complex [policy] issues, and particularly sensitive ones such as indigenous policy and delivery issues, will require moving beyond consultation to a more active engagement with those likely to be affected by decisions. This is sometimes called 'participatory governance' or, in the OECD's words, 'active participation'.¹⁰⁰

Edwards notes the necessity of establishing trusting relationships and a willingness on the part of government to share decision-making power. She also observes that this requires considerable effort. Importantly, there is the issue of the time horizon for successful and sustainable outcomes. Thus,

there is also a tension between attempting to pursue the most immediately efficient practices on the one hand and, on the other, spending the required resources to gain trust and collaboration over what can be lengthy periods of time with the aim of achieving more effective and long-term outcomes.¹⁰¹

Policy development and program implementation without sustained representative Indigenous input is simply unilateralism, no matter how well-intentioned.

IX Governance as Drama

The NTER provides an example of such unilateralism. The greater danger arising from the disappointing outcomes of the whole of government reform process was that the wrong lessons would be learned and that mistakes would be compounded. And, to some extent at least, the wrong lessons *were* learned. There can be little doubt that the NTER is the end result of the whole of government approach coupled with unilateral strategic intervention.

The problems afflicting remote Indigenous communities were dramatically illustrated by *Ampe Akelyernemane Meke Mekarle*: 'Little Children are Sacred': Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse¹⁰² ('Little Children are Sacred Report'). The Report found, inter alia, that child sexual abuse is serious, widespread and often unreported, and that the combined effects of poor health, alcohol and drug abuse, unemployment, gambling, pornography, inadequate education and housing, and a general loss of identity and control have contributed to violence and to sexual abuse in many forms.¹⁰³

In June 2007, the Commonwealth Government, citing the Little Children are Sacred Report,¹⁰⁴ announced that a national emergency existed in respect of Indigenous child abuse and initiated a major and urgent intervention in the Northern Territory – the NTER. This intervention involved a significant, and virtually unprecedented, army and police presence in approximately 70 Indigenous communities in the Northern Territory. The NTER was announced even before the Northern Territory Government had been informed, and Aboriginal people were left almost entirely out of the picture. The Government justified its unilateral approach in terms of responding to a national emergency. Any consultation that took place fell far short of the sort of standards developed by international organisations such as the World Bank. Convoys of army vehicles, police and public servants simply descended on communities at very short notice and talked to whoever was available.¹⁰⁵

The details of the NTER have been widely canvassed and the discriminatory aspects of the underpinning legislation are discussed above.¹⁰⁶ That complex legislative package was pushed through the House of Representatives in one day and similarly a Senate Committee was given one day to take submissions and listen to witnesses. Former Minister for Aboriginal Affairs, Fred Chaney, described his response to the Government's legislation as follows:

I am shocked at the extent to which the legislation, rushed through the Parliament this week:

- is contemptuous of Aboriginal property rights
- is contemptuous of the principle of non discrimination
- is authorising an absurd and unattainable level of micro management of Aboriginal lives far beyond the capacity of the federal bureaucracy ...
- provides for desert dwellers to be forced into towns, as

they were once emptied out of the cattle stations in the 1960s with devastating social effects, and

- could see successful communities and families returned to dependence, crushing the engagement which is essential to making progress.¹⁰⁷

Reactions to the implementation of the NTER have been mixed. The widespread recognition, especially by governments, of the significant difficulties facing remote Aboriginal communities is both welcome and overdue. Also welcome and certainly merited is the provision of additional resources, although whether they are sufficient and whether they are appropriately targeted is by no means clear. Restrictions on alcohol are in principle welcome and reflect the priorities of many Aboriginal communities in the Northern Territory. However, it should be noted that alcohol restrictions were already in place in respect of Aboriginal land under Northern Territory legislation.

The coercive nature of the NTER is troublesome, in particular the unusual and arguably unwarranted role of the military. Although the NTER ostensibly involves a non-force deployment restricted to providing logistical and administrative support to what is a whole of government effort, the use of the army in the circumstances is unusual in that it does not have the usual characteristics of a response to an emergency (for example, the response to Cyclone Tracy in Darwin, 1974). The apparent environment of a breakdown in law and order in the Northern Territory, the militaristic language employed by the then FaCSIA Minister of 'stabilising, normalising and then exiting',¹⁰⁸ and the emphasis on dealing with alcohol, drugs and pornography all point towards the NTER, especially in the early stages, as being a form of policing or law enforcement. This moves the army's role closer to one that entails the use of force to aid civil authorities in the enforcement of law and order.¹⁰⁹

The assumption underlying the NTER – that the problems to be addressed lie in the dysfunctionality of the communities (rather than, at least to a significant degree, in the failures of governments to properly engage with and resource the communities) – is of doubtful validity and is potentially misleading to policy makers. This a view shared by Dillon and Westbury:

The recent intervention in the Northern Territory is an attempt to simultaneously impose order on remote communities based on *the incorrect assumption* that the

source of the dysfunction resides *solely or primarily* within those communities, and to give the appearance of action and control to the wider Australian electorate.¹¹⁰

As noted, the NTER represents the whole of government philosophy taken to its extreme. Given that the NTER is an exercise in failed whole of government modalities, the prognosis for the NTER is not encouraging. Although the NTER is to be reviewed in the second half of 2008, cracks are already appearing in the edifice and counter-productive outcomes are increasingly being noted at senior levels.¹¹¹

X The International Law Context

The discriminatory nature of a number of the NTER provisions raises the question of possible derogation by Australia from its international legal obligations in respect both of multilateral treaties ratified by Australia, including the *Convention on the Elimination on All Forms of Racial Discrimination*,¹¹² and obligations binding under customary international law, such as the *ius cogens* prohibition on racial discrimination. Arguments propounded by the previous Commonwealth Government and reflected in the relevant legislation that the NTER provisions constitute, in all or part, 'special measures' providing temporary exemption from the prohibition on racial discrimination are well outside the usually accepted understanding (including in Australian jurisprudence) of the scope of the special measures exemptions. Special measures can only sanction negative discrimination with the informed consent of those so affected.¹¹³

Calma has, after close and detailed analysis of the legislation passed in respect of the NTER, concluded that

it is not possible to support the government's contention that all of the measures contained in the NT intervention legislation can be justified as special measures. It is therefore also not possible to say that in its current form the legislation is consistent with the RDA [*Racial Discrimination Act 1975* (Cth)].¹¹⁴

The NTER raises concerns precisely in relation to principles of fairness, impartiality and the rule of law. Restrictions on rights to procedural fairness and external merits review including in respect of social security entitlements involve arbitrary and potentially unfair arrangements. In a situation premised on restoring respect for law and order, this can be counter-productive. As Calma has observed:

the Government has clearly stated that the Northern Territory intervention seeks to address a breakdown in law and order in Indigenous communities. And yet it potentially involves introducing measures that undermine the rule of law and that do not guarantee Indigenous citizens equal treatment to other Australians.¹¹⁵

What has made Indigenous rights in Australia so vulnerable to the whim of the government of the day? The basic domestic law issue is the lack of constitutional entrenchment of Indigenous rights, or even of the norm of non-discrimination generally, in the *Australian Constitution*. What courts give, and indeed what parliaments give, parliaments can take away. In this context, Calma has observed:

The ease with which the obligations under the RDA can be set aside by the NT intervention legislation reveals the weak status of protections of racial discrimination in our legal system.

It vividly demonstrates how the Commonwealth Parliament has the power to legislate to override any provision of the RDA with very little accountability.¹¹⁶

However, in the absence of domestic protection, accountability can be found, to some extent at least, at the international level. Not that governments would necessarily agree. Nation states tend to deny any *special* reach of international law in respect of Indigenous peoples. Indeed, nation states resent international oversight of their treatment of their Indigenous citizens and try to ignore, or shield themselves from, the international spotlight.¹¹⁷ Asserting that Indigenous peoples are *their* citizens, nation states claim that rights and obligations pertaining to Indigenous citizens fall within the ambit of domestic responsibility. Nevertheless, no matter what governments assert, international norms and practice do encompass Indigenous rights, and Indigenous peoples are subjects of international law. Indigenous peoples are bearers of rights and have been so not only under the international human rights regime developed since World War Two, but also since the very beginnings of international law at the time of European expansion into the New World.

Indeed, the foundations of international law itself are to be found in part in the attempts by 16th century Spanish jurists to delineate the proper legal relationship between the colonising states and the Indigenous peoples whose lands were being taken over.¹¹⁸ Over the past 50 years, these early

international law concerns with Indigenous peoples have re-emerged and have converged with modern human rights norms such as self-determination and non-discrimination. This has resulted, as Professor S James Anaya has noted, in international law being 'reformulated into a force in aid of indigenous peoples' own designs and aspirations.'¹¹⁹

Indigenous peoples are now clearly established as non-state actors in international law. This trend has been confirmed by, among other things, the appointment in 2001 of a UN Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples,¹²⁰ the establishment of the UN Permanent Forum on Indigenous Issues which first met in 2002,¹²¹ and the overwhelming endorsement of the UN *Declaration on the Rights of Indigenous Peoples* by the UN General Assembly on 13 September 2007.¹²² As well, the jurisprudence of UN treaty bodies such as the Human Rights Committee and the Committee for the Elimination of Racial Discrimination ('CERD Committee') has dealt extensively with Indigenous issues.

Despite the displays of bravado by democratic governments in the face of international oversight, governments are nevertheless sensitive to criticisms from the international community. Potentially, the court of international opinion can provide something of a brake on excesses of policy. The words of a former Prime Minister of Australia, Gough Whitlam, have resonance in this context:

[m]ore than any foreign aid program, more than any international obligation which we meet or forfeit, more than any part we may play in any treaty or agreement or alliance, Australia's treatment of her Aboriginal people will be the thing upon which the rest of the world will judge Australia and Australians ...¹²³

International standards and best practice apply to governance principles concerning engagement with Indigenous communities and other minorities. These standards have been expounded by UN development agencies and financial institutions in the context of meeting the challenge of poverty alleviation in developing countries, including in respect of Indigenous peoples. The standards so developed are highly relevant to the governance challenges facing Australian governments as they endeavour to effectively address Indigenous disadvantage. In a policy brief for the Canadian Institute on Governance, Graham, Amos and Plumptre have noted that:

Defining the principles of good governance is difficult and controversial. The United Nations Development Program enunciates a set of principles that, with slight variations, appear in much of the literature. There is strong evidence that these UNDP-based principles have a claim to universal recognition.¹²⁴

Importantly, they assert that:

The central conclusion is that a universal set of principles for defining good governance can be fashioned and that the strength of their universality rests to a large extent on the body of international human rights and laws.¹²⁵

The UN Development Program ('UNDP') principles stress what the authors term 'legitimacy and voice', that is, that all men and women should have a voice in decision-making, either directly or through legitimate intermediate institutions that can represent them.¹²⁶ 'Fairness' is also a key principle of good governance and encompasses both equitable treatment and, very importantly, the rule of law: 'legal frameworks should be fair and enforced impartially, particularly laws on human rights.'¹²⁷ The UNDP principles are based on recognised and established human rights. As the authors point out, the principles of legitimacy and voice and of fairness have strong claims to universal recognition and can be linked to over a half century of UN accomplishments in the field of human rights. As they note, these two governance principles link with key clauses in the UN *Universal Declaration of Human Rights*¹²⁸ adopted in 1948 and with the various human rights treaties and protocols adopted since 1948.¹²⁹

The emerging principle in international human rights law of free, prior and informed consent is the international law bedrock for good governance in respect of Indigenous peoples. In 2005, a workshop of the UN Permanent Forum on Indigenous Issues noted that:

the legal norms, administrative measures and methodologies adopted in relation to free, prior and informed consent have been used and should continue to be used to build a culture of respect and mutual understanding in the relations between indigenous peoples, States, intergovernmental organizations and the private sector ...¹³⁰

The World Bank has unreservedly adopted this principle in its policy and procedures concerning Indigenous peoples.

Thus, Bank policy is that:

For all projects that are proposed for Bank financing and affect Indigenous Peoples, the Bank requires the borrower to engage in a process of free, prior, and informed consultation. The Bank provides project financing only where free, prior, and informed consultation results in broad community support to the project by the affected Indigenous Peoples.¹³¹

The principle of informed consent applies not only to administrative acts and decisions, but also to the legislative process itself. The CERD Committee has called upon state parties to:

Ensure that members of indigenous peoples have equal rights in respect of effective participation in public life and that no decisions directly relating to their rights and interests are taken without their informed consent.¹³²

The potential application of the norm of participation and consent where legislative provisions bear directly on significant Indigenous rights is demonstrated by the CERD Committee decision of March 1999 in respect of the 1998 amendments to the *Native Title Act 1993* (the so-called 'Ten Point Plan'), viz:

The lack of effective participation by indigenous communities in the formulation of the amendments also raises concerns with the State party's [Australia's] compliance with its obligations under article 5(c) of the Convention [which deals with participation rights].¹³³

XI Conclusion

International norms and best practice provide authoritative guidance in respect of good governance, program implementation and service delivery to Indigenous communities. Such guidelines and principles can be recognised by domestic governments and applied appropriately. Governance provides a perspective by which to analyse and measure the efficacy of government responses to Indigenous dispossession, disruption and disadvantage. Importantly, international experience suggests that without a climate of respect, consultation and negotiation it is difficult to achieve good governance and sustained improvements in outcomes. If we compare the history of government governance in Australia since about 2000 (including but not restricted to the NTER) against these internationally established principles

of good governance, it appears that Australian governance practice fails to meet these standards.

Nation states that think they can find their own way in the difficult waters of relations between Indigenous peoples and the wider society are bound for disappointment. Instead, cognisance can be taken of international human rights law and international experience, best practice and standards in respect of poverty alleviation in general and the situation of Indigenous peoples in particular. Broadly speaking, the underlying principle is that Indigenous people have the right to be fully involved in relation to major decisions that directly affect their interests.

Governance relations between nation states and Indigenous peoples as non-state actors present perhaps the greatest challenge to independent states – their international credibility, even legitimacy, may ultimately depend on how well they meet that challenge.

* Greg Marks is a Canberra-based consultant and researcher specialising in international human rights law and Indigenous policy. He is rapporteur of the International Law Association Committee on the Rights of Indigenous Peoples.

1 John Howard, quoted in 'Aboriginal Leader Blasts Stolen Generation 'Shame Job'', *ABC News*, 24 May 2007 <<http://www.abc.net.au/news/newsitems/200705/s1932665.htm>> at 26 August 2008 (emphasis added).

2 See, eg, Gary Johns, 'The Northern Territory Intervention in Aboriginal Affairs: Wicked Problem or Wicked Policy?' (2008) 15(2) *Agenda* 65, <<http://eprints.anu.edu.au/agenda/015/02/pdf/15-2-CO-1.pdf>> at 26 August 2008.

3 Elizabeth Evatt, 'ANU Reconciliation Lecture' (Speech delivered at the Australian National University, Canberra, 4 June 2007), <<http://www.reconciliation.org.au/downloads/156/ElizabethEvatt.pdf>> at 26 August 2008.

4 The substantive provisions of the relevant legislation are contained in: *Northern Territory National Emergency Response Act 2007* (Cth); *Social Security and Other Legislation Amendment (Welfare Payment Reform) Act 2007* (Cth); *Families, Community Services and Indigenous Affairs and Other Legislation Amendment (Northern Territory National Emergency Response and Other Measures) Act 2007* (Cth); *Appropriation (Northern Territory National Emergency Response) Act (No 1) 2007–2008* (2007) Cth; and *Appropriation (Northern Territory National*

Emergency Response) Act (No 2) 2007–2008 (Cth).

5 In respect of the NTER, see, eg, Department of Families, Housing, Community Services and Indigenous Affairs ('FaHCSIA'), *Emergency Response to Protect Aboriginal Children in the NT* <<http://www.facs.gov.au/nter/>> at 26 August 2008. FaHCSIA notes that: '[t]he current Government has continued most NTER measures in full and on 6 June 2008 announced a comprehensive and independent review. The review will assess what is working and what may need to be changed.' For a description of the Welfare Reform Project, see Cape York Institute, *Welfare Reform* <<http://www.cyi.org.au/welfarereform.aspx>> at 26 August 2008. For evidence of continuing Commonwealth Government support of the Welfare Reform Project, see Jenny Macklin and Anna Bligh, 'Rudd and Bligh Governments to deliver Cape York Welfare Reform' (Press Release, 24 December 2007) <http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/cape_york_reform_21dec07.htm> at 26 August 2008.

6 Commonwealth, *Parliamentary Debates*, House of Representatives, 13 February 2008, 172 (Kevin Rudd, Prime Minister).

7 See 'The Settlement as a "Training" Asset' in C D Rowley, *The Remote Aborigines* (1972) 117–125.

8 Siegfried Wiessner provides a graphic summary of the consequences of colonisation for Indigenous peoples under the rubric of 'The Legacy of Conquest'. See Siegfried Wiessner, 'Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis' in S James Anaya (ed), *International Law and Indigenous Peoples* (2003) 257, 258–9.

9 The principle of non-discrimination on the grounds of race is generally considered to be a peremptory norm, *ius cogens*, of international law. For a discussion of *ius cogens* and non-discrimination on the grounds of race see, eg, Donald W Greig, 'Sources of International Law' in Sam Blay, Ryszard Piotrowicz and B Martin Tsamneyi (eds), *Public International Law: An Australian Perspective* (1997) 58, 69.

10 For an analysis of the racially discriminatory nature of the legislation, see Aboriginal and Torres Strait Islander Social Justice Commissioner (Tom Calma), *Social Justice Report 2007* (2008) 215–19, 234–89.

11 Steering Committee for the Review of Government Service Provision ('SCRGSP'), *Overcoming Indigenous Disadvantage: Key Indicators 2007*, Productivity Commission (2007) <<http://www.pc.gov.au/gsp/reports/indigenous/keyindicators2007/keyindicators2007.pdf>> at 26 August 2008 ('*Overcoming Indigenous Disadvantage Report*').

12 Ibid 1.

13 Gary Banks, 'Overcoming Indigenous Disadvantage in Australia' (Speech delivered at the Second OECD World Forum on

- 'Measuring and Fostering the Progress of Societies', Istanbul, Turkey, 29 June 2007) 3 <http://www.pc.gov.au/_data/assets/pdf_file/0009/64584/cs20070629.pdf> at 26 August 2008.
- 14 For a discussion on movements and trends in respect of indicators of Indigenous disadvantage, see Jon Altman, Nicholas Biddle and Boyd Hunter, *The Challenge of 'Closing the Gaps' in Indigenous Socioeconomic Outcomes*, Centre for Aboriginal Economic Policy Research ('CAEPR') (2008) <<http://www.anu.edu.au/caepr/ClosingTheGaps.pdf>> at 26 August 2008.
- 15 Australian Bureau of Statistics and Australian Institute of Health and Welfare, 'Falls in Indigenous Infant Mortality Rates, but Wide Disparities Still Exist: ABS & AIHW' (Press Release, 29 April 2008) <<http://www.abs.gov.au/ausstats/abs@.nsf/mediareleasesbytitle/3C18155D35250456CA2574390029C0E5?OpenDocument>> at 26 August 2008.
- 16 *Parliamentary Debates* (Kevin Rudd), above n 6.
- 17 See Altman, Biddle and Hunter, above n 14, 1.
- 18 Michael C Dillon and Neil D Westbury, *Beyond Humbug: Transforming Government Engagement with Indigenous Australia* (2007) 15. See also John Taylor, *Population and Diversity: Policy Implications of Emerging Indigenous Demographic Trends*, CAEPR Discussion Paper No 283, CAEPR (2006) 45.
- 19 Ibid.
- 20 See Northern Land Council, *Caring for Country* (2003) <http://www.nlc.org.au/html/care_menu.html> at 26 August 2008.
- 21 Taylor, above n 18, 68–9.
- 22 Diane Austin-Broos, 'Introduction: Culture, Economy and Governance' in Diane Austin-Broos and Gaynor Macdonald (eds), *Culture, Economy and Governance in Aboriginal Australia* (2005) 1, 2.
- 23 The Minister for Families, Housing, Community Services and Indigenous Affairs, Jenny Macklin, has defended the Government's continued support of boarding hostels for Indigenous students (a program initiated by the Howard Government). See 'Boarding Schools for Indigenous Kids', *The Age* (Melbourne), 30 March 2008 <<http://news.theage.com.au/boarding-schools-for-indigenous-kids/20080330-22f1.html>> at 26 August 2008. However, residential schooling has been an often tried and just as often traumatic 'solution' to Aboriginal underachievement in Western schooling outcomes.
- 24 Mal Brough, 'Blueprint for Action in Indigenous Affairs' (Speech delivered at the National Institute of Governance Indigenous Affairs Governance Series, Canberra, 5 December 2006) <<http://www.facsia.gov.au/internet/Minister3.nsf/content/051206.htm>> at 26 August 2008.
- 25 Dillon and Westbury, above n 18, 19. See, eg, Gary Johns, *Remote Communities: The Task Ahead* (2007) The Bennelong Society <<http://www.bennelong.com.au/articles/johnsozjune2007.php>> at 26 August 2008; Helen Hughes, *Lands of Shame: Aboriginal and Torres Strait Islander 'Homelands' in Transition* (2007).
- 26 Dillon and Westbury above n 18, 20.
- 27 Brough, 'Blueprint for Action', above n 24. The Government thereby refused to support return to country, unless it coincidentally was near existing town services – which in turn, depending on circumstances, potentially contradicts the purpose of returning to traditional estates.
- 28 See FaHCSIA, *Community Housing and Infrastructure Program (CHIP)* <<http://www.facs.gov.au/internet/facsinternet.nsf/indigenous/programs-chip.htm>> at 26 August 2008.
- 29 FaHCSIA, *Community Housing and Infrastructure Program (CHIP): E-Sub Program Guidelines for 2006–07* (2006) <[http://www.facs.gov.au/internet/facsinternet.nsf/via/chip_guidelines/\\$file/e-sub_guide_2006_07.pdf](http://www.facs.gov.au/internet/facsinternet.nsf/via/chip_guidelines/$file/e-sub_guide_2006_07.pdf)> at 26 August 2008.
- 30 *Memorandum of Understanding Between the Australian Government and the Northern Territory Government Indigenous Housing, Accommodation and Related Services September 2007*, [17]. This memorandum does not appear to be available online, but see Northern Territory Department of Local Government Housing and Sport, *Strategic Indigenous Housing and Infrastructure Program* <<http://www.territoryhousing.nt.gov.au/remotehousing/>> at 26 August 2008.
- 31 See, eg, Patricia Karvelas, 'Brough Red-faced over Leak', *The Australian* (Sydney), 10 August 2007, 7. The article refers to a leaked internal government report that 'has found that small remote indigenous communities with fewer than 100 people are healthier environments than larger towns and also have strong economic possibilities'. See also Kevin G Rowley et al, 'Lower Than Expected Morbidity and Mortality for an Australian Aboriginal Population: 10-Year Follow-up in a Decentralised Community' (2008) 188(5) *Medical Journal of Australia* 283. The results of this 10-year study by Rowley et al showed that for the residents of Utopia, which is made up of 16 outstations, health results (including in relation to cardio-vascular diseases) were significantly better than for residents of other Aboriginal communities.
- 32 Arguably such rights are protected by a range of international instruments to which Australia is a party. For a discussion of the requirements and implications of international standards and practice see section X below.
- 33 The term is Noel Pearson's, who has described the concept thus: 'In this context, there may be an important role for orbits, where people head out to engage in the real economy, and then return to home base again, bringing the resources they have earned with them.' See Noel Pearson, *The Cape York Agenda – Fundamental Transformation Through Radical Reform*, Cape York Institute (2005) 6 <<http://www.cyi.org.au/WEBSITE%20>

- uploads/Documents/Cape%20York%20Agenda%20final.pdf> at 26 August 2008.
- 34 Austin-Broos, above n 22, 2 (emphasis in original).
- 35 Kingsley Palmer, 'Dependency, Technology and Governance' in Luke Taylor et al (eds), *The Power of Knowledge, the Resonance of Tradition* (2005) 101, 103.
- 36 See, amongst numerous possible sources, Tony Roberts, *Frontier Justice: A History of the Gulf Country to 1900* (2005); Sue Davenport, Peter Johnson and Yuwali, *Cleared Out: First Contact in the Western Desert* (2005).
- 37 Michael Dodson and Diane E Smith, *Governance for Sustainable Development: Strategic Issues and Principles for Indigenous Australian Communities*, CAEPR Discussion Paper No 250, CAEPR (2003) 3 <http://www.anu.edu.au/caepr/Publications/DP/2003_DP250.pdf> at 26 August 2008.
- 38 Robert Archer, *Markets and Good Government: The Way Forward for Economic and Social Development?*, UN Non-Government Liaison Service Development Dossiers (1994) <<http://www.un-ngls.org/documents/publications.en/develop.dossier/dd.01/01.htm>> at 26 August 2008.
- 39 John Graham, Bruce Amos and Tim Plumptre, *Principles of Good Governance in the 21st Century*, Policy Brief No 15, Institute On Governance (2003) 1 <<http://www.iog.ca/publications/policybrief15.pdf>> at 26 August 2008.
- 40 Ibid 6.
- 41 William Little et al, *The Shorter Oxford Dictionary on Historical Principals* (3rd revised ed, 1973).
- 42 Tim Plumptre and John Graham, cited in David F Martin, *Rethinking the Design of Indigenous Organisations: The Need for Strategic Engagement*, CAEPR Discussion Paper No 248, CAEPR (2003) 7 <http://www.anu.edu.au/caepr/Publications/DP/2003_DP248.pdf> at 26 August 2008.
- 43 Jeff Huther and Anwar Shah, 'A Simple Measure of Good Governance' in Anwar Shah (ed), *Handbook on Public Sector Performance Reviews* (2003) vol 2, 39, 40 <<http://siteresources.worldbank.org/INTWBIGOVANTCOR/Resources/SimpleMeasureofGoodGovernance.pdf>> at 26 August 2008.
- 44 Noel Pearson, 'The Concept of Native Title at Common Law' in Galarrwuy Yunupingu (ed), *Our Land is Our Life: Land Rights – Past, Present and Future* (1997) 150, 154.
- 45 Alexander Reilly, 'A Constitutional Framework for Indigenous Governance' (2006) 28 *Sydney Law Review* 403, 411 (emphasis added).
- 46 SCRGSP, above n 11, 61, [11.47].
- 47 Tim Rowse, *Indigenous Futures: Choice and Development for Aboriginal and Islander Australia* (2002) 1.
- 48 See generally Martin, *Rethinking the Design of Indigenous Organisations*, above n 42; see also Janet Hunt and Diane E Smith, *Indigenous Community Governance Project: Year Two Research Findings*, CAEPR Working Paper No 36, CAEPR (2007) <<http://www.anu.edu.au/caepr/Publications/WP/CAEPRWP36.pdf>> at 26 August 2008.
- 49 Austin-Broos, above n 22, 2.
- 50 David F Martin, 'Governance, Cultural Appropriateness and Accountability Within the Context of Indigenous Self-Determination' in Austin-Broos and Macdonald (eds), *Culture, Economy and Governance in Aboriginal Australia* 189, 192 (citations omitted).
- 51 Ibid 190. For a brief overview of the Harvard Project, see The Harvard Project on American Indian Economic Development, *Overview of the Harvard Project* <<http://www.ksg.harvard.edu/hpaid/overview.htm>> at 26 August 2008.
- 52 See Stephen Cornell and Joseph P Kalt, *Reloading the Dice: Improving the Chances for Economic Development on American Indian Reservations*, Joint Occasional Papers on Native Affairs No 2003–2, The Harvard Project on American Indian Economic Development <http://www.jopna.net/pubs/jopna_2003-02_Dice.pdf> at 26 August 2008.
- 53 The Australian Collaboration and the Australian Institute of Aboriginal and Torres Strait Islander Studies, *Organising for Success: Policy Report. Successful Strategies in Indigenous Organisations* (2007) 14–16 <http://www.aiatsis.gov.au/_data/assets/pdf_file/8844/Policy_report_text_only.pdf> at 26 August 2008.
- 54 Austin-Broos, above n 22, 2.
- 55 Ken Henry, 'Managing Prosperity' (Speech delivered at the Social and Economic Outlook Conference, Melbourne, 2 November 2006) 5 <http://www.treasury.gov.au/documents/1183/PDF/Managing_Prospersity.pdf> at 26 August 2008.
- 56 *Parliamentary Debates* (Kevin Rudd), above n 6, 171.
- 57 SCRGSP, above n 11, 61 (emphasis added).
- 58 Patrick Sullivan, 'Strange Bedfellows: Whole-of-Government Policy and Shared Responsibility Agreements, the Implications for Regional Governance' (2007) 1 *Ngiya: Talk the Law* 53, 71 (citations omitted).
- 59 Banks, above n 13, 9.
- 60 See Philip Martin, 'Potemkin in Cape York: The Politics of Misrepresentation in Aurukun's Welfare Reform Trials' (Speech delivered at CAEPR Seminar Series 1, Australian National University, Canberra, 2 April 2008) <<http://www.anu.edu.au/caepr/events08.php>> at 26 August 2008.
- 61 Dillon and Westbury, above n 18, 4 (emphasis in original).
- 62 Neil Westbury and Michael Dillon, *Indigenous Programs: Removing the Constraints* (2007) Australian Policy Online, <http://www.apo.org.au/webboard/results.chtml?filename_num=187535> at 26 August 2008.

- 63 Ibid. See also Daniel Kaufmann Aart Kraay and Massimo Mastruzzi, *Governance Matters IV: Governance Indicators for 1996–2004*, Policy Research Working Paper Series No 3630, World Bank (2005) <http://siteresources.worldbank.org/INTRES/Resources/469232-1107449512766/GovMattersIV_main.pdf> at 26 August 2008.
- 64 Westbury and Dillon, above n 62.
- 65 Concern with duplication, overlap and inconsistent regimes in the Australian system of federalism generally was one of the major themes to emerge at the 2020 Summit convened by Prime Minister Rudd on 19–20 April 2008. See Department of the Prime Minister and Cabinet, *Australia 2020 Summit: Final Report* (2008) 308, 342–6 <http://www.australia2020.gov.au/docs/final_report/2020_summit_report_full.pdf> at 26 August 2008.
- 66 See COAG, *About COAG* <<http://www.coag.gov.au/about.htm>> at 26 August 2008.
- 67 COAG, *National Framework of Principles for Delivering Services to Indigenous Australians* (2004) <http://www.coag.gov.au/meetings/250604/attachments_b.pdf> at 26 August 2008.
- 68 Mal Brough, ‘COAG Indigenous Trials’ (Press Release, 22 February 2007) <http://www.facsia.gov.au/internet/minister3.nsf/content/22feb_coag.htm> at 26 August 2008.
- 69 See Sue Hunt, *Whole-of-Government: Does Working Together Work?*, Policy and Governance Discussion Paper No 05–1, Asia Pacific School of Economics and Government, Australian National University (2005) <http://www.crawford.anu.edu.au/degrees/pogo/discussion_papers/PDP05-1.pdf> at 26 August 2008. Hunt provides an account of the history of the development of the whole of government approach both overseas and in Australia.
- 70 MAC, *Connecting Government: Whole of Government Responses to Australia’s Priority Challenges* (2004) <<http://www.apsc.gov.au/mac/connectinggovernment.pdf>> at 26 August 2008 (‘*Connecting Government Report*’).
- 71 Ibid 4.
- 72 Ibid, ch 1, ‘The Whole of Government Challenge’.
- 73 Peter Shergold, ‘A Speech to Launch *Connecting Government: Whole of Government Responses to Australia’s Priority Challenges*’ (Speech delivered at MAC *Connecting Government Report* Launch, Canberra, 20 April 2004) 1.
- 74 Commonwealth Government, quoted in Australian National Audit Office (‘ANAO’), *Whole of Government Indigenous Service Delivery Arrangements: Performance Audit*, Report No 10 (2007) 12. See same report at 11–20 for an overview of the new arrangements.
- 75 Amanda Vanstone, ‘Australian Government Changes to Indigenous Affairs Services Commence Tomorrow’ (Press Release, 30 June 2004).
- 76 Aboriginal and Torres Strait Islander Social Justice Commissioner (Tom Calma), *Social Justice Report 2004* (2005) 86–7.
- 77 Commonwealth, *Parliamentary Debates*, Senate, 1 December 2004, 1–2 (Chris Ellison, Minister for Justice and Customs) <<http://www.aph.gov.au/hansard/senate/dailys/ds021204.pdf>> at 26 August 2008. See also Amanda Vanstone, ‘Address to the National Press Club’ (Speech delivered to the National Press Club, Canberra, 23 February 2005) <<http://www.kooriweb.org/foley/images/history/news/2000s/vanstone1.html>> at 26 August 2008.
- 78 Sullivan, above n 58, 56.
- 79 Ibid.
- 80 ANAO, above n 74, 24.
- 81 Sullivan, above n 58, 56 (citations omitted).
- 82 Aboriginal and Torres Strait Islander Social Justice Commissioner (Tom Calma), *Social Justice Report 2004*, above n 76, 88.
- 83 FaHCSIA, *Emergency Response to Protect Aboriginal Children in the NT* <<http://www.facs.gov.au/nter/>> at 26 August 2008. For the NTER Review’s terms of reference, the membership of NTER Review Board, and the membership of the Expert Reference Group, see Jenny Macklin, ‘NT Emergency Response Review Board’ (Press Release, 6 June 2008) <http://www.jennymacklin.fahcsia.gov.au/internet/jennymacklin.nsf/content/nt_emergency_reponse_06jun08.htm> at 26 August 2008.
- 84 Australian Labor Party, *National Platform and Constitution 2007* (2007) 212 <http://www.alp.org.au/download/now/2007_national_platform.pdf> at 26 August 2008.
- 85 ANAO, above n 74.
- 86 Ibid 20.
- 87 See Morgan Disney and Associates, *Synopsis Review of the COAG Trial Evaluations: Report to the Office of Indigenous Policy Coordination (OIPC)* (2006) <[http://www.facsia.gov.au/internet/facsinternet.nsf/via/indigenous/\\$file/COAG_Trials_Overview.pdf](http://www.facsia.gov.au/internet/facsinternet.nsf/via/indigenous/$file/COAG_Trials_Overview.pdf)> at 29 June 2008.
- 88 Ibid 4.
- 89 Ibid 6.
- 90 Morgan Disney and Associates, *A Red Tape Evaluation in Selected Communities: Final Report for the Office of Indigenous Policy Coordination* (2006) <[http://www.facsia.gov.au/internet/facsinternet.nsf/via/indigenous/\\$file/Indigenous_RedTapeReport.pdf](http://www.facsia.gov.au/internet/facsinternet.nsf/via/indigenous/$file/Indigenous_RedTapeReport.pdf)> at 26 August 2008. This final report shows an increased burden on many Indigenous communities and organisations receiving government grants. See also Morgan Disney and Associates, *Synopsis Review of the COAG Trial Evaluations*, above n 87, 6.
- 91 Morgan Disney and Associates, *Synopsis Review of the COAG Trial Evaluations*, above n 87, 6.
- 92 Aboriginal and Torres Strait Islander Social Justice Commissioner (Tom Calma), *Social Justice Report 2006* (2007) 52–4.
- 93 John Taylor, *Social Indicators for Aboriginal Governance: Insights*

- from the *Thamarrur Region, Northern Territory*, CAEPR Research Monograph No 24, CAEPR (2004) 77, ch 7 <http://epress.anu.edu.au/caepr_series/no_24/whole_book.pdf> at 26 August 2008.
- 94 Aboriginal and Torres Strait Islander Social Justice Commissioner (Tom Calma), *Social Justice Report 2006*, above n 92, 53.
- 95 Ibid 54.
- 96 FaCSIA, *Annual Report 2006–07* (2007) 5 <http://www.facs.gov.au/annualreport/2007/docs/facsia_annual_report_07.pdf> at 26 August 2008.
- 97 Michael Dillon, *A Missed Opportunity: The Australian National Audit Office Report on Whole of Government Indigenous Service Delivery Arrangements*, Australian Policy Online 1 <www.sisr.net/apo/dillon.pdf> at 26 August 2008.
- 98 Ibid 7.
- 99 Hunt, above n 69, 4.
- 100 Meredith Edwards, *Participatory Governance and the Indigenous Agenda: From Rhetoric to Reality* (2008) Centre for Policy Development <<http://cpd.org.au/article/participatory-governance-and-indigenous-agenda-rhetoric-reality>> at 26 August 2008. Ms Edwards' coincidentally titled article deals with gaps between the rhetoric of participatory governance and actual performance in Indigenous policy generally. My particular focus is on remote Indigenous communities.
- 101 Ibid.
- 102 Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse, *Ampe Akelyernemane Meke Mekarle: 'Little Children are Sacred': Report of the Northern Territory Board of Inquiry into the Protection of Aboriginal Children from Sexual Abuse* (2007).
- 103 For an overview of the Little Children are Sacred Report's findings, see Northern Territory Government, *Summary of the Report*, Inquiry into the Protection of Aboriginal Children from Sexual Abuse <http://www.nt.gov.au/dcm/inquiry/saac/report_summary.html> at 26 August 2008.
- 104 Mal Brough, 'National Emergency Response to Protect Aboriginal Children in the NT' (Press Release, 21 June 2007) <http://www.facsia.gov.au/internet/Minister3.nsf/content/emergency_21june07.htm> at 26 August 2008.
- 105 See ABC Television, 'Top End Communities Resisting Indigenous Intervention Plan', *The 7:30 Report*, 12 July 2007 <<http://www.abc.net.au/7.30/content/2007/s1977336.htm>> at 26 August 2008. See also 'NT Traditional Owners Fear Losing Land Rights', *ABC News*, 12 July 2007 <<http://abc.net.au/news/stories/2007/07/12/1977255.htm>> at 26 August 2008.
- 106 See Aboriginal and Torres Strait Islander Social Justice Commissioner (Tom Calma), *Social Justice Report 2007*, above n 10.
- 107 Fred Chaney, 'Eighth Vincent Lingiari Memorial Lecture' (Speech delivered at Charles Darwin University, Darwin, 11 August 2007), 2 <<http://www.reconciliationaustralia.org/i-cms.isp?page=110>> at 26 August 2008.
- 108 Mal Brough, quoted in Dillon and Westbury, above n 18, 210.
- 109 If so, this is arguably against the traditional role of the military in Australia. That the Operational Commander of the NTER is a senior army officer, and that he has often appeared at communities in uniform, has not helped. Given the bloody and relatively recent history of the frontier in the Northern Territory, the mere suggestion of the application of military power can be enough to, perhaps unwittingly, suggest to Aboriginal people that the power of the army is being deployed in respect of their communities. For a brief discussion of these issues, see Neil James, 'The Army's Role in the Intervention: Little Understood', *Crikey*, 1 October 2007 <<http://www.crikey.com.au/Politics/20071001-New-territory-new-testing-of-old-limits.html>> at 26 August 2008. Dillon and Westbury also appear to have reservations about the role of the military in the NTER: see Dillon and Westbury, above n 18, 210.
- 110 Dillon and Westbury, above n 18, 46 (emphasis added).
- 111 Russell Skelton, 'Police Cannot Cope with Backlash', *The Sydney Morning Herald* (Sydney), 25–27 April 2008, 3. In that article, the Northern Territory Chief Minister is noted as referring to the 'perverse effect' of the NTER. See also 'Mayor Says NT Indigenous Residents Fleeing Intervention', *ABC News*, 29 April 2008 <<http://www.abc.net.au/news/stories/2008/04/29/2229909.htm>> at 26 August 2008, which details the influx of Northern Territory Aboriginal people to Mt Isa, Queensland 'to escape the Federal Government's intervention'.
- 112 *Convention on the Elimination on All Forms of Racial Discrimination*, opened for signature 7 March 1966, 660 UNTS 195 (entered into force 4 January 1969) ('CERD').
- 113 See *Gerhardy v Brown* (1985) 159 CLR 70, 133 (Brennan J).
- 114 Aboriginal and Torres Strait Islander Social Justice Commissioner (Tom Calma), *Social Justice Report 2007*, above n 10, 265. In the *Social Justice Report 2007*, Calma has in fact proposed a 10 Point Plan to meet such concerns and to place the NTER on a non-discriminatory footing: at 294.
- 115 Ibid 3.
- 116 Ibid 267.
- 117 That includes Australia. See, eg, Greg Marks, 'Avoiding the International Spotlight: Australia, Indigenous Rights and the United Nations Treaty Bodies' (2002) 2(1) *Human Rights Law Review* 19.
- 118 See James Brown Scott, *The Spanish Origin of International Law* (1932) ix. See also Greg Marks, 'Indigenous Peoples in International Law: The Significance of Francisco de Vitoria and Bartolome de Las Casas' (1992) 13 *The Australian Year*

- Book of International Law* 1, reprinted in S James Anaya (ed), *International Law and Indigenous Peoples* (2003) 3.
- 119 S James Anaya, *Indigenous Peoples in International Law* (2nd ed, 2004) 53.
- 120 See *Human Rights and Indigenous Issues*, Comm on Human Rights Res 2001/57, UN Comm on Human Rights, 76th mtg, [1] (2001) <http://ap.ohchr.org/documents/E/CHR/resolutions/E-CN_4-RES-2001-57.doc> at 26 August 2008.
- 121 See *Establishment of a Permanent Forum on Indigenous Issues*, ESC Res 2000/22, UN ESCOR, 45th plen mtg, 49, UN Doc E/2000/99 (2000) <<http://daccessdds.un.org/doc/UNDOC/GEN/N01/487/49/IMG/N0148749.pdf?OpenElement>> at 26 August 2008.
- 122 *Declaration on the Rights of Indigenous Peoples*, GA Res 61/295, UN GAOR, 61st sess, UN Doc A/RES/47/1 (2007).
- 123 Gough Whitlam quoted in Garth Nettheim (ed), *Human Rights for Aboriginal People in the 1980s* (1983) 11.
- 124 Graham, Amos and Plumptre, above n 39, 3 (citations omitted).
- 125 Ibid 6.
- 126 Ibid 3.
- 127 Ibid.
- 128 *Universal Declaration of Human Rights*, GA Res 217A (III), UN GAOR, 3rd sess, 183rd plen mtg, UN Doc A/RES/217A (III) (1948).
- 129 Graham, Amos and Plumptre, above n 39, 4.
- 130 *Report of the International Workshop on Methodologies Regarding Free, Prior and Informed Consent and Indigenous Peoples*, UN ESCOR, 4th sess, [43], UN Doc E/C.19/2005/3 (2005) <<http://daccessdds.un.org/doc/UNDOC/GEN/N05/243/26/PDF/N0524326.pdf?OpenElement>> at 26 August 2008.
- 131 World Bank, *Operational Manual* (2005) vol 2, [OP 4.10] <<http://wbln0018.worldbank.org/Institutional/Manuals/OpManual.nsf/05TOCpages/Operational%20Manual>> at 26 August 2008 (citations omitted).
- 132 CERD Committee, *General Recommendation XXIII: Indigenous Peoples*, 51st sess, annex V [4(d)], UN Doc A/52/18 <[http://www.unhcr.ch/tbs/doc.nsf/\(Symbol\)/73984290dfea022b802565160056fe1c?Opendocument](http://www.unhcr.ch/tbs/doc.nsf/(Symbol)/73984290dfea022b802565160056fe1c?Opendocument)> at 26 August 2008.
- 133 CERD Committee, *Decision 2 (54) on Australia of March 1999*, 54th sess, [21(2)], UN Doc A/54/18 (1999). Article 5(c) of CERD deals with participation rights.